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THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.



VOLUME XL.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING
A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING
COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XL.

SALE OF LAND.
SET-OFF AND COUNTERCLAIM.
SETTLEMENTS.

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In this Volume English Cases reported up to 1st March, 1928, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeal Reports, 27 vols., 1876—1900	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. R. A.	Butterworths' Rating Appeals, 2 vols., 1913—1925	Eng.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

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Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's <i>Lex Mercatoria</i>	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca.	Bombay Reports, Crown Cases	Ind.
Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott.	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir R. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

Bush.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A.	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. B. R.	Canadian Bankruptcy Reports Annotated, 1920—(current)	Can.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—1913	Eng.
C. L. Ch.	Common Law Chambers	Can.
C. L. J.	Cape Law Journal	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R.	Commonwealth Law Reports	Aus.
C. L. R.	Calcutta Law Reporter	Ind.
C. L. T.	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P.	Upper Canada Common Pleas	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D.	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.	Calcutta Weekly Notes	Ind.
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas.	Cameron's Supreme Court Cases	Can.
Cam. Prac.	Cameron's Supreme Court Practice	Can.
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas.	Commercial Law Reports of Canada, 4 vols., 1901—1905	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated, 1898—(current)	Can.
Can. Gaz.	Canadian Gazette	Can.
Can. Ry. Cas.	Canadian Railway Cases	Can.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L.	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann.	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl.	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart.	Cases on British North America Act (Cartwright)	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. temp. Finch	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. temp. King	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. temp. Talb.	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig.	Cassells' Digest	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports	Can.
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip.	New Brunswick Reports (Chipman)	Can.

Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' <i>Locus Standi</i> Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	Clifford and Stephens' <i>Locus Standi</i> Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent.	Coke's Entries	Eng.
Co. Inst.	Coke's Institutes	Eng.
Co. L. J.	Colonial Law Journal	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch.	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1097—1713	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig.	Congdon's Digest	Can.
Const	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough.	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. temp. Cott.	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	Coryton's Reports	Ind.
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud.	Correspondances Judiciaires	Can.
Couper	Couper's <i>Justiciary Reports</i> (Scotland), 5 vols., 1808—1885	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig.	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car.	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz.	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac.	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D.	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	Dorlon's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1540—1574 ...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720 ...	Scot.
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844 ...	Eng.
Dav. Ir.	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 ...	Ir.
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. & C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 ...	Scot.
De G.	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862 ...	Eng.
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 ...	Eng.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 ...	Eng.
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677 ...	Scot.
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B.	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B.	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 ...	Eng.
Dow. & Ry. M. C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827 ...	Eng.
Dow. & Ry. N. P.	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823 ...	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S.	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 ...	Ir.
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 ...	Ir.
Dra.	Draper's King's Bench Reports ...	Can.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap.	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug.	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844 ...	Ir.
Dugd. Orig.	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1836—1862 ...	Scot.
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 ...	Scot.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & A.	Upper Canada Error and Appeal ...	Can.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858 ...	Eng.
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860 ...	Eng.
E. D. C.	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L.	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R.	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.)	English Reports ...	Eng.
E. R.	Ontario Election Reports ...	Can.
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.

East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	Eng.
East, P. C.	...	...	East's Pleas of the Crown	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	Can.
F. (Ct. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 8 vols., 1898—1906	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	S. Af.
F. & F.	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	Eng.
F. N. D.	...	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	Eng.
Fortes. Rep.	...	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	Eng.
Fost.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
G. I. Dig.	...	...	General Index Digest	...	Can.
G. W. D.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
G. W. L.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	Eng.
Glanv. El. Cas.	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	Eng.
Glascok	...	...	Glascok's Reports (Ireland), 1 vol., 1831—1832	...	Ir.

Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb.	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr.	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases	Griffin's Patent Cases, 1884—1887	Eng.
Gwill.	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H.	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C.	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N.	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw.	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W.	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C.	Reports of the High Court of Griqualand West	S. Af.
H. E. C.	Hodgin's Election Reports	Can.
H. L. Cas.	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm.	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con.	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc.	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L.	Hale's Common Law	Eng.
Hale, P. C.	Hale's Pleas of the Crown, 2 vols.	Eng.
Han.	New Brunswick Reports (Hannay)	Can.
Har. & Ruth.	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard.	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C.	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay	Hay's Reports	Ind.
Hay & Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo.	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M.	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het.	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob.	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg.	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog.	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm.	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq.	W. Holt's Equity Reports, 2 vols., 1845...	Eng.
Holt, K. B.	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P.	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	Hong Kong Reports	Hong Kong
Hop. & Colt.	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph.	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H.	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp.	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C.	Howard's Chancery Practice	Ir.
How. C. S.	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E.	Howard's Equity Exchequer	Ir.
How. P. L.	Howard on the Popery Laws	Ir.
Hud. & B.	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C.	Hudson on Building Contracts, 2 vols.	Eng.
Hume	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut.	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl.	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde	Hyde's Reports	Ind.
I. C. L. R.	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R.	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R.	Irish Equity Reports, 13 vols., 1838—1851	Ir.

I. L. R. ...	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All.	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Bom.	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc.	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Lah.	Indian Law Reports, Lahore	Ind.
I. L. R. (Vol.) Mad.	Indian Law Reports, Madras	Ind.
I. L. R. (Vol.) Pat.	Indian Law Reports, Patna	Ind.
I. L. R. (Vol.) Ran.	Indian Law Reports, Rangoon	Ind.
I. L. T. ...	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo.	Irish Law Times Journal, 1867,—(current)	Ir.
I. R. (preceded by date)	Irish Reports, since 1893 (<i>e.g.</i> , [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L.	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
I. R. Eq.	Irish Reports, Equity, 11 vols., 1866—1877	Ir.
I. R., R. & L.	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	Ir.
Ind. Awards	Industrial Awards Recommendations	N.Z.
Ind. Jur. N. S.	Indian Jurist, New Series	Ind.
Ind. Jur. O. S.	Indian Jurist, Old Series	Ind.
Ir. Cir. Rep.	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
Ir. Jur.	Irish Jurist, 18 vols., 1849—1866	Ir.
Ir. L. Rec. 1st ser.	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	Ir.
Ir. L. Rec. N. S.	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	Ir.
Irv.	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	Scot.
J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R.	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
J. P.	Justice of the Peace, 1837—(current)	Eng.
J. P. Jo.	Justice of the Peace (Weekly Notes of Cases)	Eng.
J. R.	Jurist Reports	N.Z.
J. R. N. S.	Jurist Reports, New Series	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	Scot.
Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	Eng.
James	Nova Scotia Reports (James)	Can.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
Jebb, Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases	Ir.
Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Ir.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	Ir.
John.	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	Eng.
Kames, Dict. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Kilkerran	...	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	Scot.
Kn. & Omb.	...	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	Eng.
Knapp	...	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	Eng.
Knox	...	...	Knox's Reports	...	Aus.
Konst. & W. Rat. App.	...	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	Eng.
Konst. Rat. App.	...	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	...	Eng.
L. & G. temp. Plunk.	...	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	Ir.
L. & G. temp. Sugd.	...	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	...	Ir.
L. & Welsb.	...	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	...	Eng.
L. C. & M. Gaz.	...	...	Local Courts and Municipal Gazette	...	Can.
L. C. J.	...	...	Lower Canada Jurist	...	Can.
L. C. L. J.	...	...	Lower Canada Law Journal	...	Can.
L. C. R.	...	...	Lower Canada Reports	...	Can.
L. G. R.	...	...	Local Government Reports, 1902—(current)	...	Eng.
L. J. Adm.	...	...	Law Journal, Admiralty, 1865—1875	...	Eng.
L. J. Bcy.	...	...	Law Journal, Bankruptcy, 1832—1880	...	Eng.
L. J. C. C.	...	...	Law Journal (County Courts Reporter), 1912—(current)	...	Eng.
L. J. C. P.	...	...	Law Journal, Common Pleas, 1831—1875	...	Eng.
L. J. Ch.	...	...	Law Journal, Chancery, 1831—(current)	...	Eng.
L. J. Eccl.	...	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	Eng.
L. J. Ex.	...	...	Law Journal, Exchequer, 1831—1875	...	Eng.
L. J. Ex. Eq.	...	...	Law Journal, Exchequer in Equity, 1835—1841	...	Eng.
L. J. K. B. or Q. B.	...	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	...	Eng.
L. J. M. C.	...	...	Law Journal, Magistrates' Cases, 1831—1896	...	Eng.
L. J. N. C.	...	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	...	Eng.
L. J. O. S.	...	...	Law Journal, Old Series, 10 vols., 1822—1831	...	Eng.
L. J. P.	...	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	...	Eng.
L. J. P. & M.	...	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	...	Eng.
L. J. P. C.	...	...	Law Journal, Privy Council, 1865—(current)	...	Eng.
L. J. P. M. & A.	...	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	...	Eng.
L. Jo.	...	...	Law Journal Newspaper, 1866—(current)	...	Eng.
L. L. R.	...	...	Leader Law Reports	...	S. Af.
L. M. & P.	...	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	...	Eng.
L. N.	...	...	Legal News	...	Can.
L. R. A. & E.	...	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	...	Eng.
L. R. C. C. R.	...	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	...	Eng.
L. R. C. P.	...	...	Law Reports, Common Pleas, 10 vols., 1865—1875	...	Eng.
L. R. Eq.	...	...	Law Reports, Equity Cases, 20 vols., 1865—1875	...	Eng.
L. R. Exch.	...	...	Law Reports, Exchequer, 10 vols., 1865—1875	...	Eng.
L. R. H. L.	...	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	...	Eng.
L. R. Ind. App.	...	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	...	Eng.
L. R. Ind. App. Supp. Vol.	...	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	...	Eng.
L. R. Ir.	...	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	...	Ir.
L. R. P. & D.	...	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	...	Eng.
L. R. P. C.	...	...	Law Reports, Privy Council, 6 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	...	Quebec Reports, Queen's Bench	...	Can.
L. R. Sc. & Div.	...	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	...	Eng.
L. T.	...	...	Law Times Reports, 1859—(current)	...	Eng.
L. T. Jo.	...	...	Law Times Newspaper, 1843—(current)	...	Eng.
L. T. O. S.	...	...	Law Times Reports, Old Series, 34 vols., 1843—1860	...	Eng.
L. Th.	...	...	La Themis	...	Can.
Lane	...	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	...	Eng.
Lat.	...	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	...	Eng.
Laws. Reg. Cas.	...	...	Lawson's Registration Cases, 1895—(current)	...	Eng.
Ld. Raym.	...	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	...	Eng.
Le. & Ca.	...	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	...	Eng.
Leach	...	...	Leach's Crown Cases, 2 vols., 1730—1814	...	Eng.
Lee	...	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	...	Eng.
Lee temp. Hard.	...	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	...	Eng.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	...	Legal Reporter	...	...	...	...	...	Ir.
Legge	...	...	Legge's Reports	...	...	...	...	...	Aus.
Leon.	...	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	...	...	...	...	Eng.
Lev.	...	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	...	...	...	...	Eng.
Lew. C. C.	...	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	Eng.
Ley	...	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	Eng.
Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 10 vols., 1914—1924	...	...	...	...	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	...	...	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	...	...	...	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	...	...	...	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	...	...	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	...	...	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	...	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	Eng.
M. C. C.	...	...	Mining Commissioner's Cases	...	...	...	...	...	Can.
M. C. R.	...	...	Montreal Condensed Reports	...	...	...	...	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	...	...	...	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	...	...	...	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	...	...	...	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	...	...	...	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	...	...	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	...	...	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	...	...	...	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	...	...	...	Scot.
Macl. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1802—1873	...	...	...	...	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	...	...	...	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	...	...	...	Eng.
Mad.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1822	...	...	...	...	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	...	...	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	...	...	...	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	...	...	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	...	...	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	...	...	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	...	...	...	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	...	...	...	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	...	...	...	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	...	...	...	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports	...	...	...	...	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	...	...	...	Eng.

Men.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer.	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw.	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep.	Modern Reports, 12 vols., 1669—1755	Eng.
Mol.	Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont.	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A.	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B.	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch.	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M.	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G.	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P.	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S.	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App.	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C.	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S.	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M.	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R.	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C.	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P.	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B.	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	Municipal Reports	Can.
Murd. Epit.	Murdoch's Epitome	Can.
Murp. & H.	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C.	Native Appeal Cases	S. Af.
N. & S.	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig.	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	Can.
N. B. R.	New Brunswick Reports	Can.
N. B. R. (All.)	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.)	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.)	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.)	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	New Brunswick Reports (Trueman)	Can.
N. I. (preceded by date)	Northern Ireland Law Reports, 1925—(current) (e.g., [1925] N. I.)	Ir.
N. L. R.	Natal Law Reports	S. Af.
N. P. D.	South African Law Reports, Natal Provincial Division	S. Af.
N. S. R.	Nova Scotia Reports	Can.
N. S. R. (Coch.)	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & O.)	Nova Scotia Reports (Geldert and Oxley)	Can.
N. S. R. (G. & R.)	Nova Scotia Reports (Geldert and Russell)	Can.
N. S. R. (James)	Nova Scotia Reports (James)	Can.
N. S. R. (Old.)	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	New South Wales Reports, Admiralty	Aus.
N. S. W. B.	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq.	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas.	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R.	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.)	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.)	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S.	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N.	New South Wales Weekly Notes	Aus.
N. W.	North-Western Provinces High Court Reports	Ind.
N. W. T. R.	North-West Territories Reports	Can.
N. Z. Jur.	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law	New Zealand Jurist Mining Law	N.Z.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	... New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	... New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A. ...	... New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels. ...	... Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B. ...	... Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. O. ...	... Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B. ...	... Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C. ...	... Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas. ...	... New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.
New Pract. Cas. ...	... New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep. ...	... New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas. ...	... New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R. ...	... Newfoundland Reports	Nfld.
Nolan ...	... Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases ...	... Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy ...	... Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
O. B. & F. ...	... Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P. ...	... Old Bailey Session Papers	Eng.
O. Bridg. ...	... Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660— 1666	Eng.
O. F. S. ...	... Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	... Ontario Law Reports	Can.
O'M. & H. ...	... O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	... South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R. ...	... Ontario Reports	Can.
O. R. ...	... Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	... Reports of the High Court of the Orange River Colony	S. Af.
O. S. ...	... Upper Canada Queen's Bench, Old Series	Can.
O. W. N. ...	... Ontario Weekly Notes	Can.
O. W. R. ...	... Ontario Weekly Reporter	Can.
Old. ...	... Nova Scotia Reports (Oldrights)	Can.
Ont. Dig. ...	... Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen ...	... Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date) ...	... Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.)	Eng.
P. & B. ...	... New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T. ...	... New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas. ...	... Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D. ...	... Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I. ...	... Prince Edward Island Reports	Can.
P. R. ...	... Ontario Practice	Can.
P. Wms. ...	... Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm. ...	... Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park. ...	... Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App. ...	... Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	... Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake ...	... Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas. ...	... Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck. ...	... Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham ...	... Pelham (S. A.) Reports	Aus.
Per. & Dav. ...	... Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	... Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. O. S. ...	... Perrault's Conseil Supérieur	Can.
Per. P. ...	... Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph. ...	... Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas. ...	... Phillips' Election Cases, 1 vol., 1780	Eng.
Phillim. ...	... J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud. ...	... Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip. ...	... Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R. ...	... Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pitc. ...	... Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd. ...	... Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll. ...	... Pollenfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	... Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	... Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Pratt	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Prec. Ch.	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	Price's Mining Commissioners' Cases	Can.
Pug.	New Brunswick Reports (Pugsley)	Can.
Py. R.	Pykes' Lower Canada Reports	Can.
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	Eng.
Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	Eng.
Q. J. P.	Queensland Justice of Peace Reports	Aus.
Q. L. J.	Queensland Law Journal and Reports, 11 vols., 1879—1901	Aus.
Q. L. R.	Quebec Law Reports	Can.
Q. L. R. (Beor)	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. C.	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881	Aus.
Q. S. R.	Queensland State Reports, 6 vols., 1902—1906	Aus.
Q. W. N.	Weekly Notes, Queensland	Aus.
R.	The Reports, 15 vols., 1893—1895	Eng.
R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.)	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. C.	Ramsay, Appeal Cases	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J.	Revue de Jurisprudence	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q.	Quebec Revised Reports	Can.
R. L. N. S.	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S.	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	Eng.
R. R.	Revised Reports	Eng.
Rast.	Rastell's Entries	Eng.
Rayn.	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Real Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch.	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A.	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas.	Reserved Cases	Ir.
Rick. & M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
Ridg. temp. H.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep.	Ritchie's Equity Reports	Can.
Rob. Eccl.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	Eng.
Rob. L. & W.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1707—1727	Scot.
Robin. App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	Eng.
Rom.	Romilly's Notes of Cases, 1 part, 1767—1787	Eng.
Roscoe's B. C.	Roscoe, Digest of Building Cases	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	Eng.
Rul. Cas.	Campbell's Ruling Cases, 25 vols.	Eng.
Russ.	Russell's Reports, Chancery, 6 vols., 1824—1829	Eng.
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	Eng.

xxx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports... ..	Can.
Ry. & Can. Cas.	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.)	Aus.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	South-West Africa Law Reports	S.-W. Af.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 61 vols., 1865—1924	Scot.
Sc. R. R.	Scots Revised Reports	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1685—1727	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Macl.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw.	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law Reports, Transvaal Provincial Division	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports <i>temp.</i> Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.

xxxii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) (<i>e.g.</i> , [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.

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Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	...	Eng.
Y. & C. Ex.	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	...	Eng.
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	...	Eng.
Y. B.	...	Year Books	...	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	...	Eng.
Y. B. (Sel. Soc.)	...	Year Books (Selden Society)	...	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xvii—xxxiii, *ante*.)

A.-G.	.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	.	„ Actiengesellschaft.
Admlty	.	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Alta.	.	.	.	.	.	„ Alberta.
Anon.	.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	.	„ Applied.
Appct.	.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	.	„ Application.
Appln.	.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	.	„ Article.
Ass. Tax Case	.	.	.	.	.	„ Assessed Tax Case.
Assce.	.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	.	„ Association.
B. C.	.	.	.	.	.	„ Borough Council.
B. C.	.	.	.	.	.	„ British Columbia.
Bkpcy.	.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	.	„ Doubted.

Deft. .	for Defendant.
Distd. .	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	Exchequer Chamber.
<i>Ex p.</i> .	<i>Ex parte.</i>
Exch. .	Exchequer.
Exor. .	Executor.
Exorship.	Executorship.
Expld. .	Explained.
Extd. .	Extended.
Extrix. .	Executrix.
<i>Fi. fa.</i> .	„ <i>Fieri facias.</i>
Folld. .	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insce.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L. J.	„ Lord Justice.
L. J. J.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Man.	„ Manitoba.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B.	„ New Brunswick.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.

ABBREVIATIONS.

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N. S.	.	.	.	.	for Nova Scotia.
N. W. P.	.	.	.	.	„ North-West Provinces.
N. W. T.	.	.	.	.	„ North-West Territories.
Ont.	.	.	.	.	„ Ontario.
Ord.	.	.	.	.	„ Order.
Overd.	.	.	.	.	„ Overruled.
P. C.	.	.	.	.	„ Privy Council.
P. E. I.	.	.	.	.	„ Prince Edward Island.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quere.</i>
Que.	.	.	.	.	„ Quebec.
R. C.	.	.	.	.	Rural Council.
R. D. C.	.	.	.	.	Rural District Council.
R. S. A.	.	.	.	.	Rural Sanitary Authority.
R. S. C.	.	.	.	.	Revised Statutes of Canada.
R. S. C.	.	.	.	.	Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	Referred.
Regn. of Trade Mk.	.	.	.	.	Registration of Trade Mark.
Reg. of Trade Mks.	.	.	.	.	Registrar of Trade Marks.
Resp.	.	.	.	.	Respondent.
Restg.	.	.	.	.	Restoring.
Revsd.	.	.	.	.	Reversed.
Revsg.	.	.	.	.	Reversing.
Ry. Co.	.	.	.	.	Rail. Co. or Railway Co.
S. C.	.	.	.	.	Same Case.
S. C. (name of colony following)	.	.	.	.	Supreme Court of a Colony.
S. E.	.	.	.	.	Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	South Eastern & Chatham Railway Co
S. E. Ry. Co.	.	.	.	.	South Eastern Railway Co.
S. P.	.	.	.	.	Same Point.
Sask.	.	.	.	.	Steamship.
Sched.	.	.	.	.	Saskatchewan.
<i>Sci. fa.</i>	.	.	.	.	Schedule.
Sect	.	.	.	.	<i>Scire facias.</i>
Set. Land Act	.	.	.	.	Section.
Settlmt.	.	.	.	.	Settled Land Act.
Soc.	.	.	.	.	Settlement.
Soc. Anon.	.	.	.	.	Society.
Solr.	.	.	.	.	Société Anonyme, etc.
Trade Mk.	.	.	.	.	Solicitor.
Tram. Co.	.	.	.	.	Trade Mark.
U. C.	.	.	.	.	Tramways Company.
U. D. C.	.	.	.	.	Urban Council.
U. S. A.	.	.	.	.	Urban District Council.
Union Assmt. Com.	.	.	.	.	United States of America.
Urban S. A.	.	.	.	.	Union Assessment Committee.
V.-C.	.	.	.	.	Urban Sanitary Authority.
Workmen's Comp. Act	.	.	.	.	„ Vice-Chancellor.
Y. T.	.	.	.	.	„ Workmen's Compensation Act.
	.	.	.	.	„ Yukon Territory.

MEANING OF TERMS USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.)	Aus.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	South-West Africa Law Reports	S.-W. Af.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 61 vols., 1865—1924	Scot.
Sc. R. R.	Scots Revised Reports	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1685—1727	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Macl.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Sim. ...	...	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St. ...	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S. ...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin. ...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat. ...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ...	Ir.
Sm. & G. ...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ...	...	Smith's Leading Cases, 2 vols. ...	Eng.
Smith, Reg. Cas. ...	...	C. L. Smith's Registration Cases, 1895—(current) ...	Eng.
Smythe ...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ...	Ir.
Sol. Jo. ...	...	Solicitors' Journal, 1856—(current) ...	Eng.
Spence ...	...	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ...	...	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.) ...	Aus.
Stair Rep. ...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ...	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr. ...	...	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ...	...	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ...	...	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	...	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ...	...	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ...	...	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ...	...	Swabey's Report, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	Eng.
T. H. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ...	...	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ...	...	Reports of the Supreme Court of the Transvaal, 1910—(current) ...	S. Af.
T. P. D. ...	...	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	Eng.
T. S. ...	...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ...	...	Tasmanian Law Reports ...	Aus.
Taunt. ...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ...	...	Tax Cases, 1875—(current) ...	Eng.
Tay. ...	...	Taylor's King's Bench Reports ...	Can.
Temp. Wood ...	...	Manitoba Reports temp. Wood ...	Can.
Term Rep. ...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ...	...	Territories Law Reports ...	Can.
Thom. ...	...	Nova Scotia Reports (Thomson) ...	Can.
Toth. ...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr. ...	...	Townsend, Modern State Trials ...	Eng.
Trem. P. C. ...	...	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
Trist. ...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tru. ...	...	New Brunswick Reports (Trueman) ...	Can.
Tudor, L. C. Merc. Law. ...	...	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop. ...	...	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
U. C. Jur. ...	...	Upper Canada Jurist ...	Can.
U. C. L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current) ...	Can.

xxxii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) (<i>e.g.</i> , [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Y. & C. Ch. Cas.	...	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	...	...	...	...	...	Eng.
Y. & C. Ex.	...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	...	...	...	...	...	Eng.
Y. & J.	...	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	...	...	...	...	...	Eng.
Y. B.	...	...	Year Books	...	...	...	...	...	Eng.
Y. B. (Rolls Series)	...	...	Year Books (Rolls Series)	...	...	...	...	...	Eng.
Y. B. (Sel. Soc.)	...	...	Year Books (Selden Society)	...	...	...	...	...	Eng.
Yelv.	...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	...	...	...	...	Eng.
You.	...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	...	...	...	...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xvii—xxxiii, *ante*.)

A.-G.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	„ Actiengesellschaft.
Admlty	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Alta.	.	.	.	.	„ Alberta.
Anon.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	„ Applied.
Appct.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	„ Application.
Appln.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	„ Appellant.
Apprvd	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	„ Article.
Ass. Tax Case	.	.	.	.	„ Assessed Tax Case.
Assce.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	„ Association.
B. C.	.	.	.	.	„ Borough Council.
B. C.	.	.	.	.	„ British Columbia.
Bkpcy.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	„ Company.
Co-op. Assocn	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	„ Doubted.

Deft.	for Defendant.
Distd.	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
<i>Ex p.</i>	„ <i>Ex parte</i> .
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Extd.	„ Extended.
Extrix.	„ Executrix.
<i>Fi. fa.</i>	„ <i>Fieri facias</i> .
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insee.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L. J.	„ Lord Justice.
L. JJ.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Man.	„ Manitoba.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B.	„ New Brunswick.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.

ABBREVIATIONS.

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N. S.	.	.	.	.	for Nova Scotia.
N. W. P.	.	.	.	.	„ North-West Provinces.
N. W. T.	.	.	.	.	„ North-West Territories.
Ont.	.	.	.	.	„ Ontario.
Ord.	.	.	.	.	„ Order.
Overd.	.	.	.	.	„ Overruled.
P. C.	.	.	.	.	„ Privy Council.
P. E. I.	.	.	.	.	„ Prince Edward Island.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quære</i> .
Que.	.	.	.	.	„ Quebec.
R. C.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	„ South Eastern & Chatham Railway Co
S. E. Ry. Co.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	„ Steamship.
Sask.	.	.	.	.	„ Saskatchewan.
Sched.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	„ <i>Scire facias</i> .
Sect	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	„ Workmen's Compensation Act.
Y. T.	.	.	.	.	„ Yukon Territory.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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<i>Manors and Municipal Rights</i>	<i>„ BOUNDARIES; COMMONS; COPYHOLDS.</i>

<i>Mineral Rights Duty</i> . . .	See REVENUE.	<i>Small Holdings</i> . . .	See SMALL HOLDINGS.
<i>Mines and Minerals</i> . . .	„ MINES.	<i>Statute of Uses</i> . . .	„ REAL PROPERTY;
<i>Mortgage</i> . . .	„ MORTGAGE.		TRUSTS AND
<i>Mortmain, Statutes of</i> . .	„ CHARITIES; COR-		TRUSTEES.
	PORATIONS.	<i>Timber</i> . . .	„ AGRICULTURE; CUS-
<i>Open Spaces</i> . . .	„ COMMONS; OPEN		TOM AND USAGES;
	SPACES.		ESTATE AND
<i>Partition</i> . . .	„ PARTITION.		OTHER DEATH
<i>Perpetuities</i> . . .	„ PERPETUITIES.		DUTIES; SETTLE-
<i>Powers</i> . . .	„ POWERS.		MENTS.
<i>Quarries</i> . . .	„ MINES.	<i>Voidable Conveyances</i> .	„ FRAUDULENT AND
<i>Real Property</i> . . .	„ REAL PROPERTY.		VOIDABLE CON-
<i>Rentcharges</i> . . .	„ RENTCHARGES AND		VEYANCES.
	ANNUITIES.	<i>Water</i> . . .	„ WATER SUPPLY;
<i>Settled Land</i> . . .	„ SETTLEMENTS;		WATERS AND
	WILLS.		WATERCOURSES.

Part I.—The Contract of Sale.

SECT. 1.—NECESSITY FOR WRITING.

See Law of Property Act, 1925 (c. 20), s. 40.
Memorandum or note.]—See Sect. 8, *post*.

SECT. 2.—OFFER AND ACCEPTANCE.

SUB-SECT. 1.—OFFER.

See, generally, CONTRACT, Vol. XII., pp. 53–63;
LANDLORD & TENANT, Vol. XXX., pp. 371, 372.

1. What amounts to offer.—Whether statement of price at which willing to sell.]—The mere statement of the lowest price at which a vendor will sell contains no implied contract to sell at that price to the persons making the inquiry.—*HARVEY v. FACEY*, [1893] A. C. 552; 62 L. J. P. C. 127; 69 L. T. 504; 42 W. R. 129; 9 T. L. R. 612; 1 R. 428, P. C.

2. — Whether tender.—Of such sum as would exceed other tenders by two hundred pounds.—Undertaking to accept “highest net money tender.”]—The owner of certain coal mines proposed to receive sealed tenders from two parties who were competing for the purchase of them, & undertook to accept the highest net money tender. One of the competitors offered such a sum as would exceed by £200 the amount offered by the other:—*Held*: a tender in this form did not answer the description of the highest net money tender, & an order was made striking out the statement of claim in an action for specific performance of an alleged contract founded on such tender as disclosing no reasonable cause of action.—*SOUTH HETTON COAL CO. v. HASWELL, SHOTTON & BASINGTON COAL & COKE CO.*, [1898] 1 Ch. 465;

67 L. J. Ch. 238; 78 L. T. 366; 46 W. R. 355; 14 T. L. R. 277; 42 Sol. Jo. 345, C. A.

3. How offer determined.—By rejection.—Counter offer.]—Deft., on June 6, offered in writing to sell his farm for £1,000; but pltf. offered £950, which deft. on June 27, after consideration, refused to accept. June 29 pltf., by letter agreed to give £1,000, but there appeared to be no assent on the part of deft., though there had been no withdrawal of the first offer:—*Held*: there was no binding contract within Stat. Frauds.—*HYDIE v. WRENCH* (1840), 3 Beav. 334; 4 Jur. 1106; 49 E. R. 132.

Annotation:—*Consd. Stevenson v. McLean* (1880), 5 Q. B. D. 346.

4. — — — Failure to accept within reasonable time.]—Unless a valid acceptance be given, within a reasonable time, to a written offer to sell an estate, it will be treated as abandoned.—*WILLIAMS v. WILLIAMS* (1853), 17 Beav. 213; 51 E. R. 1015.

5. — — — —.]—An offer to sell land, to be binding upon the person making it, must be accepted within a reasonable time. If the person making the offer die, become bkpt., or sell, before the acceptance of the offer, the land is not bound.—*MEYNELL v. SURTEES* (1855), 25 L. J. Ch. 257; 25 L. T. O. S. 227; 1 Jur. N. S. 737; 3 W. R. 535, L. C.

Annotation:—*Refd. Bencke v. Chadwicke* (1856), 4 W. R. 687.

6. — — — —.]—*POWERS v. FOWLER* (1855), 4 E. & B. 519, n.; 25 L. T. O. S. 203; 119 E. R. 190, Ex. Ch.

7. — — — —.]—*RUMMENS v. ROBINS*, No. 35, *post*.

PART I. SECT. 2, SUB-SECT. 1.

a. What amounts to offer.—To sell *fer.*]—*CLARKE v. DOHERTY* (1879), 5 V. L. R. 283.—AUS.

b. — Statement of consideration only.]—*BLACKSTOCK v. WILLIAMS* (1907), 7 Terr. L. R. 362; 5 W. L. R. 85; 6 W. L. R. 79.—CAN.

c. — Offer made for valuable consideration gives option to purchase.]—An offer, though made for valuable consideration, to sell & convey land on payment of \$500 to be made on or before a fixed date only gives an option to purchase which cannot be exercised as of right after the time limited, & the addition of a clause providing that, if the payment is not

then made, the vendor shall be at liberty to cancel the agreement confers no additional right upon the proposed purchaser, so that the vendor may refuse a tender of the money subsequently made, although he has given no notice & has done no positive act of cancellation.—*PATERSON v. HOUGHTON* (1909), 19 Man. L. R. 168.—CAN.

d. — Authority given to agent to make inquiries.—Agent exceeding authority.]—*GOOD v. BESCOBY* (1913), 25 W. L. R. 639; 5 W. W. R. 245; 14 D. L. R. 325; 23 Man. L. R. 603.—CAN.

Depends upon language used.]—Whether a proposal is to be construed as an invitation to deal or

as an offer which can be turned by acceptance into a binding agreement depends upon the language used & the circumstances of the particular case.—*CANADIAN DYERS ASSOCN., LTD. v. BURTON* (1920), 47 O. L. R. 259; 18 O. W. N. 83.—CAN.

f. — Instructions to agent to find buyer.]—*PURNA CHANDRA DUTT v. INDRA CHANDRA ROY* (1921), 1 L. R. 49 Calc. 389.—IND.

3i. How offer determined.—By rejection.—Counter offer.]—A specific counter-offer or rejection puts an end to an offer.—*SHAW v. JONES*, [1924] N. Z. L. R. 1133.—N.Z.

g. — By revocation before acceptance.—Offer given for value.]—

8. — Failure to accept within stipulated time.—At a sale by auction D. became the purchaser for £6,000 of certain real estate. Before the sale took place the auctioneer had received a letter from S., stating that he had been prevented from attending the sale, & asking if any of the lots remained unsold. After the sale was concluded the auctioneer informed D. that a client of his was inquiring about the property, & D. then said that he was willing to resell the same for £8,600, of which £100 should be paid to the auctioneer as commission, provided the offer was accepted within a specified time. The offer was communicated by the auctioneer by letter to S., who wrote a reply to the auctioneer accepting it. S. brought an action against D. for the specific performance of the agreement. The evidence was conflicting as to the time within which D.'s offer was to be accepted, & his contention was that it was not accepted in time. He also contended that the auctioneer's authority did not extend to making a contract, but only to bringing the parties together:—*Held*: the auctioneer was authorised to make a binding contract for a sale of D.'s interest under his contract; but the action must be dismissed on the ground that the offer had not been accepted within the time limited by D.—*SAUNDERS v. DENCE* (1885), 52 L. T. 644; 29 Sol. Jo. 356.

Annotation:—*Refd.* *Rosenbaum v. Belson*, [1900] 2 Ch. 267.

9. — By revocation before acceptance—Sale to third party.—*MEYNELL v. SURTEES*, No. 5, *ante*.

10. — Addition of new terms to proposal.—When an offer in writing is made by the owner to sell an estate on specified terms, & this is unconditionally accepted, there is a binding contract, which neither party can vary, but the owner is entitled, at any time before his offer has been definitely accepted, to add any new terms to his proposal. If these be refused, the treaty is at an end.

The time for paying the deposit may be made an essential term for entering into a contract for sale of an estate.

Pltf.'s solr. wrote to deft.'s agent that he was instructed to make him an offer of £25,000 for the purchase of his estate. Deft.'s agent wrote, in answer, that he was authorised to accept the offer, "subject to the terms of a contract being arranged" between the two solrs.:—*Held*: this was not a concluded contract.—*HONEYMAN v. MARRYAT* (1855), 21 Beav. 14; 25 L. T. O. S. 170; 1 Jur. N. S. 857; 3 W. R. 502; 52 E. R. 763; *affd.* (1857), 6 H. L. Cas. 112, H. L.

Annotations:—*Apld.* *Rossiter v. Miller* (1877), 5 Ch. D. 648. (*See* 3 App. Cas. 1124.) *Refd.* *Chinnock v. Ely* (1864), 11 L. T. 536; *Rossiter v. Miller* (1878), 26 W. R. 865.

11. — Necessity for formal notice—Offeree aware of withdrawal.—(1) An offer in writing for the sale of real estate, giving time for the acceptance of the offer, cannot be converted

into a binding contract, if at any time before acceptance the person to whom the offer is made becomes aware of its withdrawal, although formal notice of such withdrawal may not be given to him.

(2) If a man who makes an offer dies, the offer cannot be accepted after he is dead (*MELLISH, L.J.*).—*DICKINSON v. DODDS* (1876), 2 Ch. D. 463; 45 L. J. Ch. 777; 34 L. T. 607; 40 J. P. 532; 24 W. R. 594, C. A.

Annotations:—*Distd.* *Bransom v. Stannard* (1879), 41 L. T. 434; *Henthorn v. Fraser*, [1892] 2 Ch. 27. *Refd.* *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616. *Mentd.* *Reichel v. Oxford* (Bp.) (1887), 35 Ch. D. 48.

12. ——Where an offer is made under such circumstances that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance, the acceptance is complete as soon as it is posted; but this doctrine does not apply to the revocation or modification of an offer.

Defts. handed to pltf., at their office in Liverpool, an offer in writing to sell him certain real property in Birkenhead, where he resided. On the following day pltf.'s solr. wrote by his direction accepting the offer. After the letter was posted, but before it reached its destination, pltf. received through the post a withdrawal of the offer:—*Held*: the acceptance was complete before the offer was withdrawn.—*HENTHORN v. FRASER*, [1892] 2 Ch. 27; 61 L. J. Ch. 373; 66 L. T. 439; 40 W. R. 433; 8 T. L. R. 459; 36 Sol. Jo. 380, C. A.

Annotations:—*Folld.* *Raeburn & Vétel v. Burness* (1895), 11 T. L. R. 399. *Apld.* *Bruner v. Moore*, [1904] 1 Ch. 305; *James v. Chartered Accountants Institute* (1907), 98 L. T. 225. *Refd.* *Goffin v. Houlder* (1920), 90 L. J. Ch. 488.

13. — Revocation by letter—Must reach offeree before letter of acceptance posted.—*HENTHORN v. FRASER*, No. 12, *ante*.

14. — Agreement for acceptance within specified period.—(1) Deft. having offered to purchase a house & to give pltf. six weeks for a definite answer—*Held*: before the offer was accepted, deft. might retract it at any time during the six weeks.

(2) Deft. offered to purchase a house upon certain terms, "possession to be given on or before July 25"; pltf. agreed to the terms, & said he would give possession on Aug. 1:—*Held*: no acceptance of deft.'s offer.—*ROUTLEDGE v. GRANT* (1828), 4 Bing. 653; 3 C. & P. 267; 1 Moo. & P. 717; 6 L. J. O. S. C. P. 166; 130 E. R. 920.

Annotations:—*As to* (1) *Refd.* *Head v. Diggon* (1828), 3 Man. & Ry. K. B. 97; *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344; *Stevenson v. McLean* (1880), 5 Q. B. D. 346; *Reichel v. Oxford* (Bp.) (1887), 35 Ch. D. 48; *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616. *As to* (2) *Distd.* *Chinnock v. Ely* (1864), 2 Hem. & M. 220; *Dickinson v. Dodds* (1876), 2 Ch. D. 463.

15. ——*BRISTOL, CARDIFF & SWANSEA AERATED BREAD CO. v. MAGGS*, No. 29, *post*.

GOLDSBOROUGH, MORT & Co. v. QUINN (1910), 10 C. L. R. 674.—*AUS.*

h. ——*A* parcel of land having been placed by pltf. in a land agent's hands for sale, deft. offered to purchase it, & signed a form of agreement for sale & purchase, which was taken by the agent to pltf. & was signed by him, but before deft. was notified thereof he gave notice to the agent withdrawing his offer:—*Held*: the instrument, though in form an agreement, was in substance a mere offer, & as deft. had withdrawn before he was notified of its acceptance, there

was no completed agreement.—*LARKIN v. GARDINER* (1895), 27 O. R. 125.—*CAN.*

k. ——*ARCHDEKIN v. McDONALD* (Man.) (1912), 20 W. L. R. 595; 1 W. W. R. 1014; 1 D. L. R. 664.—*CAN.*

l. ——*A*n offer to sell land may be retracted by the vendor at any time before the purchaser intimated his acceptance of it, or if the purchaser objects to any of the terms of the offer, or fails to make the cash payment stipulated for within a reasonable time.—*MANSON v. POLLOCK* (1914), 27

W. L. R. 370; 6 W. W. R. 205; 16 D. L. R. 618; 24 Man. L. R. 67.—*CAN.*

m. ——*EGALA PEDDA PAPA NAIDU v. MURIESAMY AIYAR* (1922), 1 L. R. 46 Mad. 30.—*IND.*

n. ——*RICHARDS v. HILL*, [1920] N. Z. L. R. 724.—*N.Z.*

o. — Non-compliance with condition precedent.—*HOLLISTER v. PORCHET*, [1922] 1 W. W. R. 30; 66 D. L. R. 579; 17 Alta. L. R. 298.—*CAN.*

p. Retraction of offer—Time for.—*A* retraction of an offer to purchase

SALE OF LAND.

Sect. 2.—Offer and acceptance: Sub-sects. 1 & 2, A. & B.]

16. ——— Extension of period by agreement.]—MORRELL v. STUDD & MILLINGTON, No. 32, *post*.

17. ——— Death of person making offer.]—MEYNELL v. SURTEES, No. 5, *ante*.

18. ———.]—DICKINSON v. DODDS, No. 11, *ante*.

19. ——— Bankruptcy of person making offer.]—MEYNELL v. SURTEES, No. 5, *ante*.

Effect of bankruptcy on contracts generally.]—See BANKRUPTCY, Vol. V., pp. 930-934.

SUB-SECT. 2.—ACCEPTANCE.

A. In General.

See, generally, CONTRACT, Vol. XII., 63-75, & compare, LANDLORD & TENANT, Vol. XXX., pp. 371, 372.

20. Necessity for—To constitute agreement.]—Where a letter contains the entire terms of an agreement for the purchase of lands, it is not necessary for pltf. to prove that he accepted the terms. If it require pltf. to supply a term in the agreement, there must be a special acceptance in writing supplying that term, in order to take the case out of Stat. Frauds.—BOYS v. AYERST (1822), 6 Madd. 316; 56 E. R. 1112.

21. ———.]—HARVEY v. FACEY, No. 1, *ante*.

22. Nature of—Must be unqualified.]—In order to constitute an agreement by letters, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of any new or different term.—HOLLAND v. EYRE (1825), 2 Sim. & St. 194; 57 E. R. 319.

*Annotations:—*Refd. Lucas v. James (1849), 7 Hare, 410; Goodwin v. Fielding (1853), 1 W. R. 255.

23. ———.]—ROUTLEDGE v. GRANT, No. 14, *ante*.

24. What amounts to—Communication of assent by letter—Complete at time of posting.]—Purchaser offered a price for an estate, & the vendor, by a letter sent by post & received by the purchaser the day after it was put into the post

office, accepted the offer:—*Held*: the vendor was bound by the contract from the time when he posted his letter, although it was not received by purchaser until the following day.—POTTER v. SANDERS (1846), 6 Hare, 1; 67 E. R. 1057.

*Annotations:—*Distd. British & American Telegraph Co. v. Colson (1871), L. R. 6 Exch. 108. Refd. Re Imperial Land Co. of Marseilles, Harris' Case (1872), 7 Ch. App. 587; Household Fire Insco. v. Grant (1879), 4 Ex. D. 216.

25. ———.]—HENTHORN v. FRASER, No. 12, *ante*.

26. ——— Communication of assent to agent making offer—Not communicated by agent to principal.]—B. was authorised by deft. to make a proposal of sale of some land to pltf., but to be accepted within a week. Pltf. wrote to B. within that time, accepting the offer, but B did not communicate the acceptance to deft. until long after:—*Held*: there was a valid contract, which was not destroyed by the neglect of B. to communicate the acceptance to deft.—WRIGHT v. BIGG (1852), 15 Beav. 592; 51 E. R. 668.

B. Conditional Acceptance.

See, generally, CONTRACT, Vol. XII., pp. 62, 72-75, 83-89, Nos. 353-358, 415-433, 490-546.

27. Acceptance adding new terms—Offer to purchase—Expression of hope by vendor to give possession on specified day.]—(1) A proposal by a purchaser to take the remainder of a lease was answered by a letter, which, after acceding to the proposal, added, "We hope to give you possession at half-quarter day":—*Held*: the addition did not introduce a new term, but the acceptance was unconditional.

(2) *Semble*: where the purchaser, after transmission to him of the original lease, prepares a draft assignment & makes various objections as to repairs & other matters, but does not require production of the landlord's title he will be considered to have waived its production.—CLIVE v. BEAUMONT (1848), 1 De G. & Sm. 397; 12 L. T. O. S. 530; 13 Jur. 226; 63 E. R. 1121.

*Annotations:—*As to (2) Refd. Simpson v. Sadd (1854), 4 De G. M. & G. 665. *Generally, Mentd.* Gaston v. Frankum (1848), 2 De G. & Sm. 561; Scargill v. Hurry (1850), 14 Jur. 847; Corless v. Sparring (1873), 21 W. R. 876.

28. ——— Offer to sell—Non-acceptance subject to approval of title.]—(1) Where a ct. has to find

a landed estate is of no avail if posted of same date with the acceptance of the offer, though before the acceptance has been delivered to the offeror.—THOMSON v. JAMES (1855), 18 Dunl. (Ch. of Sess.) 1; 27 So. Jur. 632.—SCOT.

PART I. SECT. 2, SUB-SECT. 2.—A.

20 i. Necessity for—To constitute agreement.]—Where an alternative offer of letting or selling is made by a letter a contract is sufficiently constituted by an answer accepting the offer as to sale.—MORRISON v. NEIL (1875), 1 V. L. R. 287.—AUS.

20 ii. ———.]—NIESMANN v. COLLINGRIDGE (1921), 29 C. L. R. 177.—AUS.

20 iii. ———.]—One lot of land out of several sold was purchased for £79 5s. After the sale another person came into the office of pltf.'s solr. & offered £100. An application by pltf. made in the circumstances to substitute the latter person for the purchaser was refused with costs.—McROBERTS v. DURIE (circa 1864), 1 Ch. Ch. 211.—CAN.

20 iv. ———.]—LOWES v. HERBON (Alta.) (1911), 18 W. L. R. 167.—CAN.

20 v. ———.]—CARBY v. ROOTS

(Alta.) (1912), 21 W. L. R. 795; 2 W. W. R. 677; 5 D. L. R. 670.—CAN.

20 vi. ———.]—LAWRENCE v. PRINGLE (B. C.) (1912), 21 W. L. R. 546; 2 W. W. R. 575.—CAN.

20 vii. ———.]—A confirmation which only remains in the breast of the confirmer, & is never communicated to the other side, has no binding effect.—BENNETT v. NEWCOMBE (B. C.) (1913), 24 W. L. R. 59; 11 D. L. R. 87.—CAN.

20 viii. ———.]—ALLAN v. RIOPEL (1913), 26 W. L. R. 248; 5 W. W. R. 712; 14 D. L. R. 811; 7 Alta. L. R. 65.—CAN.

20 ix. ———.]—Deft., through his agent, sent pltf. an offer by mail to sell him certain land for \$1,800 on terms. On the day that he received this offer, pltf. wired the agent as follows: "Send lowest cash price. Will give \$1,600 cash. Wire." The agent replied by wire as follows: "Cannot reduce price." Pltf. on receipt of this wire wrote accepting the offer:—*Held*: the telegram reading "Cannot reduce price" was a renewal of the original offer, not merely a rejection of pltf.'s counter-offer, & pltf.'s acceptance of it completed the contract of sale.—LIVINGSTONE v. EVANS, [1925] 4 D. L. R. 769; [1925] 3 W. W. R. 453.—CAN.

q. ——— Promptitude.]—KILLY v. HOLLEY (Man.) (1912), 22 W. L. R. 587; 8 D. L. R. 176; 3 W. W. R. 412.—CAN.

r. Must be in terms of offer.]—If the holder of an option to purchase land, instead of accepting the offer himself within the time limited, tenders another person as purchaser, & asks the vendor to sign a contract of sale to such other person, the vendor is not bound to sell to such other person.—VANDERLIP v. PETERSON (1906), 4 W. L. R. 403; 16 Man. L. R. 341.—CAN.

t. ———.]—An offer to sell immovable property for a definite price, payable in manner to be arranged, is not an offer to sell for payment of cash against transfer; & apart from the agreement as to the method of payment, can only be turned into a contract of sale by the acceptance & tender of the price.—GREENBERG v. WASCHKE, [1911] W. L. D. 1.—S. AF.

PART I. SECT. 2, SUB-SECT. 2.—B.

u. Acceptance adding new terms—Offer to purchase.]—MCINTYRE v. HOOD (1884), 9 S. C. R. 556.—CAN.

s. ———.]—RYAN v. SING (1884), 7 O. R. 266.—CAN.

a contract in a correspondence & not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. Applying this rule, though the first two letters of a correspondence seemed to constitute a complete contract, the House, upon the whole of what had passed in letters & conversation, came to the conclusion that no concluded & complete contract has been established.

(2) I am disposed rather to look upon the words ["subject to the title being approved by our solr."] as meaning nothing more than a guard against it being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated & approved of in the usual way, which would be by the solr. of the purchaser (LORD CAIRNS, C.).—*HUSSEY v. HORNE-PAYNE* (1879), 4 App. Cas. 311; 41 L. T. 1; 43 J. P. 814; 27 W. R. 585; *sub nom.* *HUSSEY v. PAYNE*, 48 L. J. Ch. 846, H. L.

Annotations:—As to (1) *Consd.* *Williams v. Briscoe* (1882), 22 Ch. D. 441. *Distd.* *Wood v. Aylward* (1887), 57 L. T. 54. *Apld.* *Wylson v. Dunn* (1887), 34 Ch. D. 569. *Consd.* *Tennent v. Welch* (1888), 58 L. T. 368. *Distd.* *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295. *Consd.* *Bellamy v. Debenham* (1890), 45 Ch. D. 481. *Apld.* *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616. *Distd.* *Perry v. Suffields*, [1916] 2 Ch. 187. *Refd.* *May v. Thomson* (1882), 20 Ch. D. 705; *Mason v. Von Buch* (1899), 15 T. L. R. 430; *Lever v. Koffler*, [1901] 1 Ch. 543; *Bristol Tramways, etc. Carriage Co. v. Fiat Motors*, [1910] 2 K. B. 831; *Brooks v. Knowles* (1911), 5 B. W. C. C. 15; *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284; *Morrell v. Studd & Millington*, [1913] 2 Ch. 648; *Love & Stewart v. Instone* (1917), 33 T. L. R. 475. As to (2) *Distd.* *Wilcox v. Redhead* (1880), 49 L. J. Ch. 539. *Apld.* *Kadie v. Addison* (1882), 52 L. J. Ch. 80. *Consd.* *Pago v. Norfolk* (1894), 70 L. T. 781. *Apld.* *Chipperfield v. Carter* (1895), 72 L. T. 487. *Refd.* *Hagerstrand v. Anne Thomas S.S. Co.* (1905), 10 Com. Cas. 67. *Generally*, *Mentd.* *Bank of New Zealand v. Simpson* (1900), 69 L. J. P. C. 22.

29. — **Purchaser requiring restriction against carrying on similar business.**—An offer to sell property may be withdrawn at any time before acceptance, even though a period is stated during which the offer is to remain open.

M., a baker, on May 29, 1889, wrote to G., a director of an Aerated Bread co., the following letter:—"I beg to submit to you the following conditions for disposal of my business carried on at 15 Duke Street, Cardiff. Lease & goodwill, £450, lease from Sept. 29, 1888, for fourteen years. All fixtures, fittings, utensils, etc., stock-in-trade, connected with the premises to be taken at valuation. Yours truly, R.M. This offer to hold good for ten days." On June 1, 1889, G. replied: "I accept your offer for shop & lease, etc. 15 Duke Street, Cardiff. Yours truly, J.G., for B., C. & S. Aerated Bread co. Mr. R. M." M.'s solr. then sent G. a formal memorandum of agreement comprising several terms not expressed in the two letters. The co.'s solrs. added a clause restricting M. from carrying on a similar business within certain limits. A correspondence then followed between the solrs. for the co. & for M. respecting the terms of the memorandum, & on June 7, 1889, M.'s solr. wrote withdrawing the offer. In an action by the co. against M. for specific performance of the contract alleged to be constituted by the two original letters:—*Held*: although those two letters would, if nothing else had taken place, have been sufficient evidence of a complete agreement, yet the co. had themselves

shown that the agreement was not complete by stipulating afterwards for an important additional term, namely, the restriction on M.'s carrying on business, which kept the whole matter of purchase & sale in a state of negotiation only; & M. was therefore at liberty to put an end to the negotiations by withdrawing his offer, though within the ten days mentioned in his letter.—*BRISTOL, CARDIFF & SWANSEA AERATED BREAD CO. v. MAGGS* (1890), 44 Ch. D. 616; 59 L. J. Ch. 472; 62 L. T. 416; 38 W. R. 393; 6 T. L. R. 227.

Annotations:—*Consd.* *Bellamy v. Debenham* (1890), 45 Ch. D. 481. *Refd.* *Mason v. Von Buch* (1899), 15 T. L. R. 430; *Watson v. McAllum* (1902), 87 L. T. 547; *Morrell v. Studd & Millington*, [1913] 2 Ch. 648; *Perry v. Suffields*, [1916] 2 Ch. 187.

30. — **Vendor fixing time for completion.**—The agent for an intending purchaser of property having made an offer for it received in reply a letter from the vendor's agent accepting the offer & fixing a time for signing the contract. The purchaser's agent not having attended within the time named, the vendor refused to complete:—*Held*: the contract was complete, for the naming of a time for signing a contract did not constitute a condition of the acceptance.—*BRANSOM v. STANNARD* (1879), 41 L. T. 434; 28 W. R. 180.

31. — —.—It is said, however, that the agreement is silent as to the date for completion. It is the first time I have heard that a contract is not complete, so as to satisfy Stat. Frauds, unless the date fixed for completion is prescribed. It is part of the common law applicable to cases of this kind that the fixing of the date for completion is a matter which arises after the title has been accepted, or rather after the inquiry as to title. Then it is said there is no stipulation as to the payment of a deposit. Again I say I have never heard that there may not be a perfectly good contract satisfying the provisions of Stat. Frauds although there is no provision for payment by instalments. Then it is said that pltf. would have liked to have a deposit. I daresay he would, but that is quite a different matter. Mere arrangements which in the ordinary course of business are left to the legal advisers to settle, such as the date for completion, are subsequent matters which do not prevent the two letters constituting a concluded agreement (*COZENS-HARDY, M.R.*).—*PERRY v. SUFFIELDS, LTD.*, [1916] 2 Ch. 187; 85 L. J. Ch. 460; 115 L. T. 4; 60 Sol. Jo. 494, C. A. *Annotation*:—*Refd.* *Rawlinson v. Ames*, [1925] Ch. 96.

32. — **Vendor requiring payment of deposit & fixing of time for completion—& provision for securing purchase-money.**—Although a written offer to purchase land limits a definite time for acceptance, with a proviso withdrawing the offer if not accepted within that time, that time limit may nevertheless be extended by a parol agreement before it expires, or, if not so extended, the actual acceptance though out of time may be a parol agreement be treated as a valid acceptance, & in neither case is any memorandum of the parol agreement required by Stat. Frauds.—*MORRELL v. STUDD & MILLINGTON*, [1913] 2 Ch. 648; 83 L. J. Ch. 114; 109 L. T. 628; 58 Sol. Jo. 12.

Annotation:—*Refd.* *Hartley v. Hymans*, [1920] 3 K. B. 475.

33. **Vendor requiring payment of deposit.**—*PERRY v. SUFFIELDS, LTD.*, No. 31, ante.

34. **Partial acceptance—Some terms left unsettled.**—Pltf.'s agents wrote to deft. negotiating

b. — —.—*Re* *CAHILL & RYAN* (1909), M. C. C. 320.—*CAN.*

c. — *Offer to sell.*—*BRIEN v. SWAINSON* (1877), 1 L. R. Ir. 135.—*IR.*

d. *Acceptance must be in terms of offer.*—*RICHARDSON v. RAMSAY* (1912), 20 W. L. R. 566; 1 W. W. R. 1070.—*CAN.*

e. —.—*Contract for sale of*

land held not established because the alleged acceptance of the offer of sale was not an absolute & unqualified assent to the terms of the offer.—*COULTER v. TIMLOCK* (Man.), [1919] 2 W. W. R. 736.—*CAN.*

Sect. 2.—Offer and acceptance: Sub-sect. 2, B. Sects. 3 & 4.]

the sale of the lease of a lodging-house:—"We have much pleasure in forwarding for your approval particulars, inclosed were particulars of two houses, one 22 Belgrave Road, premium 250 guineas, rent £80, term about sixteen years, certain fixtures & planned furniture at a valuation." Deft. replied "I have decided on taking 22 Belgrave Road, & have spoken to my private agent, Mr. C. of, etc., who will arrange matters with you if you will put yourselves in communication with him. I leave town this afternoon, so if you have occasion to write to me please address as before to Cirencester":—**Held**: deft.'s reply was not a sufficient acceptance of the terms proposed in pltf.'s agent's letter so as to constitute a complete binding agreement.—**STANLEY v. DOWDESWELL** (1874), L. R. 10 C. P. 102; 39 J. P. 393; 23 W. R. 389.

SECT. 3.—CONSENSUS BETWEEN PARTIES.

See, generally, CONTRACT, Vol. XII., pp. 90–92, Nos. 555–565.

35. General rule.—(1) An agreement for the sale of lands, which shows on the face of it that the parties are not agreed as to the terms of the contract between them, & as to commencement of the title, does not express the intention of the parties with such certainty that a ct. of equity will enforce performance of it.

(2) Where an offer to sell lands is made by one party, & not accepted by the other within two months, the party making the offer may withdraw it at his discretion.—**RUMMENS v. ROBINS** (1865), 3 De G. J. & Sm. 88; 14 L. T. 717; 11 Jur. N. S. 631; 13 W. R. 979; 46 E. R. 571, L. J.

36. —[Deft. instructed her solrs. to sell her house for £10,000, subject to the conditions under which she had purchased it, & the solrs. employed a house agent to sell the house, with directions that the contract of sale was to be prepared by them. With a knowledge of these circumstances, pltf. offered to purchase the house for the sum named. Deft.'s solrs. then wrote to the purchaser, informing him, that the draft contract was being prepared, & would be forwarded to pltf. for approval:—**Held**: (1) this letter, coupled with the previous negotiations, did not amount to a complete sale, even if it did, deft.'s solrs. had only a limited authority, & she was not bound to complete the contract.

(2) As soon as the fact is established of the final mutual consent of the parties to certain terms, & those terms are evidenced by writing duly signed, there exist all the materials necessary to make a legally binding contract. But if to a proposal or offer an assent is given subject to a provision as to a contract, then the stipulation as to a contract is a term of the assent, & there is no agreement independent of that stipulation (**LORD WESTBURY, C.**).—**CHINNOCK v. ELY (MARCHIONESS)** (1865), 4 De G. J. & Sm. 638; 6

New Rep. 1; 12 L. T. 251; 29 J. P. 279; 11 Jur. N. S. 329; 13 W. R. 597; 46 E. R. 1066, L. C.

Annotations:—As to (1) **Refd.** **Rossdale v. Denny**, [1921] 1 Ch. 67. As to (2) **Conad.** **Winn v. Bull** (1877), 7 Ch. D. 29. **Distd.** **Rosseter v. Miller** (1878), 3 App. Cas. 1124. **Appld.** **Bertel v. Neveux** (1878), 39 L. T. 257; **Hawkesworth v. Chaffey** (1886), 55 L. J. Ch. 335. **Refd.** **Preston v. Luck** (1884), 27 Ch. D. 497; **Chillingworth v. Esche** (1923), 129 L. T. 808.

37. —[—**KENSINGTON BOROUGH COUNCIL v. WILLETT** (1905), *Times* Nov. 16.

38. —[—The ct. will not order the specific performance of an agreement for the sale & purchase of land, the terms of which are ambiguous & understood in different senses by the contracting parties, & where the price to be paid is uncertain not only in value but in nature and character.

Resp. agreed to sell a farm for shares in a syndicate formed to "develop" a mining property. He declined to carry out the agreement on the ground that it was a necessary implication of the agreement that the syndicate should be equipped with a reasonable working capital. The parties were not agreed as to what would constitute such a capital, or as to the meaning of the word "develop":—**Held**: no such implication could be imported into the contract, & it was too ambiguous to be specifically enforced.—**DOUGLAS v. BAYNES**, [1908] A. C. 477; 78 L. J. P. C. 13; 99 L. T. 599; 24 T. L. R. 896, P. C.

39. —[—A contract by a rector for the sale of the rectory house & glebe land belonging thereto for £4,500 was pleaded as concluded in three specified letters. Before this the negotiations for the sale between the rector & his agent & the purchaser had been conducted at interviews & by letters on the footing that 3 acres of the glebe land should be reserved for the erection of a new rectory, & that certain fixtures should be taken by the purchaser. In defence to an action by the vendor for specific performance the purchaser pleaded that there was no concluded agreement, & if there were there was no memorandum of it in writing to satisfy Stat. Frauds. Pltf.'s counsel waived the reservations in the vendor's favour, & was willing to convey the rectory house & all the glebe on payment of £4,500:—**Held**: an agreement such as the vendor now asserted to be subsisting had never been contemplated by the parties, & was not the subject of the present action, which accordingly failed.—**ALLSOPP v. ORCHARD**, [1923] 1 Ch. 323; 92 L. J. Ch. 257; 128 L. T. 823; 67 Sol. Jo. 312.

See, also, Sect. 8, sub-sect. 1, B. (b), *post*.

SECT. 4.—DETERMINATION OF PRICE.

40. General rule—Price essence of contract.]—**POPHAM v. EYRE** (1774), Lofft, 786; 98 E. R. 919, L. C.

Annotation:—**Refd.** **Davis v. Symonds** (1787), 1 Cox, Eq. Cas. 402.

41. —[—According to the Roman & the English Law, as administered both in cts. of law & equity, a fixed price is an essential ingredient

PART I. SECT. 3.

1. Material difference in subject-matter of sale—Land subject to right of way.]—Where purchaser of a house had no knowledge of a right of way, & the agreement for same made no mention of it:—**Held**: there was an honest mistake, but the parties were never *ad idem* for vendors never intended to sell save subject to the right; the right of way made the subject-matter

materially different, & purchaser had the right to refuse to accept something other than he thought he was purchasing & for which the contract called.—**FESSERTON v. WILKINSON** (1914), 26 O. W. R. 419; 6 O. W. N. 347; 17 D. L. R. 858.—**CAN.**

g. Misleading advertisement at sheriff's sale.]—**REED v. RENTON** (Alta.), [1924] 3 W. W. R. 881.—**CAN.**

PART I. SECT. 4.

40 i. General rule—Price essence of contract.]—The price under a contract for the sale or purchase of land is an essential feature of the contract.—**TOWNLEY v. CITY OF VANCOUVER**, [1924] 3 D. L. R. 948; [1924] 3 W. W. R. 78; 34 B. C. R. 201.—**CAN.**

h. Necessity for.]—**STOW v. CURRIE** (1910), 16 O. W. R. 341; 21 O. L. R. 486; 1 O. W. N. 1007.—**CAN.**

in a contract of sale. A contract therefore that does not settle the price is valid & complete only when & if the party, to whom it is referred, shall fix it; & is otherwise totally inoperative.

The price is of the essence of a contract of sale (GRANT, M.R.).

The ct., however, has never gone the length of compelling a party to buy or sell the whole subject of his agreement at a price that he has never fixed & that was never fixed in any mode, to which he has given his consent (GRANT, M.R.).

MILNES v. GERY (1807), 14 Ves. 400; 33 E. R. 574.

Annotations.—**Consd.** Tillett v. Charing Cross Bridge Co. (1859), 26 Beav. 419. **Appld.** Vickers v. Vickers (1867), L. R. 4 Eq. 529. **Distd.** Richardson v. Smith (1870), 5 Ch. App. 648. **Refd.** Blundell v. Brettargh (1810), 17 Ves. 232; Pritchard v. Ovey (1820), 1 Jac. & W. 396; Morgan v. Milman (1853), 3 De G. M. & G. 24; Clark v. Westrope (1856), 18 C. B. 765; Scott v. Avery (1856), 5 H. L. Cas. 811; Collins v. Collins (1858), 26 Beav. 306; Loftus v. Roberts (1902), 18 T. L. R. 532. **Mentd.** Hart v. Hart (1881), 18 Ch. D. 670; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

42. ———.]—The price is of the essence of a contract of sale: if, therefore, to be fixed by arbitrators, & they do not fix it, there is no contract; but the ct. determining that an agreement ought to be executed does not require foreign aid to carry the details into execution.—GOURLAY v. SOMERSET (DUKE) (1815), 19 Ves. 429; 34 E. R. 576.

Annotations.—**Appld.** Morgan v. Milman (1853), 3 De G. M. & G. 24. **Refd.** Darley v. L. C. & D. Ry. (1865), 3 De G. J. & Sm. 24. **Mentd.** South Wales Ry. v. Wytts (1854), 5 De G. M. & G. 880; Hart v. Hart (1881), 18 Ch. D. 670; Evershed v. Evershed (1882), 46 L. T. 690.

43. ———.]—DOUGLAS v. BAYNES, No. 38, ante.

Compare MISTAKE, Vol. XXXV., pp. 108, 109, Nos. 132–140.

44. Provision for ascertainment of price in particular manner—Arbitration—Price not fixed by arbitrators.]—GOURLAY v. SOMERSET (DUKE), No. 42, ante.

45. ———.]—Specific performance cannot be decreed of an agreement to sell at a price to be fixed by arbitrators, already appointed to settle other matters in dispute between the parties, where deft., the vendor, had refused to execute the arbn. bond, & it was therefore uncertain that any award would ever be made.—WILKS v. DAVIS (1817), 3 Mer. 507; 36 E. R. 195, L. C.

Annotations.—**Consd.** Agar v. Mackle (1825), 4 L. J. O. S. Ch. 16. **Appld.** Vickers v. Vickers (1867), L. R. 4 Eq. 529.

46. ———.]—Effect of death of one party.]—Specific performance refused under a contract for sale at a price, to be fixed by arbitrators within a certain time, or if they should not agree to make their award within the time, by an umpire, also within a limited time. The construction of the contract, requiring the delivery of the award in writing to each party, being, that, though the consequential acts, executing the conveyances, etc., might be done by representatives, it was with reference to the terms, to be fixed by the award, personal to the parties; one of whom died before it.—BLUNDELL v. BRETTARGH (1810), 17 Ves 232; 34 E. R. 90, L. C.

Annotations.—**Consd.** Pritchard v. Ovey (1820), 1 Jac. & W. 396. **Appld.** Morgan v. Milman (1853), 3 De G. M. & G. 24. **Refd.** McDougal v. Robertson (1827), 4 Bing. 435; Brooke v. Mitchell (1840), 8 Dowl. 392.

47. ———.]—A landowner, through whose land a railway co. proposed to pass, agreed in May, 1864, to withdraw his opposition to their bill on the terms that the co. would vary the course of their line & make certain bridges, works, & approaches. The co. gave a notice to treat, & on Mar. 20, 1867, they went into possession. On

May 27, a further agreement was come to that the co. should pay £2,250 for purchase-money & compensation, & should construct the bridges askew according to an agreed plan. The co. constructed the line as agreed upon, but did not complete the works, nor pay the purchase-money, nor the interest, though completion of the works was demanded in July, 1868, & payment of interest in Dec. 1868. On Feb. 6, 1869, a substituted agreement was made between the landowner & the co., whereby it was agreed that an estimate should be made by the co.'s engineer of the cost of completing the road, & submitted to A., the landowner's agent, "for approval; in case of difference, the amount to be determined by B."; the amount, "when agreed or determined," to be paid to the landowner, "in discharge of all obligations" as to the road; & "the purchase to be completed forthwith." In Dec. 1871, A. died; & in May, 1872, the co., for the first time, sent in an estimate for the cost of completing the road. The purchase had not been completed, & neither the purchase-money nor any interest had been paid. B. was living:—**Held**: the submission of the estimate to A. for approval was of the essence of the agreement of Feb. 6, 1869; & inasmuch as by his death the agreement was incapable of being performed in the manner & form therein specified, the ct. could not enforce performance of it.—FIRTH v. MIDLAND Ry. Co. (1875), L. R. 20 Eq. 100; 44 L. J. Ch. 313; 32 L. T. 219; 23 W. R. 509.

Annotation.—**Mentd.** County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

48. ———.]—Valuation—Valuation not made—Jurisdiction of court to enforce.]—Where there is a contract to sell at a valuation by A. B. & C. the ct. will compel the vendor to permit the valuation. The time of valuation is of the essence of the contract, but deft. cannot take advantage of it, if he improperly occasion the delay.—MORSE v. MEREST (1821), 6 Madd. 26; 56 E. R. 999.

Annotations.—**Distd.** Richardson v. Smith (1870), 5 Ch. App. 649, n. **Refd.** Pope v. Duncannon (1838), 9 Sim. 177.

49. ———.]—By the terms of the agreement the land was to be valued, & the purchase-money was not to be less than £400. **Qu.**: whether this agreement could be enforced, no valuation having been made.—POTTS v. THAMES HAVEN, DOCK & Ry. Co. (1851), 15 Jur. 1004.

50. ———.]—A. & B., being in partnership as distillers, came to an agreement whereby B. was to buy out A., & it was agreed that if B. should, during A.'s life, be desirous of retiring, he should give notice, & A. should then have an option of repurchase, on the terms that within six months after notice by A., the premises, goodwill, stock-in-trade, & all such of the subsisting contracts as A. should be willing to take, should be valued "in the usual way" by two valuers, one to be named by A., the other by B., or by the umpire of the two valuers. B. gave notice of his intention to retire; whereupon A. gave notice of his intention to repurchase; & two valuers were appointed; but after the appointment B. refused to allow his valuer to proceed with the valuation:—**Held**: there was no contract between the parties which the ct. could specifically enforce.—VICKERS v. VICKERS (1867), L. R. 4 Eq. 529; 36 L. J. Ch. 946.

Annotations.—**Consd.** Smith v. Peters (1875), L. R. 20 Eq. 511. **Refd.** Richardson v. Smith (1870), 5 Ch. App. 649, n.; Loftus v. Roberts (1902), 18 T. L. R. 532.

—Conclusiveness of valuation.]—Upon a contract for the sale of a farm it was, by a letter signed by both parties, referred to a valuer to ascertain & certify the amount of the following

SECT. 4.—Determination of price. Sects. 5, 6 & 7:
Sub-sect. 1.]

particulars: “(1) the seed wheat & vetches sown on the several fields of A.’s late farm at B. previous to Dec. 25, 1847, the day possession was given to the purchaser; (2) the labour of ploughing & sowing the same; (3) the quantity & cost price, at the kiln, of the lime carried on the said farm since Michaelmas, 1847, but not the cost of carriage; (4) the value of the hay left on the farm at Christmas, 1847. All the above are to be paid for by Mr. B. We mutually agree to abide by your valuation.” The valuer having allowed a certain sum for 3 ploughings of a portion of the land, a certain other sum for lime, & a certain other sum for “working out & burning stroyle,” the ct. declined to interfere.—*BIANSCOMBE v. ROWCLIFFE* (1848), 6 C. B. 523; 18 L. J. C. P. 38; 136 E. R. 1353.

52. — By umpires—Effect of under-valuation by umpires.]—Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the ct. sees reason to believe that the price, subsequently fixed by these persons, is considerably below the real value of the property.—*PARKEN v. WHITBY*, *WHITBY v. PARKEN* (1823), Turn. & R. 366; 37 E. R. 1142.

Annotations:—*Reid*, Bower v. Cooper (1843), 2 Hare, 408. *Mentd.* Handley & Jones v. Edwards (1838), 1 Curt. 722.

53. — — — — —.]—Specific performance of an agreement to purchase at a price to be fixed by third persons named in the contract, decreed, though price thus fixed was inadequate, there being no evidence that the valuation was unfair.—*WEEKES v. GALLARD* (1869), 21 L. T. 655; 18 W. R. 331.

54. — Non-ascertainment in manner specified—Jurisdiction of court to order ascertainment in other manner.]—Where on a sale of property the parties having stipulated that the price shall be ascertained in a particular way & it is not so ascertained the ct. cannot, in the absence of special circumstances, interfere to aid the carrying out of the contract by having the price ascertained in some different mode.—*MORGAN v. MILMAN* (1853), 3 De G. M. & G. 24; 22 L. J. Ch. 897; 20 L. T. O. S. 285; 17 Jur. 193; 1 W. R. 131; 43 E. R. 10, L. C. & L. J.J.

Annotations:—*Consd.* Haynes v. Haynes (1861), 1 Drew. & Sm. 426. *Reid*, *Re Dykes’ Estate* (1869), 17 W. R. 658. *Mentd.* Johnson v. Bragge, [1901] 1 Ch. 28.

Inclusion of price in memorandum or note.]—
See Sect. 8, sub-sect. 4, B. (c).

SECT. 5.—AGREEMENT CONTEMPLATING EXECUTION OF MORE FORMAL DOCUMENT.

See CONTRACT, Vol. XII., pp. 83–89, Nos. 490–546; LANDLORD & TENANT, Vol. XXX., pp. 372, 373, Nos. 362–371.

PART I. SECT. 7, SUB-SECT. 1.

k. Milling timber & timber limits.]—
ALLEN & SONS v. KIRK, [1927] S. R. Q. 85.—**AUS.**

l. —.]—A contract for an interest in a timber limit is a contract for an interest in land within Stat. Frauds.—*HOEFFLER v. IRWIN* (1903), 25 C. L. T. 32; 2 O. W. R. 714; 4 O. W. R. 172.—**CAN.**

—.]—*McNEILL v. HAINES* (1889), 13 P. R. 115.—**CAN.**

n. —.]—As a general rule a contract for the sale of standing timber which is not to be severed immediately is a sale of an interest in land.—

HANDY v. CARRUTHERS (1893), 25 O. R. 279.—**CAN.**

o. Agreement to clear land.]—An agreement to enter upon & clear land, & take the wood after it is cut down in payment of the labour, is not for an interest in lands within Stat. Frauds.—*HAMILTON v. McDONELL* (1838), 5 O. S. 720.—**CAN.**

p. Devisee’s contingent interest in real estate.]—*Semble*: the purchase of a devisee’s contingent interest in real estate is within the Stat. Frauds.—*McDIARMID v. McDIARMID* (1862), 9 Gr.

q. Right of entry.]—*TORONTO* (Br.)

SECT. 6.—CONTRACT CONTAINED IN SERIES OF LETTERS.

See CONTRACT, Vol. XII., pp. 79–82, Nos. 471–489.

SECT. 7.—THE STATUTE OF FRAUDS—LAW OF PROPERTY ACTS.

SUB-SECT. 1.—WHAT IS INTEREST IN LAND.

See, now, Law of Property Act, 1925 (c. 20), s. 40.

55. Agreement to share purchase.]—A. & B. being severally in treaty to purchase a house & toft of land of S. they agree by parol, that A. shall desist, & that B. shall purchase, & let A. have part of the ground, which he wanted, at a proportionable price. B. purchases, & refuses to perform the agreement. This agreement is within the provision of Stat. Frauds.—*LAMAS v. BAYLY* (1708), 2 Vern. 627; 1 Eq. Cas. Abr. 22; 23 E. R. 1011, L. C.

Annotation:—*Reid*, *Maddison v. Alderson* (1883), 8 App. Cas. 467.

56. S. P. ANON. (1709), 2 Eq. Cas. Abr. 45; 22 E. R. 40, L. C.

57. Sale of mortgaged estate—After foreclosure decree.]—Bill to carry into execution on a parol agreement between solrs., that there should be a decree of foreclosure, that the estate should be sold, the mtgee. paid her principal & interest, & the remainder to the mtgor., dismissed at the Rolls, as within Stat. Frauds, on appeal evidence of the agreement read *de bene esse*, but the decree affirmed.—*COX v. PEELE* (1788), 2 Bro. C. C. 334; 29 E. R. 186, L. C.

58. Agreement by tenant for payment to landlord—For consent to assignment of lease.]—A tenant having agreed with his landlady, that if she would accept another for her tenant in his place, he being restrained from assigning the lease without her consent, he would pay her £40 out of £100 which he was to receive for the good will, if her consent were obtained; & having received the £100 from the new tenant, who was cognisant of this agreement; is liable to the landlady in an action for money had & received for her use; the consideration being executed, & therefore the case being taken out of Stat. Frauds, as a contract for an interest in land.—*GRIFFITH v. YOUNG* (1810), 12 East, 513; 104 E. R. 201.

Annotations:—*Apld* *Green v. Saddington* (1857), 7 E. & B. 503. *Reid*, *Cocking v. Ward* (1845), 1 C. B. 858. *Mentd.* *Cheshire v. Vaughan*, [1920] 3 K. B. 240.

59. Contract for profits of living.]—Where a beneficed clergyman enters into an agreement to permit the profits of his living to be received by a third person for the purpose of the surplus, after payment of a competent stipend to a curate to serve the church, being applied in liquidation of his debts:—*Held*: an agreement of the above description, signed by the creditors only, & not by the debtor, or by any person thereunto by him

v. CANTWELL (1862), 12 C. P. 607.—**CAN.**

r. Agreement to give mortgages.]—*JOHNSTONE v. COWAN* (1865), 25 U. C. R. 470.—**CAN.**

t. —.]—*THOMPSON v. YOCKNEY* (Man.) (1912), 22 W. L. R. 863; 8 D. L. R. 776; 3 W. W. R. 591.—**CAN.**

u. Building resting on stone pillars.]—Action to recover the price of a certain building, plea that the contract of sale was not in writing signed by the deft. Pltf. gave in evidence that the building in question was erected on land to which neither of the parties claimed title, & that it rested on stone

lawfully authorised, does not amount to such a substitution of a new agreement in the place of the old contract as to operate as a bar to an action at the suit of a creditor who has signed it, it being a contract "for an interest in or concerning lands, tenements, or hereditaments," within Stat. Frauds.—*ALCHIN v. HOPKINS* (1834), 1 Bing. N. C. 99; 4 Moo. & S. 615; 3 L. J. C. P. 272; 131 E. R. 1055.

Annotations.—*Reid*. Long v. Storle (1849), 13 Jur. 227; McManus v. Cooke (1887), 35 Ch. D. 681. *Mentid*. Hawkins v. Gathercole (1855), 6 De G. M. & G. 1.

60. Sale of business premises & stock.—In consideration that A., who was in the possession & occupation of premises wherein he carried on the business of a milkman would yield up the possession & occupation of the premises to B., & permit him thenceforth to occupy the same, & would assign over to B. all his property in the stock & plant, & deliver the same to B., the latter promised to pay A. a certain sum:—*Held*: this was a contract for an interest in or concerning lands within Stat. Frauds, s. 4.—*SMART v. HARDING* (1855), 15 C. B. 652; 3 C. L. R. 351; 24 L. J. C. P. 76; 1 Jur. N. S. 311; 3 W. R. 245; 139 E. R. 581. *Annotation*.—*Reid*. Lavery v. Turley (1860), 6 H. & N. 239.

61. Sale of benefit of licence to use premises as slaughterhouse.—Pltf. & deft. agreed by word of mouth that pltf. should pay £37 for the interest & deft. in premises occupied by him as a slaughterhouse & for the fixtures; deft. to return £10 if pltf. were refused a licence to use the premises as a slaughterhouse. The premises & fixtures were transferred to pltf. & deft. received the £37. Subsequently this action was brought to recover £10 on an allegation that the licence to use the premises had been refused to pltf. A non-suit was directed on the ground that the contract was for an interest in land & was void under Stat. Frauds, s. 3:—*Held*: the contract being executed as far as regarded the land, & the promise sued on relating wholly to money, pltf. might recover, though the contract was not in writing.—*GREEN v. SADDINGTON* (1857), 7 E. & B. 503; 29 L. T. O. S. 144; 3 Jur. N. S. 717; 5 W. R. 593; 119 E. R. 1333.

Annotations.—*Expld*. Hodgson v. Johnson (1858), E. B. & E. 685. *Reid*. Lindley v. Lacey (1864), 13 W. R. 80. *Mentid*. Shadwell v. Shadwell (1860), 9 W. R. 163.

62. Sale of benefit of mortgage on land.—Comrs. for a local improvement were incorporated by Act of Parliament, & empowered to borrow money on mtge. of the lands or funds acquired by them by virtue of the Acts or on bond. By a subsequent Act, which provided a form of bond, it was recited "that the comrs. had pursuant to a power in that behalf contained in one of their Acts, executed an indenture dated May 26, 1852, for securing the performance of the condition of certain bonds granted pursuant to a deed of settlement of even date therewith & therein referred to." The form of bond given by the Act

contained the following provisos: Provided always that the lands, tenements, money, property & effects of the comrs. acquired & to be acquired under or for the purposes of the Acts, or any of them shall alone be answerable to pay & satisfy the principal sum & interest secured by the above written bond, & that no comr. or other person shall in any case be personally liable to pay the same principal & interest, or any part thereof; provided also, that the above written bond is granted by the comrs. to the intent that it may be entitled to the benefit of an indenture of mtge. dated May 26, 1852, executed by the comrs. under the authority of the above mentioned Acts, & may be subject to the powers & provisions of an indenture of settlement of the same date referred to in the indenture of mortgage:—*Held*: these bonds conferred upon the holder an interest in land within Stat. Frauds, s. 4.—*TOPPIN v. LOMAS* (1855), 16 C. B. 145; 24 L. J. C. P. 144; 25 L. T. O. S. 129; 3 W. R. 446; 139 E. R. 711. *Annotations*.—*Distd*. Powell v. Jessop (1836), 18 C. B. 336. *Apld*. Driver v. Broad, [1893] 1 Q. B. 539.

63. Agreement to procure transfer or sale of lease.—Pltf., being desirous of obtaining a transfer of the lease of a public-house from deft., who was a public-house broker, signed an agreement in the following terms: "Mr. H. (pltf.) now informs me he is in possession of £60 cash, & such being the case, I hereby agree to get the lease everything, for such sum of £60 cash." Deft. had no interest in the public-house himself:—*Held*: the contract required to be in writing under Stat. Frauds, s. 4.—*HORSEY v. GRAHAM* (1869), L. R. 5 C. P. 9; 39 L. J. C. P. 58; 21 L. T. 530; 18 W. R. 141.

64. Agreement for use of dock.—Defts., a municipal corp., were possessed of a dock of which they allowed the use to ships needing repairs, under certain printed regulations. Pltf. entered into a parol agreement with defts. for the use of the dock, upon the terms of such regulations. By these regulations it was provided that the dock should be "let" to parties requiring the same for the repair of vessels at such rates as the council of the borough should from time to time sanction, & that vessels entered in a book kept by the borough treasurer should be allowed to enter the dock, as far as possible, according to the order of entry in the book. The regulations contained provisions that defts. should be entitled to detain the vessel in the dock until the dockage was paid, that the corp., foreman should open & shut the dock gates, & various other provisions tending to show that defts. intended to retain possession of & control over the dock while in use by vessels. Defts. did not admit pltf.'s vessel into the dock in her turn. In an action for breach of contract by pltf. against defts.:—*Held*: the contract was not for an interest in land within Stat. Frauds, s. 4, & therefore need not be in writing.—*WELLS v.*

pillars, which pltf. built:—*Held*: insufficient to give the building the legal character of a chattel, & therefore the contract was void under the third clause of Stat. Frauds. Had pltf. showed that the building rested on the pillars solely by its own weight, without being affixed to the pillars or connected with the soil, the case would still have been within Stat. Frauds, s. 4.—*McKENZIE v. McDONALD* (1869), 8 N. S. R. (2 G. & O.) 11.—*CAN.*

b. Agreement to relinquish interest in land.—*MURDOCH v. CURRELL* (1893), 25 N. S. R. (13 R. & G.) 293.—*CAN.*

c. Timber licence—Assignment of.—*LAUGHLAN v. PRESCOTT* (1897), 1 N. B. Eq. Rep. 406.—*CAN.*

d. ———.—*A sale of* under licenses to cut timber on Crown lands is a contract for the sale of an interest in land.—*VAUGHAN-RHYS v. LAIDLAW* (1911), 41 S. C. R. 458.—*CAN.*

e. ———.—*Agreement to bid in at auction.*—An agreement under which a Crown land lumber licence was bid in at public sale at the up-set price by deft., in whose name the licence was issued, for pltf., who had paid to deft. the up-set price previous to the sale, does not relate to an interest in land within Stat. Frauds.—*McGREGOR v. ALEXANDER* (1899), 2 N. B. Eq. Rep. 54.—*CAN.*

f. ———.—An interest in a special

timber licence issued under Land Act, of B. C. is an interest in lands.—*CLARY v. CLARY* (1910), 15 B. C. R. 9.—*CAN.*

g. Crop of wild hay.—*SHARPE v. DUNDAS* (1911), 21 Man. L. R. 191.—*CAN.*

h. Agreement for sale or mortgage.—An agreement for sale or a mtge. registered or unregistered creates an interest in land.—*SETTER v. THE REGISTRAR* (1914), 30 W. L. R. 256; 7 W. W. R. 901; 20 D. L. R. 166.—*CAN.*

k. Whether money derived from sale of land.—*LESLIE v. STEVENSON* (1915), 9 O. W. N. 82; 34 O. L. R. 473.—*CAN.*

Sect. 7.—The Statute of Frauds—Law of Property Acts: Sub-sects. 1, 2 & 3. Sect. 8: Sub-sects. 1 & 2.]

KINGSTON-UPON-HULL CORPN. (1875), L. R. 10 C. P. 402; 44 L. J. C. P. 257; 32 L. T. 615; 23 W. R. 562.

Annotations:—*Distd.* Webber v. Lee (1882), 9 Q. B. D. 315. *Refd.* Kerrison v. Smith, [1897] 2 Q. B. 445. *Mentd.* Bourne & Hollingsworth v. Marylebone B. C. (1908), 72 J. P. 129.

65. Sale of fixtures.]—The tenant of premises having become bkpt., the trustee sold the tenant's fixtures on the premises to pltf., & he sold them to deflt., the landlord. There was no agreement in writing, & the value of the fixtures was above £10. An action having been brought for the price:—*Held:* the sale was not within Stat. Frauds, s. 4, as the sale of an interest in land, nor within s. 17 as the sale of goods & chattels; & the action was therefore maintainable.—*LEE v. GASKELL* (1876), 1 Q. B. D. 700; 45 L. J. Q. B. 540; 34 L. T. 759; 40 J. P. 725; 24 W. R. 824.

Annotations:—*Consd.* Underwood v. Burgh Castle Brick & Cement Syndicate, [1922] 1 K. B. 123. *Refd.* Jarvis v. Jarvis (1893), 63 L. J. Ch. 10; Thomas v. Jennings (1896), 66 L. J. Q. B. 5. *Mentd.* *Re* Allen, [1907] 1 Ch. 575.

66. —.]—Machinery affixed to a building is land within Stat. Frauds.—*JARVIS v. JARVIS* (1893), 63 L. J. Ch. 10; 69 L. T. 412; 9 T. L. R. 631; 37 Sol. Jo. 702; 1 Mans. 199; 8 R. 361.

67. —.]—Such a contract cannot be properly described as a contract for the sale of goods or chattels within Stat. Frauds, s. 17; nor could it be correctly described as "a contract or sale of an interest concerning lands," within the meaning of sect. 4 of that statute; for tenant's removable fixtures while annexed to the freehold are not goods & chattels, & the right to sever & remove them from the freehold to which they are attached, does not give the tenant an interest in the freehold itself (*HANKINS, J.*).—*THOMAS v. JENNINGS* (1896), 66 L. J. Q. B. 5; 75 L. T. 274; 45 W. R. 93; 12 T. L. R. 637; 40 Sol. Jo. 731.

68. Agreement to charge rent—In consideration of loan.]—A customer, in July, borrowed £200 from his bankers upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas. The money was advanced by the bankers, & the customer then gave them a letter addressed by him to the tenant of the farm, by which he authorised & requested the tenant, when his Michaelmas rent became due, to pay £200 to the bankers. The letter contained no reference to the loan, & did not show that any consideration had been given for the authority. The bankers sent the letter to the tenant. The customer was adjudicated a bkpt. upon an act of bkpcy. committed in Aug.:—*Held:* as the rent was an interest in land, the agreement was one which, by Stat. Frauds, s. 4, could not be proved by parol evidence, & therefore the letter could alone be looked at.

The real arrangement between bkpt. & the bankers was a verbal one, he agreeing, in consideration of an advance by them, to charge in their favour rent which was not then due. That is a contract charging an interest in land, & Stat.

1. Sale of mill & machinery.]—*McPHERSON v. UNITED STATES FIDELITY & GUARANTEE CO., McGUIRE v. McPHERSON* (1915), 33 O. L. R. 524.—**CAN.**

m. Assignment by vendor of sum of sale—Assignment also of agreement & land—Whether assignment creates an interest in land sufficient to support

caveat.]—*DREWRY v. COWIE* (Sask.), [1919] 2 W. W. R. 388.—**CAN.**

n. Advertisement or application for timber lease.]—An advertisement or application for a timber lease confers no interest in the land on appct.—*CLARK v. MILLIGAN*, [1920] 1 W. W. R. 1044.—**CAN.**

o. Agreement to cut hay.]—An agreement by the owner of land giving

Frauds prevents us from receiving parol evidence to show what the verbal arrangement was (*JESSEL, M.R.*).—*Re WHITTING, Ex p. HALL* (1870), 10 Ch. D. 615; 48 L. J. Bcy. 79; 40 L. T. 179; 27 W. R. 385, C. A.

Annotations:—*Appl.* Mounsey v. Rankin (1885), Cab. & El. 496. *Refd.* McManus v. Cooke (1887), 35 Ch. D. 681. *Mentd.* Greenway v. Atkinson (1881), 29 W. R. 560; Percival v. Dunn (1885), 29 Ch. D. 128; Brandts v. Dunlop Rubber Co., [1904] 1 K. B. 387.

69. Option to purchase—Must be made in writing.]—In a conveyance of a plot of land, reserving the mines under it to the vendor, there was a covenant by the vendor with the purchaser that, in case the vendor, his heirs or assigns, should at any time thereafter sell, or agree to sell, to any person the mines under the same adjoining lands belonging to him, he, his heirs or assigns, would at the same time offer to the purchaser of the plot of land, his heirs or assigns, the mines under that plot, & give him & them the refusal of the same for one month from the time such offer should be made, at the same price per acre as the vendor, his heirs or assigns, should have agreed to sell the adjoining mines; & if the purchaser, his heirs or assigns, should accept such offer, & within such month agree to purchase the mines so offered, at the price at which they should be offered, the vendor, his heirs or assigns, should convey the same to the purchaser, his heirs or assigns:—*Held:* it was necessary that the offer should be made in writing, & consequently the non-acceptance within a month of a parol offer made by the devisees of the vendor did not deprive the assigns of the purchaser of their rights under the covenant.—*BIRMINGHAM CANAL CO. v. CARTWRIGHT* (1879), 11 Ch. D. 421; 48 L. J. Ch. 552; 40 L. T. 784; 27 W. R. 597.

Annotations:—*Mentd.* *Re* Blight, Blight v. Hartnoll (1881), 45 L. T. 524; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562.

70. Grant of right of shooting.]—A grant of a right to shoot over land & to take away a part of the game killed is a grant of an interest in land & within Stat. Frauds.—*WEBBER v. LEE* (1882), 9 Q. B. D. 315; 51 L. J. Q. B. 485; 47 L. T. 215; 47 J. P. 4; 30 W. R. 866, C. A.

Annotation:—*Refd.* *It.* v. Surrey County Court Judge, [1910] 2 K. B. 410.

71. Sale of building materials.]—A contract for the sale of "the building materials" of a house, with a condition that all materials were to be taken down & cleared off the ground within two months, "after which date any materials then not cleared will be deemed a trespass & become forfeited, & the purchaser's right of access to the ground shall absolutely cease," is a contract for the sale of an interest in or concerning land within Stat. Frauds, s. 4, & accordingly, from the absence of any sufficient description in the contract of the vendor, avoided.—*LAVERY v. PURSELL* (1888), 39 Ch. D. 508; 57 L. J. Ch. 570; 58 L. T. 846; 37 W. R. 163; 4 T. L. R. 353.

Annotation:—*Refd.* *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10.

72. Partnership in land—Assignment of partnership share.]—(1) G., S. & B. were partners in trade under the firm of "G., S. & B." & the partnership assets comprised leaseholds. S. & B. agreed with G. to retire from the business & to

the right to another to cut the hay which is to grow thereon is the sale of an interest in land.—*KIRK v. FORD* (Sask.), [1920] 3 W. W. R. 91; 53 D. L. R. 644.—**CAN.**

p. Independent contract relating to previous purchase of land—Not in itself concerning land.]—Where an agreement for the purchase of lands is followed by an independent contract

assign their respective shares to him, & B. signed & gave to G. the following memorandum: "Rough draft. Memorandum from G., S., & B. This is to record that in consideration of G. or his exors. paying B., or his assigns the sum of £100 on Jan. 1, 1890, & the sum of £100 on every Jan. 1 for the nine succeeding years, B. agrees to withdraw from the firm of G., S. & B." The parties intended that a more formal document should be prepared & signed by them respectively.

In an action by G. to enforce specific performance of the above agreement:—*Held*: although a partnership in land may be proved by parol evidence, yet an agreement by one of the partners to retire & to assign his share in the partnership assets, is an agreement to assign an interest in land & must be evidenced by a sufficient memorandum within Stat. Frauds.

(2) It is an entirely different thing to say that because the agreement is silent as regards the time, which the parties have not thought fit expressly to mention, yet the time shall be regarded as such an essential term that the contract is not good without its being mentioned (KEKEWICH, J.).—*GRAY v. SMITH* (1889), 43 Ch. D. 208; 58 L. J. Ch. 803; 61 L. T. 481; *affd.*, 43 Ch. D. 217, C. A.

Annotations:—*Reid, Jennings v. Jennings*, [1898] 1 Ch. 378; *Re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410. *Mentid, Thynne v. Shove* (1890), 45 Ch. D. 577; *Burchell v. Wilde*, [1900] 1 Ch. 551.

—[*See, also*, CONTRACT, Vol. XII., p. 119, Nos. 770, 771; PARTNERSHIP, Vol. XXXVI., pp. 346, 347, Nos. 237–241.

73. Sale of slag on land.—In a counterclaim by purchasers against a vendor it appeared that the vendor was the lessee of certain land part of which was composed of slag & cinders. On adjoining lands occupied by other persons were two disused cinder tips. The vendor had obtained from these persons licences to remove from the tips slag & cinders adhering to & forming part of their lands. He then agreed with the purchasers to sell to them all the slag on the demised premises & from the tips on the lands adjoining, or so much thereof as the purchasers should desire to remove, & for that purpose to give the purchasers access to the demised premises & the cinder tips on the adjoining lands. After certain slag had been removed by the purchasers & sold at a profit the lessor & licensors of the vendor intervened & prevented the further removal of slag by the purchasers.

The purchasers sued for damages for the vendor's default in delivering or giving access to the slag sold:—*Held*: the agreement was a contract to grant an interest in land, & as the vendor's failure to perform his contract was due solely to a defect in his title, the purchasers could not recover any damages for the loss of their bargain.—*MORGAN & RUSSELL & SONS*, [1909] 1 K. B. 357; 78 L. J. K. B. 187; 100 L. T. 118; 25 T. L. R. 120; 53 Sol. Jo. 136, D. C.

Growing crops.—[*See* AGRICULTURE, No. II., pp. 52–55, Nos. 280–298.

Contracts partly within Statute of Frauds.—[*See* CONTRACT, Vol. XII., pp. 125, 126, Nos. 832–837.

Assignment of leases.—[*See* LANDLORD & TENANT, Vol. XXXI., pp. 393–395, Nos. 5402–5416.

Sale of mines.—[*See* MINES, Vol. XXXIV., p. 658, Nos. 576–579.

Sale of shares.—[*See* COMPANIES, Vol. IX., pp.

225, 349, Nos. 1436–1438; 2205–2207; Vol. X., pp. 1102, 1103, Nos. 7736–7738.

Sale of debentures.—[*See* COMPANIES, Vol. X., p. 771, No. 4826.

Agreement between husband & wife—Purchase of lease by husband at wife's request.—[*See* HUSBAND & WIFE, Vol. XXVII., p. 211, No. 1827.

—**Indemnification of husband against rent.**—[*See* HUSBAND & WIFE, Vol. XXVII., p. 211, No. 1828.

Agreement to take lodgings.—[*See* LANDLORD & TENANT, Vol. XXX., p. 517, Nos. 1720–1723.

Sale by auction.—[*See* AUCTION & AUCTIONEERS, Vol. III., p. 7, Nos. 45, 46.

Advowson.—[*See* ECCLESIASTICAL LAW, Vol. XIX., p. 370, No. 1893.

Submission to arbitration.—[*See* ARBITRATION, Vol. II., pp. 314, Nos. 15, 16.

Advancement of money on security of land.—[*See* MORTGAGE, Vol. XXXV., p. 250, No. 93.

Conveyance of equity of redemption.—[*See* MORTGAGE, Vol. XXXV., p. 359, No. 1022.

SUB-SECT. 2.—CONTRACTS PARTLY WITHIN STATUTE.

[*See* CONTRACT, Vol. XII., pp. 125–128, Nos. 829–851.

SUB-SECT. 3.—THE MEMORANDUM OR NOTE.

[*See* Sect. 8, *post*.

SECT. 8.—THE MEMORANDUM OR NOTE.

SUB-SECT. 1.—IN GENERAL.

74. Must be connected with agreement.—A particular writing for the purchase of an estate, no writing within Stat. Frauds, unless the party purchased by it, or that it was shown him at the time of purchase; so that if that contains more than the words of the conveyance will in strictness carry, the purchaser cannot compel a specific execution of the residue on the particular.—*Cass v. WATERHOUSE* (1691), Prec. Ch. 29; 24 E. R. 15.

Annotation:—*Consd. Craddock v. Hunt*, [1923] 2 Ch. 136.

75. Time for making—Whether before agreement concluded.—The memorandum or note of an agreement required by Stat. Frauds, s. 4, must be a memorandum of an agreement complete at the time the memorandum is made. A letter from an alleged purchaser inclosing & referring to a draft conveyance in which it was recited that he had agreed to purchase land, held not to be a memorandum of a completed agreement.—*MUNDAY v. ASPREY* (1880), 13 Ch. D. 855; 49 L. J. Ch. 216; 42 L. T. 143; 38 W. R. 347.

—[*See, generally*, CONTRACT, Vol. XII., pp. 129, 130, Nos. 857–866.

SUB-SECT. 2.—TO WHOM GIVEN.

[*See, generally*, CONTRACT, Vol. XII., pp. 130, 131, Nos. 867–873.

76. To third party—Agent of party.—[*SMITH v. WATSON* (1719), Bunb. 55; 115 E. R. 593.

Annotation:—*Reid. Gibson v. Holland* (1865), L. R. 1 C. P. 1.

relating to that purchase, yet not in itself concerning the lands, an agreement in writing, under Stat. Frauds, s. 4, is not necessary to bind the parties

to the contract.—*SCOTT v. ANDERSON* (1857), 30 L. T. O. S. 204.—*IR.*

q. Agreement to surrender lease of

land—Conditional on being allowed to keep materials of house thereon.—[*IRONAYNE v. SHEPHERD* (1877), 1 L. 11 C. L. 146.—*IR.*

Sect. 8.—The memorandum or note: Sub-sects. 2 & 3, A. & B. (a) & (b).]

77. ——— Solicitor.]—GOODWIN v. FIELDING, No. 79, post.

78. ——— Mortgagee of premises to be sold.]—SEAGOOD v. MEALE & LEONARD, No. 205, post.

SUB-SECT. 3.—FORM OF.

A. In General.

See, generally, CONTRACT, Vol. XII, pp. 131–136, Nos. 874–915.

Writing.]—See Law of Property Act, 1925 (c. 20), s. 40.

79. Letter.]—The extrix. of a lessee agreed to sell to A. the residue of her term, except a day, & the fixtures on the premises for £400. This agreement was entered into by the extrix. without advice & there was no written memorandum of it except a letter written by the extrix. to her own solr. a few hours afterwards.

Qu.: whether the letter to the solr. was a sufficient memorandum in writing within Stat. Frauds.—**GOODWIN v. FIELDING (1853), 4 De G. M. & G. 90; 1 W. R. 343; 43 E. R. 441, L. J.J.**

80. ———.]—A. entered into a treaty with B.'s agent for the purchase of leasehold premises, fixtures & furniture, & in going over the premises, pointed out the articles of furniture which he would take at a valuation, of which the agent made a list. No agreement was executed or signed, but in the letter which passed between A. & the agent, A. consented to take the lease, & added, "the other articles which you included in your list, I will also take at a valuation":—*Held*: this was a sufficient note in writing, signed by the party, to take the case out of Stat. Frauds; parol evidence was admissible to show who was the principal; as deft. disputed the contract, the ct. would only allow the common reference as to title, without the inquiry when a good title could be shown.—MORRIS v. WILSON (1859), 33 L. T. O. S. 56; 5 Jur. N. S. 168.****

Annotations:—Consd. Stanley v. Dowdeswell (1874), L. R. 10 C. P. 102. *Apld.* Wyllson v. Dunn (1887), 34 Ch. D. 569. *Distd.* Pattle v. Anstruther (1893), 69 L. T. 175. *Apld.* Filby v. Hounsell, [1896] 2 Ch. 737. *Expld.* Lovesy v. Palmer, [1916] 2 Ch. 233. *Refd.* Commis v. Scott (1875), L. R. 20 Eq. 11.

PART I. SECT. 8, SUB-SECT. 3.—A.

79 i. Letter.]—MUNROE v. HEUBACH (1909), 18 Man. L. R. 450; 10 W. L. R. 196.—CAN.

79 ii. ———.]—BROWN v. STREET (Sask.) (1912), 21 W. L. R. 46; 3 D. L. R. 291.—CAN.

79 iii. ———.]—MANSFIELD v. TORONTO GENERAL TRUSTS CORP. (1912), 20 W. L. R. 344; 22 Man. L. R. 49.—CAN.

r. ——— Where subsequent oral agreement not in accordance with writing in prior agreement.]—Where in attempting to establish a written contract for the sale of land to him by a deft. from letters, a pltf. fails but proves a subsequent parol agreement, he cannot n order to satisfy Instruments Act, 1890, s. 208, rely upon letters as constituting a sufficient memorandum.—HAYDON v. McLEOD (1900–1), 27 V. L. R. 395.—AUS.****

t. ——— Acceptance with additional conditions as to title.]—HOPE v. DIXON (1875), 22 Gr. 439.—CAN.

s. ——— Sufficiency of.]—MCNEIL v. McDONALD (1893), 25 N. S. R. 306.—CAN.

b. Necessity for writing.]—A sheriff sold property under an execution,

but a settlement was effected & the execution creditor desired the sheriff not to convey. The purchaser filed a bill against the sheriff to compel specific performance, but no memorandum had been made or signed by the sheriff:—*Held*: the contract must be in writing.—**WITHAM v. SMITH (1855), 5 Gr. 203.—CAN.**

c. ———.]—HOSKINS v. MITCHESON (1857), 14 U. C. R. 551.—CAN.

d. ———.]—GROSS v. BRICKER (1860), 18 U. C. R. 410.—CAN.

e. ———.]—A. being lessee of land with a right to purchase within a certain period, at a certain price, assigned his interest to B., who agreed to take the deed in his own name & convey to pltf. on repayment of the money paid by him with interest at 20 per cent. B. neglected the matter, & the owner of the land, the time having expired, refused to sell except at a much higher price. Upon action by A. against B. for damages:—*Held*: it being a contract relating to land not in writing, he could not recover.—VOY v. WEIR (1860), 9 C. P. 487.—CAN.****

f. ———.]—ARCHER v. SCOTT (1870), 17 Gr. 247.—CAN.

g. ———.]—NORTH VANCOUVER DISTRICT v. TRACY (1903), 34 S. C. 11.

81. ———.]—ROSSITER v. MILLER, No. 124, post.

82. ——— Containing promise conditional on acceptance.]—Deft. being solr. for the purchaser of real estate, who had made default, wrote to the solrs. of pltf., who was the vendor, in the following terms: "to save the purchaser from danger of entire destruction of his credit, there appears to be no alternative but for me to undertake to settle the purchase. After long consideration, I very reluctantly undertake to settle it within two months, if that will be satisfactory to your client":—*Held*: this expressed a promise conditional on pltf.'s accepting the offer, & was therefore a memorandum of a contract in consideration that pltf. would accept the offer, sufficiently showing the consideration to satisfy Stat. Frauds, s. 4.—POWERS v. FOWLER (1855), 4 E. & B. 511; 24 L. T. O. S. 212; 3 W. R. 166; 119 E. R. 187; on appeal, 4 E. & B. 519, n., Ex. Ch.****

83. ——— Unconnected letters.—Between vendor & purchaser & third party.]—CHINNOCK v. ELY (MARCHIONESS), No. 36, ante.

84. ——— Containing repudiation of contract.]—It is not sufficient in order to constitute a memorandum of a contract for the sale of land within Statute of Frauds, s. 4, that the name of the purchaser should merely be placed upon the memorandum without any description. It must appear from the memorandum that the name was that of the purchaser of the land.

Letters signed by the highest bidder at the auction, repudiating his liability, but recapitulating the terms of the bargain, & referring to the particulars of sale which with the conditions formed one document, may, although the conditions are not specifically referred to, constitute a sufficient memorandum to satisfy Stat. Frauds.—**DEWAR v. MINTOFT, [1912] 2 K. B. 373; 81 L. J. K. B. 885; 106 L. T. 763; 28 T. L. R. 324.**

Annotation:—Distd. Coheu v. Roche, [1927] 1 K. B. 169.

85. Telegram.]—COUPLAND v. ARROWSMITH, No. 99, post.

86. ———.]—Pltf., by letter, offered to buy an estate for a given sum. Deft. answered by telegram, "Your offer for the L. estate is accepted." The instructions for the message were signed by deft.; but the telegram received by pltf. merely contained the names of the sender & the receiver, written by the co.'s clerk in the usual printed form:

132.—CAN.

h. ———.]—An oral agreement to sell land is valid at common law, & is not rendered void by Stat. Frauds; the statute does not affect the validity of the agreement, but only the remedy upon it.—FENSON v. SHORE (Man.) (1912), 22 W. L. R. 202; 6 D. L. R. 376; affd. (1913), 22 W. L. R. 514; 2 W. W. R. 1082.—CAN.****

k. ———.]—RITCHIE v. GIBBS (Alta.) (1913), 24 W. L. R. 660; 4 W. W. R. 985.—CAN.

l. ———.]—JACK v. ALEXANDER (1801), Rowe, 496.—IR.

m. ———.]—JOHNSTON v. M'ALLISTER (1835), 1 Jo. Ex. Ir. 499.—IR.

n. ———.]—HENDERSON v. MCKENZIE (1875), 1 N. Z. Jur. N. S. 47.—N. Z.

o. ———.]—A verbal contract of sale of land in the Orange Free State is null & void inasmuch as Ordinance 12 of 1906, s. 49, requires all such contracts to be in writing, & part performance thereof does not validate it so as to enable an action to be sustained on the contract.—WILKEN v. KOHLER, [1913] App. D. 135.—S. AF.****

Oral agreement reduced to writing.—Difference in terms of oral &

—*Semble*: this was a sufficient signature by deft., under Stat. Frauds, to render him liable to be charged on the contract.—*GODWIN v. FRANCIS* (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121; 21 L. T. 361.

Annotations:—*Apld.* *McBlain v. Cross* (1871), 25 L. T. 804. *Refd.* *Williams v. Briscoe* (1882), 22 Ch. D. 441; *R. v. Riley*, [1898] 1 Q. B. 309. *Mentd.* *Re National Coffee Palace Co., Ex p. Panmure* (1883), 24 Ch. D. 367; *Meek v. Wendt* (1888), 21 Q. B. D. 126.

87. Admission in pleading.—G. sued B. for specific performance of a contract to sell a house. Defence, signed by counsel, that B. had already contracted to sell to E., & counterclaim for rescission. G. then added E. as deft. E. relied on his contract, & counterclaimed for a declaration that he was entitled to the house free from G.'s claim. G., in answer to E., relied on Stat. Frauds:—*Held*: B.'s defence, which contained all the term of E.'s contract, was sufficient memorandum within Stat. Frauds.—*GRINDELL v. BASS*, [1920] 2 Ch. 487; 89 L. J. Ch. 591; 124 L. T. 211; 36 T. L. R. 867.

Annotation:—*Apld.* *Farr, Smith v. Messers*, [1928] 1 K. B. 397.

3. Connected Documents.

(a) Documents Expressly Referring to Another.

See, generally, CONTRACT, Vol. XII., pp. 136, 137, Nos. 918–925.

88. Letter acknowledging agreement for sale.

—Deft. having acknowledged, by letter, an agreement for sale of an estate, takes it out of Stat. Frauds.—*TAWNEY v. CROWTHER* (1790), 3 Bro. C. C. 161; 29 E. R. 466, L. C.; *subsequent proceedings* (1791), 3 Bro. C. C. 318, L. C.

Annotations:—*Consd.* *Cooke v. Tombs* (1794), 2 Aust. 420. *Distd.* *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238. *Refd.* *Forster v. Hale* (1798), 3 Ves. 696.

89. Letter from purchaser offering increased premium—Letter of acceptance from vendor's agent.—*SKINNER v. M'DOUGALL*, No. 254, *post*.

90. Letter from purchaser inclosing & referring to draft conveyance.—*MUNDAY v. ASPREY*, No. 75, *ante*.

(b) Documents Connected by Reasonable Inference.

See, generally, CONTRACT, Vol. XII., pp. 137–143.

91. General rule.—(1) Where a contract in writing, or note, exists, which binds one party to

a contract, under Stat. Frauds, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them. The purchaser of lands by auction signed a memorandum of the contract, indorsed on the particulars & conditions of sale, & referring to them. Afterwards he wrote to the vendor, complaining of a defect in the title, referring to the contract expressly, & renouncing it. The vendor wrote & signed several letters mentioning the property sold, the names of the parties, & some of the conditions of sale, insisting on one of them as curing the defect, & demanding the execution of the contract:—*Held*: these letters might be connected with the particulars & conditions of sale, so as to constitute a memorandum in writing, binding the vendor under Stat. Frauds, although neither the original conditions & particulars, nor the memorandum signed by the purchaser, mentioned, or were signed by, the vendor.

(2) On a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years, at a rent of £55 & as comprising a yard, one of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbn. The yard was not, in fact, comprehended in the property held for the term at £55, but was held by the vendor from year to year, at an additional rent. It was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect:—*Held*: this defect avoided the sale, & was not a mistake to be compensated for under the above condition; although, after the day named in the conditions for completing the purchase, & before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, & offered it to him.—*DOBELL v. HUTCHINSON* (1835), 3 Ad. & El. 355; 1 Har. & W. 394; 5 Nev. & M. K. B. 251; 4 L. J. K. B. 201; 111 E. R. 448.

Annotations:—*As to* (1) *Apprvd.* *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238. *Distd.* *Matthews v. Baxter*

written agreement.—*McDOUGALL v. MCKAY* (Sask.) (1922), 68 D. W. L. R. 245; 64 S. C. R. 1; [1922] 3 W. W. R. 191.—*CAN.*

q. Admission by payment into court.—*TOGIN v. BUDESA* (1902), 4 W. A. L. R. 87.—*AUS.*

r. Offer & acceptance in writing.—An offer in writing to purchase lands, stating terms, & an acceptance of that offer also in writing, is a sufficient contract under Stat. Frauds.—*KIRBY v. LAWRENCE* (1844), 1 U. C. R. 184.—*CAN.*

t. Receipt for purchase-money—Containing promise of deed when demanded.—*McMANUS v. McMANUS* (1876), 24 Gr. 118.—*CAN.*

a.—*J.* *MAYBURY v. O'BRIEN* (1912), 22 O. W. R. 677; 3 O. W. N. 1546; 26 O. L. R. 628; 6 D. L. R. 268.—*CAN.*

b. Deed incomplete as conveyance.—*MCCARTHY v. COOPER* (1885), 8 O. R. 316; 12 A. R. 284.—*CAN.*

c. Formal agreement delivered in escrow.—*KNIGHT v. CUSHING* (Alta.) (1912), 20 W. L. R. 28; 1 D. L. R. 331; 1 W. W. R. 563; 2 W. W. R. 704.—*CAN.*

d. Entry in solicitor's instruction book.—*MURPHY v. HARRINGTON*, [1927] I. R. 339.—*IR.*

e. Document confirming sale—Containing essential terms.—*POOLE & MCLENNAN v. NOURSE*, [1918] App. D. 404.—*S. AF.*

PART I. SECT. 8, SUB-SECT. 3.— B. (a).

f. Letter referring to printed conditions of sale.—A signed agreement expressed that the subscribers had purchased at auction the lot of land set opposite to their names respectively, according to the terms of sale, made known at the time of sale, & they agreed to take the deed, bond, or agreement, or lease, as the case might be, to each of them individually, on condition of their having made the payments according to the conditions of sale. The conditions of sale, thus referred to, had been printed & distributed in hand-bills & were read to the purchasers at the auction:—*Held*: the conditions of sale were sufficiently referred to by, & incorporated with, the signed agreement, so as to constitute a binding contract in writing, within Stat. Frauds.—*DALTON v. MCBRIDE* (1859), 7 Gr. 288.—*CAN.*

g. Second agreement referring to & supplementing prior agreement.—*GREENHAM v. WATT* (1865), 25 U. C. R. 365.—*CAN.*

h. Letter confirming sale at auction

—*Complaint of failure to incorporate all conditions of sale.*—*O'DONOHUE v. STAMMERS* (1884), 11 S. C. R. 358.—*CAN.*

k. Letter from purchaser accepting on conditions set out in letter of vendor.—*ANDREWS v. CALORI* (1907), 38 S. C. R. 588.—*CAN.*

l. Letter referring to receipt & other correspondence.—*BAILEY v. DAWSON* (1912), 20 O. W. R. 908; 3 O. W. N. 560; 1 D. L. R. 487; 25 O. L. R. 387.—*CAN.*

m. Signed written notice referring to prior unsigned written offer.—A written notice, signed, referring to a written proposal, not signed & made several years before, may be so connected with it, as to render the two documents a contract, within Stat. Frauds, sufficiently signed.—*LAWRY v. BUTTERIN* (1839), 1 I. Eq. R. 281.—*IR.*

PART I. SECT. 8, SUB-SECT. 3.— B. (b).

911. General rule.—Several documents may be construed together as evidence of an agreement or note in writing, under Stat. Frauds.—*ROCHELEAU v. BIDWELL* (1830), Dra. 357.—*CAN.*

911 II. —. —.—*LLOY v. WELLS* (Sask.)

Sect. 8.—*The memorandum or note: Sub-sect. 3,*

(1873), 28 L. T. 669. **Consd.** Peirce v. Cory (1874), L. T. 9 Q. B. 210; Cave v. Hastings (1881), 7 Q. B. D. 125. **Refd.** Thomas v. Brown (1876), 45 L. J. Q. B. 811. *As to* (2) **Refd.** *Re* Fawcett & Holmes (1889), 42 Ch. D. 150.

92. —[.]—HUSSEY v. HORNE-PAYNE, No. 28, *ante*.

93. —[.]—Two or more documents which do not refer to each other, but do refer to the same parol contract, & which, when taken together, contain all the terms of the parol contract, may together constitute a sufficient memorandum within the Stat. Frauds. On Sept. 22, 1882, deft. verbally agreed with pltf. to sell her share in certain property for £200, & signed & gave to him the following receipt: "Sept. 22, 1882. Received of J. S. one pound of my share in the Barrett's Grove property the sum of two hundred pounds." No time was fixed for completion, & no abstract was delivered, & on Mar. 19, 1883, deft. wrote to pltf.: "Mr. S., Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd instant I shall consider the agreement, made Sept. 22, 1882, not any longer binding":—**Held**: (1) the word "balance" in the letter sufficiently referred to the receipt to enable the two documents to be read together, & that they constituted a sufficient memorandum within Stat. Frauds, s. 4; (2) even if the word "balance" was not sufficient to connect the two documents, yet as they both referred to the same parol contract, all the terms of which were contained in one or other of them, they could be read together, & together constituted a good memorandum within Stat. Frauds.—STUDDS v. WATSON (1884), 28 Ch. D. 305; 54 L. J. Ch. 626; 52 L. T. 129; 33 W. R. 118; 1 T. L. R. 83.

Annotations:—*As to* (1) **Consd.** Oliver v. Hunting (1890), 44 Ch. D. 205. **Distd.** Chaproniere v. Lambert (1917), 86 L. J. Ch. 726.

94. **Sale by auction—Entry in auctioneer's sales ledger—No reference to conditions of sale.**—

At a sale by auction subject to conditions, the auctioneer entered in his sale book the names of the vendor & purchaser, the subject-matter of the sale, & the amount of the purchase-money, but omitted, in the entry, to embody or make any reference to the conditions of sale. There was no other memorandum or contract in writing:—**Held**: there was no sufficient contract in writing within Stat. Frauds, & specific performance refused as against the purchaser.—RISHTON v. WHATMORE (1878), 8 Ch. D. 467; 47 L. J. Ch. 629; 26 W. R. 827.

95. — **Letter by highest bidder—No reference to conditions of sale.**—DEWAR v. MINTOFT, No. 84, *ante*.

96. — **Memorandum of contract indorsed by purchaser on conditions of sale—Letter complaining of defect in title—Letter of vendor demanding execution of contract.**—DOBELL v. HUTCHINSON, No. 91, *ante*.

97. **Letters of vendor & purchaser to vendor's agent.**—(1) A vendor & a purchaser being in

treaty for the sale & purchase of an estate, the vendor wrote to his solr., stating that the purchaser had agreed to purchase his estate for £80,000, & requested him to settle an agreement on that basis for them to sign, adding that he had given to the purchaser a copy of this letter not signed, as a memorandum. The purchaser subsequently wrote to the vendor's solr., inquiring when he would forward to him the draft of the agreement relative to the purchase he had concluded with the vendor for his estate in that county. Prior to the execution of the conveyances the purchaser made his will, by which he devised the subject-matter of the treaty to trustees upon certain trusts:—**Held**: at the date of his will, the purchaser had a devisable interest in the estate.

(2) A letter, signed by the purchaser, not containing the terms of the contract, but, on a fair view of the evidence, referring, though not in terms, to a memorandum containing them:—**Held**: sufficient within the Stat. Frauds.—MORGAN v. HOLFORD (1852), 1 Sm. & G. 101; 20 L. T. O. S. 177; 17 Jur. 225; 1 W. R. 101; 65 E. R. 45.

98. **Letters of purchaser referring to memorandum—Containing terms of contract.**—MORGAN v. HOLFORD, No. 97, *ante*.

99. **Telegram—Correspondence between vendor & purchaser.**—Where the proposed vendor wrote: "I have let this house to you, the proposed purchaser on the following terms, etc., stating the terms at length," to which he replied, "At the risk of being thought capricious & irresolute, I have to ask you if you will for a pecuniary consideration allow me to withdraw from my obligation to take your house & farm, etc.," & in the subsequent correspondence the proposed purchaser referred to his "engagement," etc.:—**Held**: the contract could be inferred from the tenor of this correspondence with certain telegrams taken together, & specific performance decreed accordingly.

Semble. a telegram, if properly identified, equivalent to a letter.—COUPLAND v. ARROWSMITH (1868), 18 L. T. 755.

100. **Agreement for sale of property—Memorandum indorsed on plan.**—Deft. agreed to purchase a wharf, which was described as abutting on a towing path, & lately in the occupation of A. B. The contract did not refer to any plan, but at time of signing the agreement, a memorandum referring to the agreement for sale was written on a plan of the property, which showed that a strip of the wharf was to be taken off & added to the towing path:—**Held**: this plan was made part of the agreement, so as to satisfy Stat. Frauds; & it controlled the description in the agreement. Decree for specific performance affirmed with costs.—NENE VALLEY DRAINAGE COMRS. v. DUNKLEY (1876), 4 Ch. D. 1; 41 J. P. 101, C. A.

101. **Request for letter acknowledging purchase—Reply stating willingness to purchase.**—A proposal had been made that the two pltf.s. should buy a triangular field of about three acres, & that deft. should buy half an acre of it from them. One

(1912), 21 W. L. R. 50; 2 W. W. R. 219.—CAN.

n. **Sale by auction—Entry in auctioneer's sales ledger—Particulars of sale entered in book before sale.**—On a sale of lands by public auction, the note in the auctioneer's book contained particulars taken from the conditions of sale, the biddings, a statement that the lands were sold to pltf. for £2,100, & the auctioneer's signature. The particulars were filled in before the sale; the rest of the note on the following morning:—**Held**: the

auctioneer's note sufficiently referred to the conditions of sale to constitute with the latter a good memorandum within Stat. Frauds.—M'MEIKIN v. STEVENSON, [1917] 1 I. R. 348.—IR.

o. **Receipt—For part payment—Cheque & certificate.**—STEVENSON v. McRAE (N. W. T.) (1906), 3 W. L. R. 259.—CAN.

p. — **Letter of repudiation by vendor offering to return purchase-money.**—In an action for specific performance against a vendor, the evidence to satisfy Stat. Frauds con-

sisted of a receipt signed by pltf. for \$50. "to apply on equity on Canadian Pacific Ry. land," describing it, "at \$5.50 per acre," & a letter from the vendor offering to return the \$50 & referring to the sale as having been "declared off long before":—**Held**: the letter from deft. could be used with the receipt to satisfy the statute, although it repudiated the sale.—BERRY v. SCOTT (1905), 3 W. L. R. 84; 4 W. L. R. 282; 6 Terr. L. R. 369.—CAN.

q. — **Subsequent correspondence**

of pltf. & deft. met on the field; deft. wished to have a piece in one of the angles, & pltf. stepped so as to mark out where a base line would cut off half an acre. Some days afterwards the same pltf. wrote to deft. asking her to let them have a letter agreeing to purchase the half acre she had selected for £350. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre of the land as agreed upon for £350. Pltfs. did not obtain a contract with the owner of the land for the purchase until Nov. 4, which was three months afterwards. On Nov. 13 deft. threatened to withdraw, & on Nov. 20 her solrs. wrote that she did withdraw from the contract:—*Held*: (1) the second letter contained a sufficient reference to the first; & the two letters formed a valid contract within the Stat. Frauds; (2) though the two pltfs. were the purchasers of the land, & the letters forming the contract passed between deft. & one only of pltfs., he must under the circumstances be considered as agent for the other as well.—*WYLSON v. DUNN* (1887), 34 Ch. D. 569; 56 L. J. Ch. 855; 56 L. T. 192; 51 J. P. 452; 35 W. R. 405.

Annotation:—*Generally*, *Refd.* Bolton Partners v. Lambert (1889), 41 Ch. D. 295.

102. Letter & envelope.—An envelope & a letter which is shown by evidence to have been inclosed in it are so connected together that the envelope may be used to supply the name of one of the parties to a memorandum in writing within Stat. Frauds, s. 4, or Sale of Goods Act, 1893 (c. 71).—*PEARCE v. GARDNER*, [1897] 1 Q. B. 688; 66 L. J. Q. B. 457; 76 L. T. 441; 45 W. R. 518; 13 T. L. R. 349, C. A.

Annotations:—*Fold.* Last v. Hucklesby (1914), 58 Sol. Jo. 431. *Distd.* Chaproniere v. Lambert (1917), 86 L. J. Ch. 726. *Consd.* Stokes v. Whicheer, [1920] 1 Ch. 411.

103.—Where it is proved or admitted that a letter has been sent to & received by a party inclosed in an envelope addressed to that party, the letter & envelope together constitute one document or memorandum in writing sufficient to satisfy Stat. Frauds.—*LAST v. HUCKLESBY* (1914), 58 Sol. Jo. 431, C. A.

104. Receipt—For part payment—Memorandum of agreement by purchaser.—Deft., an estate agent, contracted to sell land to pltf., who paid a deposit. Deft. signed a receipt in his own name for the deposit, & pltf. signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, & pltf. sued deft. for damages for breach of the contract to sell. At the trial the jury found that deft. sold as principal:—*Held*: deft. was personally liable, & the agreement & receipt taken together formed a sufficient contract to satisfy Stat. Frauds, s. 4.—*LONG v. MILLAR* (1879), 4 C. P. D. 450; 48 L. J. Q. B. 596; 41 L. T. 306; 43 J. P. 797; 27 W. R. 720, C. A.

Annotations:—*Consd.* Cave v. Hastings (1881), 7 Q. B. D. 125; Shardlow v. Cotterell (1881), 20 Ch. D. 90. *Apld.* Studds v. Watson (1884), 28 Ch. D. 305; Sidle v. Bond-Cubbell (1885), 2 T. L. R. 44; Oliver v. Hunting (1890), 44 Ch. D. 205. *Consd.* Pearce v. Gardner, [1897] 1 Q. B. 688; Sheers v. Thimbleby (1897), 76 L. T. 709; Dewar v. Mintoft, [1912] 2 K. B. 373. *Apld.* Stokes v. Whicheer, [1920] 1 Ch. 411. *Refd.* Taylor v. Smith, [1893] 2 Q. B. 65; Last v. Hucklesby (1914), 58 Sol. Jo. 431; Chaproniere v. Lambert (1917), 117 L. T. 353.

& draft agreement.—*SELKIRK LAND & INVESTMENT CO. v. ROBINSON* (1913), 25 W. L. R. 392; 13 D. L. R. 936; 23 Man. L. R. 774.—*CAN.*

r.—By agent.—*Telegrams from agent to vendor.*—*FISH v. ARMSTRONG* (1913), 22 W. L. R. 966; 9 D. L. R. 575; 3 W. W. R. 717.—*CAN.*

t.—Cheque.—*PETERSON v. BITZER*, [1922] 1 W. W. R. 141; 63 D. L. R. 182; 62 S. C. R. 384.—*CAN.*

a.—Letter containing ambiguous reference to receipt.—*GRAY v. MURCHISON* (Alta.), [1923] 3 W. W. R. 53, 54.—*CAN.*

b.—Agreement referring to list attached — List subsequently attached with assent of purchaser.—*LAWRENCE v. FORDHAM*, [1922] V. L. R. 705.—*AUS.*

c.—Deed & mortgage.—*GILLATLEY v. WHITE* (1870), 18 Gr. 1.—*CAN.*

d.—Letters & telegrams between vendor

105.— — — — —.]—On Nov. 21, 1918, pltf. paid deft. £10 & received the following receipt:—
“6d. stamp. 21/11/1918.

Received of Mr. Auerbach . . . £10 on account of House being sold for £500 from Mr. M. Nelson
Possession to be taken in six weeks after date.

1d. stamp. MORRIS NELSON.
21/11/1918.”

Pltf. alleged & proved that on Nov. 21, 1918, before signing this receipt deft. verbally agreed to sell him his house & residence, Nelson Lodge, for £500, with possession in six weeks, & that the £10 was paid as a deposit on account of the purchase-money. Pltf. claimed specific performance. Deft. relied on Stat. Frauds:—*Held*: the receipt was a sufficient memorandum of the verbal contract, the date, parties & price being apparent on the face of it, & the actual “house being sold” by deft. to pltf. on that date at that price being readily ascertainable by parol evidence.—*AUERBACH v. NELSON*, [1919] 2 Ch. 383; 88 L. J. Ch. 493; 122 L. T. 90; 35 T. L. R. 655; 63 Sol. Jo. 683.

106.— — — — — *Memorandum by auctioneers—Indorsed on conditions of sale.*—A house & premises were put up for sale by auction under conditions of sale which did not contain any description of what was sold, but were so expressed that it could be inferred from them that the subject of sale was real estate. A. S. became the purchaser. After the sale, the auctioneer signed & gave to him the following memorandum at the foot of the conditions: “The property duly sold to A. S., Butcher, Pinxton, & deposit paid at close of sale,” & at the same time signed & gave to him the following receipt: “Pinxton, Mar. 29, 1880. Received of A. S., the sum of £21 as deposit on property purchased at £420 at Sun Inn, Pinxton, on the above date. G. C., owner”:—*Held*: (1) the receipt, memorandum, & conditions contained a sufficiently definite description of the property sold to enable the ct. to receive parol evidence of what the property consisted, & Stat. Frauds was no defence to an action by the purchaser for specific performance; (2) the receipt alone without the memorandum & conditions was a memorandum sufficient to satisfy the requirements of Stat. Frauds.—*SHARDLOW v. COTTERELL* (1881), 20 Ch. D. 90; 51 L. J. Ch. 353; 45 L. T. 572; 30 W. R. 143, C. A.

Annotations:—*As to* (1) *Apld.* Studds v. Watson (1884), 28 Ch. D. 305; Plant v. Bourne, [1897] 2 Ch. 281. *As to* (2) *Apld.* Auerbach v. Nelson, [1919] 2 Ch. 383. *Generally*, *Mentd.* Savory v. World of Golf, [1914] 2 Ch. 566.

107.— — — — — *Request for “balance”*—Reference in both documents to same parol agreement.—*STUDDS v. WATSON*, No. 93, *ante*.

108.— — — — — *Entry on counterpart of cheque for interest on purchase-money—Letter inclosing further sum due as interest.*—*COOMBS v. QUINEY* (1916), 142 L. T. Jo. 23.

109. Typewritten contract—Connection of carbon copy with original—Receipt for deposit indorsed on copy.—*STOKES v. WHICHEER*, No. 122, *post*.

110. Documents compared side by side.—*STOKES v. WHICHEER*, No. 122, *post*.

& agent of purchaser referring to same property.—*Essentials gathered from whole correspondence.*—*McILVRIE v. MILLS* (Man.) (1905), 1 W. L. R. 229.—*CAN.*

e.—Letter of agent of vendor to vendor —Letter of agent of purchaser to agent of vendor.—*CALORI v. ANDREWS* (1906), 12 B. C. R. 236; 4 W. L. R. 259.—*CAN.*

f.—Agreement for option.—*Receipt subsequently attached.*—*MCGREGOR v. CHALMERS* (Man.) (1913), 24 W. L. R.

Sect. 8.—*The memorandum or note: Sub-sect. 3, B. (b); sub-sect. 4, A. (a) & (b).]*

Admissibility of parol evidence.—To connect or identify documents.]—See CONTRACT, Vol. XII., pp. 160, 161, Nos. 1144, 1169.

SUB-SECT. 4.—CONTENTS OF.

A. Parties.

(a) In General.

See, generally, CONTRACT, Vol. XII., pp. 143–145.

111. Necessity for names of parties.—Or sufficient description.]—In order to satisfy the requirements of Stat. Frauds, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity. The term “vendor” is not of itself a sufficient description of one of the contracting parties. Real estate was put up for sale under particulars & conditions of sale which did not disclose the vendor's name, but stated that B. was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase; & B. signed at the foot of this memorandum another in these terms, “Confirmed on behalf of the vendor. B.”:—*Held*: the memorandum did not sufficiently show who the vendor was; & a bill for specific performance of the contract for sale was dismissed.—*POTTER v. DUFFIELD* (1874), L. R. 18 Eq. 4; 43 L. J. Ch. 472; 22 W. R. 585.

Annotations:—Expld. Beer v. London & Paris Hotel Co. (1875), 32 L. T. 715. *Consd.* Commins v. Scott (1875), L. R. 20 Eq. 11; Thomas v. Brown (1876), 1 Q. B. D. 711. *Expld.* Rossiter v. Miller (1877), 46 L. J. Ch. 228. *Consd.* Shardlow v. Cotterell (1881) 18 Ch. D. 280. *Apld.* Jarrett v. Hunter (1886), 34 Ch. D. 182; Pattle v. Anstruther (1893), 69 L. T. 175. *Distd.* Filby v. Hounsell, [1896] 2 Ch. 737; Carr v. Lynch, [1900] 1 Ch. 613. *Apld.* Lovesy v. Palmer, [1916] 2 Ch. 233. *Refd.* Morgan v. Worthington (1878), 38 L. T. 443; Coombs v. Wilkes (1891), 65 L. T. 56; Stokes v. Whicher, [1920] 1 Ch. 411.

112. ———.]—A purchaser undertook, in writing, to buy land at a certain price, & to complete within a certain time; but the vendor was not named in the writing, although there was a reference to a certain firm by name as the vendor's agents, & a provision that “the landlord” should be considered as an outgoing tenant. Subsequently the purchaser wrote a letter to the vendor's agents with reference to the payment of the purchase-money & the execution by “Mr. C. . .” of “the deeds”:—*Held*: there was no sufficient identification of the vendor in writing in the original document, & the subsequent letter did not so clearly refer to the original document as to supply the deficiency & satisfy the requirements of Stat. Frauds.—*COOMBS v. WILKES*, [1891]

176; 4 W. W. R. 256; 11 D. L. R. 157.—**CAN.**

g. Deed, letter, cheque & receipt.]—DIXON v. DUNMORE (1913), 24 O. W. R. 774; 4 O. W. N. 1501; 12 D. L. R. 549.—**CAN.**

PART I. SECT. 8, SUB-SECT. 4.— A. (a).

111 i. Necessity for names of parties.—Or sufficient description.]—A note or memorandum in writing containing an agreement for the sale of land must, to satisfy Stat. Frauds, name both the contracting parties or describe them so that they can be ascertained without extrinsic parol evidence, & it is not sufficient that the agent of the intending purchaser is named.—*MABER v. PENSKELESKI* (1904), 15 Man. L. R.

236.—**CAN.**

115 i. ——— Omission of purchaser's name.]—YOUNG v. SCOBIE (1853), 10 U. C. R. 372.—**CAN.**

115 ii. ———.]—TAYLOR v. GRANT (1906), 3 W. L. R. 254; 6 Terr. L. R. 353.—**CAN.**

115 iii. ———.]—A writing signed by deft. not under seal agreeing to sell a parcel of land for \$2,000 on terms stated, & acknowledging the receipt of a cheque for \$100 deposit on same, but not mentioning the name of any person as purchaser or containing anything to indicate who the purchaser is, is not a sufficient memorandum in writing to bind deft. under Stat. Frauds, & if the person whose name is signed to the cheque is not acting as the agent of the purchaser in the trans-

3 Ch. 77; 61 L. J. Ch. 42; 65 L. T. 56; 40 W. R. 77; 7 T. L. R. 592.

113. ———.]—WALTERS v. LE BLANC (1900), 16 T. L. R. 306, C. A.

114. ———.]—*Pltf.* was the lessee of vaults in the City of London under a lease granted by the Mayor & Corp. of London & the Mercers' Co. Deft. co. entered into a negotiation for the purchase of the lease. The secretary of the co. wrote to the house agents acting for *pltf.* a letter in which he said that the directors thereby offered to purchase the vaults for £2,500 cash, & to take over a mtge. for £3,500 on the lease, these terms to include the lease, goodwill, fixtures, etc. The house agents answered as follows, “In reply to your letter of the 7th instant we are now instructed to accept the offer therein contained, & will forward contract as soon as we obtain it from the solr.” Differences subsequently arose respecting the time when possession should be given, & eventually *pltf.* brought an action against *defts.* claiming damages for breach of contract:—*Held*: no binding contract had been entered into, because the name of the vendor had not been disclosed or a sufficient description given so as to satisfy Stat. Frauds; & because the letters mentioned only what was the property to be purchased & the price to be given for it, but left the other necessary terms of the agreement, such as the time when possession was to be given, to be settled by a formal contract to be prepared by a solr. in the ordinary way.—*DONNISON v. PEOPLE'S CAFE CO.* (1881), 45 L. T. 187, C. A.

What is sufficient description.]—See Sub-sect. 4, A. (b), *post*.

115. ——— Omission of purchaser's name.]—During parol negotiations for the purchase of an estate, the vendor wrote to the purchaser's solr., proposing that the solr.'s “client” should advance a sum to pay off a mtge. on the property. After further parol negotiations as to the terms, they were agreed upon by parol, & the vendor signed & handed to the purchaser a written statement of the particulars of the property & of the price. On the following day he signed & addressed to the purchaser a letter containing the following passages, “I am about to relet the land at P. for another year, concluding you will agree to it. . . . The Lady Day rents will be mine & the Michaelmas yours”:—*Held*: the signed statement of particulars was not a sufficient memorandum in writing, the purchaser's name not being mentioned in it, & the defect was not supplied by the correspondence.—*SKELTON v. COLE* (1857), 1 De G. & J. 587; 44 E. R. 850, L. J.J.

116. ——— Omission of vendor's name.]—On the sale of an estate by auction, the name of the owner did not appear in the particulars, or conditions of sale, & the agreement signed by the

action, the cheque & the agreement do not together constitute such sufficient memorandum.—*GRANT v. REID* (1907), 5 W. L. R. 361; 16 Man. L. R. 527.—**CAN.**

115 iv. ———.]—Where in a memorandum of a contract for the sale of land the name of the broker negotiating the sale appears, but there is no mention of the name of the purchaser, the memorandum is insufficient to satisfy Stat. Frauds.—*RATHOM v. CALWELL* (1911), 16 B. C. R. 201.—**CAN.**

116 i. ——— Omission of vendor's name.]—LATOR v. WINFIELD, [1925] V. L. R. 306; 46 A. L. T. 187.—**AUS.**

116 ii. ———.]—BRADLEY v. ELLIOTT (1900), 11 O. L. R. 398; 7 O. W. R. 137.—**CAN.**

purchaser did not mention the owner's name, & was not signed either by him or the auctioneer; *semble*, the seller cannot maintain an action for the non-completion of the contract.—*WHEELER v. COLLIER* (1827), *Mood. & M.* 123, N. P.

Annotations.—*Consd.* *Dobell v. Hutchinson* (1835), 3 *Ad. & El.* 355. *Refd.* *Laythorpe v. Bryant* (1836), 2 *Hodg.* 25. *Mentd.* *Birch v. Hanson* (1831), 1 *L. J. Ch.* 42; *Thornett v. Haines* (1846), 15 *M. & W.* 367; *Green v. Baverstock* (1863), 14 *C. B. N. S.* 204; *Williams v. Byrnes* (1863), 1 *Moo. P. C. C. N. S.* 154.

117. Connection of documents to ascertain identity.]—*SKELTON v. COLE*, No. 115, *ante*.

118. —.]—The conditions of sale of a piece of land stated that the vendors were trustees, without any further description, nor did their names appear on the particulars, nor on the memorandum of the sale, which was indorsed on the particulars & signed by the purchaser's agent, naming the purchaser, & confirmed by the auctioneers, as agents for the vendors, without naming them. An abstract of the title was delivered to the purchaser, entitled with the vendors' names, & the purchaser's requisitions were headed with the vendors' names:—*Held*: the contract satisfied the requirements of Stat. Frauds, as the abstract was sufficiently connected with the memorandum of the sale to be referred to in order to cure the defect of the omission of the vendors' names from the memorandum.—*BOURDILLON v. COLLINS* (1871), 24 *L. T.* 344; 19 *W. R.* 556.

119. —.]—*COOMBS v. WILKES*, No. 112, *ante*.

120. Offer to agent—Acceptance on behalf of named vendor.]—Where a written offer to purchase land is made to an agent whose name, but not that of his principal, appears in the offer, & the agent accepts on behalf of his principal, naming him, it is sufficiently shown in writing who the contracting parties are to satisfy the requirements of Stat. Frauds.—*FILBY v. HOUNSELL*, [1896] 2 *Ch.* 737; 65 *L. J. Ch.* 852; 75 *L. T.* 270; 45 *W. R.* 232; 12 *T. L. R.* 612; 40 *Sol. Jo.* 703.

Annotations.—*Expld. & Distd.* *Lovely v. Palmer*, [1916] 2 *Ch.* 233. *Refd.* *Clark v. Robinson* (1903), 51 *W. R.* 443; *Rossdale v. Denny*, [1921] 1 *Ch.* 57; *Chillingworth v. Esche* (1923), 92 *L. J. Ch.* 461.

(b) Sufficiency of Description.

See, generally, *CONTRACT*, Vol. XII., pp. 146–148; & compare *LANDLORD & TENANT*, Vol. XXX., pp. 377–378.

121. Purchaser.]—*DEWAR v. MINTOFT*, No. 84, *ante*.

122. — “I” — Receipt for deposit on carbon copy of contract—Purchaser's name in original contract.]—Deft.'s authorised agent signed for

him as “vendor” a carbon copy of a typewritten “contract” not containing any purchaser's name, by which “I agree to purchase” premises described at a sum named, to pay a deposit, to complete within a limited time & in default pay interest on the balance of purchase-money, the vendor to show a good title. Pltf. had signed the original of which the carbon was a duplicate, & given a cheque for the deposit, a receipt signed by deft.'s agent being put on the carbon copy. In an action for specific performance:—*Held*: by incorporating the cheque into the carbon document; or by connecting the carbon with its original; or by identifying the person who paid the deposit with pltf. there was a sufficient memorandum within Stat. Frauds.

Qu.: whether two documents, which did not in terms or by inference refer to one another, but, when placed physically side by side, show obviously that they were produced at the same time & to that extent formed a single document, can be connected for the purpose of constituting a memorandum under Stat. Frauds.—*STOKES v. WHICHER*, [1920] 1 *Ch.* 411; 89 *L. J. Ch.* 198; 123 *L. T.* 23; 64 *Sol. Jo.* 292.

123. Vendor—“Proprietor.”]—Upon a sale by auction of real estate in lots, the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots, & by the auctioneer on behalf of the vendor:—*Held*: the vendor was sufficiently described, & the memorandum was sufficient to satisfy the requirements of Stat. Frauds; & specific performance of the agreement decreed at the suit of the purchaser.—*SALE v. LAMBERT* (1874), *L. R.* 18 *Eq.* 1; 43 *L. J. Ch.* 470; 22 *W. R.* 478.

Annotations.—*Expld.* *Potter v. Duffield* (1874), 43 *L. J. Ch.* 472. *Consd.* *Thomas v. Brown* (1876), 1 *Q. B.* D. 714; *Calling v. King* (1877), 25 *W. R.* 550. *Fold.* *Rossiter v. Miller* (1877), 46 *L. J. Ch.* 228. *Consd.* *Shardlow v. Cotterell* (1881), 18 *Ch. D.* 280; *Carr v. Lynch*, [1900] 1 *Ch.* 613. *Refd.* *Jarrett v. Hunter* (1886), 34 *Ch. D.* 182; *Pattle v. Anstruther* (1893), 41 *W. R.* 625; *Stokes v. Whicher*, [1920] 1 *Ch.* 411.

124. — — —.]—(1) In a contract for the sale of real estate “proprietors” is a sufficient description of the vendors within Stat. Frauds.

(2) An estate belonging to appts. was offered for sale in lots subject to certain printed conditions of sale, one of which provided that the purchaser should be required to sign a contract embodying the conditions. Resp. made a verbal offer for the purchase of certain lots in accordance with the conditions. The authorised agent of the vendors wrote to him recapitulating the terms of his offer,

116 iii. — — —.]—The owner of an undivided fourth interest in certain land accepted an offer for it, subject, as he contended, to the consent of his co-owners, & gave to the proposed purchaser a receipt for a payment on account, in this receipt being the words, “this receipt subject to owner's approval”:—*Held*: as the vendors were not mentioned or described in the receipt, it was not sufficient as a memorandum under Stat. Frauds.—*TREMBLAY v. DUBSAULT* (Man.) (1912), 22 *W. L. R.* 716.—*CAN.*

116 iv. — — —.]—Where at a sale of land an auctioneer made a memorandum by writing on the conditions of sale the name of the purchaser, & endorsing on the back the name of the purchaser & the price, but neither the conditions nor the auctioneer's writing contained the names of the vendors:—*Held*: there was not a sufficient memorandum in writing to satisfy Stat. Frauds.—*PERRY v. MORRIS* (1848), 3 *Nfld. L. R.* 26.—*NFLD.*

116 v. — — —.]—Where an auctioneer at an auction of land endorsed on the conditions of sale memoranda of the names of purchasers & their bids, but the vendor's name did not appear:—*Held*: the memorandum was insufficient under Stat. Frauds & the affixing of his signature by the auctioneer a short time after the auction, even if it be admitted that his signature was sufficient to bind the vendor, was after the determination of his implied authority as agent of the vendee, & could not cure the defect.—*MCLEA v. DES BARRÉS* (1849), 3 *Nfld. L. R.* 84.—*NFLD.*

h. — — —.]—If there be in a contract for the sale of land a sufficient description of one of the contracting parties, to enable it to be ascertained who he is, it is a sufficient compliance with Stat. Frauds.—*AEVIER v. WATSON* (1888), 14 *V. L. R.* 771.—*AUS.*

k. — — —.]—In order to satisfy Stat. Frauds the names of both parties

must appear in the memorandum required by the statute to be signed by the party to be charged.—*SAWEYS v. TOSH* (1909), 28 *N. Z. L. R.* 748.—*N.Z.*

117 i. Connection of documents to ascertain identity.]—*IRVINE v. DEANE* (1850), 2 *Ir. Jur.* 209.—*IR.*

PART I. SECT. 8, SUB-SECT. 4.— A. (b).

1. General rule.]—The description of the parties in a contract for the sale of land must be such that it can be found with perfect certainty, & without fear of contradictory evidence, who the parties are.—*KING v. GRIMWOOD* (1891), 17 *V. L. R.* 253.—*AUS.*

m. — — —.]—A writing is not sufficient to make a contract of purchase of land comply with Stat. Frauds unless the parties to the contract are specified in the writing, either nominally or by description or reference. The parties must be described in such manner that

Sect. 8.—The memorandum or note : Sub-sect. 4, A. (b), & B. (a).]

& accepting it on behalf of "the proprietors," & adding that he had requested the solrs. "to forward to him the agreement for purchase." Resp. wrote back that, unless he was left free to build or not as he liked, the offer had better be reconsidered. The agent replied that the acceptance was not conditional, & that he was at liberty to do as he thought best. Resp. afterwards refused to complete the purchase:—**Held:** the letters amounted to a binding contract within Stat. Frauds.—**ROSSITER v. MILLER** (1878), 3 App. Cas. 1124; 48 L. J. Ch. 10; 39 L. T. 173; 42 J. P. 804; 26 W. R. 865, H. L.; *revsg.* (1877), 5 Ch. D. 648, C. A.; *restg.*, 46 L. J. Ch. 228.

Annotations:—As to (1) **Consd.** Shardlow v. Cotterell (1881), 18 Ch. D. 280; Jarrett v. Hunter (1886), 34 Ch. D. 182; Pattle v. Anstruther (1893), 69 L. T. 175; Lovesy v. Palmer, [1916] 2 Ch. 233. As to (2) **Distd.** Donnison v. People's Cafe Co. (1881), 45 L. T. 187. **Consd.** Hawkesworth v. Chaffey (1886), 55 L. J. Ch. 335; Lloyd v. Nowell, [1895] 2 Ch. 744. **Apld.** Filby v. Hounsell, [1896] 2 Ch. 737. **Consd.** Cook v. Williams (1897), 13 T. L. R. 481; North v. Percival, [1898] 2 Ch. 128. **Apld.** Walters v. Le Blanc (1899), 15 T. L. R. 426. **Consd.** Rosedale v. Denny, [1921] 1 Ch. 57; Chillingworth v. Esche (1923), 92 L. J. Ch. 461. **Refd.** Lewis v. Brass (1877), 3 Q. B. D. 667; Winn v. Bull (1877), 7 Ch. D. 29; Bertel v. Neveux (1878), 39 L. T. 257; Bonnewell v. Jenkins (1878), 8 Ch. D. 70; Gray v. Smith (1889), 43 Ch. D. 208; Love & Stewart v. Instone (1917), 33 T. L. R. 475.

125. ——[—] (1) If, in a contract for sale, the vendor is described simply as "proprietor," "owner," "mortgagee," or the like, the description is sufficient to satisfy the requirements of Stat. Frauds; but not so if he is described as "vendor," or "client" or "friend" of a named agent, or as "solicitor to the vendor," even where the solr. is himself the vendor & is described in the contract as "A. B. solr. to the vendor." *Semble:* a mere reference in a condition of sale to a conveyance or other document of title relating to the property, the name or description of the vendor not being stated in the condition, is not sufficient to import its contents into the contract so as to satisfy the requirements of Stat. Frauds, even if such conveyance or other document does show who is the vendor. A contract which, under Stat. Frauds, is invalid through not naming or sufficiently describing the vendor, is not rendered valid by the fact that the purchaser knew, at the time he entered into the contract, who the vendor was.

(2) Neither parol evidence nor the actual knowledge of the purchaser who the vendor is can be admitted to cover the original defect in the contract; nor can the contents of a conveyance or other document referred to in the contract be imported into it for the purpose of ascertaining the owner.—**JARRETT v. HUNTER** (1886), 34 Ch. D. 182; 56 L. J. Ch. 141; 55 L. T. 727; 51 J. P. 165; 35 W. R. 132; 3 T. L. R. 117.

Annotations:—As to (1) **Apld.** Pattle v. Anstruther (1893), 69 L. T. 175. **Consd.** Filby v. Hounsell, [1896] 2 Ch. 737. As to (2) **Consd.** Lovesy v. Palmer, [1916] 2 Ch. 233. **Apld.** Keen v. Mear, [1920] 2 Ch. 574.

126. — "Company in possession."—An agreement for the sale of real estate did not disclose the names of the vendors, but it appeared therefrom that the vendors were a co. in possession of the property offered for sale, & that they had carried on operations thereon:—**Held:** the vendors were sufficiently described to satisfy Stat. Frauds.—**COMMINS v. SCOTT** (1875), L. R. 20 Eq.

11; 44 L. J. Ch. 563; 32 L. T. 420; 23 W. R. 498.

Annotations:—**Consd.** Filby v. Hounsell, [1896] 2 Ch. 737. **Refd.** Shardlow v. Cotterell (1881), 45 L. T. 572; Wylson v. Dunn (1887), 34 Ch. D. 569.

127. — "Trustee selling under trust for sale."—A contract for the sale of land in which the vendor is not named, but is stated to be "a trustee selling under a trust for sale," is sufficient within Stat. Frauds.—**CATLING v. KING** (1877), 5 Ch. D. 660; 46 L. J. Ch. 384; 36 L. T. 526; 41 J. P. 692; 25 W. R. 550, C. A.

Annotations:—**Apld.** Towle v. Topham (1877), 37 L. T. 308. **Refd.** Morgan v. Worthington (1878), 38 L. T. 443; Shardlow v. Cotterell (1881), 45 L. T. 572. **Mentd.** Dawkins v. Penrhyn (1877), 6 Ch. D. 318; Fitcher v. Fitcher (1881), 50 L. J. Ch. 735.

128. — "Executors."—The particulars of sale of a leasehold house stated that it was the property of F., deceased, & that the sale was by direction of his exors., not naming them. A memorandum of the sale indorsed on the particulars was signed by the auctioneers as agents "for the vendors." F. was a domiciled Scotsman, & had, by a testamentary instrument in the Scottish form, named seven persons, & the acceptors of them, as exors. Two only accepted office, & confirmation was granted to them subsequently to the contract of sale:—**Held:** the contract was valid, & specific performance of it decreed at the suit of the exors.—**HOOD v. BARRINGTON (LORD)** (1868), L. R. 6 Eq. 218.

Annotations:—**Consd.** Sale v. Lambert (1874), L. R. 18 Eq. 1. **Apld.** Towle v. Topham (1877), 37 L. T. 308. **Refd.** Beer v. London & Paris Hotel Co. (1875), 32 L. T. 715; Thomas v. Brown (1876), 45 L. J. Q. B. 811. **Mentd.** Pepin v. Bruyère, [1902] 1 Ch. 24.

129. — "On behalf of himself & all persons interested."—A., to whom the owner of a quarry had agreed to grant a lease, agreed "on behalf of himself & all persons interested" to sell "the quarry" to B., & "that the lease agreed to be granted by the lessor should be granted as B. might direct." B. having refused to complete the purchase, A. brought an action for specific performance, & in his statement of claim stated his agreement with the owner of the quarry as well as the memorandum of agreement with B., & alleged that B. was aware of the nature of A.'s interest in the quarry, & had accepted the title. B. demurred on the ground that the memorandum was not sufficient within Stat. Frauds:—**Held:** the memorandum was sufficient.—**MORGAN v. WORTHINGTON** (1878), 38 L. T. 443.

130. — "Legal personal representative of A. B."—No person filling such character at date of contract.]—In the conditions of sale the vendor was described as "legal personal representative of A. B." At the date of the contract the vendor was not A. B.'s legal personal representative; there was no person filling that character. But the vendor was the only person in a position to become "legal personal representative." & he subsequently took out letters of administration to A. B.'s estate. The purchaser objected to the title on this ground:—**Held:** the objection failed; the latent ambiguity being raised by parol evidence could be got rid of by parol evidence, & there was a valid contract.—**TOWLE v. TOPHAM** (1877), 37 L. T. 308.

131. — "Vendor."—**HOOD v. BARRINGTON (LORD)**, No. 128, *ante*.

there can be no fair or reasonable dispute as to their identity.—**MAHLER v. BARKER**, [1924] 3 D. L. R. 292; [1924] 2 W. W. R. 796; 31 B. C. R. 136.—**CAN.**

n. Purchaser—"Client of A."—An offer to a "client of A." does not con-

tain a description of the purchaser sufficient to satisfy Stat. Frauds.—**NEWBERRY v. BROWN** (1915), 32 W. L. R. 118; 23 D. L. R. 627.—**CAN.**

131 i. Vendor—"Vendor."—"Ven-

dor" is not a sufficient description of the party selling to satisfy Stat. Frauds.—**WILMOT v. STALKER** (1892), 2 O. R. 78.—**CAN.**

131 ii. ——**J.—MAHLER v. L'EN-KALSKI**, 24 C. L. T. 407.—**CAN.**

132. ———.]—POTTER v. DUFFIELD, No. 111, ante.

133. ———.]—Pltf. having agreed with C., an auctioneer, to buy a house which belonged to deft., paid a deposit, & signed a memorandum, stating, "I have purchased the property . . . & have paid £70 as a deposit, . . . & agreed with the vendor to pay the remainder of the purchase-money. . . ." The memorandum was signed by pltf. & by C., "as agent for the vendor," & "as auctioneer." There was no further description of who the vendor was. Afterwards deft.'s solrs. duly sent the abstract of title. Pltf.'s solrs. received it & made requisitions, stating that they did so "without prejudice to any question that may arise as to the contract." Ultimately pltf. repudiated the contract on the ground that the memorandum did not disclose the name of the vendor, & brought an action for the return of the deposit. Deft. was always ready to carry out the contract:—*Held*: (1) pltf.'s conduct in receiving & inquiring into the abstract of title estopped him from denying the validity of the contract; (2) pltf. could not sue for return of the deposit on the ground of failure of consideration, inasmuch as the money was paid under full knowledge of the terms of the memorandum, & deft. was always willing to carry out the contract.

(3) *Seemle*: the contract was not sufficient to satisfy Stat. Frauds, the vendor not being sufficiently described.—THOMAS v. BROWN (1876), 1 Q. B. D. 714; 45 L. J. Q. B. 811; 35 L. T. 237; 24 W. R. 821.

Annotations:—As to (2) *Apld.* Chillingworth v. Esche, [1923] 1 Ch. 576. *Consd.* Montekendam v. Leanse (1923), 39 T. L. R. 445. As to (3) *Consd.* Rossiter v. Miller (1877), 46 L. J. Ch. 228.

134. ———.]—By an agreement in writing expressed to be made between B. of the one part & S. of the other part, & signed by B. only across the receipt stamp, the document being also duly stamped as an agreement, it was stated that "the vendor hereby agrees to sell to the purchaser a plot of ground, situate near Church street, Cromer, being 115 feet front by 58 feet deep, in consideration for £650, & hath received £50 on account of same." It was proved that B. had a plot of ground near Church street, which was 113 feet 11 inches long by about 58 feet deep:—*Held*: the agreement contained a sufficiently definite description of the property to enable the ct. to receive evidence of what the property consisted; the vendor's name was sufficiently stated & Stat. Frauds was no defence to an action for specific performance.—SIDLE v. BOND-CABELL (1885), 2 T. L. R. 44.

135. ———.]—JARRETT v. HUNTER, No. 125, ante.

136. ———.]—"Owner."—JARRETT v. HUNTER, No. 125, ante.

137. ———.]—Subsequent mistaken description as "trustee for sale."—The memorandum of a contract for sale of land was signed in counterpart, one copy being signed by "V. & Son, as

agents for" C. C. who was the vendor's solr. The other copy was duly signed on behalf of the purchaser:—*Held*: the latter being a complete memorandum as against the purchaser, the defect in the former was no bar to the vendor's suing for specific performance.

The memorandum which was at the foot of the particulars & conditions stated that V. & Son were agents for the "vendor" who was described as "vendor" throughout the conditions. The particulars stated that the sale was by direction of the "owner." The eighth condition, by mistake, stated that the vendor was a "trustee for sale":—*Held*: although the word "owner" was by itself a sufficient description of the vendor, the subsequent mistake was fatal, & the vendor was not sufficiently designated.—BUTCHER v. NASH (1889), 61 L. T. 72.

138. ———.]—WALTERS v. LE BLANC (1900), 16 T. L. R. 366, C. A.

139. ———.]—"Mortgagee."—JARRETT v. HUNTER, No. 125, ante.

140. ———.]—"Client" or "friend" of named agent.]—JARRETT v. HUNTER, No. 125, ante.

141. ———.]—"Solicitor to the vendor."—JARRETT v. HUNTER, No. 125, ante.

142. ———.]—"Agents of vendor."—COOMBS v. WILKES, No. 112, ante.

143. ———.]—"Landlord."—COOMBS v. WILKES, No. 112, ante.

144. ———.]—"Our client"—Conditions of sale referring to "mortgagees."—In a purchaser's action for specific performance the deft. alleged (a) that there was no concluded contract, but only an agreement as to price; (b) that the agreement did not satisfy Stat. Frauds, inasmuch as the vendor was not sufficiently identified; & (c) that the vendor's agents had no authority to enter into the contract:—*Held*: on the facts, that all three defences failed, & pltf. was entitled to specific performance.—ALLEN (A. H.) & Co., LTD. v. WHITEMAN (1920), 89 L. J. Ch. 531; 123 L. T. 773; 61 Sol. Jo. 727.

145. Insufficiency of description.]—LAVERY v. PURSELL, No. 71, ante.

146. ———.]—Admissibility of parol evidence to remedy.]—JARRETT v. HUNTER, No. 125, ante.

147. ———.]—Knowledge by purchaser of identity of vendor.]—JARRETT v. HUNTER, No. 125, ante.

148. ———.]—Whether supplied by references to other documents.]—JARRETT v. HUNTER, No. 125, ante.

B. Terms of Contract.

(a) *Must Contain All Essential Terms.*

Sec. generally, CONTRACT, Vol. XII., pp. 148, 149, Nos. 1015–1025; LANDLORD & TENANT, Vol. XXX., pp. 375, 376, Nos. 385, 391.

149. *General rule.*—(1) A. agrees for the purchase of an estate, but the agreement not reduced into writing; though A. in confidence thereof gave orders for conveyances to be drawn, & went

136 i. ———.]—"Owner."—Though the mere description of an owner as "vendor" in the contract or conditions of sale is insufficient to satisfy Stat. Frauds the term "owner" or "proprietor" is sufficient for the purpose.—ARTHUR & Co. v. CLARK & CULLEN, [1917] N. Z. L. R. 706.—N.Z.

o. ———.]—"Known as property of M."—GORDON v. MURRAY (1889), 15 V. L. R. 110.—AUS.

p. ———.]—"Description by initials."—KENNEDY v. OLDHAM (1888), 15 O. R. 433.—CAN.

q. ———.]—"We."—BENNETT v.

STODGELL (1914), 26 O. W. R. 188; 6 O. W. N. 163; 17 D. L. R. 835.—CAN.

146 i. Insufficiency of description.—Admissibility of parol evidence to remedy.]—Where an agent contracted to sell land as agent for D. Y., the vendor's true name being A. Y.:—*Held*: parol evidence was not admissible to prove the real name of the vendor, & there was no sufficient memorandum of the contract within Stat. Frauds.—FORD v. YOUNG (1882), 8 V. L. R. 93.—AUS.

146 ii. ———.]—PUDNEY v. STRONG (1888), 14 V. L. R. 758.—AUS.

r. *Necessity for description as buyer & seller.*—To make a valid memorandum of a contract of sale to satisfy Stat. Frauds, it is not necessary to describe the parties as buyer & seller where it is clear from surrounding circumstances which position they respectively occupy.—CARNROSS v. HAMILTON (1890), 9 N. Z. L. R. 91.—N.Z.

PART I. SECT. 8, SUB-SECT. 4.—B. (a).

149 i. *General rule.*—Where it appears from the evidence that a written agreement for sale of land does not correctly contain a material term of the

Sect. 8.—The memorandum or note: Sub-sect. 4, B.
(a), (b) & (c).]

several times to view the estate, this ct. will not carry such agreement into execution, & Stat. Frauds may be pleaded to a bill brought for that purpose.

(2) A letter is not a sufficient evidence of the agreement, unless the terms of the agreement are mentioned therein, but where a man takes possession in pursuance of an agreement, the ct. will decree an execution of it.—*CLERK v. WRIGHT* (1737), 1 Atk. 12; 26 E. R. 9, J. C.

Annotation:—As to (1) Refd. Maddison v. Alderson (1883), 8 App. Cas. 467.

150. —[—]—A letter to a solr., with directions for preparing the conveyance of a purchase, described generally as the land bought of A., not specifying the terms, is not sufficient evidence of a contract within Stat. Frauds.—*ROSE v. CUNYNGHAME* (1805), 11 Ves. 550; 32 E. R. 1202, L. C.

Annotations:—Mentd. Matthew v. Osborne (1853), 13 C. B. 919; *Barkworth v. Young* (1856), 4 Drew. 1.

—[—]*COX v. MIDDLETON*, No. 163, *post*.

152. —[—]*BLACKBURN v. WALKER*, [1920] W. N. 291.

153. *Letter—Term to be supplied by plaintiff.*—*BOYS v. AYERST*, No. 20, *ante*.

154. — *Asking for abstract & copy of conditions of sale—Containing no single term or condition of contract.*—Upon a sale by auction on May 9 of a house & premises, the same were upon deft.'s bidding knocked down to him; but, being the worse for liquor, he did not then sign the contract of sale. The following day, however, his attorney wrote to the vendor's attorney as follows:—"Workington, May 10, 1872. Dear Sir.—I have been instructed by Mr. Baxter to prepare his title to the Railway Hotel & premises at Workington, which he purchased last evening. It has been proposed to my client that he should take possession forthwith, & commence selling the undisposed of stock-in-trade of the late Mrs. Cape, which it is intended to value. My client is not indisposed to do this, if the vendor will consider his taking possession as without prejudice to his right, if it is considered necessary, to object to the title. Let me hear from you hereon at your earliest convenience, & send me the abstract of title & copy conditions when ready. Yours, truly, J. Milburne." On May 17, the auctioneer wrote his name & the date across the stamp upon the conditions of sale, & he went with the vendor's solr. to deft. upon the subject, but deft. then repudiated the purchase on the ground of drunkenness. Upon this the premises were resold at a loss, & the present action was brought to recover the difference & expenses:—*Held*: the letter of Mr. Milburne was not a memorandum or note in writing sufficient to satisfy Stat. Frauds, s. 4, because it did not contain the terms of the contract; & because there was no evidence to show any authority on the part of deft. to Mr. Milburne to sign any agreement or memorandum for him. *Semle*: if an auctioneer has any implied legal authority to bind a vendee upon the sale of real

property by signing the contract, he must sign it at the time of the sale & not subsequently.—*MATTHEWS v. BAXTER* (1873), 28 L. T. 669; 21 W. R. 741.

155. *Receipt—Terms to be expressed in subsequent document.*—A memorandum that A. had paid to B. £50 as a deposit in part payment of £1,000 for the purchase of a house, the terms to be expressed in an agreement to be signed as soon as prepared:—*Held*: not a sufficient agreement in writing.—*WOOD v. MIDDLEY* (1854), 5 De G. M. & G. 41; 2 Eq. Rep. 729; 23 L. J. Ch. 553; 23 L. T. O. S. 59; 2 W. R. 301; 43 E. R. 784, L. JJ.

Annotations:—Consd. Morgan v. Worthington (1878), 38 L. T. 443. *Refd. Pain v. Coombs* (1857), 3 Sm. & G. 449; *Davies v. Otty* (1864), 4 New Rep. 5; *Lucas v. Dixon* (1889), 22 Q. B. D. 357. *Mentd. Barkworth v. Young* (1856), 4 Drew. 1.

156. — *Terms only partly set out.*—C. & S. agreed to become partners in a colliery, which was to be demised upon a royalty, to be divided between them in some proportion. There was no agreement signed at the time, but S. signed certain receipts for money received from C., & which C. alleged were paid on account of the partnership:—*Held*: the agreement was for the purchase of land, & was not reduced into writing, & the receipts given were not sufficient to take the agreement out of Stat. Frauds.

Although the ct. has struggled to bring within the description of signed agreements any instrument, however informal, which does in truth disclose what the terms of the contract were, it always requires the terms to be disclosed, at least by reasonable inference.—*CADDICK v. SKIDMORE* (1857), 2 De G. & J. 52; 27 L. J. Ch. 153; 30 L. T. O. S. 205; 3 Jur. N. S. 1185; 6 W. R. 119; 44 E. R. 907, L. C.

Annotations:—Refd. Isaacs v. Evans (1899), 16 T. L. R. 113; *Re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410.

157. —[—]*BLACKBURN v. WALKER*, [1920] W. N. 291.

158. *Sale of two separate premises—Statement of purchase price in one sum—Date for completion to be agreed subsequently.*—*OSD v. COOMBES* (1884), 28 Sol. Jo. 378.

(b) *Must Show Agreement of Parties.*

See, generally, CONTRACT, Vol. XII., pp. 149, 150, Nos. 1026–1032.

159. *Inclusion of additional terms—Letters of offer & acceptance—Acceptance including fresh terms.*—Vendor & purchaser had agreed by parol upon the sale of a house at a specified price. The purchaser, by arrangement, wrote a letter to the vendor confirming his offer, repeating the terms, & requesting a reply. The vendor's solr. replied, stating that he was instructed to carry out the sale of the house according to the purchaser's letter, but adding, "there are some details to be embodied in a contract of sale which I will prepare & forward for your approval & signature":—*Held*: the latter words as to details to be embodied, qualified the otherwise unconditional

contract Stat. Frauds is a bar.—*MANDRIUK v. CHAILEY* (Alta.), [1920] 3 W. W. R. 758.—CAN.

149 ii. —[—]*PATTERSON v. SCOTT*, [1922] 2 W. W. R. 700; 69 D. L. R. 81; 32 Man. L. R. 343.—CAN.

t. *Letter—Terms only partly set out—Formal contract contemplated.*—*Held*: the letters relied upon by plff. as constituting a contract for the sale by defts. to him & the purchase by him

from defts. of certain land were not sufficient to constitute a contract of which specific performance could be ordered, for the reason that the letters did not contain all the terms of the contract, & it was in the contemplation of the parties that a formal contract should be prepared & executed which should contain terms not set forth in the letters.—*ROSS v. EASTERN SASKATCHEWAN LAND CO.* (1911), 17 W. L. R. 280; 4 Sask. L. R. 346.—CAN.

a. *Receipt—Terms only partly set out—Formal document contemplated.*—*STRICKLAND v. ROSS* (Sask.) (1912), 21 W. L. R. 945; 5 D. L. R. 706; 2 W. W. R. 887.—CAN.

b. *Matters left for future arrangement.*—*WILLISTON v. LAWSON* (1891), 19 S. C. R. 673.—CAN.

c. —[—]*MCKENZIE v. WALSH*, [1921] 1 W. W. R. 1017; 61 S. C. R. 312.—CAN.

acceptance of the offer in the purchaser's letter, & there was not a sufficient memorandum in writing within Stat. Frauds, s. 4.—*BALL v. BRIDGES* (1874), 30 L. T. 430; 22 W. R. 552.

160. — [In reply to a written offer by A. to purchase B.'s property for £1,450, B.'s solrs. wrote accepting the offer, & continued, "We inclose contract for your signature. On receipt of this signed by you across the stamp & deposit we will send you copy signed by him." The inclosure was a contract with usual conditions of sale providing for a deposit of 10 per cent., fixing a date for completion, & limiting the period of B.'s title. Three days afterwards B.'s solrs. again wrote A., "Kindly let us know whether we shall send abstract of title to you or to a solr. for you. At the same time perhaps you will send us deposit. In order to define time for delivery of abstract, & for completion, the contract sent you had better perhaps be signed, though the correspondence is a sufficient contract." A. returned the inclosure unsigned:—*Held*: the letters did not constitute a contract.—*JONES v. DANIEL*, [1894] 2 Ch. 332; 63 L. J. Ch. 562; 70 L. T. 588; 42 W. R. 687; 8 R. 579.

Annotation:—*Distd. Rouse v. Ginsberg* (1911), 55 Sol. Jo. 632.

161. Exchange of duplicate parts—Unauthorised alteration by vendor's solicitor in document signed by vendor—Subsequent ratification by vendor.—On July 14, 1921, the solrs. of pltf. & deft. attended to exchange duplicate parts of a contract for the sale of two houses by deft. to pltf. & his wife. The part signed by pltf. contained his name only as the purchaser. Without authority deft.'s solr. struck out the name of pltf.'s wife in the part signed by deft., who afterwards ratified his action & instructed him to proceed with the contract. The title was accepted & a draft assignment prepared & approved by deft.'s solr. On July 26, 1921, deft.'s solr. wrote to pltf.'s solr. a letter headed "Sweet to Koenigsblatt"—"Herewith replies to requisition. I understood that vacant possession could be given & the contract was drawn accordingly. The vendors now state that vacant possession cannot be given, & further, that the purchaser does not expect or require it." Dft. refused to complete, & in an action for specific performance he pleaded Stat. Frauds:—*Held*: the ratification related back to the time when the acts were done, & that on July 14 it was as if deft.'s solr. had in his possession a document with alterations, signed by deft. after they were made, & with authority to hand it over as part of an operative agreement in return for a similar document signed by pltf.; & that Stat. Frauds raised no difficulty, as pltf. was suing on an agreement signed by the parties.—*KOENIGSBLATT v. SWEET*, [1923] 2 Ch. 314; 92 L. J. Ch. 598; 129 L. T. 659; 39 T. L. R. 576; 67 Sol. Jo. 638, C. A.

What amounts to concluded contract—Necessity for agreement of parties.—*See Sect. 3, ante.*

(c) Description of Property Sold.

See CONTRACT, Vol. XII., p. 150, No. 1033; *LANDLORD & TENANT*, Vol. XXX., p. 377, Nos. 411, 412.

PART I. SECT. 8, SUB-SECT. 4.—B. (c).

d. Sufficiency of description.—"My property."—A contract or memorandum in writing for the sale of land in order to comply with Stat. Frauds must identify the property sold; it is not sufficient for a vendor to say "I hereby agree to sell my property to

C."—*CORCORAN v. O'ROURKE* (1888), 14 V. L. R. 889.—*AUS.*

e.—"My land."—*PARKER v. BARNETT* (1890), 16 V. L. R. 214.—*AUS.*

f.—"Description by mistake as whole lot instead of half lot."—*JENNINGS v. ROBERTSON* (1852), 3 Gr. 513.—*CAN.*

162. Sufficiency of description.—After certain negotiations for a purchase between the agents of the vendor & purchaser, a letter was written to the vendor by his agent, stating that the purchaser had agreed by his agent to purchase the property, which was sufficiently identified, at a certain price. The vendor frequently wrote to his agent in reference to the transaction, such letters being communicated to the purchaser's agent. Drafts were prepared, & signed by the vendor's agent in approval, but the vendor died before the sale was completed:—*Held*: there was a binding contract within Stat. Frauds, of which the ct. would decree specific performance.

The price being mentioned & the premises identified, under all the circumstances there was no doubt that a binding contract had been entered into (WOOD, V.-C.).—*CARPENTER v. CHURCHILL (LORD)* (1854), 2 W. R. 364.

163. — [An agreement was in the following words: "A. agrees to pay £625 for the cottage & stable, B. paying the expenses of the lease held by Mr. C. Signed A." :—*Held*: such an agreement was not sufficient within the Statute of Frauds.

If the parties contract together for the purchase of a house, *prima facie* the contract is to purchase the fee simple. It may be that the party purchasing may know that the vendor had not the fee simple, & then such a contract might be performed by the purchaser having all the interest of the vendor (*KINDERSELEY, V.-C.*).—*COX v. MIDDLETON* (1854), 2 Drew. 209; 2 Eq. Rep. 631; 23 L. J. Ch. 618; 23 L. T. O. S. 6; 2 W. R. 284; 61 E. R. 699.

Annotation:—*Folld. Dolling v. Evans* (1867), 31 J. P. 375.

164. — [An agreement for the sale of a leasehold estate did not expressly make it appear whether the sale was of the whole interest in the lease or of an underlease only:—*Held*: the provisions of Stat. Frauds were not complied with. —*DOLLING v. EVANS* (1867), 36 L. J. Ch. 474; 15 L. T. 604; 31 J. P. 375; 15 W. R. 394.

165. — [—*SHARDLOW v. COTTERELL*, No. 106, *ante*.

166. — **By reference to deeds in possession of person named in agreement.**—An agreement in writing for the sale of a house did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement. The ct. held the agreement sufficiently certain, if it could be ascertained, by an inquiry before the master, that the deeds in the possession of the person named referred to the house in question.—*OWEN v. THOMAS* (1834), 3 My. & K. 353; 3 L. J. Ch. 205; 40 E. R. 134.

Annotations:—*Apld. McMurray v. Spicer* (1868), L. R. 5 Eq. 527. *Consd. Smith v. Webster* (1876), 3 Ch. D. 49. *Apld. Naylor v. Goodall* (1877), 47 L. J. Ch. 53. *Consd. Shardlow v. Cotterill* (1881), 44 L. T. 549. *Refd. Carpenter v. Churchill* (1854), 2 W. R. 364; *Sheers v. Thimbleby* (1897), 76 L. T. 709.

167. — **"The mill property, including two cottages in E. village"**—Part of the property not in E.]—The words "the mill property, including two cottages in E. village," were held a sufficient description of the subject-matter of a contract to take the case out of Stat. Frauds, though

g. — *Ten acres of land & lands belonging to T. adjoining.*—*HORNSBY v. JOHNSTONE* (1872), 9 N. S. R. 1.—*CAN.*

h. — *"My property on K. street."*—*MCCLUNG v. MCCRAKEN* (1883), 3 O. R. 596.—*CAN.*

j. — *By reference to sheriff's*

Sect. 8.—The memorandum or note: Sub-sect. 4, B (c), (d) & (e); sub-sect. 5, A.]

part of the property was not in the parish of E. —*McMURRAY v. SPICER* (1868), L. R. 5 Eq. 527 37 L. J. Ch. 505; 18 L. T. 116; 16 W. R. 332.

Annotations:—Refd. Webb v. Hughes (1870), L. R. 10 Eq. 281; *McGrory v. Alderdale Estate Co.*, [1918] A. C. 503.

168. — “The Jolly Sailor offices, etc.”—One of three trustees acting as if he were absolute owner, entered into a contract to sell the entirety of certain freehold property, in one-fifth part of which he had a beneficial interest, describing the property as “The Jolly Sailor offices, etc.” to pltf. The other trustees afterwards refused to concur in the sale. Pltf. having brought his action for specific performance of the contract:—*Held*: the subject-matter of the contract was sufficiently defined, as the vagueness, if any, about the meaning of the words “Jolly Sailor offices, etc.” might be removed by an inquiry at chambers.—*NAYLOR v. GOODALL* (1877), 47 L. J. Ch. 53; 37 L. T. 422; 26 W. R. 162.

169. Requirement as to description of property sold.—Testator wrote to his solr. with reference to a negotiation for the purchase of certain tithes, as follows: “Previously to paying the amount (then came a word illegible) for tithes, glebe, etc., it would be advisable to have some information as to title, identity of lands,” etc.:—*Held*: this note was not a note or memorandum in writing of a contract within Stat. Frauds.—*SAVILE v. KINNAIRD* (1865), 11 L. T. 687; 11 Jur. N. S. 195; 13 W. R. 308.

(d) *Where Alternative Offers.*

170. Alternative written offers—Verbal acceptance of one.—Where, after negotiations for the letting of a certain property, a letter signed by the agent of the owner & containing an alternative offer to let the property on the conditions named therein, or to sell part at the price therein stated, is sent to the intending lessee, & in reply thereto he accepts the offer of the property, there is evidence of a concluded contract for letting sufficient to satisfy the Stat. Frauds.—*LEVER v. KOFFLER*, [1901] 1 Ch. 543; 70 L. J. Ch. 395; 84 L. T. 584; 49 W. R. 506; 45 Sol. Jo. 326.

(e) *Price.*

See, generally, CONTRACT, Vol. XII., p. 152, Nos. 1046–1052.

numbers of lots—*KEEFER v. HOAR* (1884), 8 O. L. 69.—**CAN.**

k. — “Fifty feet of two lots.”—*HEATH v. SANFORD* (1907), 17 Man. L. R. 101.—**CAN.**

l. — “Lands N. 23–4–3 E.”—*CAISLEY v. STEWART* (1911), 18 W. L. R. 420; 21 Man. L. R. 341.—**CAN.**

m. — “Fifty acres of lands across the road.”—*SPARKS v. CLEMENT* (1918), 41 O. L. R. 344; 13 O. W. N. 297.—**CAN.**

n. — “That other lot.”—*LEFLEY v. MORFAT*, [1925] 3 D. L. R. 825; 57 O. L. R. 260.—**CAN.**

o. — “That property in D. street.”—*FLOCKTON v. LEONARD* (1910), 20 N. Z. L. R. 431.—**N.Z.**

PART I. SECT. 8, SUB-SECT. 4.— B. (e).

171i. Necessity for statement.—*PIDGEON v. NARBAY* (1911), 31 N. Z. L. R. 385.—**N.Z.**

p. Necessity for time for payment.—A paper containing a receipt for part of the purchase money, which clearly ascertains the land to be sold

& the price, but omits to state when the balance is payable, although it provides that such portion should be secured by mtgc., is sufficient.—*DEVINE v. GRIFFIN* (1854), 4 Gr. 603.—**CAN.**

q. —.—A memorandum of an agreement for the sale of land held not to satisfy Stat. Frauds, on the ground that it was indefinite as to the date & amounts of the deferred payments.—*KIDD v. MILLAR*, [1918] 2 W. W. R. 366; 13 Alta. L. R. 282; 40 D. L. R. 729.—**CAN.**

r. —.—A contract in writing for the sale & purchase of land is not a sufficient memorandum under Stat. Frauds if no particular time for payment of the purchase-money is mentioned in the contract, & it contemplates the non-payment of the purchase-money for an uncertain period, indicated by a condition for the periodical payment of interest thereon.—*HOLMES v. HYLAND* (1885), 3 N. Z. L. R. 429 (S. C.).—**N.Z.**

t. Necessity for setting out terms of payment.—A memorandum in writing, signed by deft., of the sale to pltf. of a quarter-section of land

171. Necessity for statement.—*CARPENTER v. CHURCHILL* (LORD), No. 162, *ante*.

172. Effect of non-disclosure—Contract unenforceable.—Sales of land by auction are within Stat. Frauds; except sales under decree. Auctioneer's receipt for the deposit, not containing expressly or by reference the terms, viz. the price, cannot have the effect of an agreement, binding the vendor, within Stat. Frauds.

In this instance one very material particular, the price to be paid for this estate, does not appear upon the receipt: for the amount of the deposit, unless we know the proportion it bears to the price, does not show what the price is; & the receipt contains no reference to the conditions of sale to entitle us to look at them for the terms. . . . Still more should I hesitate to say, the words of the statute according to the true construction do not include sales by auction. In *A.-G. v. Day*, No. 248, *post*, LORD HARDWICKE takes occasion to state the grounds upon which sales of a particular description, viz. under a decree of the ct., are necessarily excepted (GRANT, M.R.).—*BLAGDEN v. BRADBPEAR* (1806), 12 Ves. 466; 33 E. R. 176.

Annotations:—Apld. Wood v. Midgley (1854), 2 Sm. & G. 115. *Refd. Shardlow v. Cotterill* (1881), 51 L. J. Ch. 353. *Mentd. Re Holland, Gregg v. Holland*, [1901] 2 Ch. 145.

Determination of price.—*See* Part I., Sect. 1. *ante*.

SUB-SECT. 5.—S

A. In General.

See Law of Property Act, 1925 (c. 20), s. 40, & generally, *CONTRACT*, Vol. XII., pp. 152–155; *LANDLORD & TENANT*, Vol. XXX., pp. 378–379, Nos. 420–424.

173. Necessity for — Signature only by party to be charged.—Many cases have occurred where agreements for lands appearing in writing under the hand of the party who was bound by it, which are the words of Stat. Frauds, notwithstanding here was no writing of the other part, have been carried into execution; & I have known the objection often taken of its not appearing on the side of the purchaser & as often overruled (LORD HARDWICKE, C.).—*BACKHOUSE v. MOHUN* (1736), Swan. 434, n.; 36 E. R. 938, L. C.

174. —.—*BUCKHOUSE v. (ROSSBY* 1737), 2 Eq. Cas. Abr. 32; 22 B. R. 28, L. C.

Annotation —Consd. Martin v. Mitchell, Martin v. Pelle (1820), 2 Jac. & W. 413.

described, contained sufficient particulars as to parties, price, etc., but did not contain all the terms as to payment:—*Held*: the memorandum was not sufficient to satisfy Stat. Frauds.—*FENSKIE v. FARBACHER* (Sask.) (1912), 21 W. L. R. 53; 2 W. W. R. 216; 2 D. L. R. 634.—**CAN.**

a. —.—*REYNOLDS v. FOSTER* (1913), 23 O. W. R. 933; 4 O. W. N. 694; 9 D. L. R. 836.—**CAN.**

b. —.—A receipt for a deposit paid on an agreement for the sale of land which omits reference to a term of the agreement providing for the deferring of the payment of the remainder of the purchase-money is not a memorandum sufficient to satisfy Stat. Frauds.—*LESTIUK v. SCHNEIDER* (Alta.) (1917) 2 W. W. R. 747; 36 D. L. R. 598.—**CAN.**

c. —.—*IMPERIAL DEVELOPMENT Co. v. MATTHEW* (1909), 10 W. L. R. 330.—**CAN.**

PART I. SECT. 8, SUB-SECT. 5.—A.

d. What amounts to — Unsigned memorandum in handwriting of party to be charged—Letter to co-partner giving

175. ———.] — (1) Specific performance decreed; the abstract, though delivered very late, & under a notice, that the vendee would insist on his deposit, with interest, if the title should not be made out, & possession delivered, by the time of payment, having been received & kept without objection: & the vendee upon the construction & the circumstances not being entitled to insist on the time, as the essence of the contract.

(2) An agreement signed by one party only, good to charge him within Stat. Frauds.

(3) Under the circumstances therefore, whether the time is or is not an objection, founded upon the authorities the reports of this ct. furnish, which I will not discuss, let the authorities upon that point turn the scale either for deft. or plff., there is no authority that has not some reference to the conduct of the party in the meantime; & upon the conduct this deft. has no right under the circumstances to say, this contract was not performed within two months (LORD ELDON, C.). —SETON v. SLADE, HUNTER v. SETON (1802), 7 Ves. 265; 32 E. R. 108, L. C.

426; Roberts v. Berry (1853), 3 De G. M. & G. 284; & Hanley Theatre of Varieties v. Broadbent, [1898]

(2) *Apld.* Laythorp v. Bryant (1836), 2 Bing. N. C. 735. *Refd.* Jenkins v. Reynolds (1821), 6 Moore, C. P. 86. *As to* (3) *Consd.* Parkin v. Thorold (1851), 2 Sim. N. S. 1. *Generally, Refd.* Halsey v. Grant (1806), 13 Ves. 73. *Mentd.* Hicks v. Gardner (1837), 1 Jur. 541; Stains v. Banks (1863), 9 Jur. N. S. 1049.

176. ———.] — An agreement in writing for the sale of an estate binding: though signed only by the vendor. —FOWLE v. FREEMAN (1804), 9 Ves. 351; 32 E. R. 638.

Annotations:—Apld. Laythorp v. Bryant (1836), 2 Bing. N. C. 735. *Distd.* Wood v. Midgley (1854), 2 Eq. Rep. 729. *Consd.* Ridgway v. Wharton (1857), 6 L. H. Cus. 238; Hawkesworth v. Chaffey (1886), 55 L. J. Ch. 335. *Refd.* Stratford v. Bosworth (1813), 2 Ves. & B. 341; Jenkins v. Reynolds (1821), 6 Moore, C. P. 86; Chinnock v. Ely (1865), 4 De G. J. & Sm. 638; Cayley v. Walpole (1870), 39 L. J. Ch. 609; Smith v. Webster (1876), 3 Ch. D. 49; Rossiter v. Miller (1878), 3 App. Cas. 1124; Chillingworth v. Esche (1923), 92 L. J. Ch. 461.

177. ———.] — Deft. purchased certain leasehold premises at an auction, & signed a memorandum of the purchase on the back of a paper containing the particulars of the premises, the name of the owner, & the conditions of sale: —*Held*: deft. was bound by his contract, notwithstanding it was not signed by the vendor. —LAYTHORP v. BRYANT (1836), 2 Bing. N. C. 735; 3 Scott, 238; 2 Hodg. 25; 5 L. J. C. P. 217; 132 E. R. 283.

Annotations:—Refd. Leroux v. Brown (1852), 12 C. B. 801; Liverpool Borough Bank v. Eccles (1859), 4 H. & N. 139; Williams v. Byrnes (1863), 1 Moo. P. C. N. S. 154; Reuss v. Picklesley (1866), L. R. 1 Exch. 342; *Re* Hoyle, Hoyle v. Hoyle, [1893] 1 Ch. 84. *Mentd.* Harvey v. Johnston (1848), 6 C. B. 295; Hudspeth v. Yarnold (1850), 9 C. B. 625; *Re* Whitehead, *Ex p.* Whitehead (1885), 14 Q. B. D. 419; Carhill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

178. What amounts to — Unsigned memorandum in handwriting of party to be charged — Name appearing in body of document — “I, A. B.” — An agreement beginning “I, A. B.” though not signed by the party is good within Stat. Frauds. —KNIGHT v. CROCKFORD (1794), 1 Esp. 190; 170 E. R. 324, N. P.

Annotations:—Consd. Laythorp v. Bryant (1836), 3 Scott, 238. *Refd.* Sanderson v. Jackson (1800), 2 Bos. & P. 238; Hubert v. Treherne (1842), 3 Man. & G. 743.

notice of sale.] —CAMPBELL v. DENNIS-TOUN (1873), 25 C. P. 339. —CAN.

e. — Signature by entry “Do” under name.] —WILLIAMS v. ROSS (1863), 2 W. & W. (L.) 285. —AUS.

f. — Signature on replies to requisitions on title.] — A contract for sale of land entered into by an

auctioneer “on account of the vendor” & “as agent for the vendor,” but not naming the vendor, is void under Stat. Frauds. But where the vendor signed replies to requisitions on title referring to such contract: —*Held*: there was then a sufficient signature under the statute. —BUXTON v. BELLIN (1877), 3 V. L. R. 243. —AUS.

179. ———.] — “Mr. A. proposes.” — Qu.: whether a note, written in the third person, “Mr. A. proposes,” etc., making an offer to purchase, being accepted, amounts to a contract in writing signed, within Stat. Frauds. —MORISON v. TURNOUR (1811), 18 Ves. 175; 34 E. R. 285, L. C.

Annotation:—Refd. Sansom v. Prole (1842), 12 L. J. Ch. 25.

180. ———.] — “Agrees with A. B.” — A. B. having five freehold houses but no other property in C. Street, Liverpool, agreed to sell them to C. for £248, & thereupon drew up the following memorandum in his own handwriting: —“July 26, 1839. C. agrees with A. B. to take the property in C. Street for the net sum of £248 10s.” —*Held*: the agreement was sufficiently signed by the vendor. —BLEAKLEY v. SMITH (1840), 11 Sim. 150; 59 E. R. 831.

Annotations:—Consd. Shardlow v. Cotterell (1881), 20 Ch. D. 90. *Refd.* Evans v. Hoare, [1892] 1 Q. B. 593; Plant v. Bourne, [1897] 2 Ch. 281; Shoers v. Thimbleby (1897), 76 L. T. 709; Auerbach v. Nelson (1910), 88 L. J. Ch. 493.

181. ———.] — Alteration of draft conveyance — In party's handwriting.] — One alters a draft with his own hand for the purchasing an estate; this not a signing to take it out of Stat. Frauds, though the seller afterwards executed the conveyance, & caused it to be registered.

Unless in some particular cases where there has been an execution of the contract by entering upon & improving the premises, the party's signing the agreement is absolutely necessary for the completing of it (LORD MACCLESFIELD, C.). —HAWKINS v. HOLMES (1721), 1 P. Wms. 770; 24 E. R. 606, L. C.

Annotations:—Consd. Welford v. Beazely (1747), 3 Atk. 503. *Expld.* Shippey v. Derrison (1805), 5 Esp. 190. *Refd.* Cooke v. Tombs (1791), 2 Anst. 420; Gibson v. Holland (1865), L. R. 1 C. P. 1.

182. ———.] — Printed heading — Name & address of vendor.] — An offer to purchase land written on paper containing the printed name & address of the vendor, but not signed by him, is not a sufficient memorandum of the contract to satisfy Stat. Frauds, unless it be written at his dictation. —HUCKLESBY v. HOOK (1900), 82 L. T. 117; 44 Sol. Jo. 277.

Annotations:—Refd. Cohen v. Roche, [1927] 1 K. B. 169. *Mentd.* Buckton v. L. & N. W. Ry. (1916), 87 L. J. K. B. 234.

183. Position of.] — (1) Provided the name be inserted in an instrument in such a manner as to have the effect of authenticating it, the requisition of the Act with respect to signature is complied with, & it does not matter in what part of the instrument the name is found.

(2) The right to a good title does not grow out of the agreement between the parties, but is given by law; but a purchaser may waive his right by going on with the agreement after he has full notice that he is not to expect a good title. This is, in such case, matter of notice, & not of contract. —OGILVIE v. FOLJAMBE (1817), 3 Mer. 53; 36 E. R. 21.

Annotations:—As to (1) *Apprvd.* Caton v. Caton (1867), L. R. 2 H. L. 127. *Refd.* Auerbach v. Nelson, [1910] 2 Ch. 383. *As to* (2) *Consd.* Evans v. Jackson (1836), Donnelly, 147; Cowley v. Watts (1853), 22 L. J. Ch. 591. *Distd.* Cox v. Middleton (1854), 2 Eq. Rep. 631. *Apld.* McMurray v. Spicer (1868), L. R. 5 Eq. 527. *Consd.* Ellis v. Rogers (1885), 29 Ch. D. 661. *Apprvd.* McGrory Co., [1918] A. C. 503. *Refd.* Beaumont (1818), 1 De G. & Sm. 397. *Generally,*

g. — Signature & identification of purchaser after acceptance of offer to buy.] — An acceptance in writing by the owner of land of a written offer therefor addressed to him but unsigned by any purchaser, & without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy Stat.

Sect. 8.—*The memorandum or note: Sub-sect. 5, A. & B. (a) & (b); sub-sect. 6. Sect. 9: Sub-sects. 1 & 2, A. (a).]*

Consd. *Shardlow v. Cotterell* (1881), 20 Ch. D. 90; *Plant v. Bourne*, [1897] 2 Ch. 281. **Reid.** *A.-G. v. Dixon* (1842), 1 Y. & C. Ch. Cas. 614; *Naylor v. Goodall* (1877), 47 L. J. Ch. 53; *Sheers v. Thimbleby* (1897), 76 L. T. 709. **Mentd.** *Bank of New Zealand v. Simpson*, [1900] A. C. 182; *G. W. Ry. & Mid. Ry. v. Bristol Corpn.* (1918), 87 L. J. Ch. 414.

B. By Agent.
(a) *In General.*

See Law of Property Act, 1925 (c. 20), s. 40.

184. Validity of signature by agent—Agent without authority.]—Specific performance of a contract concerning land not decreed on the signature of an agent without authority.—*HOWARD v. BRAITHWAITE* (1812), 1 Ves. & B. 202; 35 E. R. 79, L. C.; *subsequent proceedings* (1813), 1 Ves. & B. 374, L. C.

185. —.]—*DANIELS v. TREFUSIS*, No. 232, post.

Whether written authority necessary—To make contract required to be in writing.]—*See* CONTRACT, Vol. XII., p. 155, No. 1099, & AGENCY, Vol. I., pp. 282–284, Nos. 141, 148–153.

186. Whether special authority necessary—Signature by company secretary.]—An agreement to sell property to pltf. was signed for a co. by the secretary who was alleged to be their authorised agent. The agreement was made subject to the conditions of sale, & it was alleged that the vendors therein described referred to the co. The conveyance was prepared for execution when the co. was ordered to be wound up, & the liquidator repudiated the contract on the ground that the secretary was not an authorised agent for the purpose of sale:—*Held*: the allegations in the bill were sufficient to show that the secretary was the authorised agent for the purpose of executing the contract.—*BEER v. LONDON & PARIS HOTEL Co.* (1875), L. R. 20 Eq. 412; 32 L. T. 715.

Annotations:—*Reid.* *Cartwright v. Miller* (1877), 36 L. T. 398; *Rossiter v. Miller* (1877), 5 Ch. D. 648.

—*See, also*, AGENCY, Vol. I., pp. 283–286, Nos. 149–153, 156–170.

187. Necessity for express authority.]—A general authority to an agent to find a purchaser of a house does not authorise the agent to sign a contract binding on the vendor. There must, to justify such a signing, be a special & express authority to sign.—*LEWCOCK v. BROMLEY* (1920), 127 L. T. 116; 37 T. L. R. 48; 65 Sol. Jo. 75.

188. Name written by third party—At request of purchaser.]—A memorandum of a transaction of purchase, written at the time when & the place where such transaction took place, & at the pur-

chaser's dictation, by a relative of the vendor, who was present when the transaction was entered into, is a sufficient memorandum or note of the agreement in writing signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised to satisfy Stat. Frauds, s. 4.—*BROOKS v. BILLINGHAM* (1912), 56 Sol. Jo. 603.

Who may sign as agent—Not one contracting party for another.]—*See* AGENCY, Vol. I., pp. 277, 278, 633, Nos. 92–95, 2559.

Delegation of authority to sign.]—*See* CONTRACT, Vol. XII., p. 157, Nos. 1115–1119.

Revocation of authority to sign.]—*See* AGENCY, Vol. I., p. 699, Nos. 3060, 3062.

Ratification of authority to sign.]—*See* AGENCY, Vol. I., pp. 415, 421, Nos. 1109, 1112, 1113, 1153.

(b) *Particular Agents.*

Auctioneer—Whether special authority necessary.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 8, 9, Nos. 57–66.

189. — Agent for vendor.]—*HOOD v. BARRINGTON (LORD)*, No. 128, ante.

190. —.]—*THOMAS v. BROWN*, No. 133, ante.

Whether agent for both parties.]—*See* AUCTION & AUCTIONEERS, Vol. III., p. 8, Nos. 51–56.

— Implied authority to sign.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 8, 9, Nos. 57–66.

Auctioneer also vendor.]—*See* AUCTION & AUCTIONEERS, Vol. III., p. 8, No. 56.

Auctioneer's clerk—Implied authority to sign.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 9, 10, Nos. 67–73.

Estate agent.]—*See* AGENCY, Vol. I., pp. 377–379, Nos. 831–836.

Solicitor.]—*See* CONTRACT, Vol. XII., pp. 156, 157, Nos. 1104–1114; SOLICITORS.

SUB-SECT. 6.—ADMISSIBILITY OF PAROL EVIDENCE.

To correct or identify documents.]—*See* CONTRACT, Vol. XII., pp. 160, 161; & generally, DEEDS, Vol. XVII., pp. 302–348.

To identify parties & subject-matter.]—*See* DEEDS, Vol. XVII., pp. 321–325.

SECT. 9.—EVIDENCE OF THE CONTRACT.

SUB-SECT. 1.—THE MEMORANDUM OR NOTE.

See Sect. 8, ante.

Frauds, & does not become binding upon him when a purchaser is subsequently found who signs the offer.—*MCINTOSH v. MOYNIHAN* (1891), 18 A. R. 237.—CAN.

PART I. SECT. 8. SUB-SECT. 5.—**B. (a).**

1841. Validity of signature by agent—Agent without authority.]—*O'BRIEN v. GOODSSELL* (1878), 1 N. S. W. S. C. R. N. S. (Eq.) 6.—AUS.

h. — Sale subject to approval by vendor—Ratification by vendor.]—*CONLEY v. PATTERSON* (1912), 20 W. L. R. 722; 2 W. W. R. 34; 22 Man. L. R. 127.—CAN.

k. — Within scope of authority.]—*CLONCURRY (LORD) v. LAFFAN*, [1924] 1 I. R. 78.—IR.

l. Whether written authority necessary—To make contract required to be in

writing.—An agent to purchase or sell land need not be authorised in writing in order to bind his principal. It is sufficient, under Stat. Frauds, if the agent, though authorised only by parol, has signed an agreement in writing so as to satisfy the statute.—*MOLIVRIDE v. MILLS* (1906), 16 Man. L. R. 276.—CAN.

m. — Proof of authority.]—Although an agent for the sale of land, having only an oral authority from the owner, may sign for him a contract of sale of the land which will be binding under Stat. Frauds, yet, if disputed, the evidence of the agent should not be accepted as sufficient proof of such authority without corroboration, unless it is of the clearest & most convincing kind & such as bears overwhelming conviction on its face.—*GILMOUR v. SIMON* (1905), 15 Man. L. R. 205; 1 W. L. R. 417.—CAN.

n. Subsequent written recognition of oral contract—By agent in performance of duty.]—An agent's subsequent written recognition of an oral contract, where such recognition was made in the performance of his duty in the carrying out of the contract:—*Held*: binding on the principal for the purpose of taking the case out of Stat. Frauds.—*WARD v. HAYES* (1872), 19 Gr. 239.—CAN.

o. — By agent within scope of authority.]—The subsequent recognition of an unsigned contract, in writing, for the sale of lands, by the signature of his lawfully authorised agent to a notice specifying & adopting the contract, is sufficient, under Stat. Frauds, to bind the party contracting to be charged therewith.—*NORRIS v. COOKE* (1856), 7 I. C. L. R. 37; 9 Ir. Jur. 443.—IR.

SUB-SECT. 2.—WHERE WRITING DISPENSED WITH.

A. Contract Partly Performed.

(a) In General.

See Law of Property Act, 1925 (c. 20), s. 40 (2).

191. General rule.—Wherever a parol agreement is begun to be put in execution, & intended to be continued, there though there be no writing, yet this ct. shall enforce the execution thereof, notwithstanding the Statute of Frauds (LORD COWPER, C.).—GUERNSEY (LORD) v. RODBRIDGES (1708), Gilb. Ch. 3; 25 E. R. 3, L. C.

192. Must be in pursuance of the agreement.—Equity will decree performance of parol agreement, if it is admitted in the answer, or if material & unequivocal acts have been done in part performance.—GUNTER v. HALSEY (1739), Amb. 586; West temp. Hard. 681; 27 E. R. 381, L. C.

Annotations:—**Apld.** Maddison v. Alderson (1883), 8 App. Cas. 467. **Refd.** Humphreys v. Green (1882), 10 Q. B. D. 148; Hodson v. Heuland, [1896] 2 Ch. 428; Miller & Aldworth v. Sharp, [1899] 1 Ch. 622; Rawlinson v. Ames, [1925] Ch. 96.

193.—Bill for a specific performance of an agreement for the sale of lands & chattels. Plea, Stat. Frauds. Deft., during the negotiation, delivered a particular of the whole signed by him. The agreement was afterwards made at a less price. Both parties gave instructions to an attorney to prepare the conveyance; & deft. delivered to him the particular, as instructions for the deed, which was prepared. This is not sufficient to take it out of the statute, & being void as to the lands, is void *in toto*.

The instructing an attorney to draw conveyances, & his doing so, is no part performance. To take the case out of the statute, there must be a part execution of the substance of the agreement itself (MACDONALD, C.B.).—COOKE v. TOMBS (1794), 2 Anst. 420; 145 E. R. 922.

Annotations:—**Foll.** Lea v. Barber (1794), 2 Anst. 425, n. **Mentd.** Wood v. Benson (1831), 2 Gr. & J. 94.

194.—Act of part performance, avoiding Stat. Frauds, as repairs, etc., must be in its nature almost necessarily done in pursuance of the contract alleged.—*Ex p.* HOOPER (1815), as reported in 19 Ves. 477; 34 E. R. 593, L. C.

195.—There is no conflict of judicial opinion & no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon & to no other. It must be sufficient of itself & without any other information or evidence to satisfy a ct. from the circumstances it has created & the relations it has formed that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained & enforced (LORD O'HAGAN).

—MADDISON v. ALDERSON (1883), 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 47 J. P. 821; 31 W. R. 820, II. L.; *affg.* S. C. *sub nom.* ALDERSON v. MADDISON (1881), 7 Q. B. D. 174, C. A.

Annotations:—**Consd.** Humphreys v. Green (1882), 10 Q. B. D. 148; Blackburn v. Blackburn, No. 1 (1891), 36 Sol. Jo. 27. **Apld.** Hodson v. Heuland, [1896] 2 Ch. 428. **Consd.** Miller & Aldworth v. Sharp, [1899] 1 Ch. 622; Chaproniere v. Lambert, [1917] 2 Ch. 356. **Apld.** Rawlinson v. Ames, [1925] Ch. 96. **Refd.** A. G. v. Hubbuck (1884), 13 Q. B. D. 275; *Re* Boetham, *Ex p.* Broderick (1886), 18 Q. B. D. 380; Miles v. New Zealand Alford Estate Co. (1886), 32 Ch. D. 266; McManus v. Cooke (1887), 35 Ch. D. 681; Gillman, Spencer v. Carbutt (1889), 61 L. T. 281; Lucas v. Dixon (1889), 22 Q. B. D. 357; Davis v. Leicester Corp., [1894] 2 Ch. 208; Licones Insee. Corp'n. & Guarantee Fund v. Lawson (1896), 12 T. L. R. 501; Coleman v. North (1898), 47 W. R. 57; Isaacs v. Evans (1899), 16 T. L. R. 113; *Re* Fickus, Farnia v. Fickus, [1900] 1 Ch. 331; Thursby v. Eccles (1900), 70 L. J. Q. B. 91; *Re* Holland, Gregg v. Holland, [1902] 2 Ch. 360; Banbury v. Bank of Montreal, [1918] A. C. 626; Morris v. Baron, [1918] A. C. 1; *Re* A Bankruptcy Notice, [1924] 2 Ch. 76; Houghton v. Nothard, Lowe & Wills (1927), 44 T. L. R. 76.

196. Must not be merely ancillary to agreement.—I do not recollect any case where an act merely introductory or ancillary to the agreement, though attended with expense, has been held a part performance (LORD THURLOW, C.).—WHITBREAD v. BROCKHURST (1784), 1 Bro. C. C. 401; 28 E. R. 1205, L. C.

Annotation:—**Refd.** Cooth v. Jackson (1801), 6 Ves. 12.

197. Terms of agreement must be certain.—Specific performance of a parol agreement for the sale of an estate, proved by one witness, confirmed by part performance, by taking possession, & acts of ownership, refused; there being some inconsistencies in the testimony of the witness, which, with other circumstances, placed the terms of the contract in doubt.—REYNOLDS v. WARING (1831), 1 You 346; 159 E. R. 1026.

198. Ground of relief—Fraud of vendor.—(1) Sale of land by auction is within Stat. Frauds; & the name of the vendee being put down by the auctioneer is not sufficient.

(2) Payment of the auction duty is not a part performance taking an agreement out of Stat. Frauds.

(3) The ground of the doctrine of part performance is fraud.

In general the party seeking the performance must show a performance on his side; as a reason for the interference of the court in his favour; for the ground, upon which the court acts, is fraud, in refusing to perform after performance by the other party (GILANT, M.R.).—BUCKMASTER v. HARROP (1802), 7 Ves. 341; 32 E. R. 139; *on appeal* (1807), 13 Ves. 456, L. C.

Annotations:—*As to* (1) **Refd.** Mason v. Armitage (1806), 13 Ves. 25; Bell v. Balls, [1897] 1 Ch. 663. *As to* (3) **Refd.** Broome v. Monck (1805), 10 Ves. 597; Phillips v. Alderton (1875), 24 W. R. 8.

Part performance generally.—See CONTRACT, Vol. XII., pp. 169–171, Nos. 1233–1255.

PART I. SECT. 9, SUB-SECT. 2.—A. (a).

1911. General rule.—MAHON v. McCULLY (1868), 7 N. S. II. 323.—CAN.

1911i.—When a contract, resting on parol, or partly on parol, has been partly performed by the purchaser, the vendor will be precluded from setting up Stat. Frauds.—MOSES v. FRENCH (1914), 43 N. B. R. 1.—CAN.

1921. Must be in pursuance of the agreement.—Where acts of part performance are relied upon to take an agreement for the sale & purchase of land out of Stat. Frauds, the acts, to avail the party setting up the contract, must be referable to the con-

tract, & they must be done with the knowledge & consent or concurrence of the party sought to be charged.—BECK v. DUNCAN (Sask.) (1912), 22 W. L. R. 878; 8 D. L. R. 618; 3 W. W. R. 613.—CAN.

1921i.—ADOLPH v. GOOD (1912), 20 W. L. R. 401; 1 W. W. R. 936; 5 Sask. L. R. 106; 1 D. L. R. 750.—CAN.

196i. Must not be merely ancillary to agreement.—To constitute part performance the act relied on must be such a part execution of the contract as to change the relative positions of the parties with respect to the subject-matter, that is to say, the land itself; it must affect the possession, use or

tenure of the land, & not be merely introductory or ancillary to the contract.—COONEY v. BURNS, [1922] V. L. R. 403.—AUS.

1981. Ground of relief—Fraud of vendor.—The ground on which cts. of equity have enforced parol agreements on the ground of part performance is the comprehensive power vested in them to prevent fraud. If the part performance be such that the parties can easily be replaced in the same position as if the agreement were never made, the ct. will not interfere with the express provision of Stat. Frauds. In any case, a final & concluded agreement must be conclusively proved.—MORLEY v. BOLAN (1852), 3 Ndd. L. R. 277.—NFLD.

Sect. 9.—Evidence of the contract: Sub-sect. 2, A (b) & (c) i. & ii.]

(b) To What Contracts Applicable.

See, generally, CONTRACT, Vol. XII., p. 171.

199. Whether confined to contracts for sale of land.]—The doctrine as to part performance, whereby a contract not enforceable by an action at law, owing to Stat. Frauds, s. 4, was rendered enforceable in equity, was confined to suits as to the sale of interests in land, & its operation has not been extended by Jud. Act, 1873 (c. 66).—*BRITAIN v. ROSSITER* (1879), 11 Q. B. D. 123; 48 L. J. Q. B. 362; 40 L. T. 240; 43 J. P. 332; 27 W. R. 482, C. A.

Annotations:—Consd. McManus v. Cooke (1887), 35 Ch. D. 681. *Refd. Maddison v. Alderson* (1883), 8 App. Cas. 467. *Mentd. Re Whitehead, Ex p. Whitehead* (1885), 14 Q. B. D. 419; *Re Roberts, Evans v. Thomas* (1887), 57 L. T. 79; *British South African Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Richardson v. Methley School Board*, [1893] 3 Ch. 510; *Isaacs v. Evans* (1899), 26 T. L. R. 113; *Dollar v. Parkinson* (1901), 84 L. T. 470; *Smith v. Gold Coast & Ashanti Explorers*, [1903] 1 K. B. 285; *Turner v. Melladew* (1903), 19 T. L. R. 273; *Elliott v. Roberts* (1912), 107 L. T. 18; *Morris v. Baron*, [1918] A. C. 1; *Cavme v. Allan, Jones* (1919), 35 T. L. R. 453; *Re A Bankruptcy Notice*, [1924] 2 Ch. 76; *Rawlinson v. Ames*, [1925] Ch. 96.

200. —.]—The equitable doctrine of part performance has not been confined to contracts for the acquisition of an interest in land.—*McMANUS v. COOKE* (1887), 35 Ch. D. 681; 56 L. J. Ch. 662; 56 L. T. 900; 51 J. P. 708; 35 W. R. 754; 3 T. L. R. 622.

Annotations:—Refd. Turner v. Melladew (1903), 19 T. L. R. 273; *Dickinson v. Barrow*, [1904] 2 Ch. 339. *Mentd. Wimbledon & Putney Common Conservators v. Nicol* (1894), 10 T. L. R. 247; *Elliott v. Roberts* (1912), 107 L. T. 18; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

201. Contract by unauthorised agent—Remedy of person injured by representations.]—Where a person assumes, without authority, to act as agent for the sale of real estate, & the contract is merely verbal, the person injured by relying on his representations has no remedy in equity against him for damages on the ground of part performance; & there is nothing in the Judicature Acts to alter this rule.—*WARR v. JONES* (1876), 24 W. R. 695.

202. Contracts by corporations.]—J. entered into an agreement with W., who purported to act on behalf of a co. about to be formed, to sell certain property to the co. The co. was formed shortly afterwards with a memorandum & arts. of assocn. containing provisions for the adoption of the agreement by the directors on behalf of the co. with or without modification. At meetings of the directors at which J. was present, resolutions were passed adopting the agreement accepting an offer of J. to take payment of part of the purchase-money in debentures instead of in cash, & directing that the seal of the co. should be affixed to an assignment by J. to the co. of leasehold property comprised in the agreement, & to debentures to be issued to J. The assignment was executed by J. & sealed by the co.; the debentures were issued to him, & the co. took possession of the leaseholds & carried on their business thereon. The co. was afterwards wound up, & the liquidator took from J. an assignment of other property comprised in the agreement:—*Held*: there was evidence that a contract was entered into by the co. with J. to

the effect of the previous agreement as subsequently modified by the acceptance of debentures instead of cash.

The rule of equity that part performance will take a case out of Stat. Frauds applies to an incorporated co., & that an incorporated co. which comes within that doctrine of part performance is just as much bound by it as if it were an individual (*KAY, J.*).—*HOWARD v. PATENT IVORY MANUFACTURING CO.*, *Re PATENT IVORY MANUFACTURING CO.* (1888), 38 Ch. D. 156; 57 L. J. Ch. 878; 58 L. T. 395; 36 W. R. 801.

Annotations:—Refd. Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146. *Mentd. Re Pyle Works* (1890), 44 Ch. D. 534; *Page v. International Agency & Industrial Trust* (1893), 62 L. J. Ch. 610; *Newton v. Anglo Australian Investment Co.*, *Debenture Holders*, [1895] A. C. 244; *Seligman v. Prince*, [1895] 2 Ch. 617; *Re Russian Spratts Patent*, *Johnson v. Russian Spratts Patent*, [1898] 2 Ch. 149; *Barker v. Stickney*, [1918] 2 K. B. 356.

—.]—*See, also, CORPORATIONS, Vol. XIII.*, pp. 384, 385, 390, 392, 393, 394, 397, Nos. 1127, 1163, 1171, 1176, 1206, 1209.

Creation of easements.]—See EASEMENTS, Vol. XIX., p. 30, Nos. 138, 139.

Agreements for leases.]—See LANDLORD & TENANT, Vol. XXX., pp. 381–387, Nos. 450–513.

Assignments of leases.]—See LANDLORD & TENANT, Vol. XXXI., p. 395, Nos. 5414, 5415.

(c) What Constitutes Part Performance.

i. Payment of Money.

203. Whether act of part performance.]—Contract for sale of land by parol is void since Stat. Frauds, although there be a considerable part payment.—*ANON.* (1680), 1 Freem. K. B. 486; 89 E. R. 365.

204. —.]—A. agreed with B. to make him a lease for twenty-one years of lands, rendering rent, B. paying A. £150 fine. B. paid £100 in part to A.'s agent, which A. knew of, & ordered his agent to prepare the lease; but before it was executed, A. repented & refused to grant the lease. B. having paid £100 earnest, exhibited his bill for a specific performance.

The payment of this £100 is not such a performance of the agreement on one part as to decree an execution on the others; for Stat. Frauds makes one sort of contracts, viz. personal contracts, good if any money is paid in earnest. Now that statute says, that no agreement concerning lands shall be good except it is reduced into writing; & therefore a parol agreement, as it is in this case, cannot be good within the statute by giving money in earnest; for there must be something more than a bare payment of money on the one part to induce the ct. to decree a performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build or letting the other into possession, etc., in such case where the agreement has proceeded so far on one part, the statute never intended to restrain this ct. from decreeing a performance of the other (*LORD COWPER, C.*).—*PENGALL (LORD) v. ROSS* (1709), 2 Eq. Cas. Abr. 46; 22 E. R. 40, L. C.

Annotation:—Consd. Maddison v. Alderson (1883), 8 App. Cas. 467.

—.]—*CROMBIE v. CROMBIE* (1901), 3 S. A. L. R. 147.—*AUS.*

CANADA CO. (1856), 5 Gr. 558.—*CAN.*

203 iii. —.]—WILDE v. WILDE (1873), 20 Gr. 521.—*CAN.*

203 iv. —.]—Payment of money is not part performance to take an agreement touching lands out of Stat. Frauds.—CLINAN v. COOKE (1802), 1 Sch. & Lef. 22, 40, 41.—*IR.*

PART I. SECT. 9, SUB-SECT. 2.—A. (b).

p. Entire contract.]—TAYLOR v. KNOWLES (1870), 30 U. C. R. 200.—*CAN.*

PART I. SECT. 9, SUB-SECT. 2.—A. (c) i.

203 i. Whether act of part perform-

203 ii. —.]—Payment of the whole purchase money, in pursuance of a parol contract for sale, will not operate as part performance to take the case out of Stat. Frauds, any more than payment of a portion.—JOHNSON v.

205. —.]—A. agrees with B. for the purchase of nine houses which were in mtge. to J. S. & pays him a guinea in earnest. B. writes a note to J. S. & desires him to deliver up the writings, he having disposed of them, which J. S. refused unless all the mtge. money was paid him down, & afterwards purchased them himself. On a bill bought by A. for a specific execution of the agreement:—*Held*: neither the guinea paid down nor the note which was only evidence of assent but did not ascertain the terms of the agreement were sufficient to take it out of Stat. Frauds.—*SEAGOOD v. MEALE & LEONARD* (1721), 2 Eq. Cas. Abr. 49; *Prec. Ch.* 560; 1 *Str.* 426; 22 *E. R.* 43, *L. C.*

Annotations:—*Refd.* *Maddison v. Alderson* (1883), 8 App. Cas. 467. *Mentd.* *Barkworth v. Young* (1856), 4 *Drow.* 1.

206. —.]—*CHILD v. COMBER*, No. 241, *post*.

207. —.]—Paying of money has always been held in this ct. as a part performance (*LORD HARDWICKE, C.*).—*LACON v. MERTINS* (1743), 3 *Atk.* 1; 26 *E. R.* 803, *L. C.*

Annotations:—*Refd.* *Perchard v. Benyon* (1786), 1 *Cox, Eq. Cas.* 214; *Buckmaster v. Harpor* (1802), 7 *Ves.* 341; *Wythes v. Lee* (1855), 25 *L. J. Ch.* 177; *Maddison v. Alderson* (1883), 8 App. Cas. 467. *Mentd.* *Broome v. Monck* (1805), 10 *Ves.* 597; *Bigg v. Strong* (1857), 6 *W. R.* 173.

208. — **Small part of purchase-money.**—*ANON.* (1667), *Freem. Ch.* 128; 22 *E. R.* 1104.

209. — **Tender of balance.**—*VOILL v. SMITH* (1669), 3 *Rep. Ch.* 28; 21 *E. R.* 719.

210. —.]—Though payment of the substantial part of the purchase-money will take an agreement as to land out of Stat. Frauds on the ground of part performance, payment of a small part, as 5 guineas, the purchase-money being 100, will not do.—*MAIN v. MELBOURN* (1799), 4 *Ves.* 720; 31 *E. R.* 372, *L. C.*

211. — **Substantial part of purchase-money.**—*MAIN v. MELBOURN*, No. 210, *ante*.

212. —.]—Payment of a substantial part of the purchase-money of real estate will not take a parol contract for purchase out of Stat. Frauds.—*WATT v. EVANS* (1834), 4 *Y. & C. Ex.* App. 579; 160 *E. R.* 1141.

213. — **Share of deposit paid by joint purchaser.**—*AVELING v. KNIFE* (1815), 19 *Ves.* 441; 34 *E. R.* 580.

Annotations:—*Refd.* *Harrison v. Barton* (1860), 1 *John. & H.* 287. *Mentd.* *Robinson v. Preston* (1858), 4 *K. & J.* 505; *Re Rowe, Jacobs v. Hind* (1889), 60 *L. T.* 596; *National Soc. for the Distribution of Electricity by Secondary Generators v. Gibbs*, [1899] 2 *Ch.* 289.

214. —.]—Where an act, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, such act is not, in general, admitted as an act of part performance to take the case out of Stat. Frauds; as, for example, the payment of purchase-money (*WIGRAM, V.-C.*).—*DALE v. HAMILTON* (1846), 5 *Hare*, 369; 16 *L. J. Ch.* 126; 11 *Jur.* 163; 67 *E. R.* 955; *on appeal* (1847), 2 *Ph.* 266, *L. C.*

Annotations:—*Apld.* *Re De Nicols, De Nicols v. Curlier*, [1900] 2 *Ch.* 410. *Refd.* *Kay v. Johnston* (1856), 21 *Beav.* 536; *Lincoln v. Wright* (1859), 4 *De G. & J.* 16; *Smith v. Matthews* (1861), 3 *De G. F. & J.* 139; *Canning v. Catling* (1864), 4 *New Rep.* 259; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *McManus v. Cooke* (1887), 35 *Ch. D.* 681; *Gray v. Smith* (1889), 43 *Ch. D.* 208; *Rawlinson v. Ames*, [1925] *Ch.* 96.

215. —.]—A parol contract for the sale of land, though all the money be paid, without part performance, for the payment of the money is

no part performance, cannot be carried into effect if the person sued chooses to avail himself of the defect (*KNIGHT BRUCE, L.J.*).—*HUGHES v. MORGAN* (1852), 2 *De G. M. & G.* 349; 21 *L. J. Ch.* 761; 19 *L. T. O. S.* 210; 16 *Jur.* 603; 42 *E. R.* 907, *L. J.J.*

Annotations:—*Refd.* *Maddison v. Alderson* (1883), 8 App. Cas. 467. *Mentd.* *McAlmont v. Rankin* (1852), 2 *De G. M. & G.* 403; *Duncan v. Tindall* (1853), 13 *C. B.* 258; *Parr v. Applebee* (1855), 24 *L. J. Ch.* 767; *Liverpool Borough Bank v. Turner* (1860), 1 *John. & H.* 159; *Stapleton v. Haymen* (1861), 9 *L. T.* 655.

216. —.]—Pltf. agreed to purchase a farm belonging to his brother J. upon the representation that it was worth £2,000 & that the rental was £70 a year; but having subsequently discovered that the rental was only £15 & that the farm was not worth £2,000, he insisted upon repudiating the contract. J. thereupon verbally promised that if pltf. would complete the purchase, he would devise to pltf. & his son certain other lands which belonged to him, & would also consent that the purchase-money should be reduced to £1,800. Pltf. alleged that he completed the purchase relying upon that verbal promise. J. made a will in favour of pltf. & his son as agreed, but revoked it by a subsequent will. In an action against the estate of J. to recover damages for breach of the alleged verbal agreement:—*Held*: the part performance relied on by pltf., namely, the completion of the purchase, being referable not to any agreement to refrain from repudiating the previous contract of purchase, but to that previous contract itself, did not constitute such a part performance of the alleged verbal agreement as to exclude the operation of Stat. Frauds.—*HUMPHREYS v. GREEN* (1882), 10 *Q. B. D.* 148; 52 *L. J. Q. B.* 140; 48 *L. T.* 60; 47 *J. P.* 244, *C. A.*

Annotations:—*Refd.* *Miller & Aldworth v. Sharp*, [1899] 1 *Ch.* 622; *Champroniere v. Lambert* (1917), 61 *Sol. Jo.* 592.

217. Necessity for proof of reference to particular land sold & to particular interest in the land.—*HUMPHREYS v. GREEN*, No. 216, *ante*.

ii. Possession.

218. Delivery of possession.—A parol agreement for a purchase & possession delivered, decreed to be performed against a subsequent purchaser with notice, who had a conveyance & paid his money.—*BUTCHER v. STAPELY* (1685), 1 *Vern.* 363; 23 *E. R.* 524, *L. C.*

Annotations:—*Refd.* *Floyd v. Buckland* (1703), 2 *Freem. Ch.* 268; *Maddison v. Alderson* (1883), 8 App. Cas. 467.

219. —.]—A public survey is held for sale of an estate, & A. offering £1,250 for it, it is accepted & agreed to, & conveyances ordered to be got ready, & A. is put into possession; but disputes arising about settling the conveyances, A. gets an assignment of a mtge. to which the estate is subject, & antedates it, & refuses to go on with the purchase; though the agreement was only parol, yet on the circumstances of this case, A. was decreed to proceed in the purchase.—*PYKE v. WILLIAMS* (1703), 2 *Vern.* 455; 23 *E. R.* 891.

220. —.]—Where, in *assumpsit*, pltf. declared that he had bargained with E. for the purchase of three houses for a certain sum; & that deft. agreed to give him £10 for his bargain, if he would permit him to be the purchaser instead of

208 i. — **Small part of purchase-money.**—*BRADY v. HARRAHY* (1861), 21 *U. C. R.* 340.—*CAN.*

PART I. SECT. 9. SUB-SECT. 2.— A. (c) ii.

218 i. *Delivery of possession.* —

MEISNER v. MEISNER (N. S.) (1905), 36 *S. C. R.* 34; 25 *C. L. T.* 101.—*CAN.*

218 ii. —.]—A. agreeing to sell his lands to B. received the consideration & put B. in possession, but did not execute a conveyance. In a suit by A. to eject B. from the land, based

on the want of a conveyance:—*Held*: part performance by way of delivery of possession & an enforceable right on B.'s part to specific performance are each good defence to the action.—*VIZAGAPATAM SUGAR DEVELOPMENT CO., LTD. v. MUTHURAMAKEDI* (1923), 1 *L. R.* 46 *Mad.* 919.—*IND.*

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pltf., & averred that he had become such purchaser, the Ct. of Common Pleas held that such declaration might be supported, although there was no written contract for the purchase of the houses between pltf. & E. as the latter allowed deft. to become the purchaser; & he was in fact let into possession of the premises. The Ct. of K. B., on a writ of error, affirmed that judgment.—*PRICE v. SEAMAN* (1825), 4 B. & C. 525; 7 Dow. & Ry. K. B. 14; 4 L. J. O. S. K. B. 3; 107 E. R. 1155; *affg. S. C. sub nom. SEAMAN v. PRICE*, 2 Bing. 437.

Annotations:—Refd. Kelly v. Webster (1852), 16 J. P. 458; *Green v. Saddington* (1857), 7 E. & B. 503.

221. —.]—Where possession has been given on the face of an agreement, the ct. will not refuse specific performance, owing to the absence of proof of certain terms of the agreement.—*WILSON v. WEST HARTLEPOOL RY. CO.* (1865), 2 De G. J. & Sm. 475; 5 New Rep. 289; 34 L. J. Ch. 241; 11 L. T. 692; 11 Jur. N. S. 124; 13 W. R. 361; 40 E. R. 459, L. J.J.

Annotations:—Consd. Hunt v. Wimbledon L. B. (1878), 4 C. P. D. 48; *Hart v. Hart* (1881), 18 Ch. D. 670; *Re Patent Ivory Manufacturing Co.*, *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156. *Refd. Prince v. Prince* (1866), 14 L. T. 43; *Re National Savings Bank Asscn.*, *Brady's Case* (1867), 15 W. R. 753; *A.-G. v. Biphosphated Guano Co.* (1879), 11 Ch. D. 327; *Melbourne Banking Corp'n. v. Brougham* (1879), 48 L. J. P. C. 12; *Teebay v. Manchester & Sheffield Ry. Co.* (1883), 52 L. J. Ch. 613; *Re Northumberland Avenue Hotel Co.*, *Sully's Case* (1885), 54 L. T. 76; *Davis v. Leicester Corp'n.*, [1894] 2 Ch. 208. *Mentd. Bateman v. Mid-Wales Ry.* (1866), L. R. 1 C. P. 499; *Hoare v. Kingsbury U. C.*, [1912] 2 Ch. 452.

222. *Entry into possession.*] — *HAWKINS v. HOLMES*, No. 181, *ante*.

223. —.]—*CLERK v. WRIGHT*, No. 149, *ante*.

224. —.]—An objection to a bill by an incorporated railway co. for specific performance of a contract for the purchase of land entered into by their agent, that it did not appear that the agent was authorised under the corporate seal, & therefore that there was no mutuality, overruled on the ground that the co. had, before the bill was filed, not only acted on the contract by entering into possession of the land, but actually made a railroad over it.

There is only one other point . . . namely, the objection that there is no mutuality in this contract, inasmuch as the agent of pltf's. was not appointed under their corporate seal, & therefore they are not bound by his acts . . . pltf's. have not only been acting on the contract by entering into possession of the property, but have actually destroyed the property enjoyed by deft. previously to the contract, by making their railway over it. If, therefore, it were necessary for deft. to file a bill against these pltf's., I have no doubt that they would be compelled specifically to perform the contract (*LORD COTTENHAM, C.*).—*LONDON &*

BIRMINGHAM RY. CO. v. WINTER (1840), Cr. & Ph. 57; 41 E. R. 410, L. C.

Annotations:—Apld. Wilson v. West Hartlepool Harbour & Ry. (1864), 34 Beav. 187. *Refd. Lindsey v. G. N. Ry.* (1853), 10 Haro. 664; *Smith v. Wheatcroft* (1878), 9 Ch. D. 223; *Hoare v. Lewisham Corp'n.* (1901), 85 L. T. 281; *Berners v. Fleming*, [1925] Ch. 264.

225. —.]—A. B. made his will, whereby he devised lands to C. D. for life, with remainders over. A. B. afterwards contracted to sell part of the lands to E. F., & the contract partly described them, & partly referred to a plan. E. F. did not pay the whole purchase-money, but entered into possession of the land, & then became bkpt. The Ct. of Review made an order in the bkpty. declaring that A. B. had a lien for his unpaid purchase-money, & directed a sale. A. B. became the purchaser for a less sum than was due to him, & proved against E. F.'s estate for the difference. A. B. entered into possession, & so continued until his death. The plan had never been stamped, & was lost:—*Held*: the devise of so much of the lands as was contracted to be sold was revoked.—*ANDREW v. ANDREW* (1856), 8 De G. M. & G. 336; 25 L. J. Ch. 779; 27 L. T. O. S. 161; 2 Jur. N. S. 719; 4 W. R. 520; 44 E. R. 419, L. J.J.

Annotation:—Mentd. Patch v. Shore (1862), 11 W. R. 142.

226. —.]—The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent Stat. Frauds being set up as a bar to the proof of the parol contract (*JESSEL, M.R.*).—*UNGLEY v. UNGLEY* (1877), 5 Ch. D. 887; 46 L. J. Ch. 854; 37 L. T. 52; 41 J. P. 628; 25 W. R. 733, C. A.

Annotations:—Distd. Hunt v. Wimbledon L. B. (1878), 4 C. P. D. 48. *Fold. Sharman v. Sharman* (1892), 67 L. T. 834. *Refd. Alderson v. Maddison* (1881), 7 Q. B. D. 174. *Mentd. Goddard v. O'Brien* (1882), *De Colyar's County Court Cases*, 110.

227. —.]—The doctrine of part performance is founded on a change of possession, which is assented to by that party to the contract who is sought to be charged. It cannot be alleged by him that he is a trespasser. You refer his possession, if you can, to a legal origin, & you can do that by implying a contract. But you cannot make a contract by the act of a third party, who is no party to the contract itself. For instance, if A. & B. contract that A. shall sell an estate to R., & B. takes possession of it, that is evidence against B. of a contract by him to buy the estate, for otherwise he would be a wrongdoer (*JESSEL, M.R.*).—*Re FOSTER, Ex p. FOSTER* (1883), 22 Ch. D. 797; 52 L. J. Ch. 577; 48 L. T. 497; 31 W. R. 774, C. A.

228. —.]—H. & R. were respectively the nephew & niece of Mrs. A. H. was negotiating for a lease of a London house at a long term & a low rent, the transaction involving him to the extent of about £3,000. Mrs. A. hearing of this, offered him the amount, telling him that she intended to

222 i. *Entry into possession.*]—*FARQUHARSON v. WILLIAMSON* (1850), 1 Gr. 93.—*CAN.*

222 ii. —.]—*O'NEAL v. McMAHON* (1851), 2 Gr. 145.—*CAN.*

222 iii. —.]—*LAWRENCE v. ERRINGTON* (1874), 21 Gr. 261.—*CAN.*

222 iv. —.]—Pltf's. agreed to sell certain premises to defts., who signed a written contract agreeing to purchase. The writing omitted any mention of the names of the vendors. Possession of the property was taken by defts. through their agent, who carried on business therein for two days in their names:—*Held*: a sufficient part performance to let in parol evidence as to who were the vendors.—*CAMERON v.*

SPINKING & TEED (1877), 25 Gr. 116.—*CAN.*

222 v. —.]—*McDOUGALL v. CAIRNS* (1896), 2 Terr. L. R. 219.—*CAN.*

222 vi. —.]—*McLAUGHLIN v. MAYHEW* (1903), 23 C. L. T. 277; 6 O. L. R. 174; 2 O. W. R. 590.—*CAN.*

222 vii. —.]—A written offer to sell land on certain terms, accompanied by an intimation that, if the purchaser takes possession the vendor would treat that act as an acceptance of the offer, & the subsequent taking of such possession, without further communication with the vendor, together constitute a binding contract of purchase & sale of the land, which is taken out of Stat. Frauds by that act of taking

possession, such act being in itself a part performance of the contract, as well as an essential in the making of it.—*CARR v. CANADIAN NORTHERN RY. CO.* (1907), 17 Man. L. R. 178.—*CAN.*

222 viii. —.]—*WILSON v. CAMERON* (1914), 5 O. W. N. 787; 30 O. L. R. 486.—*CAN.*

222 ix. —.]—*DOUGLAS v. DOUGLAS* (1914), 26 W. L. R. 556; 5 W. W. R. 962; 15 D. L. R. 598; 24 Man. L. R. 420.—*CAN.*

q. — *Plea of entry as tenant.*]—*GRANT v. BROWN* (1867), 13 Gr. 256.—*CAN.*

r. — *Without knowledge or consent of vendor.*]—*VANDERWOORT v. HALL* (Man.) (1909), 9 W. L. R. 702.—*CAN.*

give the house to R. & her husband. She then verbally agreed with H. to purchase the house for £3,000, which was a price at which he would scarcely have sold outside the family. Shortly afterwards Mrs. A., in the presence of H. & the husband of R., said that she was giving the house to R. & her husband, & H. forthwith entered into a binding contract to take the lease. R. & her husband, with the knowledge of Mrs. A. & H., then gave up their country house & went into possession of the London house, thereby incurring considerable expenditure. The lease had not been granted, or the £3,000 paid, when Mrs. A. died:—*Held*: the contract was not only for a sale from H. to Mrs. A. of the London house, under which she would have been the owner of the house, but was a contract for the purchase of it for the benefit of R. & her husband, & although R. & her husband could not themselves enforce the contract, H. was entitled to insist on its being carried out for their benefit, & the entering into possession of the house by R. & her husband was a part performance of the contract which took the case out of Stat. Frauds.—*HOHLER v. ASTON*, [1920] 2 Ch. 420; 90 L. J. Ch. 78; 124 L. T. 233; 64 Sol. Jo. 684.

229. Continuance in possession.—By tenant after agreement to purchase.—Parol agreement not enforced upon the ground of part performance; when the act is equivocal; & easily admits compensation; as, by a tenant, rebuilding a party wall.

A tenant's possession & cultivation of the land would not sustain a parol agreement to purchase.—*FRAME v. DAWSON* (1807), 14 Ves. 386; 33 E. R. 569.

Annotations:—*Reid*, *Parker v. Smith* (1845), 1 Coll. 608; *Williams v. Evans* (1875), L. R. 19 Eq. 547; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Hodson v. Heuland*, [1896] 2 Ch. 428; *Dickinson v. Barrow*, [1904] 2 Ch. 339.

230. — By former owner offer after conveyance.—A mtgee., with power of sale, of real estate informed L., the mtgor., that he should sell it for £220, unless more were offered. It was thereupon verbally agreed between L. & W. that W. should buy it on L.'s behalf for £230, & have a lien on it for that sum; that L. should pay interest & continue to occupy the part he then occupied, & that W. should receive the rents of the rest to reduce the principal. An offer by W. to purchase for £230 was then sent by L.'s agent to the mtgee., who accepted it, & under his power of sale conveyed to W.'s infant daughter by W.'s direction. L. continued in occupation of the part he was to occupy, & paid interest, W. receiving the rents of the rest. This continued for about ten months, when W. died. After his death, the daughter, by her guardian, brought ejectment, claiming to be absolute owner:—*Held*: Stat. Frauds was no defence to a bill by L. to enforce the agreement.

L.'s continuance in possession after the conveyance, being referable only to the verbal agreement, amounted to part performance of that agreement, & excluded the operation of the statute (*KNIGHT*

BRUCE, L.J.).—*LINCOLN v. WRIGHT* (1859), 4 De G. & J. 16; 28 L. J. Ch. 705; 33 L. T. O. S. 35; 5 Jur. N. S. 1142; 7 W. R. 350; 45 E. R. 6, L. J.J.

Annotations:—*Consd. Re Marlborough, Davis v. Whitehead*, [1894] 2 Ch. 133. *Reid*, *Douglas v. Culverwell* (1862), 4 De G. F. & J. 20; *Haigh v. Kaye* (1872), 7 Ch. App. 469; *Booth v. Turle* (1873), L. R. 16 Eq. 182; *James v. Smith*, [1891] 1 Ch. 384; *De La Rochefoucauld v. Boustead* (1896), 75 L. T. 502; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196.

231. — Purchase-money paid & retained.—A wife, unknown to her husband, requested her father to sell a field, to be paid for out of her savings. The father at first refused, but he received the money, & shortly afterward put the husband into possession. For ten years the money was retained by the father without payment of interest, & the field by the husband without payment of rent. The father then attempted to eject the husband, who, being made acquainted with the circumstances, insisted on retaining the field:—*Held*: the father was bound to convey it to the husband.

I think that this must be treated as a contract for purchase between deft. & his daughter, which her husband, when he knew of it, was entitled to adopt as his own, & having been in possession for ten years, & deft. having during that period retained the purchase-money, I think there is such a contract as this ct. will specifically perform, & that there must be a decree for a conveyance of the field to plff. (*ROMILLY, M.R.*).—*MILLARD v. HARVEY* (1864), 34 Beav. 237; 11 L. T. 360; 10 Jur. N. S. 1167; 13 W. R. 125; 55 E. R. 626.

232. What amounts to act of possession.—Purchaser requesting vendor to give notice to quit to tenants.—(1) Stat. Frauds may be satisfied as completely by a note or memorandum, signed by an agent, of the terms contained in a verbal contract, as by a note or memorandum signed by the principal himself, provided the agent had authority to sign the particular note or memorandum; & the fact that the agent was not authorised or intended to bind his principal by a contract is immaterial. T. verbally agreed with C. for the purchase of land for £700, & paid a deposit to & obtained a receipt therefor from G., but did not sign any document himself. G. at the time was acting for D., who was the owner of the property & the undisclosed principal, but afterwards alleged that he had agreed to buy the land from D. for £600 & that he was contracting with T. on his own account & sub-selling to him at an increased price. G. having commenced an action against D. for specific performance of the alleged agreement between them, X. & co., the solrs. for D., being desirous of obtaining a proof of T.'s evidence in that action, wrote to Y. & co., the solrs. for T., asking for a short statement from their client, T., as to what had occurred between G. & T. Y. & co. returned a statement by T. as to the verbal agreement with G., but this was considered insufficient. X. & co. then wrote to Y. & co. asking for replies to certain questions to be answered by T., & Y.

229 i. Continuance in possession.—By tenant after agreement to purchase.—Continued possession by a tenant, coupled with acts inconsistent with his previous tenancy, is sufficient part performance to let in parol evidence of a contract of sale.—*BUTLER v. CHURCH* (1871), 18 Gr. 190.—*CAN.*

229 ii. ——*Where a person came into possession of real estate as tenant, & it was shown unequivocally, by part payment of the purchase money evidenced by the receipt in terms therefor, that his tenancy was*

afterwards relinquished, & that his possession, being changed in character by parol contract to purchase, was continued as that of a vendee:—Held: the possession thus changed was such part performance as took the contract for sale out of the Stat. Frauds.—*MCGEE v. KANE* (1885), 9 O. R. 475.—*CAN.*

229 iii. ——*By Barnes v. STAFFORD* (1876), 6 Nfld. L. R. 113.—*NFLD.*

t. — By insolvent debtor for whose benefit purchase made.—*ROBERTSON*

v. SMITH, OGDEN v. ROBERTSON (1874) 21 Gr. 303.—*CAN.*

a. What amounts to act of possession.—Staking out foundations of house.—Possession is part performance of a contract for the sale & purchase of land both by & against a stranger & the owner. On negotiations for the purchase of land the agent of plff., vendor, told deft., purchaser, that the lot was his. Deft. went on & set in the ground a number of stakes to mark out the foundation of a proposed house, & then changed his mind & refused to

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& co. replied, in a letter signed by them, saying that they enclosed the questions with the answers of T., which were made but not signed by him. The statement first sent, the answers to the questions, & the two letters from Y. & co. contained materials sufficient to constitute a note or memorandum of the contract within Stat. Frauds, s. 4. The action of *G. v. D.* having been dismissed, D. brought an action against T. for specific performance of T.'s contract to buy the land:—*Held*: Y. & co. were acting in the matter as agents for T.; Y. & co. had authority to sign the particular note or memorandum on behalf of T.; & although Y. & co. were not authorised & did not intend to bind T. by any contract, there was a sufficient note or memorandum to satisfy Stat. Frauds, s. 4.

(2) During the negotiations & after the completion of arrangements for the conveyance of the land to T., his solrs., Y. & co., asked X. & co., the solrs. of D., to get rid of two weekly tenants who were in possession. X. & co. accordingly gave notice to the tenants who gave up possession:—*Held*: this was an act of part performance as unequivocally referring to the contract as if T. had himself taken possession, & was sufficient in itself to take the case out of the statute.—*DANIELS v. TREFUSIS*, [1914] 1 Ch. 788; 83 L. J. Ch. 579; 109 L. T. 922; 58 Sol. Jo. 271.

Annotations:—As to (1) Apld. Grindell v. Bass, [1920] 2 Ch. 487. *Refd. North v. Loomes*, [1919] 1 Ch. 378; *Thirkell v. Cambi*, [1919] 2 K. B. 590.

iii. Incurring Expenditure.

233. Whether act of part performance—Expenditure on subject-matter of sale.]—SOUTHWELL v. NICHOLAS & ABDY (1732), 1 Madd. 9, n.; 56 E. R. 4.

Annotation:—Refd. Falcke v. Gray (1859), 4 Drew. 651.

234. ———.]—To maintain a contract on the ground that it is taken out of Stat. Frauds by part performance, the ct. will require it to be shown that the party seeking relief has expended money or otherwise acted in reliance on & in execution of the agreement, & that non-performance would amount to a fraud upon him.—*PHILLIPS v. ALDERTON* (1875), 24 W. R. 8.

235. ———.]—Procuring release of incumbrancer.]—Agreement by parol that upon pltf.'s procuring a release of right from a stranger, deft. would convey. Pltf. procures the release by paying a valuable consideration. This is not a part performance, & Stat. Frauds may be pleaded to a bill for specific performance of such an agreement.—*O'REILLY v. THOMPSON* (1791), 2 Cox, Eq. Cas. 271; 30 E. R. 126.

Annotations:—Consd. Maddison v. Alderson (1883), 8 App. Cas. 467. *Refd. Parker v. Smith* (1845), 1 Coll. 608; *Williams v. Evans* (1875), 44 L. J. Ch. 319.

carry out the purchase:—*Held*: what he had done constituted such a taking of possession as to constitute part performance, & pltf. was entitled to the usual judgment for specific performance.—*BODWELL v. MCNIVEN* (1902), 23 C. L. T. 107; 5 O. L. R. 332; 1 O. W. R. 841.—*CAN.*

PART I. SECT. 9, SUB-SECT. 2.— A. (c) iii.

b. Whether act of part performance—Preparation of transfer of license on sale of hotel premises.]—BURNS v. COONEY, [1912] V. L. R. 541.—*AUS.*

c. ———.]—Improvements by tenant after agreement for sale.]—Where a person already in possession of property contracts with the agent of the proprietor for the purchase of it, &

it was the interest of both parties that the purchaser should go on making improvements, & he did so, with the knowledge of the agent, without objection on his part, the improvements are such an acting on the contract as will take the case out of Stat. Frauds.—*JENNINGS v. ROBERTSON* (1852), 3 Gr. 513.—*CAN.*

d. ———.]—Without knowledge of vendor.]—MCINNIS FARMS, LTD. v. MCKENZIE (1913), 23 W. L. R. 863; 12 D. L. R. 100; 4 W. W. R. 205; 23 Man. L. R. 120.—*CAN.*

PART I. SECT. 9, SUB-SECT. 2.— A. (c) iv.

2391. Acts of ownership on land.]—ACTON TANNING CO. v. TORONTO

236. ———.]—Payment of auction duty.]—BUCKMASTER v. HARROP, No. 198, *ante*.

237. ———.]—Alterations & improvements carried out by vendor—At request of purchaser.]—Deft. entered into a verbal contract with pltf. for the purchase from them of a plot of land with a house upon it, which they were to build for her. During the progress of the building she frequently visited the site, & made suggestions for material alterations & improvements which were carried out by pltf. at her request. In an action for specific performance of the contract she relied on Stat. Frauds as a defence:—*Held*: the acts done by pltf. at the request of deft. were acts of part performance taking the case out of Stat. Frauds, & the pltf. were entitled to judgment for specific performance.—*DICKINSON v. BARROW*, [1904] 2 Ch. 339; 73 L. J. Ch. 701; 91 L. T. 161.

Annotation:—Consd. Rawlinson v. Ames, [1925] Ch. 96.

iv. Other Acts.

238. Agreement by prospective purchaser to sub-let part—Effect of purchase.]—LAMAS v. BAYLY, No. 55, *ante*.

239. Acts of ownership on land.]—BORRETT v. GOMESERRA (1721), Bunn. 94; 145 E. R. 607.

240. ———.]—LONDON & BIRMINGHAM RY. CO. v. WINTER, No. 224, *ante*.

241. Preparation of conveyance.]—To a bill for specific performance, a plea that there was no agreement in writing, was overruled.

If by her answer she should deny that there was any agreement, it will then be proper to consider whether pltf. shall be admitted to give evidence of it; & here the fees paid to the counsel, the drawing of the drafts, & engrossing them, & pltf. providing his purchase-money, are as much an execution of it on his part as the laying out money on the buildings was in the other case (*LORD MACCLESFIELD, C.*).—*CHILD v. COMBER* (1723), 3 Swan. 423; 36 E. R. 934, L. C.

242. ———.]—CLERK v. WRIGHT, No. 149, *ante*.

243. ———.]—COOKE v. TOMBS, No. 193, *ante*.

244. Delivery of abstract & title deeds.]—A. agrees by parol with B. for the purchase of lands. B. delivers a rent roll, which was dated & altered in his own handwriting, & showed by the title of it that an agreement had been made between them for the sale of the estate, at twenty-one years purchase. An abstract of the title was also delivered to A. together with the deeds, in order to be compared with the rent roll. B. likewise wrote letters to several of his creditors, informing them, that he had contracted with A. for the sale of his estate, at twenty-one years purchase, & sent the tenants to treat with A. for a renewal of their leases. Notwithstanding all these circumstances, upon A.'s filing a bill for a specific execution of this agreement, B. pleaded Stat. Frauds in bar to both

SUBURBAN RY. CO. (1917), 56 S. C. R. 196; 40 D. L. R. 421; 28 Can. It. Cas. 279.—*CAN.*

e. Pulling down building & disposing of materials.]—SHORT v. GILL (1892), 13 N. S. W. (Eq.) 155; 9 N. S. W. W. N. 97.—*AUS.*

f. Staying of action relating to subject-matter of sale.]—Held: the staying of an action relating to the land in question, was a sufficient part performance to take the case out of the Stat. Frauds.—*COATES v. COATES* (1886), 14 O. R. 195.—*CAN.*

g. Acceptance of conveyance.]—HOLMWOOD v. GILLESPIE (1894), 11 Man. L. R. 186.—*CAN.*

h. Receipt of rent from tenant—

the discovery & relief; & the plea was allowed.—**WHALEY v. BAGNEL** (1765), 1 Bro. Parl. Cas. 345; 1 E. R. 611, II. L.

Annotations:—*Refd.* **Whitchurch v. Bevis** (1789), 2 Bro. C. C. 559; **Rondeau v. Wyatt** (1792), 2 Hy. Bl. 63; **Cooke v. Tombs** (1794), 2 Anst. 420; **Wills v. Stradling** (1797), 3 Ves. 378; **Buckmaster v. Harrop** (1802), 7 Ves. 341; **Maddison v. Alderson** (1883), 8 App. Cas. 467.

245. Instructions to tenants to pay rent to purchaser.]—WHALEY v. BAGNEL, No. 244, *ante*.

246. Measurement of land.]—Admeasurement not a partial performance of an agreement to exchange lands.—**PEMBROKE v. THORPE** (1740), 3 Swan. 482; 36 E. R. 939.

247. Workman carrying out improvements—Without actual authority of purchaser.]—TOFIELD v. ROBERTS (1894), 10 T. L. R. 437.

B. Sale by Order of Court.

See, now, Law of Property Act, 1925 (c. 20), s. 40 (2).

248. General rule—Statute not applicable.]—In a bill by purchaser of lands against the vendor, to carry into execution the agreement, though not in writing, nor so stated by the bill; the vendor puts in an answer admitting the agreement as stated in the bill; it takes it entirely out of the mischief; & there being no danger of perjury the court would decree it (**LORD HARDWICKE, C.**).

But the present is a judicial sale of the estate, which takes it entirely out of the statute (**LORD HARDWICKE, C.**).—**A.-G. v. DAY** (1749), 1 Ves. Sen. 218; 27 E. R. 992, L. C.

Annotations:—*Refd.* **Distd. Blagden v. Bradbear** (1806), 12 Ves. 466; **Buckmaster v. Harrop** (1802), 7 Ves. 341. *Er p. Minor* (1805), 11 Ves. 559; **Harford v. Purrier** (1816), 1 Madd. 532; **Harrocks v. Rigby** (1878), 9 Ch. D. 180.

Mentd. **Whittaker v. Whittaker** (1792), 4 Bro. C. C. 31; **A.-G. v. Davies** (1804), 9 Ves. 535; **Price v. Hathaway** (1822), 6 Madd. 304; **Giblett v. Hobson** (1834), 3 My. & K. 517; **Frank v. Mainwaring** (1839), 2 Beav. 115; **Philpott v. St. George's Hospital, St. George's Hospital v. Philpott, A.-G. v. Philpott** (1857), 3 Jur. N. S. 1269; **Bankes v. Small** (1887), 36 Ch. D. 716; **Meeking v. Meeking**, [1917] 1 Ch. 77.

249. ———.]—BLAGDEN v. BRADBPEAR, No. 172, *ante*.

250. ———.]—On sales before the master, there is no binding contract, till the master's report is confirmed; here the parties were bound by signing the agreement of sale. . . . Sales before the master are not within Stat. Frauds (**LORD COTTENHAM, C.**).—*Re GOREN, Ex p. CUTTS* (1838), 3 Mont. & A. 549; 3 Deac. 242; 7 L. J. Ch. 187; 2 Jur. 391; *sub nom. Re BRETTELL, Ex p. GOREN*, 7 L. J. Ch. 187; *revers. S. C. sub nom. Re GOREN, Ex p. BRETTELL*, 3 Deac. 111, Ct. of R.

Annotation:—*Refd.* *Re Reay* (1847), 8 L. T. O. S. 476.

Sale by auction.]—*See AUCTION & AUCTIONEERS, Vol. III., p. 7, No. 46.*

C. Admission of Sale in Pleading.

See R. S. C., Ord. 19, rr. 15–20.

251. General rule—Statute not applicable.]—Where an agreement by parol, but confessed in the answer shall be executed, though not in writing.—**HOSIER v. READ** (1724), 9 Mod. Rep. 86; 88 E. R. 332.

252. ———.]—A.-G. v. DAY, No. 248, *ante*.

253. What amounts to admission—Failure to

plead Statute of Frauds.]—Pltf. is not bound to show upon the bill that he has complied with Stat. Frauds; but the party who relies upon that statute as a defence is bound to show that it has not been complied with (**LEACH, V.-C.**).—*Rist v. HOBSON* (1824), 1 Sim. & St. 543; 2 L. J. O. S. Ch. 86; 57 E. R. 215.

Annotation:—*Refd.* **Barkworth v. Young** (1856), 4 Drew. 1.

254. ———.]—(1) The bill alleged that deft. had entered into an agreement for the purchase of a house on certain terms; & that the agreement was made out by the letters after mentioned, & that such letters were a sufficient memorandum of agreement signed by deft. Deft., by his answer, denied that the agreement in the bill mentioned, or any agreement, had been made out by the said letters; & that the letters did not amount to an agreement; & insisted that no binding agreement had been entered into by him:—*Held*: deft. had not by his answer claimed the benefit of Stat. Frauds, & was not entitled to avail himself of it.

(2) By one of the letters stated to constitute the agreement, pltf.'s agent offered deft. a house at a certain sum, but suggested that deft. had better offer to give a larger premium, & take the fixtures at a valuation. Deft. wrote in reply, that he had no objection to give £50 more of premium. Pltf.'s agent then wrote a letter to deft., stating that he had received deft.'s letter offering £50 more of premium—making £300 premium, & accepting deft.'s offer. Deft.'s solr. subsequently recognised deft.'s agreement as contained in his letter:—*Held*: pltf. had proved an agreement on the part of deft. to give £300 premium.—**SKINNER v. M'DOUALL** (1848), 2 De G. & Sm. 265; 17 L. J. Ch. 347; 11 L. T. O. S. 411; 12 Jur. 741; 61 E. R. 120.

255. ———.]—Defts., in their answer to a bill for the specific performance of an agreement to sell lands, did not claim the benefit of Stat. Frauds, although they denied the validity of the agreement *in toto*:—*Held*: as the statute was not specially pleaded, they could not resort to it as a defence to the suit.—**HEYES v. ASTLEY** (1863), 4 De G. J. & Sm. 31; 3 New Rep. 19; 9 L. T. 356; 12 W. R. 64; 46 E. R. 827, L. JJ.

Annotation:—*Refd.* **Lucas v. Dixon** (1889), 58 L. J. Q. B. 161.

256. ———.]—I did not feel the slightest difficulty in admitting parol evidence for the purpose of rectifying the written contract, & showing that the word "six" in it ought to have been written "four": nor should I, if the evidence had shown that the contract ought to be so rectified, have felt any difficulty, Stat. Frauds not having been pleaded, as indeed, by reason of the part performance, it could not be, in going on to give consequential relief in the nature of specific performance on the footing of the contract as rectified (**NORTH, J.**).—**OLLEY v. FISHER** (1886), 34 Ch. D. 367; 56 L. J. Ch. 208; 55 L. T. 807; 35 W. R. 301.

Annotations:—*Consd.* **Craddock v. Hunt**, [1923] 2 Ch. 136. *Refd.* **Conway Bridge Comrs. v. Jones** (1910), 102 L. T. 92; **Forgione v. Lewis**, [1920] 2 Ch. 326.

Effect of admitting agreement, generally.]—*See CONTRACT, Vol. XII., p. 163, Nos. 1184–1194.*

Without consent of vendor.]—VANDERWOORT v. HALL (1909), 18 Man. L. R. 682.—**CAN.**

k. Letting contract to cut hay on land sold.]—EVANS v. NORRIS (Alta.) (1912), 22 W. L. R. 818; 3 W. W. R. 532; 8 D. L. R. 652.—**CAN.**

1. Delivery of deed of assignment—Implied by allegation of assignment in pleadings.]—A statement of claim contained an allegation that pltf. had assigned & transferred to deft. his equity in certain lands:—*Held*: this allegation implied a delivery to deft. of the document assigning & trans-

ferring the equity & this delivery was sufficiently referable to the contract for the sale of the lands to permit the application of the equitable doctrine of part performance.—**CHARBONNEAU v. PAGOR** (No. 2) (Sask.), [1917] 1 W. W. R. 1164.—**CAN.**

Sect. 9.—Evidence of the contract: Sub-sect. 2, D. & E. Sect. 10: Sub-sects. 1 & 2, A. (a), (b) & (c).]

D. Statute Pleaded as Cloak for Fraud.

257. Statute of Frauds not to be used to protect fraud.—Admissibility of parol evidence.]—The question was, whether parol evidence may be admitted on the part of deft., as there was no written agreement between him & plff. to establish a fact; deft. may be admitted to read parol evidence, to rebut the equity set up by the bill. The defence arises here from an imposition of plff. & therefore not affected by Stat. Frauds.

I am not at all clear, whether, if deft. had brought his cross bill to have this agreement established, the ct. would not have done it, upon considering this in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other, & deft. would have had the benefit of it as an agreement.

The allowing any other construction upon Stat. Frauds, would be to make it a guard & protection to fraud, instead of a security against it, as was the design & intention of it (LORD HARDWICKE, C.).—*WALKER v. WALKER* (1740), 2 Atk. 98; *Barn. Ch.* 214; 26 E. R. 461, L. C.

*Annotations:—*Refd. *Young v. Peachy* (1741), 2 Atk. 254; *Pitcairn v. Oxbourne* (1751), 2 Ves. Sen. 375; *Ritch v. Jackson* (1791), 4 Bro. C. C. 514; *Woollam v. Hearn* (1802), 7 Ves. 211; *Podmore v. Gunning* (1836), 7 Sim. 644; *Wood v. Midgley* (1854), 5 De G. M. & G. 41; *Maddison v. Alderson* (1853), 8 App. Cas. 467. *Mentd.* *Robinson v. Gee* (1749), 1 Ves. Sen. 251.

258. — Agreement prevented from being put into writing.]—*WHITCHURCH v. BEVIS* (1789), 2 Bro. C. C. 559; 2 Dick. 604; 29 E. R. 306, L. C.

*Annotations:—*Consd. *Cooth v. Jackson* (1801), 6 Ves. 12. *Refd.* *Cooke v. Tombs* (1794), 2 Aust 420; *Spurrier v. Fitzgerald* (1801), 6 Ves. 548; *Barkworth v. Young* (1856), 4 Drew. 1.

Relief in equity, generally.]—See CONTRACT, Vol. XII., pp. 161, 167, 168, Nos. 1171, 1175, 1217–1232; EQUITY, Vol. XX., pp. 254, 255, Nos. 178–184.

E. Collateral Oral Contract.

259. Whether collateral agreement binding.]—A. agrees by parol to sell an estate to B., on certain terms, provided B. will continue C. his tenant not for one year only, but from year to year, C. having just before been let into possession under a contract for the purchase of the estate which he had failed to pay for in time & had therefore forfeited his deposit; & A. thereupon agreed to take C.'s forfeited deposit as part of the purchase-money: A. & B. afterwards reduce their agreement respecting the purchase into writing, in which no notice is taken of the stipulation concerning C.'s tenancy:—*Held*: this stipulation being collateral to the written agreement was binding upon B.—*DENN d. JACKLIN v. CARTWRIGHT* (1803), 4 East, 29; 102 E. R. 740.

*Annotations:—*Refd. *Doe d. Clarke v. Smardley* (1845), 7

Q. B. 957. *Mentd.* *Doe d. Chadburn v. Green* (1839), 8 L. J. Q. B. 100.

260. Admissibility of parol evidence.]—At the time of entering into a written contract for the sale of land, there was a parol understanding that the land should be used for the erection of a church. The vendors were trustees for sale under a will, which contained a proviso that no portion of the land should be so sold as to lessen the value of the remaining portion; & this was known to the purchaser. The purchaser sold the benefit of the agreement to one of defts., who intended to erect a manufactory on the land, & he filed his bill to compel specific performance of the agreement:—*Held*: evidence was admissible of the parol understanding, & the bill was dismissed with costs.—*TRAPPES v. COBB* (1867), 17 L. T. 236; 32 J. P. 71; 16 W. R. 117.

SECT. 10.—DISCLOSURE OF MATERIAL FACTS.

SUB-SECT. 1.—IN GENERAL.

261. What is a patent defect.]—Where there runs across land an unmetalled open track of a character that is compatible with the existence of a public or private right of way or of a mere accommodation track for the use of persons entitled to the land & there is in fact a public right of way along the track it does not constitute a patent defect so that a decree for specific performance can be obtained against a purchaser of the land under an open contract.

It is not enough that there exists on the land an object of sense that might put a careful purchaser on inquiry. In order to be a patent defect, the defect must either be visible to the eye or arise by necessary implication from something visible to the eye.—*YANDLE & SONS v. SUTTON, YOUNG v. SAME*, [1922] 2 Ch. 199; 91 L. J. Ch. 567; 127 L. T. 783.

*Annotation:—*Refd. *Simpson v. Gilley* (1922), 92 L. J. Ch. 194.

Non-disclosure of title by third party—Estoppel.]—See, generally, ESTOPPEL, Vol. XXI., pp. 373–374, Nos. 1478–1484.

Misrepresentation & non-disclosure, generally.]—See MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 6 *et seq.*

SUB-SECT. 2.—BY VENDOR.

A. Patent Defects.

(a) In General.

262. What is a patent defect.]—*YANDLE & SONS v. SUTTON, YOUNG v. SAME*, No. 261, *ante*.

(b) Defect Discoverable on Examination.

263. General rule—Caveat emptor.]—[The purchaser] is bound to attend to all matters that

PART I. SECT. 9, SUB-SECT. 2.—D.

m. Statute of Frauds not to be used to protect fraud.]—*AMERO v. AMERO* (1873), R. E. D. 9.—CAN.

n. —.]—*KIRKLAND v. SMITH* (B. C.) (1911), 16 W. L. R. 530.—CAN.

o. —.]—*ROBERTS v. ROBERTS*, [1923] 2 W. W. R. 137.—CAN.

PART I. SECT. 9, SUB-SECT. 2.—E.

2601. Admissibility of parol evidence.]—*SPENCER v. SPENCER* (Man.) (1913), 24 W. L. R. 420; 4 W. W. R. 785; 11 D. L. R. 801.—CAN.

PART I. SECT. 10, SUB-SECT. 1.

p. General rule.]—A purchase by

a vendor in the name of another or under an agreement with the named purchaser by which the vendor is to be entitled to an interest in the property is a grave impropriety as it is a concealment of a material fact.—*CREIGHTON v. DUNKLEY* (Alta.), [1919] 1 W. W. R. 547.—CAN.

q. —.]—A misrepresentation by a person that he is contracting for a principal when in fact he is acting for himself, is material where the personality of the contracting party is a material element in inducing the contract.—*LOVE v. LYNCH* (Sask.), [1920] 2 W. W. R. 538; 52 D. L. R. 691.—CAN.

r. Form of advertisement.]—Advertisements for sales should be as short as possible; the short style of the cause & a short description of the property & improvements is sufficient, & no merely formal parts, such as convey no information to intending purchasers, should be inserted therein.—*BAXTER v. FINLAY* (1859), 1 Ch. Ch. 230.—CAN.

PART I. SECT. 10, SUB-SECT. 2.—A. (b).

2631. General rule—Caveat emptor.]—A. & B. had each a wild lot, & negotiated for an exchange. A. asserted that his lot was worth \$900;

are of such a kind as to be open to his observation. When he comes here for relief, he must account for not observing the circumstances of this case sooner (*LORD THURLOW, C.*).—*LOWNDES v. LANE* (1789), 2 Cox, Eq. Cas. 363; 30 E. R. 167, L. C. *Annotation*:—*Refd.* *Clarke v. Mackintosh, Mackintosh v. Clarke* (1862), 4 Giff. 134.

264. ———.]—Objections by a purchaser by auction: 1st, that a way round & across a meadow was not specified; 2nd, on account of a bidding for the pltf. Specific performance decreed with costs.

Certainly the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser who does not thought to inquire—it is not a latent defect (*LORD LOUGHBOROUGH, C.*).—*OLDFIELD (OR BOWLES) v. ROUND* (1800), 5 Ves. 508; 31 E. R. 707, L. C.

Annotations:—*Expld.* *Simpson v. Gilley* (1922), 92 L. J. Ch. 194; *Yandle v. Sutton, Young v. Same*, (1922) 2 Ch. 199. *Refd.* *Carroll v. Keays, Keays v. Carroll* (1873), 22 W. R. 243; *Ashburner v. Sewell*, [1891] 3 Ch. 405.

265. ———.]—If a purchaser enters into a contract, in absolute & express reliance on the truth of representations which turn out to be false, the ct. will not compel specific performance of the contract. But a purchaser is bound to exercise a reasonable degree of caution; &, therefore, if there be anything in the representations made by the vendor calculated to excite suspicion, or to require explanation or investigation, the purchaser is put upon his guard, & must bear the consequence of his own neglect in not making further investigation. So if a purchaser, not satisfied with the representations made by the vendor, investigates the truth of them, & has a fair opportunity of testing their accuracy, he cannot, after completion of the contract, come to this ct. for relief on the ground of misrepresentation.—*CLARKE v. MACKINTOSH, MACKINTOSH v. CLARKE* (1862), 4 Giff. 134; 1 New Rep. 160; 7 L. T. 558; 27 J. P. 259; 11 W. R. 183; 66 E. R. 651; *on appeal* (1863), 9 Jur. N. S. 114; 11 W. R. 652, L. C.

266. ———.]—It is no answer to the claim of pltf. in this case that at the time of the sale the estate was represented to the purchaser to be thoroughly well drained: first, because, if such an objection were good, it would vary by parol the written agreement; &, secondly, it is not a good objection because it was a reason for recommending the land that it was already well drained, though the draining had to be paid for. The purchaser should have inquired by whom it was drained.—*WARD v. MOSS* (1867), 16 L. T. 91.

See No. 261, *ante*.

267. Effect of laches.—*ANON.* (1689), *Freem.* Ch. 106; 22 E. R. 1088.

268. When specific performance decreed—With compensation for defect.—Specific performance of an agreement for the sale of an estate decreed, notwithstanding a variance from the description, with compensation for the deficiency in value, though a minute examination might have discovered the defects as in the state of the house & the cultivation of the lands; not for a variance from the description, as lying within a ring fence; as being an object of sense; & upon the evidence the purchaser being apprised of it.—*DYER v. HARGRAVE, HARGRAVE v. DYER* (1805), 10 Ves. 505; 32 E. R. 941.

Annotations:—*Refd.* *Knatchbull v. Grueber* (1817), 3 Mer. 124; *Jennings v. Broughton* (1854), 5 De G. M. & G. 126;

B., that his was worth \$800. They ultimately agreed to exchange, B. to pay \$100 in money. Neither had any knowledge of the other's lot, but the

truth was, that A.'s lot was worth \$400 only.—*Held*: the doctrine caveat emptor applied, & A. was entitled to enforce the contract.—*MCRAE v.*

Aberaman Ironworks v. Wickens (1868), L. R. 5 Eq. 485; *Re Fawcett & Holmes' Contract* (1889), 42 Ch. D. 150.

269. ——— *Without compensation.*—An estate was put up to sale in lots. In the particulars the lots were described respectively as "All that, etc., comprising lot—in the sale plan." The sale plan, circulated at the auction, represented a well on lot 4, with a drain & pipe conveying the water from the well through lot 2 to lot 1. Pltf., the purchaser of lot 1, filed his bill for specific performance, with compensation for the loss of the water, the vendor having conveyed away the other two lots without any reservation to pltf. of a right to a flow of water from the well:—*Held*: the sale plan, accurately describing the existing state of the property, would not carry the case higher than a view of the property by the purchaser. Decree for specific performance without compensation.—*FEWSTER v. TURNER* (1842), 11 L. J. Ch. 161; 6 Jur. 144.

Annotations:—*Refd.* *Tipping v. Power* (1842), 1 Hare, 405. *Mentd.* *Cash v. Belcher* (1842), 1 Hare, 310.

270. ———.]—At the Auction Mart, London, a house at Brighton was put up for sale, as 39, Regency square, & a person unacquainted with its actual locality became the purchaser. It appeared that the house was well known as 39, Regency square, but it was in fact in a street leading from that to another square. The purchaser accordingly claimed compensation, & that being refused, he declined to complete the contract. The ct. decreed specific performance, with costs.—*WHITE v. BRADSHAW* (1851), 18 L. T. O. S. 183; 16 Jur. 738.

Annotations:—*Refd.* *Stanton v. Tattersall* (1853), 1 Sm. & G. 529; *Denny v. Hancock* (1870), 6 Ch. App. 6, n.

271. ———.]—*CLARKE v. MACKINTOSH, MACKINTOSH v. CLARKE*, No. 265, *ante*.

(c) *Defect Concealed by Vendor.*

272. Right to compensation.—*ANON.* (*circa* 1810), cited in 4 Taunt. at p. 785; 128 E. R. 540.

Annotation:—*Refd.* *Pickering v. Dowson* (1813), 4 Taunt. 779.

273. Whether specific performance decreed.—Specific performance not decreed where there is a concealment on the part of the vendor.—*SHIRLEY v. STRATTON* (1785), 1 Bro. C. C. 440; 28 E. R. 1226, L. C.

274. ———.]—A farm was put up for sale under the direction of the ct. by particulars accompanied by a plan, & was described as "a compact small farm containing 41 acres, 3 roods, 35 poles, divided as follows." Among the parcels was "490a Bottlesey Green, containing 7 acres, 1 rood, 27 poles" opposite to which, in the column showing the amounts which made up the 41 acres, 3 roods, 35 poles was entered 4 acres, 0 roods, 38 poles. The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such, if any, as the judge in chambers should direct. G. bought the property in his own name, & was certified as purchaser. He in fact bought as agent for B. who was the owner of immediately adjoining property. On investigating the title it turned out that the vendors were only entitled to four undivided sevenths of 490a, which was a narrow close containing 7 acres, 1 rood, 27 poles having a long frontage to a high road & at one end adjoined

FROMM (1870), 17 Gr. 357.—*CAN.*

263 ii. ———.]—*MARTIN v. COTTER* (1840), 3 Jo. & Lat. 496.—*IR.*

Sect. 10.—Disclosure of material facts: Sub-sect. 2, A. (c) & (d), & B. (a).]

B.'s property. B. alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490a & G., by his directions, refused to complete. The vendors then entered into an arrangement with the owners of the other three-sevenths to give them up, receiving an equivalent out of another part of the farm having a frontage to another road:—*Held*: G. having only purchased as agent for B. could take any objection which B., had he been the nominal as well as the real purchaser, could have taken; for the purpose of resisting completion the purchaser was entitled to say when he bought the farm as shown on the plan; as the possession of 490a was important to the enjoyment of B.'s property completion could not be compelled unless he could get the whole of it, & he was not bound to accept the arrangement by which he would obtain the whole of it by giving up another part of the purchased property; & he must therefore be discharged from his purchase.

It has never been held that a man is obliged to take a thing with compensation when the thing is substantially & materially different from that which he was induced by the representations made to him to believe that he bought (*JAMES, L.J.*).—*Re ARNOLD, ARNOLD v. ARNOLD* (1880), 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635, C. A.

Annotations:—*Distd.* *Re Fawcett & Holmes Contract* (1889), 42 Ch. D. 150. *Apld.* *Jacobs v. Revell*, [1900] 2 Ch. 858. *Refd.* *Re London Corpn. & Tubbs' Contract* (1894), 63 L. J. Ch. 580.

275. —[—An agent, commissioned by a vendor to find a purchaser, has authority to describe the property & to state any fact or circumstance which may affect the value, so as to bind the vendor; & if an agent so commissioned makes a false statement as to the description or value, though not instructed so to do, which the purchaser is led to believe, & upon which he relies, the vendor cannot recover in an action for specific performance. A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to deft. that another person, H., was ready to buy the property for £700, & that if deft. were to give £50 more, he would make a clear profit of 7 per cent.; that H. had further offered to rent the property at £300, or the ground floor only at £200. Deft., relying on the above representations & others, which were unauthorised by the vendor, & untrue, contracted to purchase for £750; but afterwards, finding out the falsehood, refused to complete.—The vendor himself also made a misleading statement to the purchaser:—*Held*: independently of the statement made by the vendor himself, the false statements made by the agent, being within his authority, were sufficient to vitiate the contract; & specific performance refused.—*MULLENS v. MILLER* (1882), 22 Ch. D. 194; 52 L. J. Ch. 380; 48 L. T. 103; 31 W. R. 559.

Annotation:—*Mentd.* *Re Consort Deep Level Gold Mines, Ex p. Stark, Ex p. Elliston* (1896), 45 W. R. 227.

276. Representation by agent.—*MULLENS v. MILLER*, No. 275, *ante*.

277. — *Not made fraudulently.*—A deed of covenant of 1851, relating to a building estate, after forbidding certain offensive & noisy trades & businesses, provided that there should not be

carried on "any trade or business or occupation whatsoever whereby any injuries offensive or disagreeable noise or nuisance shall or may be occasioned caused or made." Pltf. entered into a contract for the purchase from deft. of a house on this estate for the purpose of a boys' school, on the representation of deft.'s agent that there was nothing in this deed which would prevent him from carrying on such a school on this property. On an action for rescission of the contract:—*Held*: the carrying on of pltf.'s school in an ordinary & reasonable way would be within the wording of the restrictive covenant, which could not be limited to trades or businesses *ejusdem generis* with those specifically mentioned; & pltf., having been induced by a misrepresentation of fact made by deft.'s agent to enter into this contract, was entitled in equity to rescission, even though the representation had not been made fraudulently.—*WATSON v. COPPARD*, [1899] 1 Ch. 92; 68 L. J. Ch. 8; 79 L. T. 467; 47 W. R. 72; 43 Sol. Jo. 28.

(d) Erroneous Opinion of Purchaser.

278. Vendor aware of purchaser's error.—Compensation for the dry rot in house & premises decreed, upon representation of the vendor to the purchaser as to the state of repairs; he relying upon such representations, & stating to pltf. that he did not employ a surveyor for that reason.—*GRANT v. MUNT* (1815), 1 Coop. G. 173; 35 B. R. 520.

B. Latent Defects.

(a) Duty to Disclose.

279. Defects known to vendor—Existence of nuisance.—*Qu.*: whether the existence of a nuisance in the neighbourhood of a house contracted to be purchased for a residence, which nuisance is known to the vendor, & is one which a provident purchaser could not discover, is a ground for refusing a decree for specific performance of the contract, & whether otherwise, if the nuisance be not known to the vendor.

If the vendor, at the time of the contract, does not know of the existing defect in the estate, the ct. will enforce the contract; otherwise, perhaps, if the defect be known to the vendor, & be one which a provident purchaser could not discover (*WIGRAM, V.-C.*).—*LUCAS v. JAMES* (1849), 7 Hare, 410; 18 L. J. Ch. 329; 14 L. T. O. S. 308; 13 Jur. 912; 68 E. R. 170.

Annotations:—*Consd.* *Hope v. Walter*, [1900] 1 Ch. 257. *Refd.* *Andrew v. Aitken* (1882), 22 Ch. D. 218.

280. — Informal notice given by tenant.—An agreement was entered into for the purchase of a freehold estate of 4,400 acres upon the terms of certain particulars & conditions of sale. In the particulars it was stated that the Y. farm, a farm on the estate of 605½ acres, was in the occupation of H. on a yearly tenancy. H. had before the sale written to the vendor informing him that he intended to give up the farm at the end of the current year, but this was written before the proper time for giving notice to determine the tenancy. The vendor answered this letter, & wrote, "You will of course send me a formal notice at the right time." No mention of this correspondence was made in the particulars, or at the time of the sale. After the sale H. gave formal notice to quit. The purchaser refused to

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t. Defects known to vendor—Non-disclosure of conviction.—On a sale of

a public house with a licence attached, the nondisclosure by the vendor of the fact that one conviction has been indorsed on the licence is not a material

omission which entitles the purchaser to refuse to complete the sale.—*Re WARD & JORDAN'S CONTRACT*, [1902] 1 I. R. 73.—*IR.*

complete his purchase:—*Held*: the non-disclosure of the intimation of the tenant that he intended to leave at the end of the year, he not having given formal notice to quit, did not make the statement in the particulars false or misleading, & the purchaser was not entitled to have the contract rescinded, but must complete his purchase.—*DAVENPORT v. CHARSLEY* (1886), 54 L. T. 372; 34 W. R. 391.

281. — Deed preventing acquisition of light.]—A contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land, or even that the prescriptive period is running & consequently the non-disclosure of a deed acknowledging that the vendor is not entitled to that light is no ground for refusing the vendor specific performance, or allowing the purchaser compensation, though it may be a ground for depriving the vendor of his costs.—*GREENHALGH v. BRINDLEY*, [1901] 2 Ch. 324; 70 L. J. Ch. 740; 84 L. T. 763; 49 W. R. 597; 17 T. L. R. 574; 45 Sol. Jo. 576.

Annotations:—*Apprvd.* *Smith v. Colbourne*, [1914] 2 Ch. 533. *Mentd.* *Hyman v. Van Den Bergh* (1907), 77 L. J. Ch. 154.

282. — Underground watercourse — Defect not sufficient for rescission.]—Where there is a latent defect in property which is the subject of a contract of sale, but the defect is not so material as to bring the case within the principle of *Flight v. Booth*, No. 842, *post*, the purchaser is not entitled to have the contract rescinded, even if the defect is known to & not disclosed by the vendor.

A contract was entered into for the sale of a house & lands adjoining described as a "residential property," but which in fact possessed advantages for the formation of building sites. The contract stated that the property was sold subject to all drainage, sewer, & other easements, if any, affecting the same, & clause 11, that if any error or misstatement in the particulars or contract should be disclosed, the same should not annul the sale, nor should any compensation be claimed or made in respect thereof by either party. Neither the particulars nor contract, nor the plan annexed, disclosed or indicated the existence of a natural underground watercourse which ran through the grounds & the lands of adjoining owners in a culvert or piping constructed by the owners of the several lands. The vendors, knowing of the existence of the watercourse, did not disclose it to the purchaser, & the purchaser's agents, when inspecting the property prior to the contract, did not see the piping, although it was then exposed to view in a hole in the lawn of the house. The purchaser bought the property primarily as a residence, but with a view in certain events to using it for building purposes. In an action by the vendors for specific performance they waived clause 11 of the contract:—*Held*: the watercourse was not a sewer or drain vested in the local authority, nor an easement affecting the property, nor a defect in title, but it was a latent defect in the property, although not of such materiality as would prevent the purchaser from getting substantially what she had contracted for if the contract was specifically enforced against her; & the vendors were entitled to specific performance subject to their paying compensation to the purchaser for the defect by reason of the existence of the watercourse.

There may, however, be latent defects which, though not such as to give in equity the right to

rescission, may yet affect the value of the property. . . . In an ordinary case this would, in my opinion, give rise to a claim for compensation on the part of the purchaser (*PARKER, J.*).—*SHEPHERD v. CROFT*, [1911] 1 Ch. 521; 80 L. J. Ch. 170; 103 L. T. 874.

283. — Agreement preventing statutory period of prescription beginning to run.]—The existence of an agreement which prevents the statutory period of prescription beginning to run does not create an incumbrance on the property, & the non-disclosure of such an agreement does not invalidate the contract.—*SMITH v. COLBOURNE*, [1914] 2 Ch. 533; 84 L. J. Ch. 112; 111 L. T. 927; 58 Sol. Jo. 783, C. A.

284. — Landlord's notices to repair.]—On July 31, 1924, *deft.* purchased from *pltf.* two leasehold houses & paid a deposit. Completion was fixed for Aug. 21, 1924. Under the lease the vendors were bound to do the inside & outside repairs. The conditions of sale provided that the purchaser should execute all necessary repairs. Requisitions on title were delivered, one of which asked whether any notices from landlords had been served on the property. The answer was that the vendors were not aware of any. The answer was made in good faith, but in fact the vendors had received landlord's notices on July 7, 1924, calling upon them, within three months of July 4, 1924, to make good the dilapidations found to have accrued on the premises "as per the schedule hereto annexed." On discovering their mistake the vendors, on Aug. 20, 1924, sent copies of the notices to the purchaser, who then declined to complete unless the vendors complied with the notices at their own expense. Condition 6 of the conditions of sale provided that the production of the last receipt for rent should be conclusive evidence that all the covenants had been complied with. Condition 8 provided that if any notices were outstanding they should be complied with at the expense of the purchaser. *Pltf.* brought an action for specific performance of the contract by *deft.* *Deft.* counterclaimed for the rescission of the contract & the return of his deposit:—*Held*: (1) the notices contained material facts which it was the duty of the vendors to disclose, & the non-disclosure deprived them of the right to the special relief of specific performance; neither condition 6 nor condition 8 relieved the vendors from the obligation of disclosing the notices, because the former required the purchaser to assume to be true that which the vendors knew at the time of the sale to be untrue, & the latter only stated as a contingency that which the vendors knew to be a fact; (2) the purchaser having made out no case for the rescission of the contract it was good at law, & since the purchaser refused to complete according to its terms he was not entitled to the return of his deposit.—*BEYFUS v. LODGE*, [1925] Ch. 350; 95 L. J. Ch. 27; 133 L. T. 265; 41 T. L. R. 429; 69 Sol. Jo. 507.

285. Defects unknown to vendor—Existence of nuisance.]—*LUCAS v. JAMES*, No. 279, *ante*.

286. — Underground culvert.]—Land was sold subject to a condition that, "the property being open for inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities & condition thereof. If any error shall be found in the particulars the same shall not annul the sale, nor shall any compensation be allowed in respect thereof."

The purchaser bought the land for building purposes, & this was known to the vendors. They represented to him that it was suitable for

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building, & that there was no restriction as to the class of houses to be erected. Before he entered into the contract the purchaser inspected the property. Some time after the contract he discovered that there was an underground culvert for water running across the land. There was nothing in the plan which was shown to him to indicate the existence of this culvert, & the vendors, who were trustees of a former owner, were not aware of it. In the opinion of the ct. no reasonable inspection would have enabled the purchaser to discover the culvert:—*Held*: the above condition did not apply, & the culvert was a substantial drawback to the use of the land for building purposes, so that the purchaser would not get that for which he contracted—therefore, *Flight v. Booth*, No. 842, *ante*, applied, & a good title had not been shown by the vendors in accordance with the contract.—*Re PUCKETT & SMITH'S CONTRACT*, [1902] 2 Ch. 258; 71 L. J. Ch. 606; 87 L. T. 189; 50 W. R. 532, C. A.

Annotation:—*Reid*, *Shepherd v. Croft*, [1911] 1 Ch. 521.

(b) *Misrepresentations as to Quality.*

i. *In General.*

287. Remedies of purchaser — Damages.]—

Where representations are made with respect to the nature & character of the property which is to become the subject of purchase, affecting the value of that property, & those representations afterwards turn out to be incorrect & false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a ct. of common law to recover damages for the deceit so practised, & in a ct. of equity a foundation is laid for setting aside the contract, which was founded upon a fraudulent basis (*LORD LYNTHURST*).—*ATTWOOD v. SMALL* (1838), 6 Cl. & Fin. 232; 7 E. R. 684; *sub nom. SMALL v. ATTWOOD*, 2 Jur. 226, 246, H. L.; *varying* (1832), You. 407; *subsequent proceedings* (1840), 6 Cl. & Fin. 523, L. C.

Annotations:—*Apprvd.* *Central Ry. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99. *Consd.* *Aberaman Ironworks v. Wickons* (1868), L. R. 5 Eq. 485; *Redgrave v. Hurd* (1881), 20 Ch. D. 1. *Refd.* *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *Nolthorpe v. Holgate* (1844), 8 Jur. 551; *Reynell v. Sprye*, *Sprye v. Reynell* (1849), 8 Hare, 222; *Higgins v. Samels* (1862), 2 John. & H. 460; *Torrance v. Bolton* (1872), 41 L. J. Ch. 643; *Roots v. Snelling* (1883), 48 L. T. 216. *Mentd.* *Walburn v. Ingilby* (1833), 1 My. & K. 61; *Lovell v. Hicks* (1836), 2 Y. & C. Ex. 46; *Brown v. Sawyer* (1841), 3 Beav. 598; *Benson v. Heathorn* (1842), 1 Y. & C. Ch. Cas. 328; *Archbold v. Charitable Bequests for Ireland Comrs.* (1849), 2 H. L. Cas. 440; *Marshall v. Sladden* (1849), 7 Hare, 428; *Bodenham v. Hoskins* (1852), 2 De G. M. & G. 903; *Cockell v. Taylor*, *Collett v. Preston*, *Preston v. Collett* (1852), 15 Beav. 103; *Morrell v. Wooten* (1852), 16 Beav. 197; *A. G. v. Chesterfield* (1854), 18 Beav. 596; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Smith v. Kay* (1859), 7 H. L. Cas. 750; *Beavan v. Mornington* (1860), 8 H. L. Cas. 525; *Ernest v. Croydall* (1860), 2 De G. F. & J. 175; *Other v. Smurthwaite* (1868), L. R. 5 Eq. 437; *Shedden & Shedden v. A. G. & Patrick* (1869), 22 L. T. 631; *Weise v. Wardle* (1874), L. R. 19 Eq. 171; *Panama & South Pacific Telegraph Co. v. Indiarubber, Gutta Percha & Telegraph Works Co.* (1875), 32 L. T. 238; *Arkwright v. Newbold* (1880), 28 W. R. 828; *Banco de Portugal v. Waddell*, *Re Hooper* (1880), 5 App. Cas. 161; *Burstall v. Beyfus* (1884), 26 Ch. D. 35.

288. — Rescission.]—*ATTWOOD v. SMALL*, No. 287, *ante*.

289. — Recovery of deposit.]—*ROBINSON v. MUSGROVE*, No. 769, *post*.

290. Caveat emptor.—Application of maxim.]—*COLBY v. GADSDEN*, No. 316, *post*.

291. Slight & immaterial misdescription — Whether purchaser relieved.]—A slight & immaterial misdescription of the term in the agreement for the sale of a lease will not relieve a purchaser from the obligation of completing his purchase.—*JENNINGS v. BRUNT* (1869), 19 L. T. 705, N. P.

ii. *Particular Instances.*

292. Value of premises.]—*SALMON v. FENDICK* (1844), 2 L. T. O. S. 496.

293. — Estimated annual value.]—Property was described in the particulars of sale as “of the estimated annual value of £400.” There was a condition entitling the purchaser to compensation if any error or misstatement should appear to have been made in the particulars. The purchaser adduced evidence to show that the property was only worth £200 a year; he did not, however, allege that the estimate was a dishonest one:—*Held*: as the property was of the “estimated” value stated, & the estimate was admitted not to be a dishonest one, the condition did not apply; & the purchaser was not entitled to any compensation.—*Re HURLBALT & CHAYTOR'S CONTRACT* (1888), 57 L. J. Ch. 421; 4 T. L. R. 234.

294. Amount of rent.]—*LEAKINS v. CLIZARD* (1663), 1 Keb. 522; 1 Sid. 140; 83 E. R. 1090; *sub nom. EKINS v. TRESHAM*, 1 Lev. 102.

Annotations:—*Appl.* *Lysney v. Selby* (1704), 2 Ld. Raym. 1118. *Consd.* *Pasley v. Freeman* (1789), 3 Term Rep. 51. *Refd.* *Crosse v. Gardner* (1688), Comb. 142; *Attwood v. Small* (1838), 6 Cl. & Fin. 232.

295. ——An action will lie against the seller of any interest in an estate for affirming the rents to be more than they are while he is in treaty about the sale, if the party to whom the affirmation is made relies upon it, & buys the interest thereon, though the seller was not then in possession of the estate, & the affirmation preceded the sale.

If the vendor gives in a particular of the rents, & the vendee says, he will trust him & inquire no further, but rely upon his particular; there if the particular be false, an action will lie; but if the vendee will go & inquire further what the rents are, there it seems unreasonable he should have any action, though the particulars be false, because he did not rely upon the particular (*HOLT, C.J.*).—*LYSNEY v. SELBY* (1705), 2 Ld. Raym. 1118; 92 E. R. 240; *sub nom. RISNEY v. SELBY*, 1 Salk. 211.

Annotations:—*Folld.* *Dobell v. Stevens* (1825), 3 B. & C. 623. *Consd.* *Clarke v. Mackintosh*, *Mackintosh v. Clarke* (1862), 4 Giff. 134. *Refd.* *Pasley v. Freeman* (1789), 3 Term Rep. 51; *Attwood v. Small* (1838), 6 Cl. Fin. 232; *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *Price v. Macaulay* (1852), 2 De G. M. & G. 339; *Derry v. Peek* (1889), 14 App. Cas. 337. *Mentd.* *Ingram v. Thorp* (1848), 7 Hare, 67.

296. ——Where the vendor of a public-house made, pending the treaty, certain deceitful representations respecting the amount of business done in the house & the rent received for a part of the premises whereby pltf. was induced to give a large sum for the premises:—*Held*: the latter might maintain an action on the case for the deceitful representation although they were not noticed in the conveyance of the premises or in a written memorandum of the bargain which was drawn up after these representations were made.—*DOBELL v. STEVENS* (1825), 3 B. & C. 623; 5 Dow. & Ry. K. B. 490; 3 L. J. O. S. K. B. 89; 107 E. R. 864.

Annotations:—*Refd.* *Besant v. Richards* (1830), Tambl. 509; *Attwood v. Small* (1838), 6 Cl. & Fin. 232; *Ingram v. Thorp* (1848), 7 Hare, 67; *Price v. Macaulay* (1852), 2 De G. M. & G. 339; *Reynell v. Sprye* (1852), 1 De G. M.

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2941. *Amount of rent.*—*Re RYAN'S ESTATE* (1868), 3 I. R. Eq. 255.—IR.

& G. 680; *Robson v. Devon* (1857), 5 W. R. 724; *Clarke v. Mackintosh, Mackintosh v. Clarke* (1862), 4 Giff. 134; *Central Ry. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99; *Mathias v. Yettis* (1882), 46 L. T. 497. *Mentd.* *Panama & South Pacific Telegraph Co. v. Indiarubber, Gutta Percha & Telegraph Works Co.* (1875), 32 L. T. 238.

297. —.]—In an action on the case for the fraudulent representation of the value of a term of years of a house, on the assignment of it from deft. (below) to pltf., the jury found a special verdict, that deft. directed her attorney to instruct pltf., who was an auctioneer, to prepare particulars for the sale of the premises by auction. The attorney represented the premises to be let at a rent of £100 *per annum*. They were let at that rent but deft. paid the rates & taxes, & not the tenant, but that was not known by the attorney. On this instruction pltf., with the assent of the attorney, described the premises as let at £100 *per annum*, clear of taxes & rates. Pltf. purchased the premises himself, & for a larger sum than he would have given, if he had known that the landlord paid the rates & taxes:—*Held*: this special verdict did not disclose any right of action against deft.—*WILSON v. FULLER* (1843), 3 Q. B. 68, 1009; 3 Gal. & Dav. 570; 114 E. R. 432, 796, Ex. Ch.; *reversg. S. C. sub nom. FULLER v. WILSON* (1842), 3 Q. B. 58.

Annotations:—*Consd.* *Jolliffe v. Baker* (1883), 11 Q. B. D. 255. *Refd.* *Taylor v. Ashton* (1843), 11 M. & W. 401; *Elkin v. Janson* (1845), 14 L. J. Ex. 201; *Thorn v. Bigland* (1853), 1 W. R. 290; *Udell v. Atherton* (1861), 7 H. & N. 172. *Mentd.* *Collins v. Cave* (1859), 4 H. & N. 225; *Slack v. Creve* (1860), 2 F. & F. 59; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394.

298. —.]—(1) Land was advertised to be sold in lots as freehold, subject to conditions, one of which was, that all objections to the title, not made within a prescribed time, should be considered as waived, & another of which provided that any misstatement of the quality, tenure, outgoings, or other particulars, should be the subject of compensation. An objection to the title of one lot was taken after the prescribed time, that it was of copyhold tenure. It, however, appeared that, under a composition with the lord, the rights of the copyhold were such as to render the tenure hardly different from that of freehold:—*Held*: the misdescription did not form a ground for resisting a specific performance, although the decision might have been otherwise had the misdescription been wilful.

(2) Another lot was described in the advertisements as being sold with a certain reservoir & waterworks, yielding a yearly rental of £60, exclusively of the land & buildings. An objection was taken after the prescribed time, & was supported by the fact that this rent arose from supplying with water certain houses separated from the reservoir by the property of strangers, over which the vendor had no right to carry it, beyond a licence from year to year by payment of a rent:—*Held*: the description contained such a misrepresentation as to preclude the vendor from enforcing a specific performance; & the objection was not one as to title, & therefore was not obviated by the stipulation as to time.—*PRICE v. MACAULAY* (1852), 2 De G. M. & G. 339; 19 L. T. O. S. 238; 42 E. R. 903, L. J.

Annotations:—*Generally, Refd.* *Leyland v. Illingworth, Ex p. Walker* (1860), 29 L. J. Ch. 613, n.; *Re Fawcett & Holmes Contract* (1889), 42 Ch. D. 150.

299. —.]—In an action upon a contract to purchase leasehold premises, sold by auction on the terms of a prospectus overstating the rental, such false statement, even notwithstanding the usual provision against errors of description, will vitiate the contract, either under a plea of fraud,

or a traverse of readiness & willingness; & the latter plea, if necessary, allowed to be added at the trial.

This is not a mere misdescription, & even if it were by mistake, it is one of those gross mistakes, to the advantage of the party making it, which in law vitiates a contract. It is immaterial whether the pltf. misstated it wilfully, if he stated it falsely (*WILLES, J.*).—*WOOD v. KEEP* (1858), 1 F. & F. 331.

300. —.]—*DIMMOCK v. HALLETT*, No. 322, *post*.

301. *Receipts of public-house.*—Deft. being about to sell a public-house falsely represented to B., who had agreed to purchase it, that the receipts were £180 a month; B., having to the knowledge of deft. communicated this representation to pltf., who became the purchaser instead of B.:—*Held*: an action lay against deft. at the suit of pltf.—*PILMORE v. HOOD* (1838), 5 Bing. N. C. 97; 7 Dowl. 136; 1 Arn. 390; 6 Scott, 827; 8 L. J. C. P. 11; 2 Jur. 991; 132 E. R.

Annotation:—*Refd.* *Re Royal British Bank, etc., Nicol's Case* (1859), 3 De G. & J. 387.

302. —.]—*DOBELL v. STEVENS*, No. 296, *ante*.

303. *Length of term for which tenant holds.*—A misstatement, in the particulars of sale, of the length of the term for which a tenant of the vendor holds a portion of the property, is not, in the absence of any evidence as to whether such misstatement is to the advantage of the purchaser or not, such a misrepresentation as will enable him to resist specific performance.

Seven cottages, let to weekly tenants, were put up for sale, & described as "producing £73 14s. a year." When the particulars were issued the cottages did not produce this rental. Before the sale the vendors had entered into a contract to do certain repairs, & had given notice to the tenants that their rents would be raised, & before the day fixed for completion the repairs were done, & the rents were raised 3d. a week; so that, on the day of completion, the statement in the particulars was quite accurate:—*Held*: this was not such a misrepresentation as would enable a purchaser to resist specific performance.—*GODDARD v. JEFFREYS* (1881), 51 L. J. Ch. 57; 45 L. T. 674; 30 W. R. 269; *on appeal* (1882), 46 L. T. 904, C. A.

Annotation:—*Consd.* *Van Praagh v. Everidge*, [1902] 2 Ch. 266.

304. "Brick built."—*POWELL v. DOUBBLE* (1832), cited in *Sugden's Vendors & Purchasers*, 14th ed. at p. 29.

305. *Sale of manor—Fines stated to be arbitrary.*—Trustees for sale of a manor described it in advertisements, & particulars & conditions of sale, as a manor in which the fines were arbitrary; adding that the clear profits, on an average of the last eight years, had been £150 a year, & it was one of the conditions of sale, that if there should be any error or misstatement in the particulars, the vendors or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way. After the sale it was found that by the custom of the manor arbitrary fines were payable only on alienation, & that on the death of a tenant, his customary heir paid, upon admittance, a small fixed sum, & the widow was admitted to her free bench without any payment. It was also found that the clear profits exceeded £200 a year:—*Held*: there was no such misdescription of the property as would entitle the purchaser to compensation. inasmuch

Sect. 10.—Disclosure of material facts: Sub-sect. 2, B. (b) ii.

as the annual profits, which constituted the substantial value, far exceeded the amount stated. *Semble*: if there was a substantial misdescription, a ct. of equity would not enforce against trustees specific performance with compensation, as being prejudicial to the *cestui que trust*, & incapable of being ascertained.—*WHITE v. CUDDON* (1842), 8 Cl. & Fin. 766; 6 Jur. 471; 8 E. R. 300, H. L.; *reversg. S. C. sub nom. CUDDEN v. CARTWRIGHT* (1840), 4 Y. & C. Ex. 25.

Annotations:—*Refd. Wilson v. Williams* (1857), 3 Jur. N. S. 810; *Cuddon v. Tite* (1858), 1 Giff. 395.

306. Average size of timber.—Bill by the vendor for the specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood "with upwards of 65 acres of fine oak timber trees, the average size of which approached 50 feet," & in the particulars of the lot described it only as "65 acres, 2 roods & 12 perches of growing timber." It appeared, on the evidence for pltf., that the average size of the trees was about 35 feet, but on that for deft. that it was only about 22 feet; & deft., moreover, alleged that it was sold at a time when he had no means of seeing the wood, & that he relied on the particulars of sale:—*Held*: as the representation on the particulars of sale had proved to be incorrect, & as it was not shown that deft. knew it to be incorrect at the time of making the contract, the ct. would not, at all events, enforce the specific performance of the contract without compensation; &, inasmuch as the particulars of sale did not express what number of trees or quantity of timber the wood contained it was not a case in which the ct. could measure the extent of the deficiency, or ascertain the amount of compensation; & the bill must therefore be dismissed.—*BROOKE (LORD) v. ROUNTHWAITE* (1846), 5 Hare, 298; 15 L. J. Ch. 332; 10 Jur. 656; 67 E. R. 926.

Annotation:—*Refd. Denny v. Hancock* (1870), 18 W. R. 566.

307. Result of recent valuation.—Where a purchaser, who was a solr., after viewing a farm, & being informed of the rent at which it was let, agreed to buy at £5,000:—*Held*: the omission on the part of the vendor to inform the purchaser of the result of a late valuation, or of the tenant having complained of the rent being excessive, & of the full amount not having been exacted, did not constitute a defence to a suit [for specific performance].—*ABBOTT v. SWORDER* (1852), 4 De G. & Sm. 448; 64 E. R. 907, L. C.

308. Inaccurate description of situation.—It is a misdescription in particulars of sale to describe a house as No. 58 Pall Mall, opposite Marlborough House; where the house was, in fact, not in Pall Mall, but was situate behind No. 57, Pall Mall, having an entrance with a door, which for many years bore the designation of No. 58, & a separate passage, about 65 feet long, & 3 feet 8 inches wide, across the ground-floor of No. 57, between the basement & upper stories of No. 57:—*Held*: the particulars having indicated no peculiarity in the access to the house, & the objection on this point having been taken as soon as it was known, the purchaser was entitled to have the contract rescinded.—*STANTON v. TATTERSALL* (1853), 1 Sm. & G. 529; 1 Eq. Rep. 543; 21 L. T. O. S. 333; 17 Jur. 967; 1 W. R. 502; 65 E. R. 231.

Annotation:—*Consd. Torrance v. Bolton* (1872), L. R. 14 Eq. 124.

309. Dampness.—Before entering into a contract to take the assignment of a leasehold house,

held at rack rent the purchaser told the vendor that he was in bad health & could not live in a damp house; the vendor assured him it was not damp, believing which, the purchaser signed the contract. In a suit for specific performance, it was proved that the house was permanently damp:—*Held*: the contract could not be enforced; but the purchaser not having taken the objection till after the vendor had left the house & some time had elapsed the claim was dismissed without costs.—*STRANGWAYS v. BISHOP* (1857), 29 L. T. O. S. 120.

310. "Well supplied with water."—A property situate in a town, & comprising a warehouse with a small steam engine, was described in particulars of sale under a decree as "well supplied with water." The property was well supplied with water, but only from the waterworks of the borough, & by payment of water rates, there being no natural supply. The manufactories in the town were generally supplied with water from wells upon the properties themselves, though small steam engines in warehouses frequently were not:—*Held*: there was a misdescription, & a purchaser who purchased on the faith of the description in the particulars, without knowing the real state of the case, could not be compelled to complete his purchase without compensation.—*LEYLAND v. ILLINGWORTH* (1860), 2 De G. F. & J. 248; 8 W. R. 695; 45 E. R. 617; *sub nom. LEYLAND v. ILLINGWORTH, Ex p. WALKER*, 29 L. J. Ch. 611; *sub nom. LEYLAND v. ILLINGWORTH, Ex p. WEBSTER*, 2 L. T. 587; 24 J. P. 595; 6 Jur. N. S. 811, L. J.J.

Annotations:—*Distd. Denny v. Hancock* (1870), 18 W. R. 566. *Consd. Cato v. Thompson* (1882), 9 Q. B. D. 616.

311. —.—*BIRD v. ANDREW* (1887), 4 T. L. R. 31, C. A.

312. "Let to most desirable tenant."—Pltfs. put up an hotel for sale on Aug. 4, 1882, stating in the particulars that it was let to "F., a most desirable tenant, at a rental of £400 for an unexpired term of 27½ years." The L. co. sent M., their secretary, to inspect the property. M. reported that F., from the business he was doing, could hardly pay the rent, & that the town in which it was situate seemed to be in the last stage of decay. The directors, on receiving this report, directed M. to bid up to £5,000. M. went & bought for £4,700. Before completion, F. went into liquidation, & the L. co. refused to complete. Pltfs. sued for specific performance. It was proved that on May 1, 1882, the Lady Day quarter's rent was wholly unpaid; that a distress was then threatened, & that F. paid £30 on May 6, £40 on June 13, & remaining £30 shortly before the auction, & that no part of the quarter's rent due at Midsummer had been paid. The chairman of the co. was orally examined, & deposed most positively, that the co. would not have bought but for the representation in the particulars that F. was a most desirable tenant:—*Held*: the description of F. as a most desirable tenant was not a mere expression of opinion, but contained an implied assertion that the vendors knew of no facts leading to the conclusion that he was not; the circumstances relating to the Lady Day rent showed that he was not a desirable tenant; & that there was a misrepresentation.—*SMITH v. LAND & HOUSE PROPERTY CORPN.* (1884), 28 Ch. D. 7; 51 L. T. 718; 49 J. P. 182, C. A.

Annotations:—*Consd. Bisset v. Wilkinson*, [1927] A. C. 177. *Refd. Hughes v. Twisden* (1886), 55 L. J. Ch. 481.

313. "Suitable for development."—Land offered for sale at an auction was described as "The capital freehold building site . . . in the

midst of a capital letting class of property . . . ripe for immediate development." It was in fact land which had been filled up with refuse from roads, dustbins, etc., & under the byelaws of the London County Council could not be used for building purposes without excavating the rubbish & filling in:—*Held*: this was such a misdescription as to entitle the purchaser to rescind.—*BAKER v. Moss* (1902), 66 J. P. 360.

314. Drainage.—*CREE v. STONE* (1907), *Times*, May 10.

315. Underlease described as lease.—Under a contract of sale a vendor agreed to sell two messuages described as held by an indenture of lease dated Aug. 1, 1872, for the unexpired residue of the term of eighty years computed from Mar. 15, 1866. The title was to commence with the lease; & the purchaser was to be deemed to buy with full notice thereof. The lease contained covenants referring to the lessor & his superior landlord. The lease was in fact an underlease:—*Held*: as the purchaser could not be considered to have had notice that the property she was intending to purchase was in fact held by an underlease, the representation that it was held by a lease was a fatal misdescription, & a good title had not therefore been shown.—*BROOM v. PHILLIPS* (1896), 71 L. T. 459.

iii. Onus of Proof.

See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 46, 47, Nos. 407–413.

316. On vendor—To show that purchaser did not rely on representation.—A purchaser agreed to buy an estate, upon a statement in the particulars of sale that it lay upon a valuable vein of coal, which vein afterwards proved to have been mostly worked out. Subsequently the purchaser entered into an agreement with a third party to sell the colliery at a price implying the existence of a considerable quantity of coal, & afterwards discovered the fact of the exhaustion of the coal. Where the particulars of sale are likely to mislead, it is incumbent on a vendor to show that the purchaser has not been misled; & where a misrepresentation has been made by a vendor, the ct. applies the rule of "*caveat emptor*" with great caution:—*Held*: pltf. having failed to show that his misrepresentation did not influence deft. to enter into the agreement, the rule of "*caveat emptor*" did not apply, & pltf. must be left to his remedy, if any, at law.—*COLBY v. GADSDEN* (1867), 17 L. T. 97; 15 W. R. 1185, L. C.

317. ———.]—Certain property was put up for sale by auction, & in the particulars which were advertised was described as an immediate absolute reversion of a freehold estate falling into possession on the death of a lady in her 70th year. By the conditions of sale, which were read in the auction room just previously to the sale, but were not printed or circulated among those present, the property was stated to be subject to three mtgs. The property was bought by pltf. who stated that he was deaf & did not understand that he was buying an equity of redemption:—*Held*: on a bill filed by pltf. to have the contract for sale rescinded, the description of the property in the particulars of sale was misleading, the *onus*

was therefore on the vendor to show that the purchaser was not actually misled, & as he had failed to do so pltf. was entitled to have the contract rescinded & his deposit returned.—*TORRANCE v. BOLTON* (1872), 8 Ch. App. 118; 42 L. J. Ch. 177; 27 L. T. 738; 21 W. R. 134, L. J.

Annotations:—*Distd.* *Blaiberg v. Keeves*, [1906] 2 Ch. 175. *Refd.* *Carlish v. Salt*, [1906] 1 Ch. 335; *Nocton v. Ashburton*, [1914] A. C. 932.

C. Puffing.

318. "Worth one hundred & fifty pounds."—*HARVEY v. YOUNG* (1602), *Yelv.* 21; 80 E. R. 15.

Annotations:—*Refd.* *Leakins v. Clissel* (1663), 1 Sid. 146; *Cross v. Gardner* (1688), 1 Show. 68; *Lysney v. Selby* (1704), 2 Ld. Raym. 1118; *Pasley v. Freeman* (1789), 3 Term Rep. 51.

319. "Nearly equal to freehold."—Effect of an indefinite representation by a vendor; as that a leasehold estate was nearly equal to freehold, being renewable upon a small fine; putting the purchaser upon inquiry; though, connected with certain circumstances, such representation may be fraudulent; & form a ground for rescinding the contract.—*FENTON v. BROWNE, BROWNE v. FENTON* (1807), 14 Ves. 144; 33 E. R. 476.

Annotations:—*Refd.* *Smith v. Jackson* (1816), 1 Madd. 618; *Brooke v. Rounthwaite* (1846), 5 Hare, 298.

320. "Uncommonly rich water meadow."—If land, generally reputed to be water meadow, is sold by the assignees of bkpt. by the description of uncommonly rich water meadow, whereas in fact it is very imperfectly watered, this is not such a misrepresentation as will avoid the sale.—*SCOTT v. HANSON* (1829), 1 Russ. & M. 128; 39 E. R. 49, L. C.

Annotations:—*Distd.* *Higgins v. Samels* (1862), 2 John. & H. 460. *Refd.* *Smith v. Land & House Property Corpn.* (1884), 28 Ch. D. 7; *Re Fawcett & Holmes Contract* (1889), 42 Ch. D. 150.

321. "Substantial & convenient."—A house was put up for sale by public auction, described as a substantial & convenient dwelling-house, containing two sitting rooms & five bedrooms. Deft. not having seen the house, bought it, but afterwards refused to complete the purchase, on the ground of misdescription, alleging, amongst other things, that two of the rooms, called bedrooms, were too small to be used for that purpose:—*Held*: there had been no misdescription to vitiate the contract.—*JOHNSON v. SMART* (1860), 2 L. T. 783, L. C.

Annotation:—*Distd.* *Smith v. Land & House Property Corpn.* (1884), 51 L. T. 718.

322. "Fertile & improvable."—The particulars of sale described a farm, forming about a third of the estate sold, as late in the occupation of A. at the rent of £290. A. had occupied the farm, which contained a good deal of grass land, as yearly tenant, at £290, but went in at Midsummer, paying only £1 for the first quarter, & quitted at Michaelmas in the next year, thus paying £291 for a year & a quarter. Since this pltf. had agreed to let the farm at £225; but the agreement had been rescinded before taking possession, & the evidence showed that the farm would not let for nearly so much as £290:—*Held*: (1) there was such substantial misrepresentation as entitled the purchaser to be discharged.

(2) I think that a mere general statement that land is "fertile & improvable," whereas part of

PART I. SECT. 10, SUB-SECT. 2.—C.

a. General rule.—Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities & capabilities of land he is about to offer for sale, still he will not be permitted to make direct misstatements & mis-

representations as to matters of fact which would naturally have the effect of inducing persons resident at a distance to bid for the property.—*STAMMERS v. O'DONOHUE* (1881), 28 Gr. 207; *affd.* (1882), 8 A. R. 161; *affd.* (1884), 11 S. C. R. 358.—*CAN.*

b. Land in first-class condition free from weeds.—*COLE v. PARRY*, [1920]

3 W. W. R. 73.—*CAN.*

c. Puffing & misdescription.—*Difficulty of drawing distinction between.*—It is often difficult to draw the line between mere puffing which has no effect on the validity of a bargain & misrepresentation which justifies its repudiation.—*GELDENHUYB v. BENTHIN*, [1918] App. D. 426.—*S. AF.*

Sect. 10.—Disclosure of material facts: Sub-sect. 2, C.; sub-sect. 3. Sect. 11. Part II. Sects. 1, 2, 3, 4 & 5.]

it has been abandoned as useless, cannot, except in extreme cases, as, for instance, where a considerable part is covered with water, or otherwise unclaimable, be considered such a misrepresentation as to entitle a purchaser to be discharged. In the present case, I think the statement is to be looked at as a mere flourishing description by an auctioneer (TURNER, L.J.).—*DIMMOCK v. HALLETT* (1866), 2 Ch. App. 21; 36 L. J. Ch. 146; 15 L. T. 374; 31 J. P. 163; 12 Jur. N. S. 953; 15 W. R. 93, L. J.

Annotations:—As to (1) Distd. Goddard v. Jeffreys (1881), 51 L. J. Ch. 57. Consd. Re Terry & White's Contract (1886), 32 Ch. D. 14. Refd. Phillips v. Miller (1874), 43 L. J. C. P. 74. Generally, Refd. Whittemore v. Whittemore (1869), 1 R. & Eq. 603.

SUB-SECT. 3.—BY PURCHASER.

323. Duty of purchaser to disclose — Facts within knowledge influencing price.]—Relief given against a contract where the purchaser knew that the vendors, the assignees of a bkpt., were ignorant of a circumstance considerably increasing the value.

The purchaser is not bound to give the vendor information as to the value of the property, but a very little is sufficient to affect the application of this principle.

If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate (LORD ELDON, C.).—*TURNER v. HARVEY* (1821), Jac. 169; 37 E. R. 814, L. C.

Annotations:—Consd. Thompson v. Lambert (1868), 17 W. R. 111. Refd. Walters v. Morgan (1861), 3 De G. F. & J. 718; Davies v. London & Provincial Marine Insce. (1878), 8 Ch. D. 469; Davis v. Ohlry (1898), 14 T. L. R. 260. Mentd. Shrewsbury & Birmingham Ry. v. L. & N. W. Ry. (1853), 4 De G. M. & G. 115.

324. — — —.]—The proposition laid down by the Ct. of Appeal, that "a person desirous of buying property which is being sold under the direction of the Ct. must either abstain from laying any information before the Ct. in order to obtain its approval, or must lay before it all the information he possesses, & which it is material that the Ct. should have to enable it to form a judgment on the subject under its consideration," is too broadly stated. It does not follow that because information on some material point or points is offered, or is given on request, by a purchaser from the Ct., it must therefore be given on all others as to which it is neither offered nor requested, & concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated.

Inasmuch as a purchaser is, generally speaking, under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts, would be necessarily or naturally & probably misleading. If it is a just conclusion that he did this intentionally, & with a view to mislead in any material point that is fraud; & it is a sufficient ground for setting aside a contract,

if the vendor was in fact so misled (LORD SELBORNE).

Leave to bid at a sale by the Ct. granted to a solr. on the record relieves him from his fiduciary character, & places him in the same position as an ordinary purchaser.—*COAKS v. BOSWELL* (1886), 11 App. Cas. 232; 55 L. J. Ch. 761; 55 L. T. 32, H. L.; *reversg. S. C. sub nom. BOSWELL v. COAKS* (1884), 27 Ch. D. 424, C. A.

Annotations:—Refd. Davis v. Ohlry (1898), 14 T. L. R. 260. Mentd. Re Boswell, Merritt v. Boswell, (1906) 2 Ch. 359.

325. — — — Existence of mines.]—Suppose for instance that A. knowing there to be a mine in the estate of B. of which he knew B. was ignorant should enter into a contract to purchase the estate of B. for the price of the estate, without considering the mine, could the ct. set it aside? Why not, since B. was not apprised of the mine & A. was? Because B. as the buyer, was not obliged, from the nature of the contract, to make the discovery (LORD THURLOW, C.).—*FOX v. MACKRETH, PITT v. MACKRETH* (1788), 2 Bro. C. C. 400; 2 Cox, Eq. Cas. 320; 29 E. R. 224, L. C.; *on appeal, sub nom. MACKRETH v. FOX* (1791), 4 Bro. Parl. Cas. 258, H. L.

Annotations:—Consd. Ex p. Bennett (1805), 10 Ves. 381. Refd. Hardwicke v. Vernon (1799), 4 Ves. 411; Gibson v. Jcyes (1801), 6 Ves. 266; Ex p. Lacey (1802), 6 Ves. 625; Ex p. James (1803), 8 Ves. 337; Coles v. Treothick (1804), 9 Ves. 234; Randall v. Errington (1805), 10 Ves. 423; A.-G. v. Dudley (1815), Coop. G. 146; Baker v. Peck (1860), 3 L. T. 656; Walters v. Morgan (1861), 3 De G. F. & J. 718; Pell v. Midland Counties & South Wales Ry. (1869), 20 L. T. 288; Emma Silver Mining Co. v. Lewis (1879), 4 C. P. D. 396; Re Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130. Mentd. Deerpur v. St. Albans (1831), 2 Russ. & M. 702.

326. — — —.]—There being no fiduciary relation between vendor & a purchaser, the purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or gesture intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a ct. of equity to refuse a decree of specific performance, & so, *a fortiori*, would any contrivance on the part of the purchaser, better informed than the vendor as to value, to hurry the vendor into an agreement without giving him an opportunity of being fully informed on that subject, or taking advice as to the terms of the bargain. Where therefore an intended lessor & lessee of minerals were in the above position as to knowledge, & the intended lessee brought to the lessor a lease ready prepared, without previous negotiation as to the details of it, & induced the latter to sign it, saying he might trust to the proposed lessee for making a fair allowance if the minerals turned out more valuable than was supposed:—*Held*: a bill for specific performance filed by the intended lessee, offering to make a fair extra allowance, could not be sustained, & its dismissal was confirmed on appeal.

A single word, or, I may add, a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a ct. of equity to refuse a decree for specific performance of the agreement. So *a fortiori* would a contrivance on the part of the purchaser, better informed than the vendor of the real value of the subject to be sold to hurry the

PART I. SECT. 10, SUB-SECT. 3.

d. Necessity to disclose name of real purchaser.]—McGUIRE v. GRAHAM (1908), 16 O. L. R. 431; 11 O. W. R. 999.—CAN.

vendor into an agreement without giving him the opportunity of being fully informed of its real value or time to deliberate & take advice respecting the conditions of the bargain (LORD CAMPBELL, C.). —WALTERS v. MORGAN (1861), 3 De G. F. & J. 718; 4 L. T. 758; 45 E. R. 1056, L. C.

Annotations:—**Consd.** Turner v. Green, [1894] 2 Ch. 205. **Refd.** Seddon v. North Eastern Salt Co., [1905] 1 Ch. 326.

327. — Purchase of second mortgagee's interest—Knowledge of sale by first mortgagee.—A first mtgee. by a verbal contract agrees to sell his interest to A.; a second mtgee., the value of whose interest was, by the fact of the first mtgee.'s sale, increased, but which sale was unknown to him, offered to sell at an undervalue to B., who had notice of the sale to A.:—**Held**: the concealment of the purchase by A. was no fraud upon the second mtgee.—DOLMAN v. NOKES (1856), 27 L. T. O. S. 178, C. A.

328. — Wrongful abstraction of minerals previous to purchase.—The owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it:—**Held**: the ct. would not enforce the contract at the suit of the

purchasers, though the sale was not shown to be at an undervalue.

If a man knows that he has committed a trespass of a very serious character upon his neighbour's property, & finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case (LORD HATHERLEY, C.).—PHILLIPS v. HOMFRAY, FOTHERGILL v. PHILLIPS (1871), 6 Ch. App. 770, L. C.

Annotations:—**Mentd.** Williams v. Raggett (1877), 46 L. J. Ch. 849; Whittham v. Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538.

329. — Sale under direction of court.—COAKS v. BOSWELL, No. 321, ante.

— **Agent purchasing from principal.**—See AGENCY, Vol. I., pp. 472, 473, Nos. 1555–1560.

SECT. 11.—OPTION TO PURCHASE.

330. Sale of option—Duty of vendor to disclose all terms.—MERCADO & Co. v. CHARLEY, [1921] 3 W. W. R. 186, P. C.

Part II.—Sale by and to Persons having Limited or Special Capacity.

SECT. 1.—ALIENS.

See, generally, ALIENS, Vol. II., pp. 134–138, Nos. 97–129.

Alien vendor becoming enemy alien—Sale under power of attorney previously given.—See ALIENS, Vol. II., p. 176, No. 411.

Alien vendor becoming naturalised—Sale prior to naturalisation.—See ALIENS, Vol. II., p. 190, No. 525.

SECT. 2.—BANKRUPTS.

Effect of bankruptcy of purchaser.—See BANKRUPTCY, Vol. IV., p. 255, No. 2430.

Effect of bankruptcy of vendor.—See BANKRUPTCY, Vol. IV., p. 258, No. 2447.

Sale by trustee.—See BANKRUPTCY, Vol. IV., p. 230, Nos. 2151–2153.

Property acquired after bankruptcy—Validity of sale by bankrupt.—See BANKRUPTCY, Vol. V., pp. 730, 731, Nos. 6327–6331.

SECT. 3.—CONVICTS.

Sale by administrator.—See CRIMINAL LAW, Vol. XIV., p. 495, Nos. 5459, 5460.

PART I. SECT. 11.

e. Option must be exercised in time specified.—NEVITT v. McMURRAY (1887), 14 A. R. 126.—CAN.

f. Renewal & modification of option—Rights of assignee on assignment of option.—WINSLOW v. RICHARDS (WILLIAM) CO., LTD. (1907), 3 E. L. R. 258; 3 N. B. Eq. Rep. 481.—CAN.

g. Cancellation of option—Whether action lies on consideration for option.—MCKINLEY v. FRANK (Man.) (1909), 11 W. L. R. 571; *affd.* (1909), 12 W. L. R. 498.—CAN.

h. Exercise of option.—One of two joint owners of an option cannot exercise it upon his own behalf & for his own exclusive benefit without the consent of the other so as to deprive the other of his rights under it, & where one attempts to so exercise it, such exercise enures to the benefit of the other & is presumably for their joint benefit.—WOODSIDE v. LAND & HOMES CO. (Man.), [1917] 2 W. W. R. 1227; 36 D. L. R. 713.—CAN.

k. Setting aside option—Who are necessary parties—Assignee.—MCLEOD v. MCLEOD (1918), 40 D. L. R.

711.—CAN.

l. Note given for option to purchase land—Option not to be exercisable until payment of note—Note not paid within time limit—Option period expired—Whether maker of note liable thereon.—LAYING v. PEDE (Sask.), [1919] 1 W. W. R. 714.—CAN.

m. Option under seal to purchase—Consideration mentioned as received but not in fact paid—Payment of consideration as condition precedent—Effect of waiver.—DAVIDSON v. NORSTRANT, [1921] 1 W. W. R. 993; 57 D. L. R. 377; 61 S. C. R. 493.—CAN.

Sect. 5.—Infants. Sects. 6, 7, 8, 9, 10 & 11. Part III. Sects. 1 & 2: Sub-sect. 1.]

— *Infant executors & administrators.]—See EXECUTORS, Vol. XXIII., p. 196, Nos. 2279-2281; Vol. XXIV., p. 576, No. 6132.*

SECT. 6.—LUNATICS AND PERSONS OF UNSOUND MIND.

See, generally, LUNATICS, Vol. XXXIII., pp. 128 et seq.

Lunatics.]—See LUNATICS, Vol. XXXIII., pp. 129, 132, 135, 136, Nos. 52, 90, 125-136.

— *Power of committee to sell.]—See LUNATICS, Vol. XXXIII., pp. 209, 210.*

Drunkards.]—See CONTRACT, Vol. XII., pp. 41, 42, Nos. 199-217.

SECT. 7.—MARRIED WOMEN.

See Law of Property Act, 1925 (c. 20), s. 167; HUSBAND & WIFE, Vol. XXVII., pp. 132-134, Nos. 1083-1092.

SECT. 8.—PERSONS EXERCISING COMPULSORY STATUTORY POWERS.

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 103 et seq.

SECT. 9.—EXECUTORS.

See EXECUTORS, Vol. XXIV., pp. 564-585, Nos. 6026-6188.

SECT. 10.—FIDUCIARY AND LIMITED OWNERS.

See MINES, Vol. XXXIV., pp. 636, 637 Nos. 328-349; SETTLEMENTS; TRUSTS & TRUSTEES.

SECT. 11.—MORTGAGEES.

See BUILDING SOCIETIES, Vol. VII., pp. 478, 479, Nos. 145-152; MORTGAGE, Vol. XXXV., pp. 489-510, 540-593, Nos. 2211-2486, 2689-3341.

Part III.—Sale by the Court.

SECT. 1.—IN GENERAL.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 56; R. S. C., Ord. 51, r. 1.

331. Jurisdiction of court—Settled estates.]—*Re THOMPSON'S SETTLED ESTATES, GREEN v. THOMPSON, No. 419, post.*

332. ———.]—*Under Leases & Sales of Settled Estates Act, 1856 (c. 120), the ct., upon petition to sanction a contract for sale by trustees, can only authorise a contract already entered into, or such contracts as petitioners may satisfy the ct. to be beneficial, but it cannot authorise a sale generally.—Re PEACOCK'S SETTLED ESTATES (1866), 15 L. T. 266; 12 Jur. N. S. 959; 15 W. R. 100.*

333. ———.]—*On application of cestui que trust.]—A bill was brought by one of several cestuis que trusts to compel trustees to sell part of the trust property, which consisted of a term of two hundred years, of which only nine months remained unexpired. It was not known who was entitled to the reversion expectant on the determination of the term, & plff. was anxious to buy up the residue of the term himself. The ct. decreed a sale, giving all the cestuis que trusts liberty to bid, & also directing advertisements to be made for the representatives of the original lessor, who were to be at liberty to come in under*

the suit.—EDMONDS v. FOLEY (LORD) (1861), 30 L. J. Ch. 887; 9 W. R. 859; sub nom. EDMUNDS v. FOLEY (LORD), 7 Jur. N. S. 1268.

334. ———.]—*Property vested in trustees—By Act of Parliament—For payment of management costs.]—An Act of Parliament declared that certain hereditaments should be vested in trustees, their heirs, & assigns, for the purpose of granting building leases, to contain specified covenants; & went on to authorise the trustees to pay the costs incurred out of the rents, & declared the same to be a charge on the premises:—Held: (1) the legal estate was vested in the trustees; (2) the costs were a charge on the estate; & the ct. had power to direct a sale of the corpus for payment of the costs.—DIXON v. WILKINSON (1853), 1 Eq. Rep. 556; 22 L. J. Ch. 981; 21 L. T. O. S. 297; 1 W. R. 513.*

335. ———.]—*Right of purchaser to be satisfied as to proper exercise.]—Where a sale has been directed by the ct. under a decree in a suit, the purchaser is entitled to see so much of the proceedings in the suit as will show that the jurisdiction of the ct. has been properly exercised. But a purchaser cannot take the objection that the ct. has miscarried in the exercise of its jurisdiction.—WATERS v. WATERS (1866), 36 L. J. Ch. 195; 15 L. T. 406; 15 W. R. 191.*

PART III. SECT. 1.

n. Governed by English practice—R. S. C., Ord. 51, r. 1.]—The ct. ordered a sale of certain real estate of testator & directed that the sale be conducted out of ct. & that the proceeds of sale be paid to the trustee of the will. The practice to be followed, in the future, in such cases is to be in accordance with the English practice as laid down in the above rule.—BOLGER v. BOLGER (1920), 20 S. R. N. S. W. 534; 37 N. S. W. W. N. 162.—AUS.

o. Abortive sale—Whether further order needed for resale.]—Where property has been put up for sale under an order of the ct., but the sale has proved abortive for want of bidders, the

property may be advertised & put up for sale again without further order.—SHERWOOD v. CAMPBELL (1859), 1 Ch. Ch. 299.—CAN.

p. Signature of judge not necessary—On licence to sell real estate.]—A licence to sell real estate need not be signed by the Judge of Probates. Being a judicial act, it is sufficient if it is signed by the registrar, as the act of the ct.—DOE d. SIMPSON v. FALLS (1863), 10 N. B. R. (5 All.) 540.—CAN.

q. Decree for sale of land under registered judgment—Other lands discovered subsequently subject to judgment—Necessity to revive suit.]—Where under a decree for sale founded on a registered judgment, certain lands were

sold, & several years afterwards other lands affected by the judgment having been discovered, were ordered to be sold:—Held: it was not necessary in such circumstances to revive the suit.—DICKY v. HERON (1869), 2 Ch. Ch. 490.—CAN.

r. Decree for sale—When made—Necessity for judgment creditor to show reason for sale.]—A decree will not be made for the sale of land bound by a memorial judgment, unless the judgment creditor shows some reason why he could not have obtained the fruits of his judgment by an execution.—ROBERTSON v. ARMSTRONG (1870), N. B. Dig. 647.—CAN.

t. Invalid sale—Decree not absolute.]

336. — When sale necessary or expedient.]—Under R. S. C., Ord. 55, r. 3 (f), the ct. can only approve of a sale which the exors. or trustees of the will or deed to which the originating summons relates could have made themselves.

Under R. S. C., Ord. 51, r. 1, the ct. has power to order a sale of real estate only when it is necessary or expedient for the purposes of the action before it that the property should be sold.

No new power to order a sale is conferred.

I do not think that the rule [R. S. C., Ord. 55, 1. 3] gives the ct. any power to direct a sale in a case in which it had no power to do so previously (PEARSON, J.).—*Re ROBINSON, PICKARD v. WHEATER* (1885), 31 Ch. D. 247; 55 L. J. Ch. 307; 53 L. T. 865.

337. — Cause or matter relating to real estate—Action by infant heir of intestate.]—An action was brought by the infant heir-at-law of an intestate against the widow, who was the administratrix, claiming an account of the personal estate & an account of the rents & profits of the real estate received by deft. The action coming on for hearing on motion for judgment, pltf. asked, under R. S. C., Ord. 51, r. 1, for an order for the sale of the real estate. Deft. did not object to a sale:—*Held*: the action was not a "cause or matter relating to real estate" within the meaning of the rule; & therefore the ct. had no jurisdiction to order a sale under that rule.—*Re STAINES, STAINES v. STAINES* (1886), 33 Ch. D. 172; 55 L. J. Ch. 913; 35 W. R. 75.

338. — Whether enlarged by R. S. C., Ord. 51, r. 1.]—*Re ROBINSON, PICKARD v. WHEATER*, No. 336, *ante*.

339. — — —.]—*Re TONGE'S SETTLED ESTATES* (1902), 46 Sol. Jo. 394.

340. Duty of purchaser—Carrying out directions of decree.]—COLCLOUGH *v.* STERUM, No. 480, *post*.

341. — To disclose material facts.]—COAKS *v.* BOSWELL, No. 324, *ante*.

342. Duty of court—To guard against misrepresentation, fraud or deceit.]—MAHOMED KALA MEA *v.* HARPERINK, No. 485, *post*.

Sale in administration action.]—See EXECUTORS, Vol. XXIV., pp. 787–789, No. 8186–8211.

SECT. 2.—RULES GOVERNING SALE.

SUB-SECT. 1.—MODE OF SALE.

See R. S. C., Ord. 51, r. 1A.

343. Discretion of judge.]—Where a decree in an administration action directed the accounts to be taken in a district registry, & the real estate to be sold with the approbation of the judge, the judge directed that the sale should take place

in his chambers:—*Held*: although it might have been more convenient that the sale should take place in the district registry, yet the place & manner of the sale was a matter entirely within the discretion of the judge, & refused to interfere with his exercise of such discretion.—*MACDONALD v. FOSTER* (1877), 6 Ch. D. 193; 37 L. T. 296; 25 W. R. 687, C. A.

344. Most beneficial mode—Distinct lots sold as one.]—Premises, held under distinct leases, ordered to be sold in one lot, upon the speculative probability, arising from the nature of the property, that a higher price would be obtained by that mode of sale, than if they were put up in distinct lots.—*COOK v. COLLINGRIDGE* (1827), 3 Russ. 520; 38 E. R. 670, L. C.

345. — Property of Crown debtor.]—(1) Under the words of 25 Geo. 3, c. 35, c. 1, which directs that the "right, title, estate & interest" of a Crown debtor, may be sold to satisfy the debt, a leasehold renewable on lives may be disposed of.

(2) The ct. refused to order, at the instance of the Crown, a sale by private contract; but directed the Remembrancer to certify which was the most advantageous mode of selling the property.—*R. v. LANE* (1840), 6 M. & W. 489; 151 E. R. 505; *sub nom. Re LANE*, 9 L. J. Ex. 175; 4 Jur. 464.

346. — Parties not sui juris—Or before the court.]—The ct. has power, since the passing of the Master in Chancery Abolition Act, 1852 (c. 80), to have a sale of real estate, directed to be sold under the ct., made by auction in chambers before the Chief Clerk; & where all parties interested are *sui juris*, & before the ct., they may, if they think it expedient, have a sale effected in this manner. Where, however, there are parties not before the ct., or not *sui juris*, the duty is thrown upon the ct. of determining what is the most beneficial mode of conducting the sale, & the fact of the power having fallen into disuse tending to show that its exercise was in general inexpedient. The ct. directed a sale by an auctioneer.—*PEMBERTON v. BARNES* (1872), L. R. 13 Eq. 349; 41 L. J. Ch. 209; 26 L. T. 389.

347. In accordance with order of court—Sale to best purchaser.]—A trust estate was decreed to be sold for the payment of debts & legacies, & to be sold to the best purchaser. A. articles to buy the estate of the trustees, & brings a bill to compel them to perform the contract; the trustees by their answer disclose this matter; the ct. will make no new decree, but will leave the former decree to be pursued.—*ANNESLEY v. ASHURST* (1734), 3 P. Wms. 282; 24 E. R. 1066, L. C.

Annotation:—Re Brettell, Ex p. Goren (1838), 7 L. J. Ch. 187.

348. Sale by auction ordered—Property unsold—Validity of private sale.]—Property ordered by

—Proceedings under a decree which is not absolute are invalid.—*CLARKE v. ELLIS* (1873), 6 P. R. 115.—**CAN.**

u. Jurisdiction of court.]—Ord. 50, r. 1, provides, in part: "if in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part should be sold, the ct. or a judge may order the same to be sold":—*Held*: this was a general power to be exercised by the ct. or a judge according to the circumstances, & is not meant to apply only where a sale is necessary or expedient for the purposes of the action.—*RAINEY v. RAINEY* (1906), 12 B. C. R. 494.—**CAN.**

a. Heir-at-law outside jurisdiction.]—The heir-at-law being absent from the jurisdiction, sale of real estate

may be effectuated under the decree of the ct., the particulars of the sale stating the fact, & the purchaser buying with notice.—*LEAHY v. DANCER* (1829), 3 Mol. 108.—**IR.**

b. Effect of sale—Right of purchaser as compared with purchaser by private sale.]—A purchaser at a judicial sale is in a position different from that of a mere representative of the old proprietor, or of one who comes in by a voluntary sale made by the latter. A judicial sale transfers to the purchaser the property of the judgment-debtor against the debtor's will, & places the purchaser in a higher position than that which the judgment-debtor, by any private alienation, could confer on him.—*OOMRAO SINGH v. SHIMBOO NATH* (1870), 2 N. W. 38.—**IND.**

c. — On previous attachments.]—When a judicial sale takes place, all previous attachments effected upon the property sold fall to the ground.—*KASHY NATH ITOY CHOWDHRY v. SURBANAND SHAHIA* (1885), 1 L. R. 12 Calc. 317.—**IND.**

d. Decree binds legal & equitable interests in land sold.]—*MARSHY v. BATTLEWELL* (1843), 4 Dr. & War. 58.—**IR.**

PART III. SECT. 2, SUB-SECT. 1.

e. Form & contents of advertisement.]—An advertisement for the sale of property under decree should set out all the improvements on the property, otherwise it will be referred back to the master to resettle the advertisement, & appoint a new day for sale.—

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the ct. to be sold by auction was bought in. After which, & before the auctioneer had left the rostrum, A. signed a contract to purchase it at the reserved price, which was divulged contrary to the express instructions given to the auctioneer:—*Held*: there was a valid binding contract.—*ELSE v. BARNARD* (1860), 28 Beav. 228; 2 L. T. 203; 6 Jur. N. S. 621; 54 E. R. 353; *sub nom.* *ELSE v. BARNARD*, *Ex p. COURTAULD*, 29 L. J. Ch. 729.

349. ————.]—(1) Suits were compromised with the sanction of the ct., infants being interested, & it was agreed that the estate should be sold by auction, for the purpose of division, & A. should have the conduct of the sale. At the auction the property could not be sold & it was afterwards sold by private contract at the reserved bidding:—*Held*: this was a valid sale, & the purchaser was decreed specifically to perform his contract.

(2) Where a purchaser accepts the title, he is only bound to the extent to which he has been made cognisant of it.—*BOVSFIELD v. HODGES* (1863), 33 Beav. 90; 55 E. R. 300.

Annotation:—*As to (2) Refd. Re Haedleko & Lipski's Contract*, [1901] 2 Ch. 666.

350. ————.]—**Reference to chambers.**—Evidence of the propriety of a sale of an estate by private contract heard & approved of in ct., & not referred to chambers.—*PIMM v. INSALL* (1853), 10 Hare, App. II, lxxiv; 68 E. R. 1158.

351. ————.]—**Necessity for order of court.**—Although, in pursuance of an order of ct. directing a sale of real estate by public auction, an attempt has been made to sell by public auction & has failed, the property cannot be sold otherwise than by public auction until a proper order for the purpose has been obtained, & any prevailing practice at chambers to the contrary is irregular.—*BERRY v. GIBBONS, Ex p. LEE* (1872), L. R. 15 Eq. 150; 42 L. J. Ch. 231.

352. ————.]—**By Chief Clerk.**—*PEMBERTON v. BARNES*, No. 346, *ante*.

353. **Sale by private treaty—Where more beneficial than auction sale.**—*ANON.* (1837), 1 Jur. 525.

354. ————.]—**Property of Crown debtor—Confirmation by court.**—*R. v. ADAM* (1826), 2 Y. & J. 122, n.; 148 E. R. 858.

SUB-SECT. 2.—PLACE OF SALE.

355. **Discretion of judge to determine.**—*MACDONALD v. FOSTER*, No. 343, *ante*.

356. **Before master in chambers.**—*PEMBERTON v. BARNES*, No. 346, *ante*.

357. **Before judge in chambers.**—*MACDONALD v. FOSTER*, No. 343, *ante*.

358. **Out of court—Some parties not sui juris.**—*CHUBB v. PETTIPHER*, [1872] W. N. 110.

359. ————.]—*BAKER v. BAKER* (1879), cited in 27 Ch. D. at p. 259.
Annotation:—*Fold. Strugnell v. Strugnell* (1884), 27 Ch. D. 258.

360. ————.]—In a partition action the question arose whether the ct. had jurisdiction under Partition Act, 1868 (c. 40), s. 8, to authorise

HEWARD v. RIDOUT (1859), 1 Ch. Ch. 244.—*CAN.*

f. ————.]—*Power v. FOSTER* (1901), 34 N. S. R. 479.—*CAN.*

g. **Discretion of master.**—It is open to the master to direct a sale either by auction, tender, or private sale, or partly in one mode & partly in another, but he should do his best

to see that the property is sold to the best purchaser that can be got.—*GUNN v. JOHNSON & McDUGAL & FORSTER, LTD. (Alta.)*, [1919] 1 S. W. R. 699.—*CAN.*

PART III. SECT. 2, SUB-SECT. 3.

h. **Adjournment of sale—Necessity for order of court.**—A sale under the decree

certain trustees to sell out of ct., where such trustees had no power of sale by virtue of the instrument appointing them, & where there were parties interested who were not *sui juris*:—*Held*: in a case like the present, where the ct. would not allow a plff. to sell out of ct., the trustees would not be allowed to do so, inasmuch as to direct trustees to sell where there was a power of sale was not equivalent to giving a power of sale to trustees; & there must be a sale in the usual way under the ct., as the expense would not be much greater, & the parties not *sui juris* were entitled to the protection of the ct.—*STRUGNELL v. STRUGNELL* (1884), 27 Ch. D. 258; 53 L. J. Ch. 1167; 51 L. T. 512; 33 W. R. 30.

361. ————.]—**Settled land.**—Under Settled Estates Act, 1877 (c. 18), the ct. has power to authorise the trustees to sell out of ct. generally, they bringing the proceeds into ct.; & to authorise a sale by public auction or private contract subject to a reserve price settled in chambers.—*Re ADAMS' SETTLED ESTATES* (1878), 9 Ch. D. 116; 38 L. T. 877; 27 W. R. 110.

Annotation:—*N.F. Re Harvey's S. E.* (1882), 21 Ch. D. 123.

362. ————.]—The ct. has no jurisdiction to direct a sale under Settled Estates Act, 1877 (c. 18), to be conducted out of ct.—*Re HARVEY'S SETTLED ESTATE* (1882), 21 Ch. D. 123; 30 W. R. 697.

363. ————.]—*Re TONGE'S SETTLED ESTATES* (1902), 46 Sol. Jo. 394.

364. ————.]—In appointing trustees under Settled Land Act, 1882 (c. 38), ss. 3, 59, 60, to sell an infant's estate, the ct. has jurisdiction to authorise the sale to be made out of ct.—*Re PRICE, LEIGHTON v. PRICE* (1884), 27 Ch. D. 552; 51 L. T. 497; 32 W. R. 1009.

365. ————.]—**Conditions precedent to order of court.**—Whenever I make an order for sale out of ct., I require three things—namely, that the reserved bid should be fixed by the chief clerk; that the auctioneer's remuneration should be similarly fixed, & that the purchase-money should be paid directly into ct. The directions as to the auctioneer's remuneration, as well as the reserved bid, must be mentioned in the order (*KAY, J.*).—*PITT v. WHITE* (1887), 57 L. T. 650.

Annotation:—*Fold. Re Stedman, Coombe v. Vincent* (1888), 58 L. T. 709.

366. ————.]—The ct. being satisfied that all persons interested were parties to the action & desired a sale, an order was made for sale out of ct. with the usual directions as to fixing the reserved price & the auctioneer's remuneration & as to payment of the deposit & the rest of the purchase-money into ct.—*Re STEDMAN, COOMBE v. VINCENT* (1888), 58 L. T. 709.

Annotation:—*Mentid. Wood v. Gregory* (1889), 43 Ch. D. 82.

Sale of mortgaged property.—*See MORTGAGE, Vol. XXXV., pp. 363, 546, Nos. 1054, 2743–2748.*

SUB-SECT. 3.—TIME OF SALE.

367. **Before hearing—Where for benefit of estate.**—The ct. has power, under 15 & 16 Vict. c. 86, s. 55, to order a sale before the hearing of a suit, where it is for the protection or benefit of the

of the ct. cannot be adjourned by the vendor's solr. without the authority of the ct.—*O'CONNOR v. WOODWARD* (1875), 6 P. R. 223.—*CAN.*

k. ————.]—The ct. will not postpone a sale, although a creditor to a large amount apply for a postponement on the ground that he expects the property would sell better at a later

estate.—*TULLOCH v. TULLOCH* (1867), L. R. 3 Eq. 574.

Annotation.—*Apd.* *Bell v. Turner* (1876), 45 L. J. Ch. 681.

368. —[In a suit to render the estate of deceased trustee of a will liable for certain breaches of trust a decree was made declaring the liability of the estate to make good what should be found there in respect of such breaches of trust & directing accounts & inquiries. Before the chief clerk had made his certificate, but it having appeared in the course of taking accounts & inquiries that the estate was liable for a considerable amount which the personal estate was insufficient to satisfy, the *cestui que trust* applied by petition under 15 & 16 Vict. c. 86, s. 55, for the sale of certain real estate belonging to deceased trustee a mtgo. on which had been redeemed by the existing trustee of the will:—*Held*: the ct. had jurisdiction to order the sale & it was in accordance with the practice of the ct. in such a case when once it had been ascertained that the real estate would have to be resorted to to make an order for the sale of the real estate without waiting for further consideration.—*BELL v. TURNER* (1876), 2 Ch. D. 409; 45 L. J. Ch. 681; 24 W. R. 451.

369. Sale stayed pending appeal.—Pending an appeal, the ct. will sometimes stay the sale of property which the decree has directed to be sold; but, if the property consists of personal chattels, remaining in the possession of applt., he must give ample security for their value.—*NEROT v. BURNAND* (1826), 2 Russ. 56; 38 E. R. 257, L. C.; *subsequent proceedings*, *sub nom.* *BURNAND v. NEROT* (1828), 2 Bli. N. S. 215, H. L.

Annotations.—*Refd.* *Gloucester Corp. v. Wood* (1843), 3 Hare, 131; *Suisse v. Lowther* (1843), 7 Jur. 808.

Sale in administration proceedings.—See *EXECUTORS*, Vol. XXIV., p. 789, Nos. 8207, 8208.

SUB-SECT. 4.—CONDUCT OF SALE.

370. Plaintiff—Discretion of court.—Under a decree, directing the sale of an estate, but not directing by whom the sale shall be conducted, the master is not bound to give the conduct of the sale to pltf., but may, in his discretion, if he considers it more beneficial to the estate, give the conduct of the sale to other parties.

Grounds on which the conduct of a sale, under the decree of the ct., may properly be given to parties other than pltf.—*DIXON v. PYNER* (1850), 7 Hare, 331; 19 L. J. Ch. 402; 15 L. T. O. S. 21; 14 Jur. 217; 68 E. R. 135.

Annotation.—*Refd.* *Dale v. Hamilton* (1853), 10 Hare, App. 1, vii.

371. —[—]—(1) Ordinarily, the conduct of a sale directed by the ct. is committed to pltf.; but when it appears for the benefit of the parties, it will be given to a deft. This right does not, however, depend on the extent of the interest of the parties in the property.

(2) When a sale is directed, every party to the suit having the title deeded is bound to facilitate the sale.—*KNOTT v. COTTEE* (No. 4) (1859), 27 Beav. 33; 54 E. R. 13.

Annotation.—*Apd.* *Re Garmeson Estate, Garmeson v. Sharrod* (1872), 21 W. R. 98.

—*Re KENNEDY* (1850), 15 L. T. O. S. 363.—*IR.*

1. Year from date of master's report.—Where a decree directed a sale of certain property at the expiration of a year from the date of a master's report, a sale at the end of a year from the date of the decree, instead of the date of the report, was allowed in special circumstances, on the ground

that the decree was in effect equivalent to a judgment at law.—*PORTE v. IRWIN* (1879), 8 P. R. 40.—*CAN.*

PART III. SECT. 2, SUB-SECT. 4.

m. Stifling competition.—*Held*: it would not be inferred that a sale which took place in Nov. was necessarily affected by practices of the audience to prevent competition,

372. — Purchase-money paid into court.—Where a sale is made by the ct., & the purchasers pay their money into ct., plfts. are entitled to the conduct of the sale; but where a sale, directed by decree, is made out of ct., the trustee or exor. is the proper person to conduct it.—*CORDEN v. MAYNARD* (1863), 1 New Rep. 354.

373. Parties other than plaintiff—When permitted.—*DIXON v. PYNER*, No. 370, *ante*.

374. —[—]—*KNOTT v. COTTEE* (No. 1), No. 371, *ante*.

375. Auctioneer—To avoid expense.—Auctioneer in the country appointed to conduct the sale under a decree, to avoid the expense of sending the master's clerk.—*THOMPSON v. HODGSON* (1836), 2 Y. & C. Ex. 311; 160 E. R. 415; *sub nom.* *THOMPSON v. DODGSON*, 6 L. J. Ex. Eq. 80.

376. Assignee in bankruptcy—In preference to mortgagee.—Form of Order in case of an assignee buying in, by mistake, a mtgd. estate of bkpt. at a sale under Lord Loughborough's order. On such a sale the assignees must have the conduct of it; & it is an improper practice for the sale to be conducted by the mtgee.—*Re COCK, Ex p. CUDDON* (1843), 3 Mont. D. & De G. 302; 1 L. T. O. S. 338; 7 Jur. 334.

—[—]—*See, also*, *BANKRUPTCY*, Vol. IV., p. 376, No. 3471.

377. Trustee or executor.—*CORDEN v. MAYNARD*, No. 372, *ante*.

378. Trustee & testamentary guardian—Substituted for stranger.—Where a sale has been decreed in one of two concurrent suits, the fact of the party to whom has been given the conduct of the cause being an entire stranger to the family & to the property, is a sufficient reason for taking away from him the conduct of the sale, & giving it to the trustee & testamentary guardian of the infants.—*Re GARMESON'S ESTATE, GARMESON v. SHARROD* (1872), 21 W. R. 98.

379. Trustee defendants—In preference to plaintiff trustee.—R. S. C., Mar. 1879, r. 7, provides that whenever the trusts of any will are being administered, & a sale is ordered of any property vested in the trustees of such will with power of sale, the conduct of such sale shall be given to such trustees, unless the judge shall otherwise direct. A., one of the trustees of, & the tenant for life under, a will, brought an action against the other three trustees for the administration of the trusts of the will. A sale having been ordered of certain property vested in the trustees, with power of sale:—*Held*: according to the true construction of the above rule, the conduct of the sale must be given to the three trustees, & not to pltf.—*Re GARDNER, GARDNER v. BEAUMONT* (1879), 48 L. J. Ch. 644; 41 L. T. 82.

380. Solicitor to plaintiff—Held as agent of all parties.—*DALBY v. PULLEN*, No. 517, *post*.

381. Independent solicitor—Injunction to restrain interference by plaintiff.—When a sale has been directed by the ct., & the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the ct. Thus, where the ct. directed a sale & gave the conduct of it to an independent solr., both pltf. & left., having liberty to bid, pltf. was restrained by

which had been carried on at the sale in Oct. preceding, & from which this sale in Nov. was adjourned.—*LOGIE v. STAYNER, LOGIE v. JAMIESON* (1863), 10 Gr. 222.—*CAN.*

n. Master's directions should be followed.—When a sale has been held & the master's directions have not been followed, the vendor will have to show, at his own expense, that no person

Sect. 2.—Rules governing sale: Sub-sects. 4, 5, 6 & 7.]

injunction from issuing & circulating advertisements that the sale was about to take place.—*DEAN v. WILSON* (1878), 10 Ch. D. 136; 48 L. J. Ch. 148; 27 W. R. 377.

382. —. —.]—*Re WINCHESTER, Ex p. BRIGGS*, No. 397, *post*.

—.]—*See, also*, *BANKRUPTCY*, Vol. IV., p. 223, Nos. 2092–2094.

Sale of partnership property.—*See* *PARTNERSHIP*, Vol. XXXVI., p. 518, Nos. 1881, 1885.

Sale in foreclosure suit.—*See* *MORTGAGE*, Vol. XXV., pp. 544, 545, 688, Nos. 2729–2739, 4304.

383. Conduct given to one party—No interference allowed by other party—Without leave of court.—*DEAN v. WILSON*, No. 381, *ante*.

SUB-SECT. 5.—FIXING OF RESERVE.

See R. S. C., Ord. 51, r. 4.

384. Order directing reserve—Not inserted in decree for sale—Separate order necessary.—A direction for a reserved bidding ought not to be inserted in a decree for sale, but ought to be the subject of a separate order.—*BROOKER v. COLLIER* (1827), 3 Russ. 369; 38 E. R. 614.

385. Amount of reserve price—Reimbursement of mortgagee.—Although in sales directed by the ct. it is usual to fix the reserved price at the amount at which the estate has been valued an exception will be made where a mtgee., who, being also a trustee, is incapable of bidding, is desirous of having it fixed at an amount sufficient to cover his debt.—*TENNANT v. TRENCHARD* (1872), 41 L. J. Ch. 779; 20 W. R. 785, L. C.

386. By whom reserve fixed—Master—Communication of reserved price.—At a sale by order of the ct., a reserved bidding allowed to be made one of the conditions, the master to fix the amount, & to use his discretion in communicating it to the parties, or their solrs.—*JERVOISE v. CLARKE* (1820), 1 Jac. & W. 389; 37 E. R. 423, L. C.

Annotation:—*Re* *Imperial Salt & Alkali Co., Ex p. Slattery* (1851), 15 Jur. 1163.

387. —. —.]—*SHAW v. SIMPSON* (1821), 1 Jac. & W. 392, n.; 37 E. R. 425, L. C.

388. — Judge—Effect of error in communication of price.—*Re CLAYTON (JOSEPH), LTD., SMITH v. THE CO.*, No. 408, *post*.

389. — Assignee in bankruptcy.—A reserved bidding was allowed to assignees on sale of an estate which had been mortgaged by the bkpt.—*Re DUCKETT, Ex p. ELLIS* (1833), 3 Deac. & Ch. 297, Ct. of R.

interested has been injured by the non-observance of the directions, otherwise the master will not confirm the sale.—*ROYAL CANADIAN BANK v. DENNIS* (1872), 4 Ch. Ch. 68.—**CAN.**

o. Plaintiff—In absence of contrary direction.—*PRUDEN v. SQUARE-BRIGGS* (1896), 2 Terr. L. R. 200.—**CAN.**

p. Masters.—The masters are personally to superintend sales under decrees, & a sale had in the master's office before his clerk, but in his absence, will be set aside for irregularity.—*ELLIS v. MOLLOY* (1832), 2 Hog. 255.—**IR.**

q. Auctioneer.—*O'GRADY v. BRADY* (1847), 11 L. R. 400.—**IR.**

PART III. SECT. 2, SUB-SECT. 5.

r. By whom reserve fixed—Master.—*FRASER v. BENS* (1859), 1 Ch. Ch. 71.—**CAN.**

390. —. —.]—*Re GORDON, Ex p. LEDICOTT* (1842), 11 L. J. Bcy. 18.

391. —. —.]—On a sale under the fiat of premises mortgaged by the bkpt., leave given to the assignees to fix such reserved bidding as the Comr. might approve of.—*Re HAMLET, Ex p. LACKINGTON* (1843), 3 Mont. D. & De G. 331; 12 L. J. Bcy. 43; 7 Jur. 660, Ct. of R.

392. — Trustees for sale.—*Re TONGE'S SETTLED ESTATES* (1902), 46 Sol. Jo. 394.

393. Purchaser with knowledge of reserve price—Confirmation of purchase.—A purchaser, attending the sale of an estate in the cause, heard the amount of the reserved bidding announced before he made his offer; & the master made a separate report, allowing him as the purchaser, subject to the approval of the ct. with reference to that fact. The mode of confirming this report & approving of the purchase is by a special notice of motion to that effect, & not, as in the common case, by orders *nisi* & absolute.—*DOWLE v. LUCY* (1845), 4 Ilare, 311; 67 E. R. 667.

Alteration of reserve price—By auctioneer.—*See* *AUCTION & AUCTIONEERS*, Vol. III., p. 5, No. 19.

SUB-SECT. 6.—LEAVE TO BID.

394. Representative of interested parties.—*SHAW v. SIMPSON* (1821), 1 Jac. & W. 392, n.; 37 E. R. 425, L. C.

395. Assignee in bankruptcy—Conduct of sale not by assignee's solicitor.—An assignee, under particular circumstances, permitted to bid at the sale of bkpt's estate, his solr. not having the management of the sale.—*Re PYNE, Ex p. MORLAND* (1828), Mont. & M. 76, L. C.

To commence bidding—Reserve price fixed.—*See* *BANKRUPTCY*, Vol. IV., p. 223, No. 2095.

396. Mortgagee.—On a sale of bkpt's mtged. property, the ct. in the order for leave to bid, will not direct that the mtgee. shall not be required to make any deposit.—*Re SHEPPARD, Ex p. TATHAM* (1834), 4 Deac. & Ch. 360; 1 Mont. & A. 335, Ct. of R.

397. —. —.]—As the solr. to the fiat is mtgee., the comrs. must appoint some other solr. to conduct the sale; the solr. may then move for leave to bid, in order to protect the estate (*per* CUR.).—*Re WINCHESTER, Ex p. BRIGGS* (1838), 3 Mont. & A. 505; 3 Deac. 238, Ct. of R.

398. — Where purchase price deficient.—An equitable mtgee. of leasehold property must satisfy a distress for rent out of the proceeds of sale, & can only prove for the deficiency, although

t. Amount of reserve—Whether two-thirds of appraised value of property.—*STANDARD TRUST CO. v. WALTER (Alta.)*, [1924] 3 D. L. R. 585.—**CAN.**

PART III. SECT. 2, SUB-SECT. 6.

a. Parties to suit.—Parties to the suit will not be allowed to bid at the auction, but will be permitted to have a reserved bidding.—*PHILLIPS v. CONGER* (1845), 1 O. S. 583.—**CAN.**

b. —. —.]—Whenever pltf. wishes to become the purchaser, it must be made part of the order, giving him liberty to bid, that the carriage of the sale be taken from him.—*ENNIS v. CASEY* (1811), Fl. & K. 319, n.—**IR.**

c. —. —.]—It is irregular for a party in the cause to bid at the sale of lands set up under the decree, without having previously obtained the permission of the ct. so to do, & the ct.

will not, in such case, on a certificate of his being the highest & best bidder, declare him the purchaser, unless special circumstances are shown to excuse his irregularity.—*BYRNE v. LAFFERTY* (1845), 8 I. Eq. R. 47.—**IR.**

d. —. —.]—*CLARKE v. DOBBIN, CLARKE v. CLARSON* (1815), 8 I. Eq. R. 111.—**IR.**

e. —. —.]—Where lands decreed to be sold for payment of pltf.'s demand were of insufficient value, & no *bona fide* bidders could be procured, the ct. permitted pltf. to bid without taking from him the carriage of the decree.—*SPAIGHT v. PATTERSON* (1846), 9 I. Eq. R. 149.—**IR.**

f. —. —.]—It is a settled rule of the ct. that pltf., or his solr., cannot bid at a sale under the decree, without leave of the ct. Noncompliance with that rule will vitiate the sale.—

occasioned by the payment of the rent.—*Re* CROSS, *Ex p.* COCKS (1833), 3 Deac. & Ch. 8, Ct. of R.

399. ———.—*Re* HADWEN, *Ex p.* PEDDER (1834), 1 Mont. & A. 327; 3 Deac. & Ch. 622, Ct. of R.

———.—*See, also*, MORTGAGE, Vol. XXXV., pp. 546, 595, 596, 675, Nos. 2749–2754, 3362–3375, 4131–4135.

400. **Executor—To commence bidding.**—Where testator's estate had been directed by the ct. to be sold, the ct. declined to give the exor. leave to bid at such sale, although the permission might benefit the estate.—*GELDARD v. RANDALL* (1845), 6 L. T. O. S. 167; 9 Jur. 1085.

401. **Cestuis que trusts.**—*EDMONDS v. FOLEY* (LORD), No. 333, *ante*.

402. **Solicitor on the record—Effect of granting leave.**—*COAKS v. BOSWELL*, No. 324, *ante*.

SUB-SECT. 7.—OPENING BIDDINGS.

See Sale of Land by Auction Act, 1867 (c. 48).

403. **Reserve price not reached at sale—Subsequent private offer approved by court—Acceptance confirmed as final.**—In an administration suit an estate was ordered to be sold by auction, but the reserved price not having been reached, the sale by auction became inoperative. A subsequent offer to purchase subject to the approval of the ct. within ten days was carried in before the chief clerk, who approved of the offer, & ordered the contract to be carried out, whereupon the deposit was paid & the abstract delivered. Before the order had been passed & entered a much higher price was offered. Upon summons to vary the chief clerk's certificate by setting aside the sale & directing the offer for a larger amount to be accepted:—*Held*: the certificate of the chief clerk, although not passed & entered, was tantamount to a confirmation of the contract; & the principle of Sale of Land by Auction Act, 1867 (c. 48), s. 7, by which the old practice of opening biddings on a sale by auction was discontinued, except upon the ground of fraud or improper conduct, applied equally to a sale by private contract entered into under the sanction of the ct. & such a contract could not be discharged where no unfairness existed. The chief clerk's certificate

was therefore confirmed.—*Re* BARTLETT, *NEWMAN v. HOOK* (1880), 16 Ch. D. 561; 50 L. J. Ch. 205; 44 L. T. 17; 29 W. R. 279.

Annotations:—*Consd.* *Re* Oriental Bank Corp'n. (1887), 56 L. T. 868. *Distd.* *Re* Thomas, Bartley v. Thomas, [1911] 2 Ch. 389.

404. **Grounds for opening—Misrepresentation.**—A. & B. being in partnership as brewers, disputes arose between them, & A. filed a bill for dissolution, etc. & an order was made by consent, whereby it was ordered that a receiver & manager should be appointed with a view to a sale of the concern as a going concern, & at the sale A. & B. were to be at liberty to bid. Before the day of sale, B. by his conduct & manner, if not by his direct statements, had given A. & others reason to believe that he would not be the purchaser or bid at all at the sale; & he had also used language not calculated to give a high opinion of the value of the property. On the day of the sale A. & a stranger unknown to him were the only bidders, the stranger constantly making advances on A.'s bidding, till at last A. began to think he was employed by B. to run him up, & he stopped bidding altogether, with the intention of applying to have the bidding opened afterwards, as the auctioneer had announced might be done. He accordingly applied, making a sufficiently large advance:—*Held*: having been misled by B. he was entitled to have the biddings opened.—*MANNERS v. FURZE* (1848), 17 L. J. Ch. 185; 11 L. T. O. S. 470.

405. ———.—**Fraud—Or misconduct bordering on fraud.**—In order to entitle parties to open the biddings after a sale by auction under the ct. since the passing of Sale of Land by Auction Act, 1867 (c. 48), there must be either fraud or such misconduct as borders on fraud.—*DELVES v. DELVES* (1875), L. R. 20 Eq. 77; 23 W. R. 499.

Annotation:—*Refd.* *Re* Clayton, Smith v. Clayton, [1920] 1 Ch. 257.

———.—**Damping sale.**—*See* AUCTION & AUCTIONEERS, Vol. III., p. 21, No. 149.

406. ———.—**Neglect of auctioneer—To ascertain reserve price.**—Neglect on the part of an auctioneer to ascertain the reserved price before the commencement of a sale, is not such "improper conduct in the management of the sale" as will authorise the ct. to open the biddings.—*BROWN v. OAKSHOTT* (1869), 38 L. J. Ch. 717.

Annotations:—*Refd.* *Delves v. Delves* (1875), 23 W. R. 499. *Re* Clayton, Smith v. Clayton, [1920] 1 Ch. 257.

POPHAM v. EXHAM (1860), 10 I. Ch. R. 110.—**IR.**

g. **Power of master.**—A master has no power to give leave to bid to a party conducting a sale; application must be made to the ct.—*Re* LAYCOCK, *McGILLIVRAY v. JOHNSON* (1881), 8 P. R. 548.—**CAN.**

h. **Party having conduct of sale.**—*HALSFED v. CONKLIN* (1885), 3 Man. L. R. 8.—**CAN.**

k. ———.—It is contrary to our practice to give leave to bid to the person having conduct of the sale.—*CUMMINGS v. SEMERAD* (1908), 2 Alta. L. R. 82; 8 W. L. R. 644.—**CAN.**

l. **Assignee of contract for sale.**—*CROWN LIFE ASSURANCE CO. v. CLARK* (1915), 32 W. L. R. 654; 8 W. W. R. 333; 25 D. L. R. 519; 9 Alta. L. R. 97.—**CAN.**

m. ———.—*DENT v. HUTTON*, [1923] S. C. R. 716; 25 O. W. N. 143.—**CAN.**

n. **Vendor.**—Where, in an action on an agreement for sale of land, the vendor obtained an order nisi for sale of the land with leave to bid at the sale, the order nisi not providing for a reserve bid nor an upset price, & no appeal was taken by defts. from said order, & the vendor was highest bidder

at the sale, his bid, however, being less than the appraiser's value:—*Held*: in the absence of fraud or misconduct in the management of the sale nothing more should be required of the vendor so bidding than would be required of any other person who proved to be the highest bidder; & the sale was accordingly confirmed.—*McLARRY v. WESTERN TRUST CO.*, [1924] 1 D. L. R. 384; 17 Sask. L. R. 607; [1923] 3 W. W. R. 1084.—**CAN.**

o. **Puffer.**—*SHIMMIN v. BELLEW*, [1867] 1 I. R. Eq. 289.—**IR.**

PART III. SECT. 2, SUB-SECT. 7.

p. **General rule.**—Whether the biddings will be opened or not is a question to be determined by the particular circumstances of each case.—*MAYNE v. MACARTNEY* (1839), 2 I. Eq. R. 324.—**IR.**

404 i. **Grounds for opening—Misrepresentation.**—*Re* LONGVALE BRICK & LIME WORKS, LTD., [1917] 1 I. R. 321.—**IR.**

q. ———.—**Fraud.**—*BAKER LUMBER CO., LTD. v. LEE*, [1921] 2 W. W. R. 142; 59 D. L. R. 665.—**CAN.**

r. ———.—*After* a sale regularly confirmed, the ct. cannot open the

bidding merely on a suggestion of there being persons ready to bid in advance, without first setting aside the order confirming the sale, & that order ought not to be set aside but on grounds of fraud.—*FERGUSON'S EXECUTORS v. GORE* (1804), 1 Sch. & Lef. 350.—**IR.**

t. ———.—**Value of part of property not taken into consideration.**—*Re* JELLY, *PROVINCIAL TRUSTS CO. v. GAMON* (1901), 22 C. L. T. 61; 3 O. L. R. 72.—**CAN.**

u. ———.—**Misconduct.**—An order to open bidding will not be made after great delay against an innocent purchaser, unless misconduct is shown on the part of the purchaser.—*CROOKS v. CROOKS* (circa 1866), 2 Ch. Ch. 29.—**CAN.**

b. ———.—**Inadequate description of property.**—An inadequate description of the property in the advertisement will be sufficient ground to open biddings, if calculated to mislead or deter the public from purchasing, but not otherwise.—*CRESSWICK v. THOMPSON* (1873), 6 P. R. 52.—**CAN.**

c. ———.—**Offer of an advanced price.**—After a sale under a decree or order, biddings will not be opened merely upon the offer of an advanced price,

*Sect. 2.—Rules governing sale: Sub-sects. 7, 8 & 9.
Sect. 3: Sub-sect. 1, A. & B.; sub-sect. 2.]*

407. — Bidding by person disqualified.]—Property sold in a foreclosure suit was purchased by W., a solr., whose name appeared on the particulars of sale as one of several solrs. from whom particulars of sale could be obtained. He was not solr. to any of the parties to the suit, but was solr. to some creditors of the mtgee., one of whom had obtained a decree for administration of the mtgee.'s estate. W. had two days before the sale taken out a summons to obtain leave for pltf. in the administration suit to attend proceedings in the foreclosure suit, such summons being returnable on the day after the sale. He had never been consulted about the sale, & did not know what was the amount of the reserved bidding:—*Held*: W. was not disqualified from purchasing, for that his client was at liberty to purchase, & therefore his being her solr. did not disqualify him, & the mere fact of his own name appearing on the particulars of sale as a person from whom copies of them might be obtained was not a disqualification; if W. had stood in such a fiduciary position as to be disqualified from purchasing, Sale of Land by Auction Act, 1867 (c. 48), s. 7, would not have been a bar to setting aside the purchase, though absolutely confirmed.—*GUEST v. SMYTHIE* (1870), 5 Ch. App. 551; 39 L. J. Ch. 536; 22 L. T. 563; 34 J. P. 676; 18 W. R. 742, L. J.

Annotation:—*Refd.* *Farrar v. Farrars* (1888), 40 Ch. D. 395.

408. — Reserve price not reached.]—Sale of Land by Auction Act, 1867 (c. 48), s. 7, did not alter the existing practice by which the highest bidder became the purchaser on being declared or allowed to be the purchaser by the usual certificate. It merely enacts that the certificate allowing him to be the purchaser shall be given if he has bid up to the reserve price & there has been no fraud or improper conduct in the management of the sale. The certificate is still necessary for the purpose of converting the highest bidder into the accepted purchaser.

Upon a sale by the ct. in a debenture holder's action, the judge fixed the reserve price at the sum of £8,400, but by a mistake in the master's chambers the sum of £4,575 was inserted as the reserve price in the sealed instructions furnished to the auctioneer who, acting thereon, knocked down the property at £5,000 to the highest bidder:—*Held*: inasmuch as the judge had only authorised the sale provided the reserve price fixed by him was obtained, & as the highest bid at the auction had not reached that figure but had only exceeded a lower reserve price which, by

mistake, & in contravention of the direction of the judge in person, had been supplied to the auctioneer, there was nothing to compel the ct. to certify the highest bidder to be the purchaser, & the certificate must be refused.—*Re CLAYTON (JOSEPH), LTD., SMITH v. THE CO.*, [1920] 1 Ch. 257; 89 L. J. Ch. 188; 122 L. T. 517; 36 T. L. R. 109; 64 Sol. Jo. 176.

SUB-SECT. 8.—PAYMENT OF DEPOSIT.

409. Deposit paid to vendor's solicitor—For payment into court—At direction of master.]—Motion, that, on sale of an estate under an order of the ct., the master might be at liberty to take a deposit on the purchase-money to be paid into the hands of the master's chief clerk, by him to be paid into the bank in the name of the accountant general, to the credit of the cause, refused. But the ct., on appct.'s solr. appearing by counsel, & undertaking to pay what he might receive according to the order of the ct., & appct. himself undertaking to be bound by any order the ct. might make in respect of any moneys his solr. might receive, gave liberty to the master to fix a deposit, & to direct the purchaser to pay same to such solr., such solr. to pay same into ct. on or before a time appointed by the present order.—*LYON v. COLVILL* (1842), 6 Jur. 680.

— *By auctioneer.*—*See AUCTION & AUCTIONEERS*, Vol. III., p. 6, Nos. 28, 29.

410. Exemption from payment—Mortgagee permitted to bid.]—*Re SHEPPARD, Ex p. TATHAM*, No. 396, *ante*.

SUB-SECT. 9.—REMUNERATION OF AUCTIONEER.

See AUCTION & AUCTIONEERS, Vol. III., pp. 31–35, Nos. 226–254.

SECT. 3.—TITLE.

SUB-SECT. 1.—INVESTIGATION.

A. In General.

411. Production of deeds—Person interested not party to suit.]—Production of deeds & documents will not be ordered where a deft. & another person, who is not a party to the suit, are severally interested in the estate & title deeds.

An estate was sold under a decree. Upon a summons to produce the deeds for inspection, the ct. refused to make the order, as the deeds were

whether the purchaser at the sale is a stranger to the suit, or a party allowed by an order of the ct. to bid.—*MITCHELL v. MITCHELL* (1875), 6 P. R. 232.—*CAN.*

J—After the confirmation of the sale, the biddings will not be opened upon a mere advance of price.—*VINCENT v. THWAITES* (1843), 5 I. Eq. R. 526.—*IR.*

e.—*Advantages to parties concerned.]—**DIGBY v. BROWNE* (1839), 1 I. Eq. R. 377.—*IR.*

f.—*In opening biddings, this ct. does not tie itself down to any precise rule as to the amount of the sum to be advanced, but looks substantially to that which is for the benefit of the parties, & to the circumstances of the particular case before it.*—*POWER v. POWER* (1841), 3 I. Eq. R. 511.—*IR.*

g.—*The rules which permit the practice of re-opening biddings upon the sale of properties by*

order of ct., do not include cases where it clearly appears that no appreciable advantage will result to the parties intended to be benefited by it.—*BENNETT v. MCKAY* (1880), 6 Nfld. L. R. 241.—*NFLD.*

*h. Procedure where opening of biddings not granted.]—*The ct. will in a proper case, & upon conditions, substitute a proposed purchaser at an increased price for a person who has purchased property at a sale under a decree, instead of opening the biddings generally & directing a resale; giving the present purchaser the option to take it at the increased price.—*HARRISON v. PATTERSON* (1861), 1 Ch. Ch. 363.—*CAN.*

*k. Private tender—Reopening sale after acceptance of tender.]—*Where a private tender for the purchase of property sold by order of the ct. has been accepted, the principles applicable to reopening biddings on a sale by auction by order of the ct. will be

followed.—*MUNSTER BANK v. MUNSTER MOTOR CO.*, [1922] 1 I. R. 15.—*IR.*

PART III. SECT. 2, SUB-SECT. 8.

*1. Necessity to pay money into court.]—*Where the party having the conduct of a sale, neglects to pay into ct. the deposit paid to him by the purchaser at the time of sale, the ct. will, on the application of the purchaser, order him to do so.—*CROOKS v. GLENN* (1860), 1 Ch. Ch. 354.—*CAN.*

PART III. SECT. 3, SUB-SECT. 1.—A.

*m. Production of deeds—To one purchaser for inspection by all purchasers of lots.]—**REYNOLDS v. REYNOLDS* (1843), 6 I. Eq. R. 75.—*IR.*

*n. Right to evidence that interested persons are living.]—*A party purchasing under a decree of the ct. has a right to call for evidence showing that persons whose interests were intended to be disposed of were alive at the time of such sale, before accepting title by

held by the agents of two tenants in common, one of whom was not a party to the suit.—*EDMONDS v. FOLEY* (LORD) (1862), 30 Beav. 282; 31 L. J. Ch. 384; 5 L. T. 709; 8 Jur. N. S. 552; 10 W. R. 210; 54 E. R. 897.

Annotation.—*Apld.* *Kearsley v. Phillips* (1882), 10 Q. B. D. 36.

412. Reference to master.—On motion to pay money into ct., the amount of purchase-money for an estate, where the title had been reported upon by the master to be sufficient, it was ordered that it should be referred back to the master to inquire when the vendor had shown a good title.—*MAJOR v. WARD* (1848), 10 L. T. O. S. 364.

413. — Costs of reference.—Where an estate was sold under a decree of the ct., & one of the conditions of sale was, that the purchaser pay the purchase-money into ct. on a given day, at his own expense, it was held, that the purchaser was entitled to the costs of a reference as to the title reported good by the master.—*CAMDEN v. BENSON* (1837), 1 Keen, 671; 48 E. R. 466.

B. By Conveyancing Counsel.

See R. S. C., Ord. 51, rr. 7–13.

414. Whether necessary.—Under 15 & 16 Vict. c. 86, s. 56, the ct. has power to dispense with the rule that an abstract of title upon a sale, under an order by private contract, shall be laid before the conveyancing counsel.—*GIBSON v. WOOLLARD* (1854), 5 De G. M. & G. 835; 3 Eq. Rep. 152; 24 L. J. Ch. 56; 24 L. T. O. S. 137; 3 W. R. 94; 43 E. R. 1094, L. J.J.

Annotation.—*Reid.* *Re Jones*' S. E. (1855), 3 Eq. Rep. 735.

415. Right of master to refer to conveyancer.—*Qu.*: whether a master to whom a question of title is referred, has a right to require the parties to procure for him the opinion of any conveyancer whom he shall select, upon the abstracts of title which have been brought into his office?—*FLOWER v. WALKER* (1826), 1 Russ. 408; 38 E. R. 159, L. C.

416. Function of conveyancer — Agent of vendor.—*Re BANISTER, BROAD v. MUNTON*, No. 100.

SUB-SECT. 2.—WHEN PURCHASER REQUIRED TO ACCEPT TITLE.

See Law of Property Act, 1925 (c. 20), s. 204.

417. Notwithstanding irregularity — & defects in decree.—A purchaser under a decree not affected by irregularities & defects in the decree, by which the application of the money may not have been properly secured.—*CURTIS v. PRICE* (1805), 12 Ves. 89; 33 E. R. 35.

Annotations.—*Follid.* *Baker v. Sowter* (1847), 10 Beav. 343. *Reid.* *Beloeley v. Carter* (1869), 4 Ch. App. 230. *Mentid.* *Wykham v. Wykham* (1811), 18 Ves. 395; *Colmore v. Tyndall* (1828), 2 Y. & J. 605; *Kavanagh v. Morland* (1853), 18 Jur. 185; *Beaumont v. Sallsbury* (1854), 19 Beav. 198; *Lewis v. Rees* (1856), 3 K. & J. 132; *Denman v. Jones* (1867), 16 L. T. 787; *Cooper v. Kynock* (1872), 7 Ch. App. 398.

418. If court decides for validity of title.—The question of title or no title being matter of

opinion for the ct., the purchaser is bound by that opinion, & cannot object to take the title on the ground that the difficulty of the question on which it depends furnishes a sufficient objection to completing the purchase.—*RUSHTON v. CRAVEN* (1823), 12 Price, 599; 147 E. R. 821.

Annotation.—*Distd.* *Pyrke v. Waddingham* (1852), 10 Hare, 1.

419. Erroneous order.—Where realty, which was comprised in a settlement, had been in part subjected to sub-settlements, operating through powers of appointment in the original deed, & in part emanipated from all settlement, by becoming vested in persons as tenants in fee, & in other persons as mtgees. — *Held*: (1) an order obtained in the matter of Leases & Sales of Settled Estates Act, 1856 (c. 120), & in the matter of the estates comprised in the original settlement, for the sale of all the lands comprised therein was erroneous. *Semble*: if the property had all been subject to the sub-settlements, created in the manner above specified, the order would have been valid. (2) It was competent to a purchaser, before the completion of the sale, to make an objection to the title resting on such an order.

(3) *Semble*: if the sale had been completed, the purchaser's title would have been good under Leases & Sales of Settled Estates Act, 1856 (c. 120).

(4) Leases & Sales of Settled Estates Act, 1856 (c. 120), is applicable to a case where the settlement contains a sufficient power of sale.—*Re THOMPSON'S SETTLED ESTATES, GREEN v. THOMPSON* (1859), John. 418; 5 Jur. N. S. 1343; 70 E. R. 485.

Annotation.—*Generally, Reid.* *Re Shephard's S. E.* (1869), L. R. 8 Eq. 571.

420. Concurrence of party dispensed with.—An order for sale under Settled Estates Act, 1877 (c. 18), contained a direction dispensing with the concurrence or consent of the persons entitled, whether beneficially or otherwise, to any estate or interest subsequent to a certain estate tail, without naming them. The purchaser objected to the title on the ground that the order on the face of it was irregular.—*Held*: under Conveyancing & Law of Property Act, 1881 (c. 41), s. 70, the purchaser would in any event have a good title, that sect. being applicable whether the objection to the order appears on the face of it or not, & the purchaser must complete.—*Re HALL DAKE'S CONTRACT* (1882), 21 Ch. D. 41; 51 L. J. Ch. 671; 46 L. T. 755; 30 W. R. 556, C. A.

Annotations.—*Consd.* *Mostyn v. Mostyn*, [1893] 3 Ch. 376; *Jones v. Barnett*, [1900] 1 Ch. 370. *Reid.* *Re Stafford's S. E.* (1903), 20 T. L. R. 61.

421. ——By an order in an administration action the trustees of certain land were ordered to sell it with the approval of the judge, & the first mtgees. were to be at liberty to retain all the purchase-money in reduction of their charge. There were puisne incumbrances, the persons entitled to which were not parties to the proceedings. The property was sold in lots under conditions of sale which stated that the first mtgees. would join in the conveyance to the purchasers &

means of a vesting order.—*SLATER v. FISKEN* (1857), 1 Ch. Ch. 1.—*CAN.*

o. Order for delivery of abstract.—On moving to make an order nisi for not delivering an abstract of title absolute, it is necessary to show that it has not been delivered to either party named in the order.—*DICK v. McNAB* (1858), 1 Ch. Ch. 21.—*CAN.*

p. Removing objections to title.—The party having the conduct of the sale represents, for the purposes of the sale, so far as the purchaser is con-

cerned, all the other parties to the suit, & it is his duty to remove, or procure to be removed, any objection which may properly be made to the title.—*STREET v. HALLETT* (1876), 6 P. R. 312.—*CAN.*

q. Notice of interest of third party by possession—Interest of tenant.—*MANSON v. MANSON* (1884), 10 P. R. 155.—*CAN.*

PART III. SECT. 3, SUB-SECT. 2.

r. Where proof of title involves no

difficulty.—Where the title or the proof of it is involved in no difficulty, a condition of sale that "The vendor is not to be bound to give any evidence of title or any title-deeds or copies thereof, other than such as are in his possession, or procure any abstract," was held to be very objectionable, & one which should not be sanctioned by masters even by consent.—*McDONALD v. GORDON* (1867), 2 Ch. Ch. 125. — *CAN.*

release the property from their debt, but that as the debt to the first mtgges. exceeded the probable amount of the purchase-money no subsequent incumbrance would be abstracted or released; & that the purchaser should not require the concurrence in the conveyance of any person having only an equitable interest bound by the order for sale, other than the vendors who are selling as trustees. The first mtgges., who consented to join in the conveyance, wished to insert in the grant to the purchasers the words, "according to their estate & interest in the premises & not further or otherwise," & the words, "subject to such right or equity of redemption, if any, as is subsisting in the hereditaments, & is not by these presents conveyed or released":—*Held*: the purchasers were protected against the equitable interests of the puisne incumbrancers by Conveyancing & Law of Property Act, 1881 (c. 41), s. 70, & they were entitled to an absolute conveyance of the estate in fee simple without any qualifying words, & to a declaration that the subsequent incumbrancers were bound by the order of the ct.—*MOSTYN v. MOSTYN*, [1893] 3 Ch. 376; 62 L. J. Ch. 959; 69 L. T. 741; 42 W. R. 17; 9 T. L. R. 635; 37 Sol. Jo. 700; 2 R. 587. C. A.

422. Notwithstanding party with equitable interest.]—WALTHAM'S (LORD) CASE (undated), cited in *Coop. G.* at p. 139.

424. —[.]—Vesting order as to the equity of redemption in an infant, against whom, in a foreclosure suit, a decree for sale had been made, refused, on the ground that the mtgee. had the legal estate, & that all equities were bound by the order for sale.—*Re WILLIAMS' ESTATE* (1852), 5 De G. & Sm. 515; 21 L. J. Ch. 437; 19 L. T. O. S. 152; 61 B. R. 1222.

When it is conceded that you have before the ct. every living person who could be properly made a party, the decree for sale is a good decree, & binds the interest of everybody else, whether unborn or already born, in the sense of living, but not sustaining the character of the person taking the property. In all such cases the decree binds the equity (JESSEL, M.R.).—*BASNETT v. MOXON* (1875), L. R. 20 Eq. 182; 44 L. J. Ch. 557; 23 W. R. 915.

427. --.]—By an agreement dated Dec. 15, 1900, the vendor agreed to sell to the purchaser

428. Notwithstanding non-compliance with formalities.—After an estate has been sold by auction under a decree of ct., the purchaser's title is not to be attacked merely on the ground that the holder of the decree had not complied with all the statutory formalities for the conduct of such sale; as, for example, the want of due notice of sale; & the burden of proof of such compliance is not on the purchaser.—**SINGH v. SINGH** (1863), 9 L. T. 129, P. C.

430. ———.]—A. agreed to sell land to B., who accepted the title, paid part of his purchase-money, & was let into possession, but took no conveyance. A. subsequently obtained a decree against B. for sale of the property, & payment of the balance of purchase-money out of the proceeds:—*Held*: a purchaser under the decree could not be compelled to complete without the concurrence of the registered judgment creditors of B., whose judgments were prior to the decree, & who were not parties to the suit.—GREY-COAT HOSPITAL (GOVERNORS) *v.* WESTMINSTER IMPROVEMENT COMRS. (1857), 1 De G. & J. 531; 5 W. R. 855; 44 E. R. 829; *sub nom.* GRAY-COAT HOSPITAL (GOVERNORS) *v.* WESTMINSTER IMPROVEMENT COMRS., 26 L. J. Ch. 843; 29 L. T. O. S. 339; 3 Jur. N. S. 1188, L. J.J.

431. —.]—Conveyancing & Law of Property Act, 1881 (c. 41), s. 70 (1), which provides that "an order of the ct. under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of (*inter alia*) want of jurisdiction," does not operate to give a good title to a purchaser at a sale under an order of the ct. when the ct. in making the order supposed that it was dealing with an interest belonging to a judgment debtor, though it in fact belonged to a person not a party to the proceedings & not bound by them. Under such circumstances, notwithstanding the order of the ct. & the provisions of s. 70, that person has a good title as against the purchaser.—*JONES v. BARNETT*, [1900] 1 Ch. 370; 69 L. J. Ch. 242; 82 L. T. 37; 48 W. R. 278; 16 T. L. R. 178, C. A.

Annotations:—*Reid. Re Hambrough's Estate*, Hambrough v. Hambrough, [1909] 2 Ch. 620; *Hewson v. Shelley*, [1914] 2 Ch. 13.

Discharge of purchaser.]—*See Sect. 9, post.*

SECT. 4.—PURCHASE-MONEY—PAYMENT INTO COURT.

See R. S. C., Ord. 51, r. 3A.

432. Where no dispute as to title.]—Orders to pay into ct. purchase-money of property sold under the decree of the ct., where there is no question as to the title, made in chambers.—*DAVENPORT v. DAVENPORT* (1852), 9 Hare, App. 1.1; 22 L. J. Ch. 11; 20 L. T. O. S. 60; 16 Jur. 988; 1 W. R. 12; 68 E. R. 785.

433. Abstract not complete.]—Form of purchaser's order for liberty to pay purchase-money into ct., & for the investment thereof, when the time for payment had arrived, but the vendors had not completed the abstract of title.—*HINDLE v. DAKINS* (1838), Coop. Pr. Cas. 381; 1 Coop. temp. Cott. 378; 47 E. R. 551, L. C.

Annotations:—*Apld. Morris v. Bull* (1847), 12 Jur. 4. *Reid. De Visne v. De Visne* (1849), 1 Mac. & G. 336.

434. Imperfect title—Costs of application.]—A motion that the purchaser pay his purchase-money into ct. is premature, if the title is not perfect, & the costs thereof will be allowed him.—*MEIRE v. GRIFFITHS* (1847), 8 L. T. O. S. 406.

435. Payment in before title accepted—Right to possession deferred.]—Notwithstanding the general rule, the ct. may, under special circumstances, permit a purchaser to pay his purchase-money into ct. before he has accepted the title; but in such case express provision must be made against his taking possession until he shall have accepted the title.—*DEMPSEY v. DEMPSEY* (1847), 1 De G. & Sm. 691; 63 E. R. 1253.

Annotation:—*Reid. De Visne v. De Visne* (1849), 1 Mac. & G. 336.

436. Payment in without prejudice to objections—Whether allowed.]—Purchase-money of estates

sold under decrees may be paid into ct., without prejudice to the question of title, if a sufficient case is made to induce the ct. to make the order.—*MORRIS v. BULL* (1847), 17 L. J. Ch. 9; 10 L. T. O. S. 303; 12 Jur. 4.

Annotation:—*Reid. De Visne v. De Visne* (1849), 1 Mac. & G. 336.

437. —.]—Parties interested in an estate which was sold for a large sum of money, asked that the purchaser might pay a part of the purchase-money into ct. without prejudice to objections to the title:—*Held*: such an order would be contrary to the rule of the ct.; & though such rule was not inflexible, the ct. refused to make the order, even with the consent of the purchaser.—*OUSELEY v. ANSTRUTHER* (1819), 11 Beav. 399; 18 L. J. Ch. 157; 13 L. T. O. S. 63; 50 E. R. 871.

438. — No right to possession.]—A purchaser under the ct. will not be allowed to take possession "without prejudice to objections to the title," even upon payment of his purchase-money into ct.—*HUTTON v. MANSELL* (1840), 2 Beav. 260; 48 E. R. 1180.

439. Application of purchase-money paid in—Right of purchaser to direct.]—A message belonged to testator, who devised his real estate in trust for sale. An adjoining message was vested in the trustees of his settlement upon trust for sale, & the purchase-money, subject to the payment of definite sums, belonged to testator's estate. Under a decree for administering testator's estate the two messages were put up for sale together in one lot, & it was provided that the purchase-money should be paid into ct. to the credit of the cause, "The proceeds of the sale of testator's real estate." The trustees of the settlement had obtained liberty to attend the proceedings as to the sale. The purchaser objected to the title on the ground that the two properties were sold together for one lump sum, without any provision for apportioning it, & that it was to be paid into ct. in a suit unconnected with the settlement:—*Held*: this objection was not sustainable, for the ct., having the money in its custody, would see it properly applied. The ct., however, for the satisfaction of the purchaser, ordered that the purchase-money should be apportioned, & the part apportioned to the settled message paid into ct. to a separate account.—*CAVENDISH v. CAVENDISH* (1875), 10 Ch. App. 319; 33 L. T. 219; 23 W. R. 313, L. J.

Annotations:—*Consd. Rawlinson v. Miller* (1875), 1 Ch. D. 52; *Morris v. Debenham* (1876), 2 Ch. D. 540. *Reid. Re Cooper & Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802; *Tolson v. Sheard* (1877), 5 Ch. D. 19.

440. — To pay off incumbrances—Delay in preparation of conveyance.]—Delay in the preparation of the draft conveyance is no sufficient ground for coming to the ct. to have part of the purchase-money applied to pay off incumbrances.—*BEVAN*

PART III. SECT. 4.

439 i. Application of purchase-money paid in—Right of purchaser to direct.]—*FAIRRELL v. IRWIN* (1826), 2 Mol. 511.—*IR.*

t. — To pay off incumbrances.]—*GREENE v. ELLIOTT* (1839), 1 E. R. 207.—*IR.*

a. — Adverse claims—Complicated accounts.]—*MAGRATH v. RANNEY* (1912), 20 W. L. R. 329; 4 D. L. R. 457.—*CAN.*

b. — Payment of rents accruing due between lodgment of purchase-money & possession.]—*NUNN v. MAHON* (1836), 2 Jo. Ex. Ir. 181.—*IR.*

c. — Duty of purchaser.]—A purchaser of lands sold under a decree

is not bound to see to the application of the purchase-money.—*BLAKE* (1843), 5 I. Eq. R. 596.—*IR.*

d. Payment into court.]—*Re ROBERTSON, ROBERTSON v. ROBERTSON* (1877), 24 Gr. 555.—*CAN.*

e. —.]—In sales under a decree, it is irregular to pay the purchase-money to the party; it ought to be paid into ct.—*BENNETT v. HAMILL* (1806), 2 Sch. & Lef. 566.—*IR.*

f. — After title accepted.]—A purchaser of real estate, at a sale under a decree, will not be ordered to pay his purchase-money into ct. until the title has been accepted or approved of.—*CROOKS v. STREET* (1858), 1 Ch. Ch. 95.—*CAN.*

g. —.]—On a sale under a

decree, the purchaser, except under special circumstances, will not be compelled to pay his purchase-money into ct. until he has accepted or approved of the title or the master has reported that the vendor can make a good title.—*McDERMID v. McDERMID* (1879), 8 I. R. 28.—*CAN.*

h. — After confirmation of sale but before inquiry into title.]—Where a sale has taken place under a decree, & has been confirmed, an order will be made for the purchaser to pay the balance of his purchase-money into ct., though no inquiry has been made as to the title.—*Re STEWART, STEWART v. STEWART* (1859), 1 Ch. Ch. 243.—*CAN.*

k. — Right to withhold payment

Sect. 4.—Purchase-money—Payment into court.
Sects. 5, 6 & 7.]

v. BEVAN (1823), 1 Coop. temp. Cott. 381; 1 L. J. O. S. Ch. 159; 47 E. R. 907.

441. ——— Conveyance executed.]—Where a sale takes place under a decree & the purchase-money is paid into ct., & the purchaser discovering an incumbrance does not prosecute a requisition made in consequence, but executes the conveyance, he can stand in no better position than an ordinary purchaser, & cannot interfere with the distribution of the proceeds.—*MILLER v. PRIDDEN* (1856), 26 L. J. Ch. 183; 23 L. T. O. S. 244; 3 Jur. N. S. 78; 5 W. R. 171.

442. Division of purchase-money—Part of property unsold.]—A purchaser entitled to title deeds having paid his purchase-money into ct., the ct. will not order the money to be divided, & the deeds to remain in the hands of the master until the completion of the sale of another lot.—*HOBSON v. NEALE* (1830), Tam. 446; 48 E. R. 177.

443. Sub-sale at profit—Before original purchase confirmed—Additional purchase-money payable into court.]—A purchaser in this ct. having resold with a profit before his purchase was confirmed, the person to whom he has sold is to be considered as a substantial purchaser, & must pay the additional purchase-money into ct. for the benefit of the parties to the suit.—*HODDER v. RUFFIN* (1830), Tam. 341; 48 E. R. 135.

Annotation:—Refd. Dewell v. Tuffnell (1855), 1 K. & K. 321.

See No. 452, *post*.

444. Value of estate increased before possession—Purchase-money increased.]—Where a purchaser has an advantage by the dropping in of lives, the ct. will direct an inquiry what interest was proper to be paid by him on that account.—*DAVY v. BARBER* (1743), 2 Atk. 489; 26 E. R. 695, L. C.

445. Amount payable by purchasers in possession—Where incumbrances on property & claims for improvements.]—Where property was sold under an order of the ct., in which plff. was interested to the extent of one-eighth part, & three of defts., who were interested in the other shares, & were in possession of the property, became the purchasers of part of the property, they were required to pay the whole amount of their purchase-money into ct., notwithstanding there were incumbrances upon the property, & the purchasers claimed to be entitled to allowances for improvements.—*BULMER v. ALLISON* (1845), 15 L. J. Ch. 11; 6 L. T. O. S. 145, L. C.

446. Purchaser kept out of possession—Deductions allowed from purchase-money.]—A purchaser of real estate upon a sale by the ct. was kept out of possession for a year through the opposition of plff. in the cause, who was himself in occupation of the estate; & was ultimately let into possession by virtue of a writ of assistance issued by the ct.:

until objection to title disposed of.]—A purchaser under the decree of this ct. is not entitled to have his objections to the title disposed of before he brings in the whole of the purchase-money, & has the sale absolutely confirmed.—*NEWMAN v. FITZGERALD* (1844), 6 I. Eq. R. 258.—*IR.*

1. ——— By promissory note—Liability for interest.]—*ANON.* (1845), 8 I. Eq. R. 158.—*IR.*

m. Liability of purchaser for interest from time of purchase—Interest stipulated for—Though delay not due to purchaser.]—A purchaser at a sale under order of the ct. was held liable for interest from the time of his purchase, although delay had taken place in perfecting the title for which he

was in no way responsible, such delay, however, not being caused by any fault of the vendors, the conditions of sale stipulating for the payment of interest from the day of sale.—*Re THOMPSON, BIGGAR v. DICKSON* (1868), 2 Ch. Ch. 196.—*CAN.*

n. Investment of purchase-money—At risk of purchaser—Unless order for investment on notice to all parties.]—Purchase-money invested under an order of the ct., obtained by the purchaser without notice to all parties, is at the risk of the purchaser—but the investment is made at the risk of the estate if the order for investment is made on a motion, of which all parties had notice.—*McCANN v. FORBES* (1817), 1 Hog. 13.—*IR.*

—Held: the purchaser was entitled to have paid to him out of the purchase-money in ct. sums in respect of the following items: (a) the costs of obtaining the orders under which he succeeded in getting possession; (b) an occupation rent for the time during which he was kept out of possession; (c) compensation for deterioration of the property during the same period; (d) arrears of tithes which he had been compelled to pay.—*THOMAS v. BUXTON* (1869), 1. R. 8 Eq. 120; 38 L. J. Ch. 709.

Duty on purchase-money—Sale of settled estates.]
—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 114, No. 860.

SECT. 5.—WHEN SALE COMPLETE.

447. On payment of purchase-money—Where title objected to.]—Purchaser under a decree considered only as owner of the estate from the time he pays in his purchase-money; & not from the confirmation of the report by which he is declared the best purchaser, he having taken objections to the title.—*MACKRELL v. HUNT* (1749), 2 Madd. 34, n.; 56 E. R. 217, L. C.

Annotation:—Mentd. Boyse v. Rossborough (1854), 3 De G. M. & G. 817.

448. ———.]—Purchaser under a decree of the ct. is not entitled, upon an affidavit that he has had his money lying ready for some time, to be let into possession of estate, & receipt of rents for all such time so passed.—*BARKER v. HARPER* (1806), Coop. G. 32; 35 E. R. 467, L. C.

449. On approval of title.]—*WILDEN v. ANDREWS*, No. 1451, *post*.

450. On confirmation of report—As to best purchaser.]—Motion, that a person reported best purchaser should complete his purchase by a certain day, refused; the report not being absolutely confirmed.—*ANON.* (1794), 2 Ves. 335; 30 E. R. 660, L. C.

Annotation:—Refd. *Re* Clayton, Smith v. Clayton, [1920] 1 Ch. 257.

451. ———.]—A purchase before the master is not complete before confirmation of the report. Therefore a loss by fire after the report, but before confirmation, falls upon the vendor; & the circumstance, that the sale had been delayed by the purchaser having opened the biddings, was not attended to.—*Ex p. MINOR* (1805), 11 Ves. 559; 32 E. R. 1205, L. C.

Annotations:—Apid. Twigg v. Fifield (1807), 13 Ves. 517.

Refd. Anson v. Towgood (1820), 1 Jac. & W. 637; Millean v. Vanderplank (1853), 11 Hare, 136; *Re* Clayton, Smith v. Clayton, [1920] 1 Ch. 257.

452. On grant of certificate of purchase—Eight days from signature.]—After a certificate of purchase under a sale by the ct. has become binding by the lapse of eight days since the signature thereof by the judge, the purchaser is considered to be so far the absolute owner that he may sell

PART III. SECT. 5.

o. On confirmation of sale.]—*STEVENS v. ULLERICH* (1911), 17 W. L. R. 568; 4 Sask. L. R. 170.—*CAN.*

p. ———.]—Where a life estate was sold under a decree, & the tenant for life died subsequently to the lodgment of the one-fourth of the purchase-money, & the obtaining of the rule nisi, but prior to the confirmation of the sale:—**Held:** the contract was not complete, until the sale was confirmed by the order of the ct., & the purchaser was not bound to complete his purchase.—*VINCENT v. GOING* (1841), 3 Dr. & War. 75; 3 I. Eq. R. 480.—*IR.*

at an advanced price for his own benefit.—*DEWELL v. TUFFNELL* (1855), 1 K. & J. 324; 69 E. R. 482.

SECT. 6.—CONVEYANCE ON SALE.

See R. S. C., Ord. 51, r. 3.

The conveyance generally.]—*See* Part IX., *post*.

453. Form of conveyance—Order of judge—Right to appeal.]—One of the conditions of sale of certain freehold property sold under the direction of the ct. provided that the conveyances of the respective lots should contain proper reservations & provisions & covenants by the purchasers for the purpose of securing the liabilities & rights under certain reservations & stipulations as to the property mentioned in the particulars of sale, the form of such reservations, provisions, & covenants, in case of dispute, to be settled by the judge.

A dispute arose between the vendor & a purchaser as to the form of the covenant, & the judge settled the covenant, adding a proviso that if the purchaser assigned the property purchased, & the assignee entered into a similar covenant, the purchaser should be freed from any further liability:—*Held*: (1) the order of the judge settling the form of the conveyance was subject to appeal; (2) the vendor was entitled to an unqualified covenant, & the proviso must be struck out.—*POLLOCK v. RABBITS* (1882), 21 Ch. D. 466; 47 L. T. 637; 31 W. R. 150, C. A.

454. Concurrence of Incumbrancer—Where prior concurrence in conditions of sale.]—Deft., who is an incumbrancer on an estate sold under the decree of the ct., & who has concurred in settling conditions of sale, describing such estate as to be sold free from incumbrances, will be ordered to concur in carrying the sale into effect, & to execute the conveyance of the estate to the purchaser free from his incumbrance.—*TOMLIN v. HATFIELD* (1839), 9 L. J. Ch. 119.

455. Concurrence of cestuis que trust—Whether necessary.]—Testator devised all his real & personal estate to trustees upon trust after the death of his wife absolutely to sell the whole of his property in such manner as they should think fit & to pay one-fourteenth part of the proceeds to each of his fourteen children at twenty-one or marriage with further provisions under which his daughters' shares were settled on them for life with remainders over. A suit having been instituted for the administration of the estate & the wife being dead an order was made in the suit for sale of part of the estate by the trustees:—*Held*: the concurrence of the children constituting the tenant for life under Settled Land Act, 1882 (c. 38), was not necessary upon the sale by the trustees; but even if such concurrence would be necessary the order of the ct. was sufficient to enable the trustees to sell without joining the fourteen children or any of them in the conveyance to the purchaser.—*TAYLOR v. PONCIA* (1884), 25 Ch. D. 646; 53 L. J. Ch. 409; 50 L. T. 20; 32 W. R. 335.

Annotation.—*Refd. Re Harding's Estate*, [1891] 1 Ch. 60.

PART III. SECT. 6.

q. Where legal estate outstanding.]—*HEAL v. HARPER* (1851), 2 Gr. 695.—*CAN.*

r. Parties—Mortgagor.]—A mtgor. or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the ct.—*ROSS v. STEELE* (1859), 1 Ch. Ch. 94.—*CAN.*

t. Right of new deed on proof of

material error.]—RE UNITED PRESBYTERIAN CONGREGATION OF LONDON (1873), 6 P. R. 129.—*CAN.*

a. Appointment of person to convey.]—Where the ct. orders a sale of land, & a person entitled, being a party to the proceedings, refuses to execute the deed, the person having carriage of the proceedings, & not the purchaser, is the proper person to take out a summons to have a person appointed to convey under Trustee

456. Death of confirmed purchaser—Conveyance to devisee.]—Where a confirmed purchaser of premises under a decree of the ct., died before any conveyance had been made to him, having in the meantime devised his interest therein to trustees, the ct. ordered that a conveyance should be made to them, without the consent of testator's heir-at-law, he being an infant.—*R. v. GREGORY* (1817), 4 Price, 380; 146 E. R. 497.

457. Sub-sale before conveyance—Conveyance to sub-purchaser.]—Lands having been purchased at a sale by auction under an extent, & the purchaser having resold them for a less sum than that which he had contracted to give, the ct., with the consent of the A.-G., made an order that the name of the second purchaser should be substituted in the contract, & that the conveyances should be made to him, the original consideration being expressed in the deed.—*R. v. RAWLINGS, Ex p. HAND* (1835), 2 Cr. M. & R. 471; 4 Dowl. 407; 5 Tyr. 895; 4 L. J. Ex. 295; 150 E. R. 203.

458. Insertion of covenants—Settlement by conveyancing counsel.]—Conveyances made under a decree of this ct. are to be settled by the like rule as men of judgment among conveyancers would direct.—*LOYD v. GRIFFITH* (1745), 3 Atk. 261; 26 E. R. 954, L. C.

Annotation.—*Refd. Cottrell v. Cottrell* (1866), 35 L. J. Ch. 466.

459. ———.]—Application to have a discussion heard before the ct., as to whether a particular covenant should or should not be inserted in a deed of conveyance made in pursuance of a decree, refused on the ground that the conveyancing counsel were the proper functionaries whose duty it was to decide such questions.—*PLUMBE v. PLUMBE, YATES v. PLUMBE* (1854), 22 L. T. O. S. 270; 2 W. R. 242.

460. ——— For title—By beneficiaries under trust for sale.]—Testator devised real estate upon trust for sale, & to divide the proceeds among his children equally. A sale of such real estate having been made under a decree of the ct., not for the payment of testator's debts, but for the division of the proceeds among the parties beneficially entitled thereto:—*Held*: the purchaser was not entitled to covenants for title from those parties.—*COTTRELL v. COTTRELL* (1866), L. R. 2 Eq. 330; 35 L. J. Ch. 466; 14 L. T. 220; 12 Jur. N. S. 285; 14 W. R. 572.

461. ——— Settled by judge—Modification of form on appeal.]—*POLLOCK v. RABBITS*, No. 453, *ante*.

SECT. 7.—DEFAULT OF PURCHASER.

462. Completion of purchase enforced.]—One reported the highest bidder compelled to complete his purchase.—*CUNNINGHAM v. WILLIAMS* (1793), 2 Anst. 344; 145 E. R. 897.

463. Non-payment of purchase-money—Resale ordered—Liability for deficiency & costs.]—A resale of property, sold under a decree, ordered, in case the purchaser did not pay his money into ct. within a given time; & the purchaser ordered,

Act, 1893, s. 33.—*MOORHEAD v. KIRKWOOD*, [1919] 1 I. R. 225.—*IR.*

PART III. SECT. 7.

b. Non-payment of purchase-money—Determination of agreement by court—Jurisdiction of court to reopen.]—In an action by a vendor for default in payment under an agreement of sale of land, when the time fixed by the ct. for payment has expired & an order

Sect. 7.—Default of purchaser. Sect. 8: Sub-sects. 1 & 2. A. & B. Sect. 9: Sub-sect. 1.]

in that case, to make good the deficiency & to pay the costs of all the proceedings.—*GRAY v. GRAY* (1811), 1 Beav. 199; 48 E. R. 916, L. C.

464. ————.]—A. had been allowed by the ct. to become the purchaser of estates sold under the direction of the ct. A. made default in payment of his purchase-money, & a resale was ordered, with the usual direction that A. should make good any deficiency, & pay the costs of the resale. The order also directed that A. should be discharged from his purchase:—*Held*: the latter part of the order was incorrect, & it was, consequently, discharged.—*HARDING v. HARDING* (1839), 4 My. & Cr. 514; 9 L. J. Ch. 124; 3 Jur. 1164; 41 E. R. 198, L. C.

465. ———— *Extension of time to purchaser.*—A purchaser under the ct. of a reversionary interest having made default in completing, a resale was ordered, & the purchaser was to make good any deficiency. Before such resale, it was discovered that the reversionary interest had previously fallen into possession, the ct. gave the purchaser four days to complete his purchase.—*ROBERTSON v. SKELTON* (1850), 13 Beav. 91; 19 L. J. Ch. 561; 15 L. T. O. S. 452; 51 E. R. 36.

466. ———— *Liability to committal.*—A purchaser may be committed for disobeying an Order to pay in his money.—*LANSDOWN v. ELDERTON* (1808), 14 Ves. 512; 33 E. R. 617, L. C.

467. ———— *Purchaser not discharged.*—*HARDING v. HARDING*, No. 464, *ante*.

468. *Delay in payment of purchase-money—Interest payable—Where agreement for interest.*—One of the conditions at an attempted sale by auction under a decree provided that the purchase should be completed on a day named, & that, if from any cause whatever the purchase-money should not then be paid, interest should be paid from that date. The purchase was by private contract, subject to the conditions of sale, & also subject to the purchase being approved by the ct. The purchase-money was a fund in ct., & after a long delay the conveyancing counsel approved of the title for the purchasers:—*Held*: neither party being to blame for the delay, the purchasers could not be relieved from their obligation to pay interest.—*Re NEWCASTLE & DARLINGTON JUNCTION RY. CO.'S ACT, Re YORK, NEWCASTLE & BERWICK RY. CO.'S ACT, 1847, Ex p. DURHAM (DEAN & CHAPTER), TEWART v. LAWSON, TEWART v. TEWART* (1856), 3 Sm. & G. 307; 2 Jur. N. S. 345; 65 E. R. 671; *sub nom. Re YORK, NEWCASTLE & BERWICK RY. CO.'S ACT, Ex p. DURHAM (DEAN & CHAPTER), TEWART v. LAWSON, TEWART v. TEWART*, 4 W. R. 419.

SECT. 8.—SETTING ASIDE SALE.

SUB-SECT. 1.—IN GENERAL.

469. *Who may apply—Bidder not party to cause.*—*HUGHES v. LIPSCOMBE*, No. 490, *post*.

has been made determining the agreement & foreclosing the rights of those claiming under or through it, there is no jurisdiction in the ct. to reopen the matter & allow redemption.—*BEAT v. DUSSESSOYE*, [1920] 2 W. W. R. 275; 52 D. L. R. 249; 30 Man. L. R. 270.—*CAN.*

PART III. SECT. 8, SUB-SECT. 1.

a. Who may apply—Persons interested—Sentimental interest insufficient.—

SHAW v. TACKABERRY (1913), 24 O. W. R. 630; 4 O. W. N. 1369; 15 D. L. R. 475.—*CAN.*

d. Purchaser not highest bidder.—*BIGGS v. ROWE* (1837), Sau. & Sc. 152.—*IR.*

e. Right of parties to suit to object to confirmation of sale—Where person having conduct of sale the highest bidder.—Where the person having the conduct of a sale under a decree of the ct. is the highest bidder, & applies to be con-

470. ———— *Bidder not interested in estate.*—*HUGHES v. LIPSCOMBE*, No. 490, *post*.

471. *Right of purchaser to out of pocket expenses.*—*PRIDEAUX v. PRIDEAUX*, No. 478, *post*.

472. *Order for resale—Estate to be put up at price paid—Together with sum paid for improvements.*—If an assignee purchase part of the bkpt.'s estate, & improve, the estate must be resold, & put up at the price given by the assignee, adding the sum laid out in improvements.—*Re JOHNSTON, Ex p. HEWIT* (1835), 2 Mont. & A. 477, Ct. of R.

473. ————.]—*SIDNEY v. RANGER*, No. 487, *post*.

474. ———— *On sub-sale by purchaser—For increased sum—Sale by court not realising sub-sale price.*—*HOLROYD v. WYATT*, No. 482, *post*.

475. *Purchaser not highest bidder—Whether highest bidder entitled to be declared purchaser.*—*HUGHES v. LIPSCOMBE*, No. 490, *post*.

SUB-SECT. 2.—GROUNDS FOR.

A. Objection to Transaction.

476. *Undervalue—Court without notice of sale & purchasers.*—*KENNEDY v. VANLORE (LADY)* (1633), 1 Rep. Ch. 70; 21 E. R. 510.

477. ———— *Notice of its pendens to set aside sale.*—*KENNEDY v. VANLORE (LADY)* (1633), 1 Rep. Ch. 70; 21 E. R. 510.

478. ————.]—An estate being sold before a master when the purposes of the decree did not require it; the sale shall be set aside, although the reports of the several purchasers were confirmed; but the purchasers must be fully reimbursed all their expenses out of pocket. *Qu.*: whether inadequacy of price alone is a sufficient ground to set aside such a purchaser?—*PRIDEAUX v. PRIDEAUX* (1783), 1 Bro. C. C. 287; 1 Cox, Eq. Cas. 34; cited in 2 Ves. at p. 53; 28 E. R. 1133.

Annotation:—*Refd. Watson v. Birch* (1793), 4 Bro. C. C. 172.

479. *Sale unnecessary.*—*PRIDEAUX v. PRIDEAUX*, No. 478, *ante*.

480. *Sale subject to charges not warranted by decree.*—A person purchasing lands under a decree is bound to see that the directions of the decree are observed.

Lands in strict settlement, with a power to grant leases, being subject to prior incumbrances, are, by a decree in a suit instituted by the incumbrancers, directed to be sold subject to the charges prior to the deed of settlement. Pending the suit, the tenant for life under the settlement grants leases not authorised by the power, & raises money upon annuities for his life, which he charges upon the lands, & they are sold subject to those charges:—*Held*: on a suit by the remainderman in tail, the sale, subject to charges not warranted by the decree, was void.—*COLCLOUGH v. STERUM* (1821), 3 Bli. 181; 4 E. R. 572, II. L.

481. *Collusion between purchaser & trustee for sale.*—*BAILEY v. WATKINS* (1826), 6 Bli. N. S. 275; 5 E. R. 597, II. L.

firmed as the purchaser, the application will not be granted if any of the parties in the suit object.—*CRAWFORD v. BOYD* (1875), 6 P. R. 278.—*CAN.*

f. Loss of right by delay—Application after conveyance.—*POWER v. REEVES* (1864), 10 H. L. Cas. 645; 11 E. R. 1176.—*IR.*

PART III. SECT. 8, SUB-SECT. 2.—A.

g. Irregularities in sale.—The rule of the ct. is, that a purchaser at a

482. Sub-sale by purchaser at profit.]—If, at a sale by auction under the order of the ct., a purchaser sell his purchase for an additional sum beyond his purchase-money, the ct. will order the property to be resold; & *semble*, if upon such resale the property does not produce the improved price agreed to be given by the sub-purchaser, he will be responsible to the ct. for the difference.—*HOLROYD v. WYATT* (1845), 2 Coll. 327; 6 L. T. O. S. 216; 9 Jur. 1072; 63 E. R. 755.

483. —.]—The application of the sub-purchaser to be substituted as the purchaser from the ct., neither the original purchaser nor the vendors consenting, was refused & a resale ordered.—*Re GOODWIN'S ESTATE* (1862), 1 New Rep. 46; 32 L. J. Ch. 70; *sub nom. Re GOODWIN'S SETTLED ESTATES, Ex p. LEGARD*, 7 L. T. 310; 8 Jur. N. S. 1173.

484. Misdescription—Effect of delay.]—A suit was originally instituted by pltf. on behalf of himself & other creditors, in which a sale of certain lands, etc. was ordered for their benefit, & conditions of sale settled by the master, one of which was, that if there should appear any error or mistake in the description of the premises, or any other mistake or error whatsoever, respecting the premises or any part thereof, such mistake or error should not annul the sale, but a compensation or equivalent be given or taken, as the case might require; such compensation or equivalent to be determined by the master, in case the parties could not agree, etc. One of the lots was not sold at the sale, but afterwards by private contract, subject to the same conditions, to A. It was described as containing 14 acres, which were proved to be customary acres, or 27 statute acres. The sale was approved by the master & confirmed by the ct. Four years afterwards, a creditor presented his petition, praying for a reference to the master to ascertain & report what amount of compensation beyond the amount of the purchase-money agreed to be given, should be allowed for the excess in the quantity of land comprised in the lot purchased, or that the order might be discharged, & the premises put up for sale again:—*Held*: petitioner came too late, in petitioning four years after discovery.—*PRICE v. NORTH* (1837), 2 Y. & C. Ex. 620; 7 L. J. Ex. Eq. 9; 160 E. R. 544.

Annotation:—*Refd. Durham v. Legard* (1865), 34 Beav. 611.

485. Misrepresentation.]—In sales under the direction of the ct. it is incumbent on the ct. to be scrupulous in the extreme to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. Sale by auction held under the direction of the ct. set aside at the instance of the purchaser on the ground of misrepresentation as to the subject-matter of the sale.—*MAHOMED KALA MEA v. HARPERINK* (1908), 25 T. L. R. 180, P. C.

sale under the decree is not bound by any irregularity in the proceedings so as to cause him to lose the benefit of his purchase.—*DICKEY v. HERON* (1863), 1 Ch. Ch. 149.—*CAN.*

h. —.]—Where an irregularity had occurred in advertising, but no injury had thereby accrued, & a fair price had been obtained, the ct. confirmed the sale.—*CAYLEY v. COLBERT* (1869), 2 Ch. Ch. 455.—*CAN.*

k. —.]—Although a decree for sale should direct the same to take place with the approbation of the master, the omission of such direction is no ground for moving to set aside the sale under the decree where the same really took place with such approbation, even in a case where infants

are interested.—*TICKER v. TICKER* (1880), 27 Gr. 576.—*CAN.*

l. —.]—*WHITNEY v. BURN* (Alta.) (1910), 15 W. L. R. 392.—*CAN.*

m. —.]—*GAJRAJMATI TEORAIN v. AKBAR HUSAIN* (1906), 1 L. L. R. 29 All. 196; L. R. 34; Ind. App. 37.—*IND.*

n. *Interest sold not defined.*—*FRITZGIBBON v. DUGGAN* (1865), 11 Gr. 188.—*CAN.*

o. *Bidders deterred from bidding—Testator's son bidding for another.*—*RODGERS v. RODGERS* (1867), 13 Gr. 143.—*CAN.*

p. *Decree authorising sale of defendant's interest—Sale of whole estate—Refusal to confirm.*—*BUTLER v. FORBES* (1906), 4 W. L. R. 579.—*CAN.*

B. Objection to Purchaser.

486. Purchase by party—Whether leave of court necessary.]—B., one of several defts., having purchased an estate sold under the decree, for £810, without having obtained leave to bid; another deft. moved that the estate might be again put up to sale at £810, & if it should fetch more, that the sale to B. might be set aside, & that he might pay the expenses of the resale & the costs of the motion. The ct. refused the application, but without costs.—*ELWORTHY v. BILLING* (1841), 10 Sim. 98; 10 L. J. Ch. 176; 59 E. R. 549.

487. Purchase by person having conduct of sale—Under assumed name.]—A party to a suit, who was also a solr., & had the conduct of a sale decreed by the ct., purchased at the sale under a feigned name. The ct., after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, & if there should be no higher bidder, the party to be held to his purchase.—*SIDNEY v. RANGER* (1841), 12 Sim. 118; 59 E. R. 1076.

488. Purchase by son of owner of property.]—*CAUTY v. HOLDITCH* (1844), 3 L. T. O. S. 409, L. C.

489. Purchaser without means of completing purchase.]—*CAUTY v. HOLDITCH* (1844), 3 L. T. O. S. 409, L. C.

490. Purchaser not highest bidder.]—A bidder at a sale under the decree of the ct., who is not a party to the cause or interested in the estate which is the subject of the sale, has no right to apply to the ct. to set aside a sale to another bidder, on the ground of irregularity in that the latter, although reported the purchaser, was not, in fact, the highest bidder. *Qu.*: whether he may apply to be declared the purchaser in the place of the bidder reported to be the best purchaser.—*HUGHES v. LIPSCOMBE* (1846), 6 Hare, 142; 67 E. R. 1115.

Purchase by assignee in bankruptcy.]—*See BANKRUPTCY*, Vol. IV., p. 221, Nos. 2069–2073.

SECT. 9.—DISCHARGE OF PURCHASER.

SUB-SECT. 1.—IN GENERAL.

491. Necessity for special application.]—The ct. will not, upon the allowance of an exception to a report in favour of the title, direct a discharge of the purchaser on payment of his costs. There must be some special application for the purpose.—*HIDE v. HIDE* (1825), 1 Coop. temp. Cott. 379; 47 E. R. 906.

492. When granted—Purchaser solicitor in cause.]—The ct. refused to discharge the solr. in the cause from a purchase before the master

q. *Upset price fixed too low.*—*FOX v. HUNTER* (1909), 12 W. L. R. 87.—*CAN.*

PART III. SECT. 8, SUB-SECT. 2.—B.

r. *Next friend or plaintiff.*—*DENISON v. DENISON* (1872), 1 Ch. Ch. 37.—*CAN.*

PART III. SECT. 9, SUB-SECT. 1.

t. *When granted—Purchaser becoming insolvent.*—Where a purchaser under a decree of the ct. becomes insolvent, & unable to complete the purchase, he will be discharged from it.—*Re HEELY* (1858), 1 Ch. Ch. 54.—*CAN.*

u. —. *Misrepresentation.*—*VIG-NOLLES v. BOWEN* (1847), 12 L. Eq. R. 191.—*IR.*

Sect. 9.—Discharge of purchaser: Sub-sects. 1 & 2, A. & B.]

with the view of preventing a sale at an under-value.—*NELTHORPE v. PENNYMAN* (1808), 14 Ves. 517; 33 E. R. 619, L. C.

493. — Substitution of true purchaser for agent.]—*PARAMORE v. GREENSLADE* (1848), 11 L. T. O. S. 101.

—Irregularity in decree.]—*See* Sub-sect. 2, A., *post*.

—Defect in title.]—*See* Sub-sect. 2, B., *post*.

494. Service of petition—Who must be served.]

—Defts. in a cause, where there has been a sale under a decree, ought to be served with the petition of a purchaser to be discharged from his purchase.

In Sept. 1848, a purchaser bought under a decree, & by his requisitions on the title required a receipt to be given by a trustee having power to give receipts, but who was by mistake stated in the pleadings to have disclaimed, & was not a party to the cause. Afterwards the purchaser required that the trustee should be brought before the ct. by supplemental bill. In the course of the discussions on these subjects it was objected by the purchaser that an additional *cestui que trust* ought to have been brought before the ct. Pltf. acceded to this, & promised that the defects complained of should be supplied & remedied by a proper supplemental suit, & petition of rehearing, in which, as all parties were amicable, a decree might be obtained in three weeks. This took place in Mar. 1849. The purchaser, in answer to the proposal, declined waiting any longer, & demanded back his deposit & costs. He then presented a petition to be discharged from his purchase; but, before the petition came on to be heard, the defects in the suit had been supplied:—*Held*: not a case for discharging the purchaser.—*SHERWOOD v. BEVERIDGE, THURPP v. BEVERIDGE* (1849), 3 De G. & Sm. 425; 13 L. T. O. S. 361; 13 Jur. 1042; 64 E. R. 545.

495. Necessity for affidavit by purchaser—That property not resold at profit.]—The ct. will not discharge a purchaser & substitute another even upon paying in the money without an affidavit, but there is no under bargain.—*RIGBY v. MACNAMARA* (1801), 6 Ves. 515; 31 E. R. 1172, L. C.

496. Effect of discharge—Decree subsequently perfected—Contract not revived.]—*COSTER v. TURNOR*, No. 511, *post*.

497. — Condition precedent to resale.]—In sales before the master, notwithstanding the confirmation of a report against the title, there must be an order discharging the purchaser before the ct. will give effect to a resale.—*WILLIAMS v. WACE* (1838), Coop. Pr. Cas. 42; 47 E. R. 391.

498. — Right to interest on deposit—Notwithstanding conditions of sale.]—A sale in chambers under a decree in a partition suit having been declared invalid on the ground that the sale took place before the certificate in answer to the inquiries directed by the decree was made:—*Held*: the vendors could not avail themselves of a condition enabling them if unwilling, or unable for any reasonable cause to remove or comply with any objection or requisition by a purchaser, to rescind on payment of the deposit without interest & without costs on either side; & the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into ct. & invested with the dividends thereon, or the actual amount of deposit & the produce, with costs, charges, & expenses.—*POWELL v. POWELL* (1875), L. R. 19 Eq. 422; 44 L. J. Ch.

311; *sub nom. POWELL v. POWELL, Ex p. BEVAN*, 32 L. T. 148; 23 W. R. 482.

Annotations:—*Fold. Hollwell v. Seacombe*, [1906] 1 Ch. 426; *Re Thomas, Bartley v. Thomas* (1911), 105 L. T. 59.

499. — —.]—*Re THOMAS, BARTLEY v. THOMAS*, as reported in, [1911] 2 Ch. 389; 105 L. T. 59.

SUB-SECT. 2.—WHEN GRANTED.

A. Irregularity in Decree.

See, now, Law of Property Act, 1925 (c. 20), s. 204.

500. Right to discharge—General rule.]—A purchaser under a decree is not to be relieved from his purchase, merely because there are irregularities in the decree, where there is no want of jurisdiction or parties.

Real estate was devised to & vested in trustees, in trust for certain persons, amongst whom were an infant & persons not *in esse*. In a suit for carrying the trusts into execution, the debts & legacies were paid out of the personal estate, before any provision was made for payment of the costs of suit. While there was personal estate remaining, & before the facts had been so ascertained as to make a sale of the real estate proper, a decree was made for the sale of the real estate for payment of the costs:—*Held*: although the decree was not such as would have been pronounced, on due consideration, & would have been varied upon a rehearing, yet a purchaser under it was not entitled to be discharged from his purchase, on the ground of irregularity, there being no want of jurisdiction or parties.—*BAKER v. SOWTER* (1847), 10 Beav. 343; 16 L. J. Ch. 333; 9 L. T. O. S. 530; 50 E. R. 614.

501. — Decree obtained by fraud.]—Very doubtful whether a purchaser for valuable consideration under a decree of ct. fraudulently obtained, though ignorant of the fraud, can protect himself, when the fraud appears on the face of the proceedings.—*GORE v. STACPOOLE, STACPOOLE v. GORE* (1813), 1 Dow, 18; 3 E. R. 607, H. L.

502. — Proceedings for rectification pending.]—Purchaser of estates sold under a decree, discharged, on motion, from his purchase, upon error in the decree being shown though the parties are proceeding to rectify it. *Qu.*: whether he is entitled to his costs.—*LECHMERE v. BRASIER* (1821), 2 Jac. & W. 287; 37 E. R. 637, L. C.

Annotations:—*Consd. Graham v. Whitmarsh* (1823), 2 L. J. O. S. Ch. 42. *Distd. Coster v. Turnor* (1830), 1 Russ. & M. 311; *Sherwood v. Beveridge, Thurpp v. Beveridge* (1849), 3 De G. & Sm. 425. *Refd. Chamberlain v. Lee* (1840), 10 Sim. 444; *Whitfield v. Lequeuvre* (1849), 3 De G. & Sm. 464. *Mentd. Hood v. Pimm* (1831), 4 Sim. 101; *Sedgwick v. Coverdale* (1834), 3 L. J. Ch. 140; *Stanton v. Hatfield* (1836), 1 Keen, 358; *Hughes v. Eades* (1842), 11 L. J. Ch. 297; *Lancashire v. Lancashire* (1846), 15 L. J. Ch. 293.

503. — —.]—*SHERWOOD v. BEVERIDGE, THURPP v. BEVERIDGE*, No. 494, *ante*.

504. — Want of jurisdiction.]—A trader who had freehold, copyhold, & personal estate died in Sept. 1832, leaving an infant heir. His estate was insufficient to pay his debts & charges. His partners, however, by deed, took upon themselves to pay all the debts, & secured the principal part of his property for his family. A suit was instituted for carrying the deed into execution, & the master found that it would be for the benefit of the infant heir, that the real estate should be sold, & applied in the manner mentioned in the deed. A decree was made for sale, & the infant was declared a trustee within 1 Will. 4, c. 60:—

Held: a sale under the decree could not be enforced; the ct. had no jurisdiction to order the sale; the infant was not a trustee within the Act; the purchaser was not bound to wait till the error was corrected, & the ct. therefore discharged him with his costs, charges, & expenses.—**CALVERT v. GODFREY** (1843), 6 Beav. 97; 12 L. J. Ch. 305; 49 E. R. 761.

Annotations:—**Apld.** Lachlan v. Reynolds (1853), Kay, 52. **Refd.** Browne v. Paull (1852), 19 L. T. O. S. 269; Field v. Moore (1855), 2 Jur. N. S. 145; Robinson v. Wheelwright (1856), 6 De G. M. & G. 535; *Re* Howarth (1873), 8 Ch. App. 415; *Re* De Teissier's S. E., *Re* De Teissier's Trusts, *De Teissier v. De Teissier*, [1893] 1 Ch. 153. **Mend.** *Reld v. Territt* (1844), 1 Coll. 1; Thomas v. Townsend (1852), 16 Jur. 736.

505. ———.]—**EADE v. BLAKE** (1843), 1 L. T. O. S. 335; *subsequent proceedings, sub nom.* **EADE v. BLAKE, Ex p. DRINKALD**, 1 L. T. O. S. 409.

506. ———.]—**BAKER v. SOWTER**, No. 500, *ante*.

507. ——— **Necessary parties not bound.**]—**EADE v. BLAKE** (1843), 1 L. T. O. S. 335; *subsequent proceedings, sub nom.* **EADE v. BLAKE, Ex p. DRINKALD**, 1 L. T. O. S. 409.

508. ———.]—**BAKER v. SOWTER**, No. 500, *ante*.

509. ——— **Defect cured before hearing of purchaser's petition.**]—**SHERWOOD v. BEVERIDGE, THRUPP v. BEVERIDGE**, No. 494, *ante*.

510. ——— **Inquiry as to necessary parties.**]—A purchaser under a decree of leaseholds presented a petition to be discharged from his purchase, on the ground that a share in the property had been bequeathed upon trusts, & that the bequest appeared, by inference from the pleadings, to have been assented to; but that some of the *cestuis que trust* were infants, & were not before the ct. The assent was disputed:—*Held*: the purchaser was not entitled at once to be discharged, but only to a reference to the master as to title.—**WHITFIELD v. LEQUEUTRE** (1849), 3 De G. & Sm. 464; 64 E. R. 563.

511. ——— **Sale under decree nisi.**]—Under a decree directing the sale of an estate, which, as against T., one of defts., was only a decree *nisi*, & before the decree was made absolute the estate was sold, & A. was reported the purchaser: afterwards, on the application of A., an order was made by the judge discharging him from the purchase, on the ground that the decree was not absolute as against T.; *pltf.* immediately gave notice of a motion before the Lord Chancellor to discharge that order, & that motion having stood over a considerable time, the decree was made absolute as against T. before it was heard:—*Held*: the purchaser was entitled to be discharged at the time when the application was made, & he, having been once discharged by an order which was right at the time when it was pronounced, the contract could not be revived by the proceedings subsequently taken by the vendor to make the decree perfect.—**COSTER v. TURNOR** (1830), 1 Russ. & M. 311; 8 L. J. O. S. Ch. 98; 39 E. R. 120, L. C.

512. ——— **Sale notwithstanding inquiry as to parties interested.**]—By a decree for administration in a county ct. a sale of real estate devised to A. & six other persons parties to the suit was ordered, & an inquiry was directed before the registrar of the ct. as to A., who had not been

heard of for many years. On an affidavit produced to the registrar showing that A. had not been heard of for seventeen years, the sale was effected without any certificate as to the result of the inquiry being made. The sale produced more than £500, & the cause was transferred to the Ct. of Ch. On motion by the purchaser to be discharged & to have his costs paid, on the ground that the sale was invalid as having been made before a certificate in answer to the inquiries had been made:—*Held*: A. must be presumed to be dead without issue, & as all parties interested were in fact before the ct. at the hearing, & were willing to convey, & a good title could be made independently of Partition Act, 1868 (c. 40), the purchaser was bound to accept such a title, & could not rely upon the technical informality in the decree.—**RAWLINSON v. MILLER** (1875), 1 Ch. D. 52; 46 L. J. Ch. 252.

513. ———.]—A decree in a partition suit directed inquiries as to the persons interested, & whether a sale would be more beneficial than a partition, & if so found, directed a sale. The sale took place before the certificate was made:—*Held*: the purchaser was entitled to be discharged, but the decree was not wrong in directing a sale without reserving further consideration.—**POWELL v. POWELL** (1874), 10 Ch. App. 130; 44 L. J. Ch. 122; 31 L. T. 737; 23 W. R. 201, L. C. & L. J.

B. Defect in Title.

514. **Right to discharge.**]—**CALVERT v. GODFREY**, No. 504, *ante*.

515. ——— **Notwithstanding condition for acceptance of title.**]—The ct. having directed a sale of certain property which had belonged to testator in the cause, it was put up for sale, under conditions of sale, which provided that the title should commence with a conveyance on sale in 1838, & that the purchaser should accept such commencement as a good substantial root of title, & not make any objection or requisition in respect of any prior title, or evidence of prior title, notwithstanding any recital or other disclosure of such prior title. The title of the vendor of 1838 being, in the opinion of the ct., bad:—*Held*: the purchaser was not precluded by the condition from taking the objection, & the contract for the purchase was annulled, & he was entitled to be freed from his contract, & to get all his costs.

But in a sale under the authority of the Ct. of Ch., which, above all things, ought to teach others, & set them an example of straightforward dealing, & telling the truth, & the whole truth, such a condition in the circumstances of the case, is in my opinion, binding on no one (*ROMILLY, M.R.*).—**ELSE v. ELSE** (1872), L. R. 13 Eq. 196; 41 L. J. Ch. 213; 25 L. T. 927; 20 W. R. 286.

Annotations:—**Consd.** *Re* National Provincial Bank of England & Marsh, [1895] 1 Ch. 190. **Apld.** *Re* Tyler, *Ex p. Official Receiver*, [1907] 1 K. B. 865.

516. **What constitutes defect—Defect as to part of estate.**]—**ROFFEY v. SHALLCROSS** (1819), 4 Madd. 227; 56 E. R. 690.

Annotations:—**Consd.** *Casamajor v. Strode* (1834), Coop. temp. Brough. 510. **Refd.** *Holliday v. Lockwood*, [1917] 2 Ch. 47.

517. ——— **Defect cured after long delay.**]—Under a decree for sale, made in a suit for the administration of testator's assets, A. became, in

PART III. SECT. 9, SUB-SECT. 2.—B.

514i. **Right to discharge.**]—A purchaser of real estate at a sale in the ct. of bkpy. will not be discharged from his purchase on objections to title, where the abstract of title posted in the ct., contains express notice of

the defects objected to.—*Re* SMITH, *Ex p. GETHIN* (1838), L. & G. temp. Plunk. 429.—**IR.**

514ii. ———.]—**BASAPPA BIN MALAPPA AKI v. DUNDAYA BIN SHIVLINGAYYA** (1878), I. L. R. 2 Bom. 540.—**IND.**

b. *Whether any one substituted for discharged purchaser—Willingness of proposed substitute to waive defects in title.*]—**O'CONNOR v. BERNARD** (1841), 3 I. Eq. R. 496.—**IR.**

c. *What constitutes defect—Want of*

Sect. 9.—Discharge of purchaser: Sub-sect. 2, B.; sub-sect. 3. Sect. 10. Part IV. Sect. 1: Sub-sect. 1.]

1813, the purchaser of certain lots, &, after a long resistance to the title, was in 1824 compelled to pay the purchase-money into ct. & was let into possession: two years afterwards, & before the conveyances were executed, having discovered, by means of the information of third parties, a circumstance which constituted a material defect in the title, & which, there was reason to believe, had been long before known to the solr. of pltf., he obtained a reference back to the master; the master reported against the title; to the report exceptions were taken, & before the exceptions came on to be heard the vendors had cured the defect:—*Held*: the purchaser had a right to be discharged from his contract, & a further reference of title ought not to be directed; in a sale under a decree, the solr. of pltf., having the management of the sale, is to be considered, as between the vendors & the purchaser, to be the agent of all the parties to the suit.—*DALBY v. PULLEN* (1830), 1 Russ. & M. 296; 8 L. J. O. S. Ch. 74; 39 E. R. 114.

Annotations:—Distd. Croome v. Lediard (1831), 2 My. & K. 261. *Refd.* Casamajor v. Strode (1834), Coop. temp. Brough 510.

518. — Equitable title—Legal estate outstanding.]—Upon a sale under the order of the ct., the purchaser will not be compelled to accept an equitable title without the legal estate being got in, except, perhaps, in a case where a dry legal estate is outstanding in an infant.—*FREELAND v. PEARSON* (1869), L. R. 7 Eq. 246.

519. — Sale of property of person of unsound mind—No consent by committee.]—On a petition presented under Leases & Sales of Settled Estates Act, 1857 (c. 120), an order was made for the sale of an estate to which A. B., a person of unsound mind, but not so found by inquisition, was entitled for life in remainder. A. B.'s brother had been previously appointed, under sect. 35 of the Act, the guardian of A. B. & of certain infants, for the purpose of consenting on their behalves to the application, & he was to be at liberty on behalf of the infants to consent. The order for the sale was made upon hearing counsel for A. B. by his guardian, & the guardian by his counsel consenting. The purchaser objected to the title on the ground that only a committee properly appointed could consent on behalf of A. B.:—*Held*: the objection was well founded: & a summons taken out by the vendors to compel the payment of the balance of the purchase-money, interest, & the costs, dismissed.—*Re CLOUGH'S ESTATE* (1873), L. R. 15 Eq. 284; 42 L. J. Ch. 393; 28 L. T. 261; 21 W. R. 454.

Annotation:—Refd. *Re Crabtree's S. E.* (1875), 23 W. R. 761.

parties.]—CONYERS v. CROSSIE (1844), 7 L. Eq. 11. 300.—*IR.*

PART III. SECT. 9, SUB-SECT. 3.

520 i. Right of purchaser to costs.]—A purchaser under a decree has no lien for his costs on the funds in ct. arising out of the sales of other property, so as to prevent any distribution of the fund, until the report of the title being bad has been confirmed.—*M'CANN v. O'FARRELL* (1824), 1 Hog. 137.—*IR.*

520 ii. —.]—Whenever a purchaser is discharged he must also get interest & his costs.—*PLEASANTS v. ROBERTS* (1825), 2 Mol. 507.—*IR.*

520 iii. —.]—Where a purchaser was discharged on account of waste committed on the premises between the

period of sale & making good title, he was refused the costs incurred in investigating the title & interest on his purchase-money, while he was entitled to his discharge on another ground which he brought forward tardily.—*MAGENNIS v. FALLON* (1828), 2 Mol. 561; 2 L. R. Ir. 167.—*IR.*

520 iv. —.]—*GOWER v. HILL* (1832), Hayes & Jo. 127.—*IR.*

520 v. —.]—*JOHNSON v. REARDON* (1840), 3 I. Eq. R. 200.—*IR.*

520 vi. —.]—*MACKAY v. ORR* (1841), 2 I. Eq. R. 499.—*IR.*

520 vii. —.]—A purchaser who, having lodged one-fourth only of his purchase-money, was discharged upon a report of bad title:—*Held*: entitled to the costs incurred by him in in-

SUB-SECT. 3.—COSTS.

520. Right of purchaser to costs.]—*CALVERT v. GODFREY*, No. 504, *ante*.

521. —.]—*ELSE v. ELSE*, No. 515, *ante*.

522. —.]—Costs to which a purchaser under the ct. is entitled on its being found that a good title cannot be made.—*PERKINS v. EDE* (1852), 16 Beav. 268; 51 E. R. 781.

Annotation:—Apld. *Holliwell v. Seacombe*, [1906] 1 Ch. 426.

523. —.]—*HOLLIWELL v. SEACOMBE*, No. 733, *post*.

524. — Rectification proceedings pending.]—*LECHMERE v. BRASIER*, No. 502, *ante*.

525. — Notwithstanding conditions of sale.]—*POWELL v. POWELL*, No. 498, *ante*.

526. Liability of purchaser to costs—Unsuccessful application.]—*OSBORN v. OSBORN*, No. 594, *post*.

527. Who may be liable—Defendant having conduct of cause—No funds in court.]—Def., to whom the conduct of a sale under the decree of the ct. is given, will not be ordered to pay in the first instance where there are no funds in ct. the costs of a purchaser who is discharged from his purchase on the ground of bad title.—*MULLINS v. HUSSEY* (1866), L. R. 1 Eq. 488; 35 Beav. 301; 35 L. J. Ch. 348.

SECT. 10.—COSTS.

528. Right of purchaser to costs—No reference as to title.]—Where a sale had been directed under a decree, but there was no reference to the master as to the title, & no available fund in ct.:—*Held*: the purchaser was entitled to be reimbursed by pltf. the costs of investigating the title & confirming the purchase.—*BERRY v. JOHNSON* (1837), 2 Y. & C. Ex. 564; 1 Jur. 474.

529. — Out of estate—Costs of settling conveyance from infant.]—Under a decree in a creditors' suit, the real estates of a debtor, who had died intestate, leaving an infant his heir, were ordered to be sold. The estates were accordingly sold by auction in lots. Under the conditions of sale was this note: "N. B. This sale is made by an order of the Ct. of Ch., etc., & the property being vested in an infant, the purchaser will have no covenants for title." A. purchased one of the lots:—*Held*: the costs attending the settling of the deed of conveyance from the infant to A. by the master, by reason of the infancy of the heir, ought to be borne by intestate's estate, & not by A.—*BROWN v. LAKE* (1845), 15 L. J. Ch. 34.

530. — Costs of petition to obtain purchase-money out of court.]—A purchaser under the ct., after having obtained his conveyance, ought not

investigating the title, but not to interest on the one-fourth.—*FEELY v. KILKENNY* (1842), Fl. & K. 456.—*IR.*

520 viii. —.]—A purchaser who has been discharged from his purchase on report of bad title is entitled to interest on his one-fourth of the purchase-money from the date of its lodgment, up to the lodgment of the residue.—*LINAHAN v. COTTER* (1845), 8 I. Eq. 11. 104.—*IR.*

PART III. SECT. 10.

d. Right of purchaser to costs—Necessity to wait until completion.]—A person who has made a deposit upon being declared the highest bidder at a sale under a decree is outbid at a subsequent setting up to sale, he is entitled to have his deposit back

to appear upon a petition to obtain the purchase-money out of ct., & he will not be allowed his costs of so doing.—*BARTON v. LATOUR* (1854), 18 Beav. 526; 52 E. R. 207.

531. — Costs of assignment of term—Not provided for by conditions of sale.]—On the sale of the P. estate under an order of ct., one of the conditions provided, that if the purchaser should require a conveyance of any outstanding legal estate which should not have been referred to or noticed in any of the abstracted deeds or other documents dated within the last thirty years, or of any outstanding term, all the expenses attending the getting in & conveyance of such estate, etc., should be borne by the purchaser. The P. estate was in 1823 conveyed to trustees for a term of one thousand years, to secure the payment of a sum of money, the payment of which was under orders of ct. provided for. The purchaser of the estate required an assignment of the term from the representative of the surviving trustee, on the ground that it was not satisfied, but he refused to pay the costs of such assignment:—*Held*: the purchaser was entitled to an assignment of the term, the costs of which, not having been provided for by the condition of sale, must be borne by the vendors.—*STRONGE v. HAWKES* (1856), 27 L. T. O. S. 150; 2 Jur. N. S. 388.

Annotation:—*Reid. Re Moore & Hulme's Contract* (1911), 106 L. T. 330.

532. — Costs of appearance on further consideration—Purchase-money paid into court subject to shop order.]—A purchaser under the ct., who

had not obtained his conveyance, paid his money into ct. subject to a stop order:—*Held*: he was entitled to his costs of appearance on further consideration, he having been served with notice.—*NOBLE v. STOW* (1861), 30 Beav. 272; 54 E. R. 894.

533. Liability of plaintiff—Where no fund in court.]—*BERRY v. JOHNSON*, No. 528, *ante*.

534. Liability of party—Purchasing without leave of court.]—A party to the cause becoming, without leave of the ct., purchaser at a sale of property made by order of the ct., must pay the extra costs occasioned by the deviation from the ordinary practice of the ct.—*KNIGHT v. CREWE* (1846), 8 L. T. O. S. 153.

535. Costs of suit exceeding funds in court—Borne rateably by parties.]—Where the real estates of intestate were sold under a decree in an administration & the heir-at-law was a *feme covert*, who declined acknowledging the conveyance to the purchaser, in such a case where the costs of the suit exceeded the funds in the cause the ct. directed the costs of the purchasers occasioned by the refusal of the married woman to make the acknowledgment to be first taxed & paid; & subject thereto, that the costs of plffs. & defts. should be taxed & paid rateably.—*BILLING v. WEBB* (1849), 1 De G. & Sm. 716; 63 E. R. 1265.

Where purchaser discharged.]—*See* Sect. 9, sub-sect. 3, *ante*.

Default of purchaser—Resale on non-payment of purchase money.]—*See* Nos. 463, 464, *ante*.

Part IV.—Conditions of Sale, Particulars and Special Stipulations.

SECT. 1.—GENERALLY.

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), s. 46.

536. Construction of conditions—Strictly against person framing them.]—Conditions of sale must be construed strictly against the person who frames them.

A condition, that the vendor shall be at liberty to rescind the contract, if the purchaser should "show any objection of title, conveyance or otherwise, & should insist thereon": was held, not to authorise the vendor to rescind the contract, without attempting to answer the requisitions, although some of them were untenable; held, also, that he was bound to answer them, & give the purchaser an opportunity of either waiving or insisting upon them.

The vendor, notwithstanding such a condition, was held bound to comply with a requisition, that a mtgee. of the property, by underlease, should be paid off & concur in the conveyance.

A vendor has duties, in that character, which

he cannot get rid of by such conditions of sale.—*GREAVES v. WILSON* (1858), 25 Beav. 290; 27 L. J. Ch. 546; 31 L. T. O. S. 68; 4 Jur. N. S. 271; 6 W. R. 482; 53 E. R. 647.

Annotations:—*Distd. Duddell v. Simpson* (1866), 36 L. J. Ch. 70. *Consd. Re Jackson & Oakshott* (1880), 14 Ch. D. 851; *Re Des Reaux & Setchfield's Contract*, [1926] Ch. 178. *Reid. Merrett v. Schuster*, [1920] 2 Ch. 240.

537. Purpose of conditions—Notice of terms of sale.]—The proper office of the particulars is to describe the subject-matter of the contract, that of the conditions to state the terms on which it is sold (*MALINS, V.-C.*).—*TORRANCE v. BOLTON* (1872), as reported in L. R. 14 Eq. 124; *on appeal*, 8 Ch. App. 118, L. J.J.

Annotations:—*Reid. Blalberg v. Keeves*, [1906] 2 Ch. 175; *Carlish v. Salt*, [1906] 1 Ch. 335. *Mentd. Nocton v. Ashburton*, [1914] A. C. 932.

538. — Purchaser's rights as to title.]—*BLAIBERG v. KEEVES*, No. 564, *post*.

539. Form of conditions—Printed not written.]—I cannot consider it a judicious condition, nor can I consider the practice which I understand is peculiar to the west of England & is the usual

immediately; but for his interest & costs he must wait the completion of sale.—*ARCDALL v. MONTGOMERY* (1787), Vern. & Scr. 302.—*IR.*

e.—*Counsel's fee.*—In sales under decree, as in private sales, plff. or vendor is not bound to furnish to the purchaser a fee for counsel with the abstract of title, unless by special condition. If the purchaser requires the opinion of counsel he must take it at his own expense, but he will have

only a qualified or conditional property in the opinion until the sale is complete.—*ALEXANDER v. CROSBIE* (1839), 2 L. Eq. R. 141.—*IR.*

f.—*Clarke v. De Burgh* (1839), 2 L. Eq. R. 19.—*IR.*

PART IV. SECT. 1, SUB-SECT. 1.

538 i. Construction of conditions—Strictly against persons framing them.]—Conditions of sale which restrain the vendor's liability, & which derogate

from the rights of the purchaser according to the general rules of law, are to be construed strictly.—*MORTIMER v. MORT* (1856), 2 Legge, 938.—*AUS.*

g.—*According to intention of parties.*—*MACARTHUR v. LECKIE* (1893), 9 Man. L. R. 110.—*CAN.*

h. Ambiguous conditions—Construction.—*ALLMANN v. MCDANIEL*, [1912] 1 I. R. 467.—*IR.*

k. Sale according to plan showing

Sect. 1.—Generally: Sub-sects. 1 & 2.]

course there, of having written instead of printed conditions of sale, to be a wise & proper practice to be pursued at all (STUART, V.-C.).—BARTLETT v. WOOD (1859), 2 L. T. 141; *on appeal* (1861), 30 L. J. Ch. 614, L. C.

Annotations :—**Mentd.** Crogan v. Allen (1882), 22 Ch. D. 101; *Re* Cope, D'Augular v. Cope (1885), 1 T. L. R. 611; Plumb v. Craker (1885), 16 Q. B. D. 40; *Re* Ormston, Goldring v. Lancaster (1887), 58 L. T. 74; Power v. Parker (1887), 4 T. L. R. 143.

540. What conditions must contain—Not legal effect of facts stated.—The particulars of sale described the thing to be sold as an improved ground rent, amply secured, & stated the property to be held under a sub-lease of the full term of the ground lease.

The conditions of sale provided that no objection should be taken by reason of the sub-lease being in excess of the superior lease, & offered previous inspection of the leases, & provided that the purchaser should be held to have notice of the leases, & their effect, whether he inspected or not :—**Held** : the particulars disclosing the facts & the conditions referring to the facts the purchaser was bound, though the particulars & conditions did not particularly state the legal effect; particularly having regard to the circumstance that inspection was offered.—SMITH v. WATTS (1858), 4 Drew. 338; 28 L. J. Ch. 220; 32 L. T. O. S. 190; 7 W. R. 126; 62 E. R. 131.

Annotation :—**Refd.** Evans v. Robins (1863), 11 L. T. 211.

541. — Not reasons for imposing conditions.—*Re* SANDBACH & EDMONDSON'S CONTRACT, No. 562, *post*.

542. Ambiguous conditions—Right of purchaser to discharge.—TAYLOR v. MARTINDALE, No. 1119, *post*.

543. — — — — ——Whenever a purchaser is precluded from his rights by a special condition, that special condition ought to be expressed in such language as clearly to show what it is.

A condition of sale was so framed as to lead a purchaser to conclude, that at the time when the vendor, a mtgee., purported to exercise a power of sale, he had in him a power of sale, & that the purchaser was not to take any objection on the ground that when the vendor exercised the power, the mtgor. or his assignees did not concur in the sale. On a motion by the vendor, that the purchaser should pay his purchase-money into ct.:—**Held** : upon the principle first above stated, the purchaser could not be held bound by the condition to admit that there was a good & valid power of sale : & he might be discharged from his purchase, with costs.—CRUSE v. NOWELL (1856), 25 L. J. Ch. 709; 27 L. T. O. S. 313; 2 Jur. N. S. 536; 4 W. R. 619.

544. — Construction—In favour of purchaser.—OSBORNE v. HARVEY, No. 1385, *post*.

545. — — — — ——If a vendor means to exclude a purchaser from that which is matter of common right, he is bound to express himself in terms the most clear & unambiguous. But if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think that the construction must be that which is rather favourable to the purchaser than to the vendor (KNIGHT-BRUCE, V.-C.).—SYMONS v.

JAMES (1842), 1 Y. & C. Ch. Cas. 487; 6 Jur. 452; 62 E. R. 983.

Annotations :—**Apprvd.** Rhodes v. Ibbetson (1853), 4 De G. M. & G. 787. **Refd.** Sidney v. Clarkson (1865), 14 W. R. 157.

546. — — — — ——Vendors having put forth ambiguous conditions of sale, held to be bound strictly by those conditions.

If he [the vendor] uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself (KNIGHT-BRUCE, V.-C.).—SEATON v. MAPP (1846), 2 Coll. 556; 63 E. R. 859.

Annotations :—**Apprvd.** Rhodes v. Ibbetson (1853), 4 De G. M. & G. 787. **Consd.** Brumfit v. Morton (1857), 30 L. T. O. S. 98. **Refd.** Drysdale v. Mace (1854), 5 De G. M. & G. 103; Sidney v. Clarkson (1865), 14 W. R. 157. **Mentd.** Day v. Luhke (1868), L. R. 5 Eq. 336.

547. — — — — ——Leasehold hereditaments were agreed to be sold, & the vendor stipulated that he would produce a good & marketable title, commencing from the freeholder, but that no title should be called for prior to the lease granted by D. to the vendor. The lease having been granted pursuant to a prior contract, which contract had been mortgaged, the purchaser refused to complete, & the vendor filed a claim for specific performance :—**Held** : the words of the contract were ambiguous, & the purchaser was entitled to construe them most favourably to himself; & therefore, if the vendor insisted on specific performance, the disputed stipulation must be construed as if the words "but no title shall be called for prior to the lease granted by D. to the vendor" were omitted.—RHODES v. IBBETSON (1853), 4 De G. M. & G. 787; 2 Eq. Rep. 76; 23 L. J. Ch. 459; 43 E. R. 715, L. J.J.

Annotations :—**Distd.** Lawrie v. Lees (1881), 7 App. Cas. 19. **Mentd.** Saunders v. Druce (1855), 3 Drew. 139.

548. — — — — ——CRUSE v. NOWELL, No. 543, *ante*.

549. Objectionable conditions—Notice to purchaser at time of sale—No right to relief.—The ct. will not relieve a purchaser from the effects of special conditions of sale, where he had the objectionable nature of them brought under his notice at the time of the sale.—HYDE v. DALLAWAY (1842), as reported in 6 Jur. 119.

Misleading conditions.—*See* Sub-sect. 2, *post*.

550. Sale by auction—Land sold in lots—Condition throwing common incumbrance on one lot—Right of indemnity to other purchasers.—Estates being sold by auction in lots under conditions, one of which expressed that they were subject to the perpetual payment of £120 a-year to the curate of N., but that the same, & the perpetual annual payment of £20 to the hospital of C., were in future to be charged upon, & paid by, the purchaser of lot 1 only; the purchasers of the other lots are entitled, not to an absolute exoneration, but to an indemnity from the purchaser of lot 1. Nature of the indemnity which they may require.—CASAMAJOR v. STRODE (1819), 2 Swan. 347; 1 Wils. Ch. 428; 36 E. R. 649; *affd.* (1821), Jac. 630, L. C.

Annotation :—**Refd.** Croome v. Lediard (1834), 2 My. & K. 251.

551. — — — — ——Conditions affecting lots not purchased—No implied notice to purchaser.]—

roads—Vendor not liable to make roads.—CHENEY v. CAMERON (1858), 6 Gr. 623.—CAN.

1. Condition for release of vendor from making title on failure of Crown to approve assignment.—ARTHUR v. MONCK (1870), 21 C. P. 76.—CAN.

m. Enforcement of conditions—Effect of failure to register agreement.—Failure on the part of a vendor to register an agreement of sale does not debar him from recovering upon the covenants contained in such agreement.—MCDONALD v. MCCLYMONT (1916), 8 W. W. R. 990.—CAN.

n. Condition against assignment without vendor's consent.—BIGGS v. ISENBERG, [1920] 3 W. W. R. 357.—CAN.

o. Alteration of conditions by seller—Without notice to purchaser.—STRAND WOOD CO., LTD. v. ALEXANDER, [1906] T. S. 486.—S. AF.

When property is sold in lots, described in particulars of sale, a vendee is only affected with notice of what concerns the lots which he purchases, & is not to be taken as having read all the particulars of all the lots.

Real estate, all belonging to the same owner was sold by auction under the order of the Ct. of Ch., in lots. Lot 9 was sold as building land to S., with right of way over lot 16. At the time of the sale a right of footway only existed. But by the conveyance, which was duly executed, a right of way for carts & carriages was granted. S. conveyed lot 9 with the right which had been conveyed to him to C. Lot 16 was sold to T. who had no notice that a larger easement than the original one had been conveyed to the purchaser of lot 9. C. employed a builder to carry materials with carts, etc., over lot 16, but T., the owner of the latter lot, interfered. C. accordingly filed his bill for an injunction, & T. answered & filed his cross bill for a declaration that C. was entitled to a footway only. C. had not completed his purchase. Conflicting evidence was given as to inquiries & conversations at the sale, & it appeared that C. was present during the whole of the sale & noted down the biddings; in consequence of which T. attempted to fix him with notice that lot 16 was subject only to the more limited right:—*Held*: C. being in possession of the legal estate, & having purchased the land as building land, was entitled to his injunction against T., who was only an equitable owner, although T. purchased subject to the limited right only, & had no notice of the larger right actually conveyed.—*CURTIS v. THOMAS, THOMAS v. CURTIS* (1875), 33 L. T. 664.

—*J*.—See AUCTION & AUCTIONEERS, Vol. III., pp. 15, 16, Nos. 111–117.

552. Sale by private treaty—Purchaser present at abortive auction—Conditions of sale not imported.—An offer by letter to purchase a house at a given sum, which is accepted unconditionally, will not constructively incorporate particulars & conditions of sale into the contract merely because the purchaser & his agent had attended the auction, & had the particulars, etc., given to them.

C. put up a leasehold house for sale by auction, at which W. & his agent attended: the house was not sold, but W. through his agent offered to the auctioneer £3,200 for the premises, which was unconditionally accepted. Upon a bill for a specific performance:—*Held*: the offer & acceptance formed a contract to purchase the premises; but the attendance at the previous auction & the knowledge of the conditions of sale did not make them a part of the agreement.—*COWLEY v. WATTS* (1853), 22 L. J. Ch. 591; 21 L. T. O. S. 97; 17 Jur. 172; 1 W. R. 218.

Annotation.—*Reid. Sheers v. Thimbleby* (1897), 76 L. T. 709.

SUB-SECT. 2.—MISLEADING CONDITIONS.

553. What amounts to misleading condition—Condition as to title—Catching condition.—*ADAMS v. LAMBERT* (1838), 2 Jur. 1078, L. C.

554. ——— Amounting to warranty of right to convey.—Real property settled upon A. for life, with remainder to trustees upon trust for sale, & to stand possessed of the proceeds for all the children of A. equally, to be paid on their attaining

twenty-one, was contracted to be sold by the trustees in the lifetime of A. A's children had attained twenty-one, & had conveyed their interests to trustees for the benefit of their children, who were minors, without any power of sale being given to such trustees. One of the conditions of sale was as follows: "The purchaser shall not object to the vendors' title on the ground that the sale is taking place in the lifetime of A. The children of A., or the assigns & trustees of such of them as have aliened or settled their estates & interests, shall, if required, join in the conveyance to the purchasers":—*Held*: this amounted to a warranty that the children, or those representing them, were in a condition to join in an effectual conveyance to the purchaser, & the purchaser was not precluded from relying upon this defect of title.—*MOSLEY v. HIDE* (1851), 17 Q. B. 91; 20 L. J. Q. B. 539; 17 L. T. O. S. 100; 15 Jur. 899; 117 E. R. 1216.

Annotation.—*Apld. Want v. Stallibrass* (1873), L. R. 8 Exch. 175.

555. ——— Legal effect not stated.—Conditions of sale must express in distinct terms a difficulty of title, & therefore when a condition set out facts from which the conclusion in law was that the vendors showed no title, but this conclusion was one which would not occur to an ordinary purchaser, & was not stated in the condition:—*Held*: the sale could not be enforced.—*WILLIAMS v. WOOD* (1868), 16 W. R. 1005.

556. ————A vendor of property inserted in the conditions of sale a provision that "no objection or requisition should be made by the purchaser by reason of the non-acknowledgment of an indenture dated Dec. 18, 1841, by a married woman who was a party thereto." The effect of this was that no title would be given to one-fifth of the property. The purchaser refused to complete, & an order was asked for to compel him to do so:—*Held*: the condition, as framed, was misleading; the vendor should have stated explicitly that he had no title to one-fifth of the property; & the vendor could not avail himself of such a condition.—*Re CUMMING TO GODBOLT* (1884), 1 T. L. R. 21.

557. ——— Title to commence with specified ed—Sale by court.—*ELSE v. ELSE*, No. 515, ante.

558. ——— Omission to disclose that deed voluntary.—*Re MARSH & GRANVILLE (EARL)*, No. 1050, post.

559. ——— Erroneous statement of facts.—B. entered into a contract for purchase of a freehold estate from H. One of the conditions of sale was, that the title to the beneficial ownership to the property should commence with the will of C., dated in 1829, & the purchaser should assume that C. was at his death beneficially entitled to the property in fee simple, free from incumbrances. On an investigation of the title it appeared that C. had in 1824 contracted for the purchase of the estate, but the vendor not at that time being able to make a good title, C. took possession & invested the purchase-money, & it was not till long after the death of C. that the title was made out & the purchase-money paid:—*Held*: in a suit by H. for specific performance of the contract, the statement in the conditions of sale was erroneous & misleading, & was consequently not binding on the purchaser, & the bill was dismissed with costs, *ut* having declined to take an open reference as

PART IV. SECT 1, SUB-SECT. 2.

559 i. What amounts to misleading condition—Condition as to title—Er-

roneous statement of facts.—*GARDINER v. TATE* (1876), 1 R. 10 C. L. 460.—*IR*.

559 ii. ————*Re LYONS*

& CARROLL'S CONTRACT, [1890] 1 L. R. 383.—*IR*.

559 iii. ————*HAMILTON v. WESTERN BANK* (1861), 23 Duml.

Sect. 1.—Generally: Sub-sects. 2 & 3.]

to title.—**HARNETT v. BAKER** (1875), L. R. 20 Eq. 50; 45 L. J. Ch. 64; 32 L. T. 382; 39 J. P. 644; 23 W. R. 559.

Annotations.—**Reid**. **Best v. Hamand** (1879), 12 Ch. D. 1; **Re Scott & Alvarez's Contract**, **Scott v. Alvarez**, [1895] 2 Ch. 603.

560. — Omission to disclose reservation of part of estate.—Where specific execution of a contract is sought, there must have been perfect truth & the fullest disclosures by the vendor in order to entitle him to relief. The ct. will otherwise, even where there has been no intentional suppression of fact, relieve the purchaser who has been thereby deceived, provided he has acted throughout reasonably & fairly.

A building estate was offered for sale by auction, in plots, under conditions of sale which stipulated that no public-house should be erected thereon. Deft. bought one of the plots & accepted the title, but refused to complete on discovering that the whole of the vendor's estate, as had been deft.'s impression, was not included in the sale, but that a plot had been reserved, within 100 yards of deft.'s purchase, to which the vendor contended the above stipulation did not extend. This impression was produced by the conditions of sale being framed as if including the whole estate without any reservation, & also by the reserved plot not being coloured or marked with the vendor's name. Deft. thereupon refused to complete, unless with covenants on the part of the vendor including the reserved plot; & in a suit for specific performance instituted by the vendor:—**Held**: he could not compel deft. to execute the contract if he, pltf., insisted on retaining the plot free from any restrictive covenant; & pltf. was entitled, at his option, either to a decree for specific performance with a covenant including the reserved plot, or to have his bill dismissed, & must in either case pay the costs of the suit.—**BASCOMB v. BECKWITH** (1869), L. R. 8 Eq. 100; 38 L. J. Ch. 536; 33 J. P. 580; 17 W. R. 812; *sub nom.* **BASCOMB v. BECKWITH**, 20 L. T. 862.

Annotation.—**Reid**. **Denny v. Hancock** (1870), 18 W. R. 566.

561. — Dependent on vendor's knowledge or belief.—(1) An estate was sold by an order of the ct. in an administration action, & the vendor, the devisee in trust, who was a solr., submitted a statement of his title to one of the conveyancing counsel. One of the conditions of sale as settled by him required the purchaser to assume that B. was seised of & entitled to the property in fee simple in possession, free from incumbrances in 1835, & up to & at her death in 1861, & that it was not accurately known how she acquired the property; & it was expressly stipulated that no other title should be required or inquired into, whether in the vendor's possession, power or knowledge or not. The statement of title submitted by the vendor showed clearly that these assumptions were not based on fact, B. having been a mtgee. in possession, & having acquired a prescriptive title under Stat. Limitations by adverse possession, commencing in 1844. The purchaser having discovered these facts brought a summons to rescind his contract for purchase:—**Held**: the condition was a misleading condition, & he was entitled to

have a good holding title notwithstanding the condition, & if the vendor elected to show that title then to have a reference to chambers to ascertain whether a good holding title could be made out; & if not, rescission of the contract.

(2) In sales made under the order of the ct., the conveyancing counsel, though in one sense the officer of the ct., is the counsel of the vendor, so that in case of a mistake, as between vendor & purchaser, the vendor is liable to the same extent as if the mistake had been made by a counsel not appointed by the ct.

(3) A vendor is not entitled by his conditions to require a purchaser to assume that which the vendor knows not to be true; a purchaser can at the most be asked to assume something of which the vendor knows nothing.—**Re BANISTER, BROAD v. MUNTON** (1879), 12 Ch. D. 131; 48 L. J. Ch. 837; 40 L. T. 828; 27 W. R. 826, C. A.

Annotations.—**As to (1)** **Apld.** **Smith v. Robinson** (1879), 13 Ch. D. 148. **Consd.** **Re Marsh & Granville** (1883), 24 Ch. D. 11. **Reid**. **Jones v. Rimmer** (1880), 29 W. R. 165; **Nash v. Wooderson** (1884), 52 L. T. 49; **Re Scott & Alvarez's Contract**, **Scott v. Alvarez** (1895), 12 R. 474; **Re Tyler, Ex p. Official Receiver**, [1907] 1 K. B. 865. **As to (3)** **Reid**. **Blenkhorn v. Penrose** (1880), 43 L. T. 668.

562. ——**]**—A condition of sale requiring the purchaser to assume certain facts is not misleading, if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title. In such a case it is not necessary to explain in the condition the specific defect in the title which the condition is intended to cover.—**Re SANDBACH & EDMONDSON'S CONTRACT**, [1891] 1 Ch. 99; 60 L. J. Ch. 60; 63 L. T. 797; 39 W. R. 193; 7 T. L. R. 167, C. A.

Annotations.—**Apld.** **Re Scott & Alvarez's Contract**, **Scott v. Alvarez**, [1895] 1 Ch. 596; **Blalberg v. Keeves**, [1906] 2 Ch. 175.

563. ——**]**—On the sale by auction by a mtgee. of a leasehold house, one of the conditions of sale provided that the purchaser should be furnished with an abstract of the lease, of the assignment of the lease, & of the subsequent title, & should not make any objection in respect of the "intermediate title" between the lease & the assignment, "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the assignment vested in the assignees a good title for the residue of the term."

Subsequently to the sale vendor's solr. communicated to the purchaser information obtained from the mtgor. prior to the sale as to the intermediate title, & tending to throw suspicion on vendor's title to sell at all, whereupon the purchaser took out a summons under Vendor & Purchaser Act, 1874 (c. 78), to have it declared that the title was not such as he ought to be compelled to accept:—**Held**: the condition cast upon the purchaser the burden of proving a defective title, & to relieve him from his contract, it was not enough for him to show merely that the title was doubtful or open to suspicion; & therefore, the vendor was entitled to a declaration that a good title had been shown "according to the terms of the contract."

Semble: a purchaser who can obtain the legal estate cannot evade his contract on the ground

(Ct. of Sess.) 1033; 33 Sc. Jur. 519.—**SCOT**.

P. *Ambiguous condition.*
—**GEOGHEGAN v. CONNOLLY** (1858),
8 L. Ch. R. 598.—**IR**.

q. *Unwarrantable suppression of defects in title.*—**BOYD v.**

DICKSON (1876), 10 I. R. Eq. 239.—**IR**.

AHERN'S CONTRACT, [1905] 1 I. R. 85, 98; 38 L. T. 225.—**IR**.

t. *Insufficient disclosure of restrictive covenants.*—**STANLEY v.**

M'GAURAN (1882), 11 L. R. Ir. 314.—**IR**.

a. *Insufficient information given.*—**MANIFOLD v. JOHNSTON**, [1902] 1 I. R. 7.—**IR**.

b. *Confused & contradictory conditions.*—**WHITE v. HAGUE**, [1921] 1 I. R. 138.—**IR**.

that he is unable to get a complete string of covenants for title.—*Re SCOTT & ALVAREZ'S CONTRACT, SCOTT v. ALVAREZ*, [1895] 1 Ch. 596; 61 L. J. Ch. 378, n., C. A.; *subsequent proceedings*, [1895] 2 Ch. 603, C. A.

Annotations.—*Reid. Re Wallis & Barnard's Contract*, [1899] 2 Ch. 515; *Re Hughes & Ashley's Contract*, [1900] 2 Ch. 595.

564. ———.]—The vendor put up for sale by auction property described as “an eligible freehold investment comprising a house & shop No. 349, Whitechapel road.” One of the conditions of sale was “The property was formerly held with other property under an indenture of lease dated Jan. 31, 1672, for a term of five hundred years at a yearly rent of 1s., but the property was assigned in the year 1828 free from the rent, which has never been paid by the vendor, & the purchaser shall assume that the rent has been released & is not now charged upon the property sold. By a deed poll in 1902 under Conveyancing & Law of Property Act, 1881 (c. 41), the property was expressed to be enlarged by the beneficial owner into a fee simple. . . . It shall be assumed that the deed poll operated as an effectual enlargement according to its tenor.” The lease was from the lord of the manor of Stepney. The facts stated in the condition were true, & the property had been assigned to the vendor in 1902 as free from the rent, but subject to the lease, but in the abstracted deeds between 1828 & 1902 it was described as held at a rent of 1s. The purchaser objected that the assumption he was required to make in the particulars was to the vendor's knowledge untrue & the statement in the particulars that the property was freehold was a misrepresentation, & brought this action for rescission of the contract & return of his deposit. It was proved at the hearing that a search in the records of the manor showed that no rent had been paid for fifty years, & there was no certain evidence that it had ever been paid at all:—*Held*: the vendor might reasonably believe that the property was freehold & was therefore justified in so describing it in the particulars, & then, by the conditions, requiring the purchaser to assume the facts establishing the freehold title, which the vendor knew he would have a difficulty in proving. There was therefore no misrepresentation.

It is not the function of the particulars to deal with title at all; that has to be dealt with on evidence, & it is the function of the conditions to state what evidence of title the purchaser is to have (WARRINGTON, J.).—*BLAIBERG v. KEEVES*, [1906] 2 Ch. 175; 75 L. J. Ch. 464; 95 L. T. 412; 54 W. R. 451.

565. ——— *Condition as to non-registration.*—*GIRLING v. GIRLING*, [1886] W. N. 18.

566. ——— *Effect of purchaser being a lawyer.*—I think that if the point is not perfectly clear in *plffs.* favour the fifth & sixth conditions of sale cannot in this respect be disregarded—cannot but have weight attributed to them in the present contention—cannot but preclude an experienced & able member of the legal profession, such as *deft.*, from objecting to the title on grounds which . . . must, I conceive, be taken to have been by that condition pointedly & distinctly brought under his observation & attention (KNIGHT-BRUCE, L.J.).—*MINET v. LEMAN* (1855), 7 De G. M. & G. 340; 3 Eq. Rep. 783; 24 L. J. Ch. 545; 25 L. T. O. S. 284; 1 Jur. N. S. 692; 44 E. R. 133, L. J.

Annotations.—*Mentd. Baldwin v. Baldwin* (No. 2) (1856), 22 Beav. 419; *Farley v. Bonham* (1861), 2 John. & H. 177; *Jacomb v. Turner*, [1892] 1 Q. B. 47.

567. ——— *Reference to documents.*—A condition of sale which refers to a document as affecting the title, & offers an opportunity of inspecting it,

is not misleading, unless it so states the documents as to lead to the belief that all that is material in it is disclosed.—*BLENKHORN v. PENROSE* (1880), 43 L. T. 668; 29 W. R. 237.

Annotation.—*Reid. Dougherty v. Oates* (1900), 45 Sol. Jo. 119.

SUB-SECT. 3.—PARTICULARS.

568. Purpose of particulars—Description of subject-matter.—*TORRANCE v. BOLTON*, No. 537, *ante*.

569. ——— *Not of title.*—*BLAIBERG v. KEEVES*, No. 561, *ante*.

570. Effect of—Purchaser bound by particulars—Not by general description in advertisement.—Purchaser not entitled to a conveyance of part, though answering the general description in the advertisement of sale, as it was not in the contemplation of either party at the time of the purchase or conveyance; purchaser being referred to a more particular description, which did not include that part; & the surrender having been made according to that & from his own instructions.—*CALVERLEY v. WILLIAMS, WILLIAMS v. CALVERLEY* (1790), 1 Ves. 210; 30 E. R. 306, L. C.

Annotations.—*Consd. Clowes v. Higginson* (1813), 1 Ves. & B. 524; *Douglas v. Baynes*, [1908] A. C. 477. *Reid. Manser v. Back* (1818), 6 Harc. 443; *Price v. Jay* (1863), 4 Giff. 235.

571. ——— *Description of property by lots—No presumption to sell undivided estate.*—After a sale by auction of a messuage & lands, one of the conditions of which was that any mistake or error in the description of the property, or any other error in the particulars, should not annul the sale, but, except where otherwise provided for by the conditions, a compensation should be given or taken, to be settled by two referees or an umpire—it was found that one of the lots contained about 20 acres more, & another about 10 acres less, than the quantity of land described in the particulars:—*Held*: upon the construction of the condition, the mistake or error thereby contemplated was such a mistake or error as would annul the contract; (2) the excess of the quantity of land in one of the lots, & the deficiency in the other, were both subjects of compensation within the condition; & the ct. would, if necessary, refer it to the master to settle the amount of such compensation, notwithstanding that, from the variety in the nature of the different portions of the land in which the variations occurred, there was no uniform standard for computing such amount; (3) whether a vendor could or could not in equity be relieved on the ground of mistake from a contract for the sale of lands inaccurately described as to quantity, & which description had been prepared by his solr. from former particulars & conditions relating to the same property, drawn up by another solr. on the report of a surveyor, equity would not in such circumstances enforce the contract against the vendor, unless the case should be one for compensation, & the purchaser should submit to make such compensation.

The actual designation in the particulars of the property offered for sale of the number of acres contained in a lot:—*Held*: to negative the presumption of any intention on the part of the vendor to sell the estate in the lump.—*LESLIE v. TOMPSON* (1851), 9 Harc. 268; 20 L. J. Ch. 561; 17 L. T. O. S. 277; 15 Jur. 717; 68 E. R. 503.

Annotations.—*As to (1) Consd. Painter v. Newby* (1853), 11 Harc. 26. *Reid. Bettys v. Maynard* (1882), 46 L. T. 766.

572. Necessity for accuracy.—It is the duty of a vendor in his particulars of sale to describe the

Sect. 1.—Generally: Sub-sect 3. Sect. 2: Sub-sects. 1, 2, 3 & 4.]

property with perfect accuracy & not leave it to inference.—*SWAISLAND v. DEARSLEY* (1861), 29 Beav. 430; 30 L. J. Ch. 652; 4 L. T. 432; 7 Jur. N. S. 984; 9 W. R. 526; 54 E. R. 694.

Annotation:—Consd. Tamplin v. James (1880), 15 Ch. D. 215.

573. — Misrepresentation.]—In a sale by the direction of the ct. the particulars of sale stated that lot 12 comprised a house “at present in the occupation of C., at a rental of *per annum* £42.” The purchaser of this lot paid the deposit, & his purchase was confirmed by order absolute, & he then obtained an order for payment of the remainder of the purchase-money into ct. The purchaser afterwards discovered that C. was not tenant to the vendors, but to some person who claimed by an adverse title:—*Held*: the description in the particulars of sale must mean that C. was tenant to the vendors for a limited period at a given rent, & that this was a representation so different from the fact that it amounted to such bad faith on the vendor’s part as would induce the ct. to discharge the purchaser from his contract.—*LACHLAN v. REYNOLDS* (1853), Kay, 52; 2 Eq. Rep. 713; 23 L. J. Ch. 8; 22 L. T. O. S. 211; 2 W. R. 49; 69 E. R. 23.

574. — Effect of knowledge of purchaser.]—A house was stated in particulars of sale to be “in the occupation of the C. J. company under a lease.” The co. were in occupation by virtue of a lease, which, however, had not been granted to them, but to A., B. & C., who were their trustees. The vendor’s solr. immediately before the sale told the purchaser that he did not remember the names of the lessees, but believed that A. & B. were two of them. The purchaser objected to the title on the ground that the above-statement in the particulars amounted to a representation that the co. were the lessees:—*Held*: assuming the statement to be such that if the case had stood on the particulars only the contract ought to have been rescinded, the purchaser, having bought with the above information, must be held to his bargain.—*FAREBROTHER v. GIBSON* (1857), 1 De G. & J. 602; 44 E. R. 857, L. J.

Annotation:—Distd. Cato v. Thompson (1882), 9 Q. B. D. 616.

575. ——In a sale of property under administration in the County Palatine Ct. of Lancaster, the particulars of sale described one of the lots as leasehold, held under a lease, the date & parties to which were stated. There was no attempt made to state the terms of the lease, & no mention was made of a ground rent of £43 17s. 6d., to which the lot was subject. The lot was sold at auction for £1,400. The purchaser afterwards claimed to have the sale rescinded, on the ground that the particulars being silent on the subject of ground rent, he had been misled & induced to believe that there was no ground rent, or only a nominal one. In his affidavit he stated that if he had known of the ground rent he would not have bid more than £700. The property had been previously valued at £1,450 by a professional valuer, who had taken the ground rent into account, & who at the sale bid £1,390:—*Held*: the particulars were misleading & the purchaser was entitled to have the sale rescinded.—*JONES v. RIMMER* (1880), 14 Ch. D. 588; 49 L. J. Ch. 775; 43 L. T. 111; 29 W. R. 105, C. A.

Annotation:—Expld. Blenkhorn v. Penrose (1880), 43 L. T. 668.

576. ——*]*—*TOMPKINS v. TRATT* (1915), 139 L. T. Jo. 541.

577. Omissions in particulars—Failure to disclose service of notices to pave.]—The omission by a vendor, without fraudulent intent, to disclose, before sale, to the purchaser of town leasehold property the fact that he, the vendor, had been served by the local authority with the usual notices under Public Health Act, 1875 (c. 55), to pave, etc., the street fronting the premises, is not such an “omission in the particulars” tending to depreciate the value of the property as to entitle the purchaser, if he completes his purchase, to compensation under the usual general condition, where the works are not executed by the local authority, & the expenses thereof do not therefore become a charge on the premises, until after the completion of the purchase.

Qu.: whether such an omission on the part of the vendor, even though without fraudulent intent, would have afforded the purchaser sufficient ground for resisting specific performance of his contract, or for an action for rescission.

A condition of sale indemnifying the vendor against expenses “in complying with any requirement enforceable against him & made after the sale by the local authority in respect of paving, etc., the streets” is not such an implied statement that no requirement has been made by the local authority before the sale as to entitle the purchaser to relief on the ground of deception on discovering that notices under Public Health Act, 1875 (c. 55), had been served on the vendor before the sale.—*Re LEYLAND & TAYLOR’S CONTRACT*, [1900] 2 Ch. 625; 69 L. J. Ch. 764; 83 L. T. 380; 49 W. R. 17; 16 T. L. R. 566, C. A.

Annotations:—Refd. Carlisle v. Salt, [1906] 1 Ch. 335; *Beyfus v. Lodge*, [1925] Ch. 350.

578. Variation by auctioneer—Whether parol evidence admissible.]—*FIFE v. CLAYTON* (1807), 1 Coop. temp. Cott. 351, n.; 13 Ves. 546; 47 E. R. 890, L. C.

Annotations:—Refd. Berners v. Fleming, [1925] Ch. 264. *Mentd. Williams v. Phillips* (1881), 8 Q. B. D. 437.

—*See AUCTION & AUCTIONEERS*, Vol. III., pp. 17, 18, Nos. 127, 130–133.

—*Not heard by bidder—Whether bar to specific performance.]—See AUCTION & AUCTIONEERS*, Vol. III., pp. 15, 16, Nos. 114, 115.

SECT. 2.—RIGHTS UNDER PARTICULAR CONDITIONS.

SUB-SECT. 1.—BIDDINGS.

See, generally, AUCTION & AUCTIONEERS, Vol. III., pp. 19, 20, 37, Nos. 137–145, 265.

Sales subject to reserve.]—See AUCTION & AUCTIONEERS, Vol. III., pp. 11–15, 44, Nos. 81–110, 307.

Damping the sale.]—See AUCTION & AUCTIONEERS, Vol. III., pp. 20–22, Nos. 148–161.

Deposit.]—See Sub-sect. 2, post.

SUB-SECT. 2.—DEPOSIT.

See, generally, AUCTION & AUCTIONEERS, Vol. III., pp. 23 et seq.

Forfeiture & recovery.]—See Part VIII., Sect. 2, post.

SUB-SECT. 3.—FIXTURES AND MACHINERY.

579. Condition to take at valuation—Whether valuation condition precedent to specific performance.]—A purchaser having agreed to buy

certain land & bleach works for £7,770 & to take the plant & machinery at a valuation:—*Held*: the necessity of a valuation was no reason for refusing specific performance at the suit of the vendor.—*JACKSON v. JACKSON* (1853), 1 Sm. & G. 184; 22 L. J. Ch. 873; 21 L. T. O. S. 98; 1 W. R. 264; 65 E. R. 80.

Annotation:—*Reid*. *Richardson v. Smith* (1870), 5 Ch. App. 648.

580. ———.]—An agreement for sale of leasehold premises & the goodwill of a trade, & certain fixtures to be taken at a valuation, to be made by two gaugers, to be named, or their umpire:—*Held*: the ct. could not decree specific performance of an agreement, one part of which was left to be determined by arbns.—*DARBEY v. WHITAKER* (1857), 4 Drew. 134; 29 L. T. O. S. 351; 5 W. R. 772; 62 E. R. 52.

Annotations:—*Apld*. *Tillett v. Charing Cross Bridge Co.* (1859), 26 Beav. 419. *Reid*. *Collins v. Collins* (1858), 26 Beav. 306; *Baker v. Met. Ry.* (1862), 31 Beav. 504; *Richardson v. Smith* (1870), 5 Ch. App. 648; *Hart v. Hart* (1881), 18 Ch. D. 670. *Menid*. *Muller & Co.'s Margarine v. I. R. Comrs.* (1899), 69 L. J. Q. B. 291.

581. ———.]—By the contract for the sale of an estate it was agreed that the price should be £24,000, & it was further agreed, amongst other things, that certain furniture, & other articles on the estate, the value of which was about £2,000, should be valued by valuers mutually agreed upon, & that the purchaser would take a part of the furniture & articles at that valuation. The vendor refused to appoint a valuer, & refused to complete. Decree made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture & articles.—*RICHARDSON v. SMITH* (1870), 5 Ch. App. 648; 39 L. J. Ch. 877; 19 W. R. 81, L. C. & L. J.

582. ———.]—*Refusal of permission to enter to make valuation—Mandatory injunction.*—Where an agreement has been entered into for the sale of a house at a fixed price, & of the fixtures & furniture therein at a valuation by a person named by both parties, & he undertakes the valuation, but is refused permission by the vendor to enter the premises for that purpose, the ct. will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. The ct. has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing.—*SMITH v. PETERS* (1875), L. R. 20 Eq. 511; 44 L. J. Ch. 613; 23 W. R. 783.

Annotation:—*Reid*. *County Hotel & Wine Co. v. L. & N. W. Ry.* (1918) 2 K. R. 251.

—.]—*See, generally*, *ARBITRATION*, Vol. II., pp. 385, 386, Nos. 459–470.

SUB-SECT. 4.—TIMBER.

583. Condition to take at valuation—Timber wholly on copyhold land—Sale of land of mixed tenures.—On a contract for the sale of lands, described as partly freehold & partly copyhold, & the timber thereupon, the latter at a specified valuation, upon a condition that the vendor should

not be required to distinguish the freehold land from the copyhold, nor the respective boundaries thereof, it was held that, upon the particulars & conditions, the contract for the land & timber was one contract, & not separate contracts; & that the purchaser was bound to pay for the timber at the valuation, notwithstanding the fact that it might be wholly upon the copyhold land, & therefore subject to the rights of the lord, & the restrictions of the custom.

Where, upon a contract for the sale of an estate, a separate & distinct contract is made for the sale of the timber upon it the ct. will not enforce the latter contract unless the vendor can give the purchaser such possession & dominion over the timber as will entitle him to fell & remove it; but, if an entire contract be made for the sale, both of the estate & the timber, notwithstanding the purchase-money is made up of distinct sums for each, the vendor is only bound to make out his title to the land according to the contract; & the title to the land is the title to the timber upon it.

The purchaser of undistinguished freehold & copyhold land & timber, under a single & entire contract, must be considered as estimating, in the price he pays for the land, the price he pays for the timber.—*CROSSE v. LAWRENCE* (1852), 9 Hare, 462; 21 L. J. Ch. 889; 18 L. T. O. S. 314; 16 Jur. 142; 68 E. R. 591.

Annotation:—*Follid*. *Crosse v. Keene* (1852), 9 Hare, 469.

584. ———.]—*Sale of copyhold land.*—A contract for the purchase of copyhold land at a certain price, & the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not show any custom in the manor, or licence from the lord, enabling the tenants of the manor, or himself, or his assigns, to fell the timber.—*CROSSE v. KEENE* (1852), 9 Hare, 469; 21 L. J. Ch. 892; 18 L. T. O. S. 314; 16 Jur. 142; 68 E. R. 595.

585. ———.]—*Appointment of umpire—Jurisdiction of court to set aside valuation.*—Where a contract for the sale of an estate provided that the timber should be taken at a valuation, each party to appoint his own valuer, & that the parties should in case of difference, appoint an umpire:—*Held*: the ct. had no jurisdiction to set such umpire's valuation aside, the umpire being merely a valuer substituted for other valuers, & not an arbitrator.—*Re CARUS-WILSON & GREENE* (1886), 18 Q. B. D. 7; 56 L. J. Q. B. 530; *sub nom.* *Re WILSON & GREENE, Re CASTERTON ESTATES*, 55 L. T. 864; 35 W. R. 43; 3 T. L. R. 22, C. A.

Annotations:—*Consd.* *Re Hammond & Waterton* (1890), 62 L. T. 808. *Reid*. *Re Carpenter & Bristol Corpn.* (1907), 71 J. P. 417; *Kennedy v. Barrow-in-Furness Corpn.* (1909), 2 Hudson's B. C., 4th ed., p. 411.

—.]—*See, generally*, *ARBITRATION*, Vol. II., pp. 385, 386, Nos. 459–470.

586. Agreement to take at price named by auctioneer—Effect of mistake by auctioneer.—At a sale of an estate by auction under the direction of the ct., J. E. having previously been informed of the value of the timber, purchased lot 2, & agreed to take the timber at the price named by the auctioneer. The chief clerk confirmed the sale &

PART IV. SECT. 2, SUB-SECT. 3.

c. Condition against removal until payment of purchase-money—Whether condition defeated by vendor taking mortgage.—On the sale of a wooden factory & machinery, it was stipulated that until the purchase-money should be fully paid, the vendees were not to remove the machinery. The vendors afterwards conveyed to the purchasers, who, to secure the unpaid purchase-money, executed a mte. purporting

to be the factory only, & not mentioning the machinery:—*Held*: the covenant against removing the machinery remained in force.—*CRAWFORD v. FINDLAY* (1871), 18 Gr. 51.—*CAN.*

d. Condition to instal machinery—Forfeiture on default—Default for reasonable cause.—*KOKOMO INVESTMENT CO., LTD. v. DOMINION HARVESTER CO., LTD.* (Alta.), [1918] 3 W. W. R. 366; 43 D. L. R. 198.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 4.

a. Condition to remove within time limited—When time begins to run.—One of the conditions of sale was, that the timber was to be removed by T. within two years:—*Held*: the effect of the condition was that T. was only to have the right to cut & remove the timber within two years from the date of the agreement.—*STEINHOFF v. McILAR* (1887), 13 O. R. 546.—*CAN.*

Sect. 2.—Rights under particular conditions: Sub-sects. 4 & 5, A. (a) & (b).]

filed his certificate. It was subsequently discovered that the value of the timber on a portion of the lot had been, by the mistake of the auctioneer, omitted:—*Held*: on summons by the vendors, the purchaser was entitled to hold the property without submitting to a valuation of the timber.—*GRIFFITHS v. JONES* (1873), L. R. 15 Eq. 279; 42 L. J. Ch. 408; 37 J. P. 357; 21 W. R. 470.

Annotation:—*Reid*. *Re Clayton, Smith v. Clayton*, [1920] 1 Ch. 257.

587. — Meaning of timber.]—*Re TOWER'S CONTRACT*, [1924] W. N. 331.

SUB-SECT. 5.—TITLE.

A. Commencement of Title.

(a) Title to Commence at Specified Time.

See, now, Law of Property Act, 1925 (c. 20), s. 44.

588. Meaning of forty years' title.]—Property was put up for sale by auction on June 11, 1890. The particulars described the property as "freehold." The conditions of sale provided that the title should commence with a mtge. dated July 29, 1852, & that the purchaser should within fourteen days after the delivery of the abstract send to the vendor's solrs. all his objections & requisitions as to the title, & that subject thereto, the title should be deemed to be accepted.

An abstract of title, commencing with the mtge. of July 29, 1852, was delivered to the purchaser on June 24, 1890. On July 8 the purchaser sent various objections & requisitions to the vendor's solrs. He was not satisfied with the vendor's replies, & on July 23 he delivered further requisitions. On Aug. 9 he issued a summons under Vendor & Purchaser Act, 1874 (c. 78), asking for a declaration that his requisitions & objections had not been satisfactorily answered by the vendor, & that a good title had not been shown in accordance with the particulars & conditions of sale. On Oct. 16 the purchaser filed an affidavit in support of his summons, in which he raised as an objection to the title the existence in a deed of Mar. 3, 1847, through which the title to part of the property was traced, of a covenant restricting the right of building on that part. The purchaser had discovered the contents of this deed by means of inquiries which he had made of a third party with reference to another matter; but the objection was not mentioned to the vendor until the affidavit of Oct. 16 was filed. The ct. was of opinion that the purchaser must be deemed to have acquired notice of the covenant shortly before July 23:—*Held*: the purchaser having acquired notice of the restrictive covenant, would be bound by it; it formed a valid objection to the title; he was not too late in raising the objection; & he was entitled to be relieved from his contract.

Semble: as the purchaser had agreed to accept a title of less than forty years, he would, even if he had not discovered the covenant, have had constructive notice of it, since it would have been disclosed by the abstract, if a proper forty years' title had been shown.

If a purchaser chooses to take property with a thirty-eight years' title, without going any further back, he has, in my opinion, constructive notice of that which he would actually have known if he had required a forty years' title to be shown, & had investigated the title during that period. . . .

When I say a forty years' title, I mean a title deduced for forty years, & for so much longer as it is necessary to go back in order to arrive at a point at which the title can properly commence. The title cannot commence *in nubibus* at the exact point of time which is represented by three hundred & sixty-five days multiplied by forty. It must commence at or before the forty years with something which is in itself, or, which it is agreed shall be, a proper root of title (*NORTH, J.*).—*Re COX & NEVE'S CONTRACT*, [1891] 2 Ch. 109; 64 L. T. 733; 39 W. R. 412.

Annotation:—*Reid*. *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386.

589. Agreement to take less than forty years title—Constructive notice of restrictive covenants—Entitling purchaser to repudiate.]—*Re COX & NEVE'S CONTRACT*, No. 588, *ante*.

590. — Affecting purchaser from squatter.]—Neither a squatter who has acquired a good title by possession, nor a purchaser from him, is exempt from liability arising through his not insisting on & obtaining a full forty years' title. Therefore, if any purchaser under the squatter's possessory title chooses to accept less than a forty years' title, he is fixed with constructive notice of all such equities affecting the land as he would have discovered by reasonable inquiries under a title for the full period.

Thus, where, on a purchase for value of freehold land, the purchaser agreed to accept a title commencing with a possessory or squatting title acquired within forty years prior to the purchase, he was held to have constructive notice of restrictive covenants affecting the land entered into within the forty years by an owner before the squatter took possession.—*Re NISBET & POTTS' CONTRACT*, [1906] 1 Ch. 386; 75 L. J. Ch. 238; 94 L. T. 297; 54 W. R. 286; 22 T. L. R. 233; 50 Sol. Jo. 191, C. A.

Annotations:—*Reid*. *Abbey v. Gutters* (1911), 55 Sol. Jo. 364; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Long v. Gray* (1913), 58 Sol. Jo. 46; *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Meyer v. Charters* (1918), 34 T. L. R. 589.

591. Whether purchaser entitled to documents executed before specified time.]—The vendor contracted to sell land in England under a contract fixing the commencement of title in 1874, & stating that he was selling as tenant for life under his statutory power under Settled Land Acts. The settlement in question was a compound settlement created by several instruments, some of which, including a will made in 1836, were dated or made prior to the time fixed for the commencement of title, & the last of which was a resettlement made in 1902. The vendor had, however, voluntarily furnished an abstract of all the earlier documents constituting the compound settlement except the will of 1836, which was recited in one of these documents dated in 1860. The compound settlement originally comprised land in Ireland alone, & by an order of the High Ct. of Justice in Ireland made in 1908, the present trustees were appointed trustees of the compound settlement for the purposes of Settled Land Acts. In 1910 the land in England, the subject of the contract was conveyed to the trustees & their heirs to the uses, upon the trusts & subject to the powers, charges, & provisions to, upon, & subject to which under the compound settlement the freehold lands therein comprised stood limited. The conveyance contained a statement to the effect that the purchase was made at the direction of the tenant for life out of capital moneys in the hands of the trustees arising under the compound settlement:—*Held*: the purchasers were precluded by Conveyancing & Law of Property Act, 1881 (c. 41), s. 3 (3), from

requiring production of the probate of the will of 1836 or an abstract or copy thereof.—*Re ARRAN (EARL) & KNOWLESSEN & CREER'S CONTRACT*, [1912] 2 Ch. 141; 81 L. J. Ch. 547; 106 L. T. 758.

Annotation:—*Mentd. Re Charteris, Charteris v. Kenyon*, [1917] 2 Ch. 257.

(b) *Title to commence with Specified Document.*

592. Whether purchaser precluded from investigating earlier title.—Conditions of sale, describing a title to premises as arising under an exchange, by virtue of an award of comrs. under an Inclosure Act, are satisfied by showing a title by award in respect of other lands & of common rights, without showing the further particulars of the exchange; & if the vendor contracts to commence his title with the award, the purchaser has no right to inquire into the title of the lands given by the vendor in exchange for the lands contracted to be sold.—*CATTELL v. CORRAL* (1840), 4 Y. & C. Ex. 228; 9 L. J. Ex. Eq. 37; 160 E. R. 989.

Annotation:—*Refd. Re Marshall & Salt's Contract*, [1900] 2 Ch. 202.

593. —.]—Where a condition of sale provided that the vendors should not be required to commence the title prior to the will of E., but that the purchaser should be satisfied with a declaration of the seisin of E. in fee simple of the property, free from incumbrances for a certain period:—*Held*: the declaration must strictly comply with the terms of the condition.—*NOTT v. RICCARD* (1856), 22 Beav. 307; 25 L. J. Ch. 618; 26 L. T. O. S. 267; 2 Jur. N. S. 1038; 4 W. R. 269; 52 E. R. 1126.

Annotations:—*Refd. Wells v. Maxwell* (No. 1) (1863), 32 Beav. 408; *King v. Chamberlayn*, [1887] W. N. 158.

594. —.]—(1) Though a condition of sale that the title shall commence with a certain indenture leaves it open to the purchaser to show aliunde that the parties purporting to convey were not competent to do so, yet if this be not shown, their competency to convey must be assumed, & this where the conveyance was by a corp'n. only having power to convey under certain circumstances not shown to exist.

(2) The costs of an unsuccessful application by a purchaser under a decree to be relieved from his purchase, on the ground of defective title, must be paid by appt.—*OSBORN v. OSBORN* (1870), 18 W. R. 421.

595. —.]—*Re SANDBACH & EDMONDSON'S CONTRACT*, No. 562, *ante*.

596. —.]—The conditions of sale of a freehold estate provided that the title should commence with a conveyance on sale dated 1892 deducing the title by recitals from 1844; & that it appeared from such recitals that on payment off of a mtge. in 1868 no reconveyance was executed, & that in that year the estate, which was in fact of freehold tenure was assured to the vendor at the sale in 1892 by a form of assurance applicable only to copyholds, & that the purchaser should raise no objections in respect of these matters or require the legal estate, if outstanding, to be got in, but should be satisfied with the recitals. By the deed of 1892, which recited that by a voluntary settlement of 1868, the settlor covenanted to surrender the estate, which was subject to a mtge. of £700, to the use of trustees of the settlement upon trust for sale,

to pay off the mtge. & thereupon to cause the estate to be conveyed or surrendered so as to vest in the trustees freed from the mtge., the estate was conveyed by the trustees to the predecessor in title of the present vendor. The mtge. was paid off, but no reconveyance was executed. The estate was purchased by the auctioneer at the present sale, who refused to complete. Upon summons by the vendor under Vendor & Purchaser Act, 1874 (c. 78):—*Held*: the purchaser was told he would not get the legal estate; although he might claim the legal estate by reason of the covenant to surrender & the declaration of trust for sale, he could not call upon the original settlor to pass the legal estate.—*Re WILLIAMS & PARRY'S CONTRACT* (1895), 72 L. T. 869; 13 R. 574.

597. —.] *Stipulation that no earlier title be investigated.*—Upon a sale by auction of leasehold premises one of the conditions was as follows—"the lessor's title will not be shown, & shall not be inquired into." In a suit to enforce specific performance by the vendor against the purchaser the latter objected that the lessor's title appeared by Acts of Parliament produced by the purchaser, which showed that the lessors had no power to lease the premises:—*Held*: the condition provided that the title should not be shown, also precluded inquiry for every purpose; & specific performance was decreed.—*HUME v. BENTLEY* (1852), 5 De G. & Sm. 520; 21 L. J. Ch. 760; 16 Jur. 1109; 64 E. R. 1225.

Annotations:—*Consd. Drysdale v. Maco* (1854), 2 Eq. Rep. 386. *Distd. Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515; *Harnett v. Baker* (1875), L. R. 20 Eq. 50. *Apld. Re Bankster, Broad v. Munton* (1879), 12 Ch. D. 131 (*See* 12 Ch. D. p. 139). *Folld. Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190. *Consd. Re Scott & Alvarez's Contract, Scott v. Alvarez*, [1895] 2 Ch. 603. *Refd. Nunn v. Hancock* (1871), 24 L. T. 569; *Best v. Hamand* (1879), 12 Ch. D. 1.

598. —.]—*Deft. became purchaser at public auction of a lot comprehending a freehold messuage & a fee farm rent of 21s. By the conditions of sale, no evidence was to be required of the receipt or payment or existence of the fee farm rent, other than that disclosed by a certain conveyance; "nor should any objection be taken to the title in consequence of the non-payment or non-receipt" of the fee farm rent. It was discovered that in fact the rent had not been paid or received for twenty years before the sale: & the purchaser contended that it was therefore extinguished under Real Property Limitation Act, 1833 (c. 27), s. 34, & had ceased to exist at the time of the sale:—Held*: he was not entitled to repudiate the contract on this ground, but must be considered to have purchased, under the conditions of sale, the chance of the rent being obtainable.—*HANKS v. PALLING* (1856), 6 E. & B. 659; 25 L. J. Q. B. 375; 27 L. T. O. S. 170; 2 Jur. N. S. 688; 4 W. R. 607; 119 E. R. 1009.

599. —.]—By the terms of a contract for the purchase of real estate, it was stipulated that "a copy of the pedigree on which the claim of the vendor as heir-at-law to the last owner was based should be furnished to the purchaser, who should admit the right of the vendor as such heir-at-law, & should not require any further evidence of marriages, births, failure of issue, descents, intestacies, survivorships, or other matters of pedigree than such as were in the possession of the vendor." The vendor furnished a pedigree which was defective:—*Held*: upon the construction of the contract, the purchaser

PART IV. SECT. 2, SUB-SECT. 5.—A. (b).

5971. Whether purchaser precluded from investigating earlier title—Stipulation that no earlier title be investigated.—*Re McCURE & GARRETT'S CONTRACT*, [1899] 1 I. R. 225.—*IR.*

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had thereby admitted the vendor's right as heir-at-law to the last owner, & he could not object to any defect in the vendor's pedigree purporting to show such heirship.—*NASH v. BROWNE* (1863), 32 L. J. Ch. 148; 7 L. T. 667; 9 Jur. N. S. 431.

600. ————] — *BEST v. HAMAND*, No. 699, *post*.

601. ————] — A contract entered into in 1882 for the sale of freehold estate provided that the title should commence "with an indenture dated Oct. 18, 1845," & made between persons whose names were mentioned, & that the earlier title should not be investigated or objected to. From the abstract of title delivered by the vendors to the purchaser it appeared that the deed of 1845 was a conveyance by a person, who purported to be the absolute owner, of freehold & leasehold property to trustees, on trust for himself for life, & after his death on trust to sell the property, & to hold the proceeds of sale on the trusts declared by a deed of even date. An express power was reserved to the grantor to revoke the trusts. The deed was a voluntary one, except for the consideration which resulted from the liability assumed by the trustees in respect of the leaseholds:—*Held*: inasmuch as the fact that the deed of 1845 was a voluntary one would influence the purchaser in determining whether he would agree to accept a title commencing within forty years, the vendors ought to have stated in the condition of sale the nature of the deed; the omission to state this rendered the condition a misleading one; & the purchaser was not bound by the contract to accept a title commencing with that deed.

Qu.: whether a voluntary conveyance is a good root of title.—*Re MARSH & GRANVILLE (EARL)* (1883), 24 Ch. D. 11; 53 L. J. Ch. 81; 48 L. T. 947; *sub nom.* *MARSH v. GRANVILLE (LORD)*, 31 W. R. 845, C. A.

Annotations:—*Distd.* *Farnham Brewery Co. v. Hunt* (1893), 68 L. T. 440. *Consd.* *Re Williams & Parry's Contract* (1895), 72 L. T. 869. *Refd.* *Re Lulham, Brinton v. Lulham* (1884), 53 L. J. Ch. 928.

602. ————] — Upon a sale of land as belonging to the vendors in fee one of the conditions of sale provided that the title should commence with a conveyance dated in 1869, & that the prior title "shall not be required, investigated, or objected to." The purchaser refused to complete his purchase, & took out a summons under Vendor & Purchaser Act, 1874 (c. 78), for the return of his deposit, on the ground that he had discovered *aliunde* that, by reason of the will of testator, who died prior to 1869, the grantor in the deed of 1869 had only a life estate in the property, & that consequently the vendors could not show a title to the fee:—*Held*: the purchaser was bound by the condition; it precluded him from raising the objection to the title, & the summons must be dismissed.—*Re NATIONAL PROVINCIAL BANK OF ENGLAND & MARSH*, [1895] 1 Ch. 190; 71 L. T. 629; 43 W. R. 180; 39 Sol. Jo. 43; 13 R. 347; *sub nom.* *Re MARSH'S PURCHASE*, 64 L. J. Ch. 255.

Annotation:—*Distd.* *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596.

603. ————] — *Defect discovered aliunde.*—T. becoming possessed of certain copyhold premises, mortgaged the same to P., & by the indenture of mtge. covenanted to surrender them into the hands of the Dean & Chapter of W., the lords

of the manor, to the use of deft., who was to be a trustee to sell the premises, in the event of default being made in payment of the mortgage money. T. made no surrender in pursuance of the above indenture, but died after devising all his real property to certain trustees; subsequently to the death of T., the lords of the manor, at the nomination of deft., granted the property in question to certain persons upon the said trusts, etc., mentioned in the indenture of mtge. T., in his lifetime, surrendered other property to the lords of the manor, by way of mtge. to C., in consideration of a loan of £100, & by an indenture of even date, covenanted, amongst other things, to repay the money borrowed, & gave the mtgee. a power of sale, in case of default in payment of the money. That indenture was stamped with an *ad valorem* stamp of £1 10s. Deft. sold the whole of the above property to pltf. under the following conditions of sale:—that he should deduce a good title to the premises for the lives by which they were held under the Dean & Chapter of W.; but that no earlier or other title should be deduced, or any deed or document produced anterior to the last copy of court roll, by which the premises were granted:—*Held*: deft. showed no title in himself, as no surrender of the premises had been made to his use by T., & the vendee was not precluded by the conditions of sale from making this objection to the title, as it appeared on the face of the abstract delivered.

By the conditions of sale the defendants are not bound to produce any earlier title deed than the last copy of court roll: that protects them from any other title anterior to that court roll: but still pltf. is at liberty to show *aliunde* that the title is void (*ABINGER, C.B.*).—*SELICK v. TREVOR* (1843), 11 M. & W. 722; 12 L. J. Ex. 401.

Annotation:—*Refd.* *Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515

604. ————] — Certain leasehold premises were put up for sale by auction on the following, amongst other, conditions: "The abstract of title shall commence with an indenture of underlease, dated May 1, 1869, being a lease from W. to S. for a term of fourteen years less two days, from Lady Day, 1869, & it shall form no objection to the title that such indenture is an underlease; & no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease." Deft. having agreed to purchase the premises, discovered that W. had previously to May 1, 1869, mortgaged the premises. Deft. objected that the legal estate being outstanding, W. had no power to grant the lease of May 1:—*Held*: deft. was not precluded by the condition from taking the objection, & he was not bound to complete the purchase.—*WADDELL v. WOLFE* (1874), L. R. 9 Q. B. 515; 43 L. J. Q. B. 138; 23 W. R. 44.

Annotations:—*Distd.* *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190. *Refd.* *Best v. Hamand* (1879), 12 Ch. D. 1; *Smith v. Robinson* (1879), 13 Ch. D. 148; *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 54 L. T. 444.

605. ————] — *Freehold property was sold in 1877 subject to a condition that the title should commence with a deed dated Dec. 30, 1867, & no earlier or other title should be required or inquired into by the purchaser:—Held*: this condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered through any inquiry made

603 i. ————] — *Defect discovered aliunde.*—*CUNNINGHAM v. SPROULE* (1901), 1 S. R. N. S. W. 117.—*AUS.*

603 ii. ————] — *Re DAVYS & SAURIN* (1886), 17 L. R. Ir. 334.—*IR.*

by him, but was accidentally disclosed by the vendor. Where there is a condition of sale that no title to the property sold shall be shown before a certain date, *semble*, Law of Property Amendment Act, 1859 (c. 35), s. 24, does not apply to the concealment of an incumbrance prior to that date.—*SMITH v. ROBINSON* (1879), 13 Ch. D. 148; 49 L. J. Ch. 20; 41 L. T. 405; 28 W. R. 37.

Annotation.—*Consd.* *Re* National Provincial Bank of England & Marsh, [1895] 1 Ch. 190.

See Nos. 616, 619, *post*.

606. — *Discovery of new matter after judgment.*—Leasehold property was sold under a condition that the purchaser should not "make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease & the execution" of a certain assignment thereof, "notwithstanding any recital or reference to such title contained in the assignment or any subsequent document of title, but "should" assume that the assignment vested in the assignees a good title for the residue of the term." The purchaser discovered *aliunde* that the intermediate title rested on a forged deed & a conveyance by a trustee purporting to convey as absolute owner.—*Held*: specific performance could not be enforced by the vendor, but the condition precluded the purchaser from recovering back the deposit.—*Re* SCOTT & ALVAREZ'S CONTRACT, SCOTT v. ALVAREZ, [1895] 2 Ch. 603; 64 L. J. Ch. 821; 73 L. T. 43; 43 W. R. 694; 11 T. L. R. 471; 39 Sol. Jo. 621; 12 R. 488, C. A.

Annotations.—*Consd.* *Re* Wallis & Barnard's Contract, [1899] 2 Ch. 515; *Re* Hughes & Ashley's Contract, [1900] 2 Ch. 595. *Distd.* *Simpson v. Gilkey* (1922), 92 L. J. Ch. 194. *Refd.* *Re* Calcott & Elvin's Contract (1898), 67 L. J. Ch. 327; *Re* Wells, Boyer v. McLean (1903), 72 L. J. Ch. 513; *Toon v. Stanbury-Kardley* (1906), 22 T. L. R. 536; *Beyfus v. Lodge*, [1925] Ch. 350.

B. Vendor's Title to be accepted.

607. Validity of condition—Accepted by agent of purchaser with general authority.—If an agent for a purchaser, having a general authority, contracts to purchase such title as the vendor has, the ct. will compel specific performance of the contract.—*St. JOHN v. STIRLING* (1829), 7 L. J. O. S. Ch. 189.

608. — *Language must be clear.*—The ct. will not assume that a purchaser has agreed to purchase the vendor's interest, whatever it may be, unless the language of the agreement is clear.

An agreement for the purchase of a lease, which does not mention the length of the term granted by the lease, is void for uncertainty, & cannot be enforced.—*SOUTHERN v. HARRIMAN* (1866), 14 W. R. 487, L. C.

609. Whether purchaser bound.—*WOOLNOUGH v. VIRDON* (1870), 2 Lev. 33; 2 Keb. 708; 83 E. R. 440.

610. — *Assignees putting up to sale bkpt.'s interest to an estate "as he lately held the same, an abstract of which may be seen at the office of Messrs. T. & co."*—*Held*: vendee could not insist upon any other title than such as bkpt. had.—*FREME v. WRIGHT* (1819), 4 Madd. 364; 56 E. R. 739.

Annotations.—*Distd.* *Southby v. Hutt* (1837), Donnelly, 196. *Appl.* *Pridde v. Wood* (1864), 4 New Rep. 320. *Distd.* *Edwards v. Wickwar* (1865), L. R. 1 Eq. 68.

PART IV. SECT. 2, SUB-SECT. 5.—B.

609 i. Whether purchaser bound.—*MANSELL v. MOORE* (1908), 7 W. L. R. 808.—*CAN.*

609 ii. — *A condition of sale which provides that the purchaser*

shall assume that the vendor derived a good title under a will does not preclude the purchaser from showing that, upon the true construction of the will, a good title did not pass.—*Re* McVICKER'S CONTRACT (1890), 25 L. R. Ir. 307.—*IR.*

611. — *By contract A. agreed to sell to B. the two leases & goodwill in trade of a public-house, & shop adjoining, for the sum of £4,250, "as he holds the same," for terms of twenty-eight years from Midsummer next ensuing, at the annual rent therein mentioned, & B. agreed to accept a proper assignment of the said leases & premises as above described, without requiring the lessor's title; & upon payment of the said sum of £4,250, A. agreed to execute an effectual assignment of the said leases, & deliver up possession of all the said premises:—Held: the true meaning of this agreement was, that the vendee was to purchase the two leases without inquiring into the title of the lessor, & could not refuse to complete his purchase on account of an objection to that title.*—*SPRATT v. JEFFERY* (1829), 10 B. & C. 249; 5 Man. & Ry. K. B. 188; 8 L. J. O. S. K. B. 114; 109 E. R. 443.

Annotations.—*Distd.* *Shepherd v. Keatley* (1834), 1 Cr. M. & R. 117. *Consd.* *Hume v. Bentley* (1852), 5 De G. & Sm. 520; *Tweed v. Mills* (1865), L. R. 1 C. P. 39; *Shoard v. Venables* (1867), 36 L. J. Ch. 922. *Distd.* *Phillips v. Caldeleugh* (1868), L. R. 4 Q. B. 159. *N.F.* *Harnett v. Baker* (1875), L. R. 20 Eq. 50. *Refd.* *Souter v. Drake* (1834), 5 B. & Ad. 992; *Palmer v. Temple* (1839), 9 Ad. & El. 508; *Duke v. Barnett* (1846), 2 Coll. 337; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Waddell v. Wolfe* (1871), L. R. 9 Q. B. 515; *Best v. Hamand* (1879), 12 Ch. D. 1; *Re* National Provincial Bank of England & Marsh, [1895] 1 Ch. 190.

612. — *T., being possessed of a plot of land for a certain term of years, by indenture of Apr. 24, 1845, assigned it by way of mtgee. to S. as a security for £300 & interest, with a power of sale on default in payment on a certain day. By a memorandum of the same date, T. undertook to deposit with S. a lease, when the same was executed, of another plot of land, as a further & collateral security for the £300 & interest. A mill & other buildings stood partly on one plot of land & partly on the other. On Dec. 18, 1845, the lease mentioned in the memorandum was granted & deposited with S. By indenture of Mar. 2, 1847, T. assigned a moiety of the entire premises to A.; & on Sept. 20, 1847, executed an assignment of all his estate & effects for the benefit of his creditors. By indenture of Aug. 31, 1848, S. assigned both plots of land, mill, & buildings to deft., subject to the equity of redemption, & with such power of sale as S. possessed. In Apr. 1852, deft. offered the premises for sale by auction; & the conditions stated (*inter alia*) that he sold as mtgee.; & that, as he had only an equitable interest in the second plot, the purchaser should accept such title as he was able to deduce & convey. Pltf. became the purchaser of both plots, but refused to complete the purchase, on the ground that the legal estate in the second plot was outstanding, & might be used adversely to him; & having brought an action to recover back the deposit:—Held: by the express terms of the conditions of sale, deft. contracted, with reference to that plot, to sell an equitable interest only.*—*ASHWORTH v. MOUNSEY* (1853), 9 Exch. 175; 2 C. L. R. 418; 23 L. J. Ex. 73; 2 W. R. 41; 156 E. R. 75; *sub nom.* *ASWORTH v. MOUNSEY*, 22 L. T. O. S. 121.

613. — *An agreement by a vendor to sell "all his estate & interest" in certain premises is prima facie good; & does not necessarily mean an agreement to sell an estate in fee simple,*

i. — *Notice of equitable charge before conveyance.*—*UTTERSON LUMBER CO. v. RENNIE* (1892), 21 S. C. R. 218.—*CAN.*

g. — *Notice of breach of trust.*—*Re* O'FLANAGAN & RYAN'S CONTRACT, [1905] 1 I. R. 280.—*IR.*

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but may mean an equity of redemption only.—**PRIDDLE v. WOOD** (1864), 4 New Rep. 320.

614. —[—]—Pltf. agreed to sell to deflt. all his estate, right, & interest in certain lands, pltf. only to produce a title from A. B., the last owner, to himself. It appeared that deflt. knew that A. B. was one of four supposed owners of the property, & was anxious to buy up such title as he had in order to get rid of his opposition to a bill in Parliament:—*Held*: deflt. was not at liberty to show *aliunde* that A. B. had no title, & pltf. was entitled to specific performance. The mere assertion by the vendor that he had a good title, on the faith of which the purchaser relied without investigating the title, was not necessarily such a misrepresentation as would preclude the vendor from enforcing the contract.—**HUME v. Pocock** (1866), 1 Ch. App. 379; 35 L. J. Ch. 731; 14 L. T. 386; 12 Jur. N. S. 445; 14 W. R. 681, L. J.

615. —[—]—**HARNETT v. BAKER**, No. 559, *ante*.

616. —[—]—**Defect discovered aliunde.**—On a sale by auction of leasehold property, one of the conditions of sale was, that the vendor "should not be obliged to produce the lessor's title," the vendee having *aliunde* discovered certain defects in the lessor's title:—*Held*: notwithstanding the above condition, he was entitled to insist upon those defects.—**SHEPHERD v. KEATLEY** (1834), 1 Cr. M. & R. 117; 4 Tyr. 571; 3 L. J. Ex. 288; 149 E. R. 1018.

Annotations:—**Consd.** **Penney v. G. W. Ry.** (1838), 1 Horn & H. 247. **Apld.** **Sellick v. Trevor** (1843), 11 M. & W. 722. **Consd.** **Duke v. Barnett** (1846), 2 Coll. 337. **Distd.** **Hume v. Pocock** (1866), 35 L. J. Ch. 731. **Apld.** **Waddell v. Wolfe** (1874), L. R. 9 Q. B. 515. **Distd.** *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190. **Refd.** **A. G. v. Sitwell** (1835), 1 Y. & C. Ex. 559; **Hume v. Bentley** (1852), 5 De G. & Sm. 520; **Keyse v. Hayden** (1853), 20 L. T. O. S. 244; **Darlington v. Hamilton** (1854), Kay. 550; **Stranks v. St. John** (1867), L. R. 2 C. P. 376; **Osborn v. Osborn** (1870), 18 W. R. 421; **Harnett v. Baker** (1875), L. R. 20 Eq. 50; **Best v. Hamand** (1879), 12 Ch. D. 1.

617. —[—]—Purchaser agreed to accept vendor's title "without dispute." The purchaser afterwards objected that, at the date of the agreement, there was a flaw in the vendor's title, consisting of an unreleased incumbrance, which left the legal estate in the property outstanding. Upon a bill filed by the vendor for specific performance:—*Held*: the purchaser was precluded, by the terms of his contract, from insisting on the objection.—**DUKE v. BARNETT** (1846), 2 Coll. 337; 15 L. J. Ch. 173; 6 L. T. O. S. 478; 10 Jur. 87; 63 E. R. 759.

Annotation:—**Distd.** *Re Scott & Alvarez's Contract*, **Scott v. Alvarez**, [1895] 2 Ch. 603.

618. —[—]—**DARLINGTON v. HAMILTON**, No. 1130, *post*.

619. —[—]—Pltf. purchased a house & premises at a sale by auction. The third & fourth conditions of sale stipulated that the vendors would deliver an abstract of title, commencing with a conveyance of the property to J. D. dated in Jan. 1800; that the quantities, which in the particulars of sale were stated to be 76 feet frontage & upwards of 217 feet into the main road, were to be taken, more or less. The fifth condition stated that the said J. D. died in 1800, having devised the property to his wife for life or widowhood; that he appeared to have made no devise of the reversion, & the property had been since dealt with on that supposition. The abstract of title traced the title from J. D. through his sons & co-heirs-at-law, the property being gavel-

kind. J. D. had made a will, by which he devised the property in question to his wife for life, or so long as she should remain a widow; & with the rest, residue & remainder of the produce of the sale of certain other property directed to be sold, after payment of certain legacies, he directed the same to be placed at interest, & he gave to his wife for life or widowhood the whole of such interest; & after her decease or second marriage, to his three sons & his said daughter Ann, equally to be divided between them, share & share alike; but if the share of his said daughter should not be legally claimed within three years after his wife's decease, then to his said three sons equally, or the survivors of them. The title deeds stated the property to be only 204 feet in depth:—*Held*: the fifth condition precluded pltf. from objecting that the persons beneficially interested in the property should join in the conveyance, & the slight difference as to measurement between the particulars & the title deeds was not material.—**LETHBRIDGE v. KIRKMAN** (1855), 25 L. J. Q. B. 89; 26 L. T. O. S. 122; 2 Jur. N. S. 372; *sub nom.* **LETHBRIDGE v. HICKMAN**, 4 W. R. 90.

See Nos. 603–605, *ante*.

620. —[—]—**Conditions stating facts—Leaving inference to purchaser.**—If conditions of sale simply state the facts, & stipulate that the purchaser shall take such title or such interest as the circumstances detailed would confer upon him & no other, the purchaser must accept it, whatever it may be; but if they go on to state, not as a conclusion of law from the circumstances detailed, but as a positive fact, that the vendors have power to sell the fee, the purchaser is not precluded from inquiring whether the vendors have anything to sell, as their power so to do may have arisen from separate & independent sources.—**JOHNSON v. SMILEY** (1853), 17 Beav. 223; 1 Eq. Rep. 397; 22 L. J. Ch. 826; 22 L. T. O. S. 39; 1 W. R. 440; 51 E. R. 1019.

Annotation:—**Mentd.** *Re Inkson's Trusts* (1855), 26 L. T. O. S. 146.

621. —[—]—**Adding as a fact vendor's power to sell.**—**JOHNSON v. SMILEY**, No. 620, *ante*.

622. —[—]—**Purchaser aware of defect.**—(1) An underlease was described in the conditions of a sale by auction as a lease:—*Held*: a fatal misdescription.

(2) The purchaser was aware that a short time before the sale the vendor only had the underlease.—*Held*: the knowledge prevented his setting up the misdescription as an objection to the title.—**HENDERSON v. HUDSON** (1867), 15 W. R. 860.

Annotations:—As to (1) **Refd.** *Re Beyfus & Masters's Contract* (1888), 39 Ch. D. 110. As to (2) **Apld.** *Re Edwards to Sykes* (1890), 62 L. T. 445.

623. —[—]—**Discovery of onerous covenants.**—**Re HAEDICKE & LIPSKI'S CONTRACT**, No. 1073, *post*.

624. **Duty of vendor to show best title.**—A purchaser bought an estate under conditions, one of which was that the purchaser should take such title as the vendor had:—*Held*: this did not relieve the vendor from the duty of showing a *bona fide* title, & the best title he could produce from the materials within his power.—**KEYSE v. HAYDEN** (1853), 20 L. T. O. S. 244; 1 W. R. 112; *previous proceedings* (1852), 1 W. R. 73.

625. **Duty of vendor to pay off existing incumbrances.**—A vendor who contracts to sell only such right or interest, if any, as he has, is bound to convey such right or interest free from an existing incumbrance.—**GOOLD v. BIRMINGHAM, DUDLEY & DISTRICT BANK** (1888), 58 L. T. 560; 4 T. L. R. 413.

C. Other Conditions.

626. Stipulation by vendor to give satisfactory title—Purchaser confined to usual objections.]—A stipulation to give such a title as shall be satisfactory to the purchaser, does not authorise the purchaser to make any other than the usual objections to the title.—*LORD v. STEPHENS* (1835), 1 Y. & C. Ex. 222; 160 E. R. 90.

627. Condition that parties to be bound by recitals of fact.]—As it appears from condition 7 that the parties are to be bound by any recitals of fact, they are clearly bound by this statement, that J. was admitted tenant-in-tail & not to a fee simple conditional (*WOOD, V.-C.*).—*GOOLD v. WHITE* (1854), Kay, 683; 3 Eq. Rep. 1100; 24 L. T. O. S. 43; 69 E. R. 291.

Annotation:—Consd. Poppleton v. Buchanan, Buchanan v. Poppleton (1858), 4 C. B. N. S. 20.

628. Condition against objections to leases.]—*MICHOLES v. CORBERT* (1865), 3 De G. J. & Sm. 18; 46 E. R. 544, L. J.

629. —.]—Trustees for sale sold by auction certain leasehold properties. One of the conditions of sale stipulated that no objection should be made if any lease was an underlease, or that the premises were held on the same lease with other property, or that the same were liable to superior rents or covenants. A purchaser objected to this condition as depreciatory:—*Held*: the solr. who prepared the conditions should have ascertained whether the leases were underleases or not; there should have been a statement of fact as to each lot, & not, as this was, a statement which might apply to any of the lots; & this was a depreciatory condition, & ought not to have been inserted by trustees. —*Re RAYNER'S TRUSTEES & GREENAWAY* (1885), 53 L. T. 495.

630. Condition providing for evidence of payment of charge—Whether purchase bound.]—Copyholds were sold with a condition that "no evidence shall be required of the payment or discharge of any legacy or sum of money charged on the property which became payable twelve years or upwards prior to the day of sale." The court rolls contained an entry of a conditional surrender by way of mtge. made in 1865 by the predecessor in title of the vendors. The mtgee. had not been admitted & no payment or acknowledgment in respect of either principal or interest had been made for more than twelve years prior to the day of sale:—*Held*: the condition precluded the purchaser from requiring the conditional surrender to be vacated by satisfaction being entered on the court rolls in the usual way.—*HOPKINSON v. CHAMBERLAIN*, [1908] 1 Ch. 853; 77 L. J. Ch. 567; 98 L. T. 835.

631. Representation of limited title of vendor.]—A lease contained an agreement that the lessee should have the right of purchasing the premises of the lessor at any time during the term, to which was added, "it being understood that B., the lessor, is possessed of the same premises for his own life & the life of Mrs. M. & the survivor of them":—*Held*: this amounted to an agreement for title to an estate for the lives of B. & Mrs. M.

With reference to the agreement for title, it is suggested that deft. does not undertake to show title because the earlier part of the agreement is

silent upon the subject. But the subsequent words cut down what would otherwise be an absolute agreement for title into an agreement to deduce a limited title only. Those words cannot be taken as a mere idle statement because then pltf. would undertake to pay a considerable rent upon the chance of deft. having any or no estate (*MAULE, J.*).—*WORTHINGTON v. WARRINGTON* (1848), 5 C. B. 635; 3 New Pract. Cas. 42; 17 L. J. C. P. 117; 10 L. T. O. S. 415; 136 E. R. 1027; *subsequent proceedings* (1849), 8 C. B. 134.

Annotation:—Reid. Doe d. Croft v. Tiddbury (1854), 14 C. B. 301.

632. Condition for assignment of "the beneficial interest."]—Where the conditions of sale provided that the purchasers of a leasehold should be satisfied with an assignment of the beneficial interest only, & the legal estate was outstanding in trustees, who, at the time of the sale, were dead. On a claim filed by the vendor:—*Held*: the purchaser was not bound to complete the contract without administration being taken out by the vendors to the survivor of the trustees; & though the vendor only undertook to convey the beneficial interest, & not the legal estate, yet the whole beneficial interest was to be assigned, & it could not be ascertained whether the vendor could assign it till there was a personal representative to the survivor of the trustees.

The subject-matter of the contract is the beneficial interest in the leaseholds. Now it is "the beneficial interest" not "such beneficial interest as the vendors have" that is stated in the conditions of sale. If it were the latter, the vendors might probably insist upon the purchaser completing the contract without their being at the expense of taking out administration to the survivor of the trustees; but it is not so (*LORD LANGDALE, M.R.*).—*SMITH v. ELLIS* (1850), 15 L. T. O. S. 451; 14 Jur. 682.

633. Condition precluding requisition as to one document.]—On a sale of a public-house by a co. it appeared upon the investigation of title that the co. had previously purchased the public-house in question, with other property, from one of their own directors, under circumstances which might have rendered the transaction voidable at the option of the shareholders of the co. One of the conditions of sale under which the co. sold to defts. contained a statement that a memorandum of a certain character had been indorsed upon a trust deed; & precluded defts. from making requisitions or inquiries as to the deed in question. The memorandum was in fact insufficient, & defts. claimed that they were not bound by the conditions of sale. There were also certain debentures upon the assets of the co. which were not disclosed by the abstract of title. The co., however, assented to the demand by defts. that the debenture holders, & also the shareholders of the co., should join in the conveyance. Defts. having subsequently repudiated the contract, the co. brought an action for specific performance:—*Held*: defts. were not entitled to rescind on the ground of the nature of the original sale to the co., having regard to the fact that the debenture holders & shareholders would concur in the conveyance; assuming the condition of sale as to the

PART IV. SECT. 2, SUB-SECT. 5.—C.

h. Condition for production only of evidence of title in vendor's possession.]—*McKAY v. MANNELL* (1895), 17 N. S. W. L. R. (Eq.) 166; 13 N. S. W. W. N. 45.—*AUS.*

k. —.]—By written agreement
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for the purchase of land it was provided that "no title deeds, abstracts, or evidences of title to be required other than those in the vendor's possession, nor shall the vendor be required to give a covenant for the production of the same"—*Held*: under this condition the vendor was

relieved from the absolute obligation of making a good title to the land.—*McINTOSH v. ROGERS* (1887), 14 O. R. 97.—*CAN.*

l. Condition that certificate of title be "produced" to purchaser—Proper place for production.]—*MORRISON v.*

Sect. 2.—Rights under particular conditions: Sub-sect. 5, C.; sub-sect. 6, A. (a) & (b), & B.]

memorandum to be not binding upon the purchasers, it was not one which went to the length or to the root of title, & the purchasers were not entitled to rescind on the ground that the condition did not bind them, but must deal with the deed as if the condition had not existed.—*FARNHAM BREWERY CO., LTD. v. HUNT & CO.* (1893), 68 L. T. 440; 9 T. L. R. 317; 3 R. 381.

634. Estate "free from incumbrances"—Resolution by local authority registered as land charge.—By clause 1 of a contract, dated Dec. 10, 1926, the purchaser agreed to purchase certain premises "for an estate in fee simple absolute, free from incumbrances," except as thereafter mentioned. Clause 2 provided that the property was sold subject to the restrictive & other covenants contained or referred to in a conveyance, dated Sept. 28, 1925. The deposit was paid by the purchaser on the same day. Shortly before the date fixed for completion the purchaser discovered that the property was included in the area proposed to be dealt with by the local authority by a resolution dated Oct. 26, 1925, under Town Planning Act, 1925 (c. 16), s. 2, which resolution had been registered as a land charge under Land Charges Act, 1925 (c. 22), in Jan. 1926. Neither the vendor nor the purchaser was aware of the existence of this resolution at the date of the contract.

On an application by the purchaser for a declaration that the vendor had not shown a good title to the property sold in accordance with the contract & for repayment of the deposit:—*Held*: the mere passing & registration of the resolution by the local authority did not operate to impose on the land any subsisting incumbrance within the meaning of clause 1 of the contract; the sects. of the Act of 1925 showed that the purpose of the registered resolution was not so much to impose restrictions on the land as a prevent unreasonable claims being made by persons who bought up land subject to the scheme; & there was nothing like an interference with the property which made it different from that which was contracted to be sold; even if the registered resolution was an incumbrance, it was an incumbrance of such a nature that the purchaser must, under Law of Property Act, 1925 (c. 20), s. 198, be deemed to have contracted with actual notice of its existence, & was therefore precluded from refusing to complete the contract.—*Re FORSEY & HOLLEBONE'S CONTRACT*, [1927] 2 Ch. 379; 91 J. P. 182; 71 Sol. Jo. 823; 25 L. G. R. 442, C. A.

SUB-SECT. 6.—ABSTRACT OF TITLE.

A. Time for Delivery.

(a) In General.

635. Whether time of the essence of the contract.—A seller of an estate ought to be prepared to produce his title deeds at the particular day. A Court of Equity, indeed, will, under particular circumstances, enlarge the time; but then those circumstances, entitling him to such indulgence, must clearly appear (*LORD KENYON*).—*BERRY v. YOUNG* (1788), 2 Esp. 640, n.; 170 E. R. 482.

RICHARDSON, [1907] V. L. R. 218.—**AUS.**

m. Condition for production of only certain title deeds & abstract.—A clause in the conditions of sale that the vendors shall only produce certain

title deeds & an abstract of the registrar, & that the purchaser shall not be entitled to call for any other proof of title, does not exempt the vendors from showing otherwise a good title.—*CANADA PERMANENT BUILDING SOCIETY v. WALLIS* (1880), 8 Gr.

636. —.]—Conditions of sale stated that an abstract of title would be furnished within seven days from the day of sale on the application of the purchaser for the same, & provided that all objections should be taken within eight days of such delivery or be considered as waived. The purchaser's solr. called for the abstract two days after the sale, but owing to the estate being in mtgce. & the mtgee. being abroad, the abstract was not delivered till thirteen days after the sale. The purchaser brought an action for the deposit. The vendor filed a bill for specific performance & an injunction:—*Held*: the time of the delivery of the abstract was not of the essence of the contract, the importance of stipulations as to time being differently regarded in cls. of law & equity.

Time may be made to be of the essence of a contract, by express stipulation between the parties, by the nature of the property, or by surrounding circumstances, showing the intention of the parties that the contract was to be completed within a limited time. The question here is, whether in the absence of any of these circumstances, time is to be considered of the essence of the contract. I have always considered that the ct. looks at the substance, & not at the mere form of a contract (*TURNER, L.J.*).—*ROBERTS v. BEURY* (1853), 3 De G. M. & G. 284; 22 L. J. Ch. 398; 20 L. T. O. S. 215; 43 E. R. 112, L. J.J.

Annotations:—*Consd.* *Tilley v. Thomas* (1867), 3 Ch. App. 61. *Refd.* *Jamshed Khodaram Irani v. Burjorji Dhumjibhai* (1915), 32 T. L. R. 156; *Stickney v. Keeble*, [1915] A. C. 386.

637. Duty of purchaser to ask for delivery.—Neither deft. demanded nor pltf. tendered, the abstract immediately. I do not agree, that it is solely incumbent upon the vendor to move by making a tender of the abstract. Something is also incumbent upon the purchaser, to ask for it (*GRANT, M.R.*).—*GUEST v. HOMFRAY* (1801), 5 Ves. 818; 31 E. R. 875.

638. Time stipulated for delivery—At one of several places—What is good compliance.—Where a vendor covenants to deduce a good title at A., B. or C., on or before a certain day, a plea that he was ready to deduce a good title at that time, without averring notice to the covenantee at which place he would be ready to deduce such title, is insufficient.

So, a plea that by a subsequent agreement, not under seal, made before breach, the time for deducing such title had been enlarged, & deft. was ready to deduce such title within the enlarged time. So, a plea that in consideration deft. would deduce a good title & convey after breach pltf. agreed to accept such title & conveyance at a later day.—*RIPPINGHALL v. LLOYD* (1833), 5 B. & Ad. 742; 2 Nev. & M. K. B. 410; 110 E. R.

Annotations:—*Refd.* *Kirk v. Gibbs* (1857), 1 H. & N. 810; *The Fox* (1914), 83 L. J. P. 89. *Mentd.* *Reeve v. Palmer* (1859), 5 Jur. N. S. 916.

— **Effect of failure to comply.**—*See* Nos. 615, 657, *post*.

(b) Waiver of Stipulated Time.

639. Receipt of documents after stipulated time without objection.—By the terms of an auction the title-deeds were to be produced by a certain day; they were not then ready; but the purchaser received them afterwards without objection;

368.—**CAN.**

n. Condition for title by possession at election of purchaser—Possession to be satisfactory to purchaser.—*FLOYD v. HANSON* (1915), 43 N. B. R. 339.—**CAN.**

he cannot afterwards, on disliking the title, object to the delay.—**SMITH v. BURNAM** (1795), 2 Anst. 527; 145 E. R. 956.

640. —.]—**SETON v. SLADE, HUNTER v. SETON**, No. 175, *ante*.

641. Communications continued beyond stipulated time.—**LLOYD v. RIPPINGALL** (circa 1835), cited in 1 Y. & C. Ex. 401, at p. 410; 160 E. R. 167.

Annotation :—**Refd.** **Hipwell v. Knight** (1835), 1 Y. & C. Ex. 401.

642. —.]—Time will, in equity, be deemed of the essence of the contract, in all cases where it can be collected from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. But where, upon an agreement for the purchase of an estate, the parties entered into a stipulation that an abstract of title should be delivered immediately, & that, in case the contract was not completed by a given day, the purchaser should be released from his contract, & the abstract was not immediately delivered, but communications on the subject of the title were continued between the parties until the time limited by the contract had expired :—*Held* : under these circumstances, the benefit of the stipulation as to time was waived by the purchaser.—**HIPWELL v. KNIGHT** (1835), 1 Y. & C. Ex. 401; 4 L. J. Ex. Eq. 52; 160 E. R. 163.

Annotation :—**Mentd.** **Simpson v. Margitson** (1817), 11 Q. B. 23.

B. What is a Proper Abstract.

See Law of Property Act, 1925 (c. 20), s. 15.

643. Question of degree.—**WARD v. GRIMES** (OR **GHRIMES**), No. 670, *post*.

644. Abstract of such title as available at time of delivery.—**BLACKBURN v. SMITH**, No. 668, *post*.

645. —.]—By the conditions of sale of leasehold property, it was provided, amongst other things, that an abstract of the title of the vendors should be delivered to the purchaser on the tenth day after the sale; & that, "if any requisition on or objection to the title of any lot be made, whether arising out of the abstract furnished or otherwise, which the vendors may be unable or unwilling to remove or comply with, it shall be in the option of the vendors, by notice in writing to be given to the purchaser, to rescind the contract, unless such purchaser shall, within ten days after such notice shall have been given, waive such objection or requisition; & in case such purchaser shall not, within ten days after such notice shall have been given, waive such objection or requisition, the deposit money shall thereupon be returned to such purchaser, but without any interest, costs, or expenses." The abstract delivered showed the title to be in the vendors jointly with the exors. of deceased partner. The purchaser thereupon required that the exors. should join in the conveyance. It was afterwards discovered that two years before the exors. had released to the vendors all their interest in the property of the firm, & the purchaser was furnished with a further abstract of that deed. Conceiving that deed to be insufficiently stamped, the purchaser still required that the exors. should be conveying parties. This they refused, & thereupon the vendors gave the purchaser notice, under the above condition, that they elected to rescind the contract, & offered to return the deposit money. In an action against the vendors for not delivering a proper abstract, the deposit having been paid into ct. :—*Held* : the purchaser was entitled to

recover for the breach of contract, but only, under the circumstances, to nominal damages.—**STEER v. CROWLEY** (1863), 14 C. B. N. S. 337; 2 New Rep. 128; 32 L. J. C. P. 191; 9 Jur. N. S. 1292; 11 W. R. 861; 143 E. R. 475.

Annotations :—**Consd.** **St. Leonard's Shoreditch Vestry v. Hughes** (1864), 17 C. B. N. S. 137. **Refd.** **Gray v. Fowler** (1873), L. R. 8 Exch. 249.

646. — **Good title not essential.**—A condition of sale was that in case the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor might rescind the contract on notice & repayment of the deposit to the purchaser; & objections not delivered within fourteen days after delivery of the abstract to be treated as waived, in which respect time was to be essential. The purchaser returned the abstract with queries within the fourteen days, & the vendor answered the queries; the purchaser on the same day objected to the answers; the correspondence on the subject of the title continued for several weeks, & then the vendor gave notice that he rescinded the contract :—*Held* : (1) the continuance of the treaty for the completion of the title after the first objection of the purchaser was a waiver of the condition as to his rescinding of the contract; (2) such a condition of sale ought to be discouraged & ought not to receive a construction oppressive on the purchaser; (3) the vendor's right to rescind the contract under the condition must be co-extensive with the purchaser's right to object to the title under the same condition.

Semble : the vendor was only bound *bond fide* to deliver an abstract of such title as he had at the time of delivering it; & so long as the condition remained in force, was not bound to deliver any supplemental abstract of title afterwards acquired.

If by the expression "perfect abstract" is meant the most perfect abstract in the vendor's possession, actual or constructive, at the time of his delivering it, I should probably accede to pltf.'s argument; for, undoubtedly, a ct. of equity would not permit a vendor, who had a good title, & the means of showing such title on his abstract, fraudulently to deliver an imperfect abstract to which objections would necessarily be taken; & upon these objections being taken, avail himself of his own fraud to avoid his contract, under the condition (**WIGRAM, V.-C.**).—**MORLEY v. COOK** (1842), 2 Hare, 106; 12 L. J. Ch. 136; 7 Jur. 79; 67 E. R. 41.

Annotations :—*As to* (1) **Distd.** **St. Leonard's, Shoreditch Vestry v. Hughes** (1864), 17 C. B. N. S. 135. *As to* (3) **Refd.** **Greaves v. Wilson** (1858), 25 Beav. 290.

647. — —.]—**Deft.**, with A., since deceased, sold a farm to pltf. under conditions of sale; by the third condition it was stipulated that the vendors should deliver an abstract of title within seven days, & "all objections & requisitions not stated in writing & delivered to the vendor's solr. within fourteen days from the delivery of the abstract shall be considered as waived, & in this respect time shall be of the essence of the contract," & by the fourteenth condition, "if the purchaser shall fail to comply with these conditions, his or her deposit shall be thereupon actually forfeited to the vendors," who were to be at liberty to resell, & recover any deficiency & the cost of resale from the purchaser. Pltf. paid a deposit of £300. An abstract of title was delivered within seven days; & from the abstract it appeared that the vendors sold as trustees under a will which devised the estate to them on trust to pay the income to F., testator's son-in-law, for life, or to permit him to receive the same, & after his

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decease, on trust to sell the estate, & hold the produce "upon the trusts for the children of F. as therein mentioned"; it was further stated in the abstract that F. would join in conveying the property. It was objected by the purchaser, but not till after the expiration of fourteen days from the delivery of the abstract, that F. being still alive, the vendor's power of sale had not arisen. It subsequently appeared that the trusts of the will as to the produce of the sale were for the benefit of such of the children of F. by H., testator's daughter, who should be living at testator's death, to be paid to them at twenty-one, or, if daughters, at twenty-one or on marriage, with limitations over for the benefit of survivors on the death of any child under twenty-one or before marriage. There were eight children of F. & H. living at testator's death, of whom some had since married & settled their shares. In an action brought by the purchaser to recover his deposit:—*Held*: he was entitled to succeed on the ground that no complete abstract had been delivered.

Provided a vendor gives a true abstract of the title which he has at the time, the abstract is good, although the title shown by it is bad (*POLLOCK, C.B.*).—*WANT v. STALLBRASS* (1873), *L. R. 8 Exch. 175*; *42 L. J. Ex. 108*; *29 L. T. 293*; *21 W. R. 685*.

Annotations.—*Distd. Soper v. Arnold* (1887), *37 Ch. D. 96*. *Appl. Saxby v. Thomas* (1890), *63 L. T. 695*. *Refd. Saxby v. Thomas* (1890), *64 L. T. 65*.

648. ———. —Deft., in Mar. 1868, as surviving devisee in trust, sold by auction to pltf.'s testator land & tolls, lots 3 & 4, under certain conditions. Condition 3 provided that the vendors were to deliver to the purchaser an abstract of title within seven days from the sale, the purchaser was to make his objections & requisitions within twenty-one days of the delivery of the abstract, & all objections & requisitions not made within that time were to be taken to be waived; "& in case any purchaser shall make any objection or requisition on the title of the respective lots which the vendors shall be unwilling or unable to answer or comply with, the vendors reserve to themselves the option, notwithstanding they may have attempted to answer or comply with such objections or requisitions, or may have partly done so, at any time to rescind the contract for the sale of the lot or lots, in respect of which such objections or requisitions shall be made, upon repaying or tendering to such purchaser or purchasers the deposit money, without interest, costs, or expenses, in full of all claims or demands for the investigation of title or otherwise." An abstract was delivered, on which the purchaser made & insisted on two objections, of which one, as to lot 3, was frivolous, & the other, as to lot 4, was an objection as to quantity, in respect of which he was, under another condition, only entitled to compensation, which was offered. Deft. thereupon, on July 24, filed a bill in Chancery for specific performance, & the purchaser on Sept. 23, put in an answer, in which he reiterated his objections, & also objected to complete on the ground of certain transactions affecting lot 4 which had not been disclosed by the abstract. These transactions were known to the vendor at the time of the sale, & were intentionally but *bonâ fide* omitted from the abstract, as it was supposed they did not affect the title. The contents of the deeds relating to these transactions were first communicated to pltf. by an affidavit, made by deft. in this action under an order for discovery; but the deeds were previously known

to his attorney, who had been a clerk in the office where they were prepared. On Dec. 2 the purchaser died; on Jan. 26, 1869, the vendor's solr. wrote to the solr. of the purchaser requesting particulars of the probate of his will; & on Feb. 12, the vendor, now deft., announced his intention to rescind, & afterwards formally rescinded the contract & tendered the deposit. An order was made in the suit that deft., pltf. in the suit, should revive it or that the bill should be dismissed without costs, & the suit not being revived, the bill was dismissed accordingly. In an action brought by pltf. against deft. for not deducing a good title, & for fraudulently representing that he had & would deduce a good title, the arbitrator, to whom the facts were referred, having negatived fraud:—*Held*: deft. had, by filing his bill, elected not to rescind on any of the original objections, but the third condition applied to all objections to the title whether appearing on the abstract or not; deft. was, therefore, entitled to rescind on account of the objection as to lot 4 raised by the answer, & founded on the transactions which were omitted from the abstract; & the delay from the filing of the answer on Sept. 23, 1868, to Feb. 12, 1869, was not unreasonable. *Qu.*: whether, if an action had been brought against deft. for breach of his contract to deliver a true abstract, pltf. could, under the circumstances, have recovered substantial damages.—*GRAY v. FOWLER* (1873), *L. R. 8 Exch. 249*; *42 L. J. Ex. 161*; *29 L. T. 297*; *21 W. R. 916*, *Ex. Ch.*

649. ———. —In 1884 two leases were granted to a co. from which the present vendors derived title. In the same year the co. went into liquidation for the purposes of reconstruction, & sold all its assets, including the leases, to a new co. of the same name; but there was no formal assignment of the leases, & the old co. was shortly afterwards dissolved. In 1901 these leases were sold by order of the ct., subject to conditions which limited the time for sending in requisitions & objections to title. After the prescribed period the purchaser objected that the vendors had shown no legal title to the leases. The lessor had received rent from the new co. & its successors in title from 1884 until the present time, & the vendors offered to procure the consent of the lessor to the assignment of the leases to the purchaser:—*Held*: the purchaser was precluded by the conditions from insisting upon his objection as to the outstanding legal estate, which had become vested in the Crown as *bona vacantia*, inasmuch as the objection related, not to the root of the title, but to the subsequent devolution thereof.

It appears to me to have been the most perfect abstract the vendors could furnish at the time of its delivery; & that being so, the abstract is not imperfect or insufficient because it shows a defective title, or even no title at all (*JOYCE, J.*).—*PRYCE-JONES v. WILLIAMS*, [1902] *2 Ch. 517*; *71 L. J. Ch. 762*; *87 L. T. 260*; *50 W. R. 586*; *46 Sol. Jo. 602*.

Annotation.—*Mentd. Hastings Corpn. v. Letton*, [1908] *1 K. B. 378*.

650. Difficulty of obtaining skilled persons to abstract title during war time.—By an agreement made in Sept. 1915, the vendor as tenant for life in possession under an indenture of settlement of June 28, 1895, agreed for the sale to the purchasers of the T. estates for an estate in fee simple in possession, together with certain mineral rights. It was provided that the vendor should deliver an abstract of his title to the property agreed to be sold & that the title should commence with the indenture of settlement, the prior title not to be

investigated or made the subject of any requisition or objection except at the purchasers' expense. The preparation of a complete abstract involved the examination of a very large number of documents; & questions having arisen as to what was the obligation of the vendor in respect of the abstract:—*Held*: the vendor was only bound to furnish abstracts or copies of leases or tenancy agreements & of conveyances reserving minerals executed after June 28, 1895; & such obligation of the vendor would, in view of the difficulty at the present time of obtaining skilled persons to abstract documents, be satisfied by the delivery as part of the abstract of the counterparts of leases or tenancy agreements & the completed drafts of conveyances.—*BOND v. BASSETT* (1917), 87 L. J. Ch. 160; 117 L. T. 551.

C. Rights of Purchaser on Failure to deliver.

651. Return of deposit.]—*BERRY v. YOUNG* (1788), 2 Esp. 640, n.; 170 E. R. 482.

652. —.]—If the vendor of an estate by auction does not show a clear title by the day specified, the purchaser may recover back his deposit & rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not.—*WILDE v. FORT* (1812), 4 Taunt. 334; 128 E. R. 359.

Annotations:—*Reid*. *Howe v. Smith* (1884), 27 Ch. D. 89; *Stickney v. Keeble*, [1915] A. C. 386. *Mentd.* *Barymore v. Ellis* (1836), 8 Sim. 1.

653. — With interest—Failure to deliver within reasonable time.]—On Aug. 25, 1890, a contract was entered into for the sale of a farm, of which the purchaser was to have personal possession at or soon after Michaelmas, 1890. The contract provided for the delivery of an abstract of title, but was silent as to the period within which such delivery was to take place. Some abstracts were sent on Aug. 27, but, as was pointed out by the purchaser's solrs. on Aug. 30, the title to a part of the property was not then properly shown. After another request for a further abstract the deeds in the vendor's possession were sent to the purchaser's solrs. on Sept. 4. After further requests for the title the purchaser's solrs., on Oct. 13, gave the vendor's solr. a notice in writing that unless a proper abstract was sent within fourteen days the purchaser would treat the contract as at an end, & require a return of his deposit & damages for the breach of contract. On Oct. 16, the vendor's solr. sent an abstract of title, but this, as pointed out by the purchaser's solrs. on Oct. 20, did not refer to the title called for. No abstract of this title was sent until Nov. 29, & on Dec. 2 all the abstracts were returned to the vendor's solr. The purchaser shortly afterwards brought an action for the return of his deposit & for damages:—*Held*: the period of fourteen days, mentioned in the notice of Oct. 13, was a reasonable period within which to require delivery of a proper abstract; & no proper abstract being delivered within that period, the purchaser was entitled to rescind the contract & recover his deposit & the expenses of investigating

the title.—*COMPTON v. BAGLEY*, [1892] 1 Ch. 313; 61 L. J. Ch. 113; 65 L. T. 706.

Annotation:—*Consd.* *Stickney v. Keeble*, [1915] A. C. 386.

654. Repudiation of contract.]—*STEWART v. SMITH* (1824), 6 Hare, 223, n.; 67 E. R. 1148.

Annotations:—*Apld.* *Southcombe v. Exeter (Bp.)* (1847), 6 Hare, 213. *Reid.* *Walker v. Jeffreys* (1842), 1 Hare, 341.

655. —.]—*UPPERTON v. NICKOLSON*, No. 1114, *post*.

656. —.]—When a contract for sale is entered into by which it is stipulated that the abstract is to be delivered on a particular day, & it is not delivered within a reasonable time after that day, the purchaser is at liberty to repudiate the contract.

The conditions of sale under which a purchase was made provided that the abstracts should be delivered within twenty-one days from the day of sale. When seventy-eight days had expired without any abstract having been delivered, the purchaser gave notice to the vendor that he declined to complete. After one hundred & eighteen days had elapsed, abstracts of the title to some of the lots were delivered to the purchaser, & the abstract of the remaining lot was delivered a fortnight later, but were returned by the purchaser on the same days on which they were delivered. On a bill to enforce specific performance of the contract:—*Held*: as the vendor had failed to deliver the abstracts within a reasonable time after the day named, he could not enforce the contract against the purchaser, & the bill must be dismissed with costs.—*VENN v. CATTELL* (1872), 27 L. T. 469.

657. Purchaser relieved of condition as to time for objections.]—By conditions of sale it was stipulated that the vendor of an estate which was sold in lots should deliver an abstract of the title to the purchasers, & deduce a good title; but that as to a part of the estate, acquired under an inclosure, he should not be bound to show any title thereto prior to the award; & it was further stipulated that the vendor should deliver up to the largest purchaser in value all the title deeds & other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession & set forth in the abstract:—*Held*: on the construction of these conditions, they did not relieve the vendor from his liability to verify the title shown upon the abstract by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence.—*SOUTHBY v. HUNT* (1837), 2 My. & Cr. 207; *Donnelly*, 196; 1 Jur. 100; 40 E. R. 619, L. C.

Annotations:—*Consd.* *Gabriel v. Smith* (1851), 16 Q. B. 847; *Keyse v. Hayden* (1853), 20 L. T. O. S. 241; *Nash v. Browne* (1863), 32 L. J. Ch. 148. *Reid.* *Sansom v. Rhodes* (1840), 8 Scott, 544; *Drysdale v. Mace* (1851), 5 De G. M. & G. 103; *Oakden v. Pike* (1865), 34 L. J. Ch. 620; *Upperton v. Nickolson* (1871), 6 Ch. App. 436; *Re Halifax Commercial Banking Co. & Wood* (1898), 79 L. T. 536.

658. Damages.]—*STEER v. CROWLEY*, No. 645, *ante*.

659. — Costs of investigating title.]—*COMPTON v. BAGLEY*, No. 653, *ante*.

PART IV. SECT. 2, SUB-SECT. 6.—C.

o. Return of deposit—With interest & costs of investigating title.]—Re PRIESTLEY & DAVIDSON'S CONTRACT (1892), 31 L. R. Ir. 122.—*IR*.

654 i. Repudiation of contract.]—*COOPER v. GILLIES* (1890), 11 N. S. W. L. R. (L.) 396; 7 N. S. W. W. No. 50.—*AUS*.

654 ii. —.]—*SEE v. REYNOLDS* (1890), 11 N. S. W. Eq. 219.—*AUS*.

654 iii. —.]—Where vendors had not furnished an abstract of title, notwithstanding repeated notices, & had at length brought an action at law on a note given by the purchaser for part of the purchase-money, the purchaser filed a bill alleging that by the delay the contract was at an end, & praying an injunction to stay the suit at law. The vendors failing to justify their neglect, the ct. granted the injunction.—*WALTON v. ARMSTRONG* (1865), 11

Gr. 379.—*CAN*.

657 i. Purchaser relieved of condition as to time for objections.]—Re TODD & M'FADDEN'S CONTRACT, [1908] 1 I. R. 213.—*IR*.

p. Return of instalments of purchase-money—Where delivery of abstract condition precedent to payment.]—WILSON v. WITTROCK, *WITTROCK v. WILSON* (1860), 19 U. C. R. 391.—*CAN*.

Sect. 2.—Rights under particular conditions: Sub-sect. 6, D.; sub-sect. 7, A. (a) & (b) i.]

D. Other Cases.

660. Right to possession of abstract—On refusal to complete purchase.]—Upon a contract for the sale of an estate, the title & abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract, until either the purchase is finally rescinded by consent, or declared impracticable by a ct. of equity. When the contract is determined, the abstract becomes the property of the vendor. If the sale proceeds, the abstract is the property of the vendee. But an opinion written thereon, as it was necessarily written on the seller's paper by his consent, continues the property of the purchaser. A proviso that in case the vendor of an estate cannot deduce a good title, or the purchaser shall not pay the money on the appointed day, the agreement shall be utterly void, gives an option to the vendor to rescind the sale, in case the vendee does not pay the money, & to the purchaser to rescind, in case the vendor does not make a title, but not *vice versa*.—*ROBERTS v. WYATT* (1810), 2 Taunt. 268; 127 E. R. 1080.

Annotations:—Distd. Mackereth v. Dunn (1843), 7 Jur. 278. *Consd. New Zealand Shipping Co. v. Soc. des Ateliers et Chantiers de France*, [1919] A. C. 1. *Mentd. Nicholls v. Bastard* (1835), 2 Cr. M. & R. 659.

661. ———.]—Where a party was agent of vendor & vendee in the sale & purchase of an estate, & afterwards became the sole agent of the purchaser, to whom an abstract of title was delivered, but who afterwards refused to complete his purchase, & retained the abstract in his hands, the ct. compelled deft. & his agent to deliver it up to pltf., after action brought to recover the purchase-money of the estate.—*LANGSLOW v. COX* (1819), 1 Chit. 98.

662. ——— On completion of purchase.]—*ROBERTS v. WYATT*, No. 660, *ante*.

663. Effect of delay in delivery of abstract—On liability for interest on purchase-money.]—The declaration stated that by certain arts. of agreement pltf. agreed to sell, & deft. to purchase, a piece of land, & pltf. agreed to deliver an abstract of title & to deduce a clear title within a month from the signing of the contract, or from being required so to do; that deft. agreed to pay a portion of the purchase-money on the signing of the contract, & the residue on or before a future fixed day, & to pay interest in the meantime half-yearly; & that pltf. did, within one month from being required, deliver an abstract of title & deduce a clear title. Breach, non-payment by deft. of half a year's interest. Plea, that pltf. did not deliver an abstract of title & deduce a clear title in manner & form, etc. Upon demurrer, for immateriality & duplicity:—*Held*: the plea was bad, for raising an immaterial issue, the delivery of the abstract & the deduction of title not being a condition precedent to the payment of the money.—*DICKER v. JACKSON* (1848), 6 C. B. 103; 17 L. J. C. P. 234; 11 L. T. O. S. 222; 12 Jur. 541; 136 E. R. 1190.

Annotations:—Refd. Thames Haven Dock Co. v. Brymer (1850), 5 Exch. 696. *Mentd. Porcher v. Gardiner* (1849), 8 C. B. 461.

PART IV. SECT. 2, SUB-SECT. 6.—D.

g. Right to verification of abstract.]
—Before an abstract was asked for, the purchaser had sold small portions of the land, & he & his vendee had cut down some of the wood thereon; but

the vendor notwithstanding promised afterwards to give an abstract as demanded, & delivered an abstract accordingly:—*Held*: pltf. was entitled to have this abstract verified.—*GORDON v. HARDEN* (1871), 18 Gr. 231.—**CAN.**

SUB-SECT. 7.—REQUISITIONS.

A. Time for Requisitions and Objections.

(a) In General.

664. Whether time essence of contract.]—(1) In a condition of sale, that objections to the vendor's title are to be sent in within a given time, time is of essence of the contract.

(2) The "delivery of an abstract" is the furnishing by a vendor of a document which contains with sufficient fullness the effect of every instrument which constitutes part of his title.

(3) If the condition is not observed, if an abstract is not delivered within the time specified, the purchaser has a right to say, "The vendor has not performed the conditions, & therefore I repudiate the purchase." On the other hand, if the vendor has performed the condition of delivering the abstract within the specified time, or if he has not, if the abstract were accepted, & that condition waived by the purchaser, then if the purchaser does not deliver his objections, or if he does deliver his objections, if there be any objection not contained in what are so sent in, but afterwards thought of, such objection shall be considered as waived, & the title to that extent accepted (*KINDERSLEY, V.-C.*).—*OAKDEN v. PIKE* (1865), 34 L. J. Ch. 620; 12 L. T. 527; 11 Jur. N. S. 666; 13 W. R. 673.

Annotations:—As to (2) Consd. Want v. Stallibrass (1873), L. R. 8 Exch. 175. *Expld. Re Stamford, Spalding & Boston Banking Co. & Knight's Contract*, [1900] 1 Ch. 287. *As to (3) Refd. Want v. Stallibrass* (1873), L. R. 8 Exch. 175; *Saxby v. Thomas* (1890), 61 L. T. 65.

665. Where no time stipulated—Delivery must be within reasonable time.]—Specific performance refused on the laches & trifling conduct of pltf.; the contract being for a sale to pltf. under a bkpey. of a reversionary interest for life, which in the interval fell into possession. Defts. having also been in some degree remiss, the bill was dismissed without costs upon delivering up the agreement.—*SPURRIER v. HANCOCK* (1799), 4 Ves. 667; 31 E. R. 314.

Annotations:—Refd. McDonald v. Hanson (1806), 12 Ves 277; *Southcomb v. Exeter* (3p.) (1817), 16 L. J. Ch. 378.

666. ——— Effect of unreasonable delay.]—A purchaser having retained the abstract for five months, made no objections to the title, but simply required the vendor to verify the abstract with the title deeds:—*Held*: he must be deemed to have accepted the title.—*PEGG v. WISDEN* (1852), 16 Beav. 239; 20 L. T. O. S. 174; 16 Jur. 1105; 1 W. R. 43; 51 E. R. 770.

Annotation:—Refd. Green v. Sevin (1879), 13 Ch. D. 589.

667. From when time runs.]—(1) All objections to a title were to be taken within twenty-one days from the delivery of the abstract, or be deemed waived, & time was, in that respect, to be considered the essence of the contract:—*Held*: the twenty-one days did not begin to run, until a perfect abstract had been delivered.

(2) A mtgee. had a power of sale in case of default being made in payment of mtge. money:—*Held*: the unsupported solemn declaration, under Statutory Declarations Act, 1835 (c. 62), of the mtgee. alone, of a default having been made, was not sufficient evidence of that fact, as between vendor & purchaser.—*HOBSON v. BELL, GLENN v.*

PART IV. SECT. 2, SUB-SECT. 7.—A. (a).

666 i. Where no time stipulated—Effect of unreasonable delay.]—*O'CONNOR v. BEATTY* (1877), 2 A. R. 497.—**CAN.**

BELL (1839), 2 Beav. 17; 8 L. J. Ch. 241; 3 Jur. 190; 48 E. R. 1084.

Annotations.—As to (1) **Refd.** Blacklow v. Laws (1842), Haro, 40; Morley v. Cook (1842), 2 Haro, 106; Want v. Stallbrass (1873), L. R. 8 Exch. 175. As to (2) **Refd.** Thurlow v. Mackeson (1868), 9 B. & S. 975. *Generally*, **Refd.** Borell v. Dann (1843), 2 Haro, 440; Falkner v. Equitable Reversionary Soc. (1858), 4 Drew, 352.

668. — From delivery of proper abstract.]

By agreement in writing, deft. agreed to sell & pltf. to purchase, a piece of land, & to pay part of the purchase-money down, & the remainder on a future day; & it was agreed that pltf. should have immediate possession, & that deft. should furnish pltf. with a full & sufficient abstract of title to the land, & upon payment of the balance of the purchase-money, a conveyance of the fee simple should be made: that all objections to, & requisitions in support of the title, not delivered in writing in a month after the delivery of the abstract, should be deemed to be waived. Pltf. paid the deposit, & took possession of the land. Deft., in due time, delivered an abstract, containing a statement of all the deeds, etc., in his custody, power, or knowledge, but tracing the title for a period less than sixty years, & showing it to be in a trustee. No objection was made within the month. Afterwards the trustee died intestate; & it not appearing in whom the legal estate vested, pltf. gave notice that he rescinded the contract, & brought an action to recover back the deposit, & in one count of the declaration, declared specially on the agreement, & assigned as a breach the non-delivery of a "full & sufficient abstract" of deft.'s title to the land, which was traversed by a plea:—*Held*: no objection having been made within the month, the issue was satisfied by the abstract delivered, it having been a full & fair statement of all the muniments which deft. had in his possession, power, or knowledge, & a fair statement of the deduction of his title, though it did not go back sixty years.—BLACKBURN v. SMITH (1848), 2 Exch. 783; 18 L. J. Ex. 187; 154 E. R. 707.

Annotations.—**Refd.** Green v. Saddington (1857), 3 Jur. N. S. 717; Want v. Stallbrass (1873), L. R. 8 Exch. 175; Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773. **Mentd.** Heilbutt v. Hickson (1872), L. R. 7 C. P. 438.

What amounts to proper abstract.]—See Nos. 650, 670, *ante*.

(b) *Limitation of Time.*

i. *In General.*

669. Effect of stipulation—When objection not made within time—No title to minerals disclosed.]—SMITHSON v. POWELL, POWELL v. SMITHSON, No. 782, *post*.

670. — — — Objection treated as waived.]—(1) What is a complete or proper abstract is a question of degree.

(2) Conditions of sale provided that all requisitions as to the title not made by the purchaser within a month after the time fixed for the delivery of the abstract should be deemed to be waived. An abstract of title was duly delivered, but the purchaser did not make any requisitions as to the title within the proper time, & did not complete his contract, insisting that no proper abstract had been delivered. Upon a bill filed against him by

the vendor for specific performance:—*Held*: in the absence of any evidence as to the imperfection of the abstract, the purchaser must be taken to have waived his objections to the title; he must specifically perform the contract.

(3) Where a purchaser objects that the abstract is insufficient, it lies upon him to show in what respects it is imperfect (ROMILLY, M.R.).—WARD v. GRIMES (OR GHRIMES) (1863), 8 L. T. 782; 9 Jur. N. S. 1097; 11 W. R. 794.

671. — — — — —.]—OAKDEN v. PIKE, No. 604, *ante*.

672. — — — — —.]—*Re* THOMPSON & CURZON, No. 1171, *post*.

673. — — — Deposit forfeitable on refusal to complete.]—Deft. sold to pltf. certain land described in the particulars of sale as freehold building land. The land, part of which was over a railway tunnel, had been purchased by deft. from a railway co. who had no Parliamentary powers to make the sale, so that the conveyance, being *ultra vires*, was void. The conditions of sale provided that the title was to commence with the conveyance from the railway co. to deft.; that the purchaser should not make any objection to the conveyance or the title prior to the date thereof; & that he should object to the title within seven days from the date of the delivery of the abstract. Pltf., after the expiration of the seven days, objected that deft. could not make a title to the land, & refused to complete. In an action to recover the deposit:—*Held*: pltf. could not recover, because, although deft. was not able to make a title, being merely in possession of the land, the objection thereto was taken too late.—ROSENBERG v. COOK (1881), 8 Q. B. D. 162; 51 L. J. Q. B. 170; 30 W. R. 314, C. A.

Annotation.—**Refd.** Saxby v. Thomas (1890), 64 L. T. 65.

674. — — — Interest payable by purchaser—Delay caused by state of title.]—(1) It was provided by a contract for sale that an abstract of title should be delivered before Jan. 25, 1844, & that if from any cause whatever the purchase should not be completed by Apr. 25, the purchaser should pay interest on his purchase-money from that day. The abstract of title to the bulk of the estate was delivered on Mar. 1, 1844, but as to part of the estate no abstract was delivered till the end of Nov. 1844. A good title was not completely made out & verified till July 31, 1847:—*Held*: the purchaser must pay interest from Mar. 1, 1845, being the day on which the purchase ought to have been completed, allowing for its completion the same period from the actual delivery of the abstract of Nov. 1844, as was allowed by the contract from the time when the abstract ought to have been delivered.

(2) Where there is no vexatious conduct, wilful delay, or unfair dealing on the part of the vendor, delay arising from difficulties occasioned by the state of the title will not disentitle him to interest under such a stipulation as the above.

(3) The right of the vendor to interest under such a stipulation will not arise until he performs his part of the contract, by delivering an abstract, showing that he was a title to the property; but it is not incumbent upon him, before he can claim

PART IV. SECT. 2, SUB-SECT. 7.—
A. (b) i.

670 i. Effect of stipulation—When objection not made within time—Objection treated as waived.]—JAMES v. GIBSON (1890), 16 V. L. R. 821.—AUS.

670 ii. — — — — —.]—When on a sale of lands the contract provided that the purchaser should be allowed

ten days to make requisitions on title, & time was made of the essence of the contract, & the purchaser made certain objections within the ten days, & the answers not being satisfactory refused to complete, whereupon the vendor sued for specific performance & obtained the usual judgment:—*Held*: the purchaser could not raise in the master's office fresh objections

not raised within the ten days mentioned in the contract.—IMPERIAL BANK OF CANADA v. METCALFE (1886), 11 O. R. 467.—CAN.

670 iii. — — — — —.]—ARMSTRONG v. NASON, ARMSTRONG v. WRIGHT, ARMSTRONG v. MCCLELLAND (1895), 25 S. C. R. 203.—CAN.

r. — — — — — Right to rescind for

Sect. 2.—Rights under particular conditions: Subsect. 7, A. (b) i., ii. & iii.]

interest, to show that he has done everything that is requisite to make the contract capable of immediate completion.

(4) A vendor remaining in possession under such circumstances that he has to account for rents & profits, will not be ordered to account on the footing of wilful neglect & default unless a special case be made for so charging him; nor ought any direction to be given as to allowing him money expended for needful repairs, unless a special case be made for it.—*SHERWIN v. SHAKESPEAR* (1854), 5 De G. M. & G. 517; 2 Eq. Rep. 957; 23 L. J. Ch. 898; 24 L. T. O. S. 45; 18 Jur. 843; 2 W. R. 668; 43 E. R. 970, L. J.J.

Annotations:—*As to (1) Apld. Regent's Canal Co. v. Ware* (1857), 23 Beav. 575. *As to (2) Follid. Vickers v. Hand* (1859), 26 Beav. 630. **Consd.** *Palmerston v. Turner* (1864), 33 Beav. 524. **Distd.** *Herbert v. Salisbury & Yeovil Ry.* (1866), L. R. 2 Eq. 221. **Follid.** *Williams v. Glenton* (1866), 1 Ch. App. 200. **Consd.** *Re Riley to Stretefield* (1886), 56 L. T. 48; *Re London Corp'n. & Tubbs' Contract*, [1894] 2 Ch. 524; *Bennett v. Stone*, [1903] 1 Ch. 509. *As to (4) Apld. Regent's Canal Co. v. Ware* (1857), 23 Beav. 575. **Consd.** *Met. Ry. v. Defries* (1877), 2 Q. B. D. 189. **Generally, Mentd.** *Re Phillips, Ex p. Kiverton Coal Co.* (1872), 7 Ch. App. 730.

ii. To What Objections Applicable.

675. Matters disclosed on face of abstract—Imperfect abstract.]—BLACKLOW v. LAWS, No. 692, *post*.

676. —.]—Where objections to a title of an estate are to be taken within a limited time after the delivery of an abstract of title, this means such objections only as are patent on the face of the abstract.—*BEETON v. TIMS* (1816), 7 L. T. O. S. 91.

677. —.]—A vendor put up for sale "the absolute reversion to the sum of £2,000 consols," with conditions that any objections to title should be made within ten days after delivery of the abstract, & that the vendor, in case he should be either unable or unwilling to meet any objection that should be raised, might rescind the contract upon return of the deposit without interest or costs. The vendor filed a bill for specific performance, & the case came on upon motion for a decree:—**Held:** notwithstanding the expiration of the time allowed for making objections to title, the purchaser was entitled to raise objections in respect of matters not disclosed upon the face of the abstract, which he had subsequently discovered, & which would render the title bad or doubtful.—*WARDE v. DIXON* (1858), 28 L. J. Ch. 315; 32 L. T. O. S. 349; 5 Jur. N. S. 698; 7 W. R. 148.

Annotations:—Consd. *Isaacs v. Towell*, [1898] 2 Ch. 285. **Refd.** *Gray v. Fowler* (1873), L. R. 8 Exch. 249; *Simpson v. Gilley* (1922), 92 L. J. Ch. 194.

678. —.]—GRAY v. FOWLER, No. 648, *ante*.

679. Questions of title—Omission of title deeds.]—GRAY v. FOWLER, No. 648, *ante*.

680. — Abstract incomplete—Trusts of will not set out.]—WANT v. STALLIBRASS, No. 647, *ante*.

681. — Trust for sale of land to pay debts—Inquiry whether debts paid.]—Where exors. in whom the legal fee is vested are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid unless twenty years have elapsed from testator's

decease.—*Re TANQUERAY-WILLAUME & LANDAU* (1882), 20 Ch. D. 465; 51 L. J. Ch. 434; 46 L. T. 542; 30 W. R. 801, C. A.

Annotations:—Distd. *Re Whistler* (1887), 35 Ch. D. 561; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101. **Consd.** *Re Verrell's Contract*, [1903] 1 Ch. 65. **Refd.** *Re Adams & Perry's Contract* (1899), 80 L. T. 149; *Solomon v. Attenborough*, [1912] 1 Ch. 451. **Mentd.** *Marshall v. Gingell* (1882), 21 Ch. D. 790; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1889), 41 Ch. D. 568; *Re Lashmar, Moody v. Penfold* (1890), 60 L. J. Ch. 143; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223; *Re Brooke, Brooke v. Brooke* (1893), 63 L. J. Ch. 159.

682. — Sale of leaseholds by executor—Inquiry whether debts paid.]—The rule intimated in *Re Tanqueray-Willaume & Landau*, No. 681, *ante*, that where an exor. is selling real estate after twenty years have elapsed from testator's decease, a presumption arises that the debts have been paid & the purchaser is therefore put upon inquiry, does not in general apply to the case of an exor. selling leaseholds of his testator.—*Re WHISTLER* (1887), 35 Ch. D. 561; 56 L. J. Ch. 827; 57 L. T. 77; 51 J. P. 820; 35 W. R. 662.

Annotations:—Apld. *Re Venn & Furze's Contract*, [1894] 2 Ch. 101. **Distd.** *Re Verrell's Contract*, [1903] 1 Ch. 65. **Refd.** *Solomon v. Attenborough*, [1912] 1 Ch. 451.

683. — — —.]—Re Whistler, No. 682, *ante*, must be treated as an express decision that the twenty years' rule laid down in *Re Tanqueray-Willaume & Landau*, No. 681, *ante*, does not apply to the case of an exor. selling leaseholds of his testator.—*Re VENN & FURZE'S CONTRACT*, [1894] 2 Ch. 101; 63 L. J. Ch. 303; 70 L. T. 312; 42 W. R. 440; 38 Sol. Jo. 273; 8 R. 220.

Annotations:—Distd. *Re Verrell's Contract*, [1903] 1 Ch. 65. **Consd.** *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356; *Solomon v. Attenborough*, [1912] 1 Ch. 451. **Refd.** *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596; *Re Wells & Hopkinson's Contract* (1916), 114 L. T. 940.

684. — — —.]—Testator by his will appointed his wife sole trustee & extrix. thereof, & gave to her all his estate upon trust for sale or conversion for the benefit of herself during life or widowhood, & declared it to be his wish that, unless circumstances otherwise required it, his leasehold estates should not be converted during the life or widowhood of his wife, & at her death or marriage he bequeathed a leasehold house to his son. Eighteen years after the death of testator the widow entered into a contract for sale of the leasehold house. Her solrs. informed the purchaser that there were no debts of testator remaining unpaid. No reason for selling was suggested. The purchaser objected to the title, unless the concurrence of the son was obtained, but this was refused:—**Held:** under the peculiar circumstances of the case, the purchaser having actual notice that there were no debts of testator remaining unpaid, & no reason being suggested for the sale, the title was not one which ought to be forced on a purchaser.—*Re VERRELL'S CONTRACT*, [1903] 1 Ch. 65; 72 L. J. Ch. 44; 87 L. T. 521; 51 W. R. 73; 47 Sol. Jo. 71.

Annotation:—Refd. *Solomon v. Attenborough*, [1911] 2 Ch. 159.

685. — No title shown by abstract.]—A condition limiting the time for requisitions on title does not bind the purchaser where the abstract shows no title at all.—*SAXBY v. THOMAS* (1890), 63 L. T. 695; *reversd.* on other grounds, 64 L. T. 65, C. A.

686. Questions of conveyance—Underlease with

misdescription unaffected.]—AGHORE NATH MOOKERJEE v. ADMINISTRATOR-GENERAL OF BENGAL (1903), L. L. R. 30 Calc. 468.—**IND.**

PART IV. SECT. 2, SUB-SECT. 7.—A. (b) ii.

t. Questions of title—No title shown.]

—In an action for specific performance of a contract for the sale of land it was contended by plff. that the title could not now be objected to by deft. as by the terms of the contract all objections to the title were to be notified by Dec. 26, 1887, & the objection in question was not taken until

a week later:—**Held:** such a condition did not apply to the case of the vendor being unable to give a good title, but only to objections & requisitions which might have been properly enforced against a vendor who had a valid title; & the objection here might go to the root of plff.'s title.—

declaration of trust—For last day of term.]—By an indenture made in 1865 a lease was granted to J. G. P. for a term of ninety-nine years from Mar. 25, 1865, at a rent of £3 16s. 4d. The lease became vested in H., who on Aug. 6, 1885, granted S. H. an underlease for the whole of the term, less eleven days, at a rent of £12. H. then mortgaged for the whole term, less one day, of which there was a declaration of trust, & on Sept. 29, 1896, the mtgees. sold to W. S. The vendors were the legal personal representatives of W. S., & the purchaser had entered into a contract to buy what was described in the particulars as “an improved leasehold ground rent of £8 3s. 8d. arising out of a ground rent for £12 amply secured on property held on lease . . . having fifty-three years unexpired in Mar. & subject to an original ground rent of £3 16s. 4d.” The conditions provided that the title should commence with an indenture of underlease dated Aug. 6, 1885, & that the purchaser should not question the validity of the underlease, but should assume a good title was vested in W. S. for the residue of the term. The purchaser contended that he was entitled to an assignment of the original lease, & that, as there was an outstanding day, he was entitled to a declaration that the vendor had not made out a good title, & to the return of his deposit. The vendor said that he had only contracted to sell the term for which the ground rent of £12 was payable. The purchaser, moreover, had delivered no requisitions, & it was submitted that the objection was out of time:—*Held*: the objection was not out of time, as the objection was one of conveyance & not of title; what was contracted to be sold was the improved ground rent for the whole term during which it was payable.

Semble: even if the contract had been to assign the whole of the original term, the vendor could have enforced the contract, as there was a declaration of trust of the last day of the term.—*Re SCOTT & EAVE'S CONTRACT* (1902), 86 L. T. 617.

687. Question going to root of title.]—*Re SCOTT & EAVE'S CONTRACT*, No. 686, *ante*.

688. — Objection that legal estate outstanding.]—*PRYCE-JONES v. WILLIAMS*, No. 649, *ante*.

iii. Waiver of Limitation.

689. Waiver by vendor—What may amount to—Continuing to treat for completion.]—*MORLEY v. COOK*, No. 646, *ante*.

690. — Corresponding as to objections delivered after time.]—Conditions of sale stipulated that the sale should be completed on a certain day; & that objections to the title not made within twenty-one days from the delivery of the abstract should be considered as waived; & that, if the purchaser should not comply with the conditions, his deposit should be forfeited, & the vendor be at liberty to resell the property. The purchaser did not deliver his objections until several weeks after the expiration of the twenty-one days, & after the day appointed for completing the purchase: the vendor's solr., however, received them, & entered into a long correspondence with the purchaser on the subject of them, but without coming to a satisfactory conclusion. Finally, the vendor resold the property, but at a less price, notwithstanding the purchaser protested against the resale, & gave notice to the

vendor of his intention to file a bill to enforce the contract. About six months afterwards he filed his bill, making the auctioneer & the purchaser at the resale, to whom he had some months before given notice of his prior contract, co-defts. to it. The ct. held that the benefit of the conditions had been waived by the vendor's solr. & decreed a specific performance, with a reference to the master as to title, & dismissed the bill, with costs as against the auctioneer, because he denied that he had ever intended to part with the deposit, & without costs as against the purchaser at the resale, who claimed the benefit of his contract if the ct. should think that plff.'s ought not to be performed.—*CUTTS v. THODEY* (1842), 13 Sim. 206; 6 Jur. 1027; 60 E. R. 80; *on appeal* (1844), 1 Coll. 223, n., L. C.

Annotation.—*Reid*. *Morley v. Cook* (1842), 2 Hare, 106.

691. — — — — —.]—(1) D. devised lands in fee to two trustees, L. & P., in fee, upon trust, as soon as convenient, to raise a sum of £2,000 for the benefit of his daughter “by sale or otherwise, at the discretion of my trustees.” There was no receipt clause. Testator died in 1815. P. & L. accepted the trusts, & P. died in 1851. In 1852, L. sold by auction:—*Held*: he could alone make a good title to the premises.

(2) A special condition of sale stipulated, that by a fixed day the purchaser should either reject or accept the title, & if not rejected it was to be good. Within the time fixed the purchaser took an objection, but stated at the same time he did not reject the title upon that ground, but wished to hear how the vendor met the difficulty. The vendor insisted at first on the condition, by which the purchaser, not having rejected the title, was to be held to have accepted it, but subsequently entered upon a long correspondence. *Semble*: the vendor had by his conduct waived the condition.—*LANE v. DEBENHAM* (1853), 11 Hare, 188; 22 L. T. O. S. 143; 17 Jur. 1005; 1 W. R. 465; 68 E. R. 1241.

Annotation.—*Consd. Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475.

692. Right of objection waived by purchaser—Not unless question raised in abstract.]—(1) The conditions of sale provided that all objections to the title disclosed by the abstract, not taken within a certain time after delivery of the abstract to the purchaser, should be deemed to be waived:—*Held*: the time for objecting was not to be computed from the time of the delivery of an imperfect abstract; & the purchaser was not precluded from taking an objection which arose out of evidence called for before the expiration of the time fixed.

(2) The sale took place under a decree. The abstract stated that the person, at whose death the sale was to be made, proved the will of testator, but it did not state the pleadings in the cause, or whether that person was living or dead:—*Held*: this was not a sufficiently distinct intimation to the purchaser that the time of sale had, without any sufficient ground, been anticipated.—*BLACKLOW v. LAWS* (1842), 2 Hare, 40; 67 E. R. 17.
Annotations.—*As to* (1) *Apld.* *Want v. Stallibrass* (1873), L. R. 8 Exch. 175. *Generally*, *Mentd.* *Goulder v. Camm* (1859), 29 L. J. Ch. 135.

693. — Not in case of misrepresentation in description.]—*PRICE v. MACAULAY*, No. 298, *ante*.

694. — What may amount to—Abstaining from objection.]—*PEGG v. WISDEN*, No. 666, *ante*.

BROWN v. PEARNS (1888), 12 P. R. 396.
—*CAN.*

a. — — — — —.]—Where there is clearly no title a purchaser cannot be

bound by a stipulation in conditions of sale that objections to the title must be made within a limited period or they will be deemed to be waived, or by a stipulation that no objection

shall be made to the operation of a certain deed, there being no disclosure of the facts making the same really inoperative.—*COOK v. HILL* (1890), 8 N. Z. L. R. 570.—*N.Z.*

Sect. 2.—Rights under particular conditions: Sub sect. 7, B. (a) & (b) i., ii. & iii.]

B. Reservation of Right to Rescind.

(a) In General.

695. Nature of reservation.] — ROBERTS v WYATT, No. 660, ante.

696. Numerous attempts to remove objections—Interest on returned deposit.] —(1) A purchaser under a decree having accepted the title & paid his purchase-money into ct., discovered that a will had been misstated in the abstract, in such a manner as to conceal an important defect in the title. Upon petition, before conveyance, he was discharged from his purchase, & his purchase-money was ordered to be repaid; but as his solr. had neglected to examine the original will, although the abstract showed that it was of a very peculiar nature, & although reminded of the necessity of doing so by the counsel who advised upon the abstract:—*Held*: he was not entitled to interest & he must pay the costs of all parties, except of the person who had the conduct of the sale.

(2) A purchaser is not conclusively bound by the acceptance of the title by his counsel; but if he pays his purchase-money into ct., he is bound. This rule, however, does not apply to a case where the counsel is misled by the abstract of title.

(3) A condition that, if any objection or requisition should be made which the vendor should be unable or unwilling to remove, it should be lawful for him to rescind the contract; & that, in that case, the purchaser should be entitled to a return of his deposit, without interest, but should not be entitled to any costs or damages, does not entitle the vendor, after making numerous fruitless attempts to remove an objection made by a purchaser desirous of being discharged, to return him his deposit only, but the vendor must then pay interest upon the deposit, & the costs of the purchaser.—*M'CULLOCH v. GREGORY* (1855), 1 K. & J. 286; 3 Eq. Rep. 495; 24 L. J. Ch. 246; 24 L. T. O. S. 307; 3 W. R. 231; 69 E. R. 466; *subsequent proceedings* (1856), 3 K. & J. 12.

Annotations:—Generally, Reifd. Shoreditch Vestry v. Hughes (1864), 10 L. T. 723; *Allen v. Richardson* (1879), 13 Ch. D. 524.

697. Whether reservation of right depreciatory—Sale by mortgagee.] —A condition of sale on a sale by a mtgee. under a power of sale, entitling the vendor to rescind the contract in case he should be unwilling or unable to answer any requisition, is depreciatory in a sense, but not so depreciatory as to be improper, being one that a prudent owner would introduce, & therefore held binding on the mtgor.—*FALKNER v. EQUITABLE REVERSIONARY SOCIETY* (1858), 4 Drew. 352; 4 Jur. N. S. 1214; 7 W. R. 73; 62 B. R. 136; *sub nom. FAULKNER v. EQUITABLE REVERSIONARY INTEREST SOCIETY*, 28 L. J. Ch. 132; 32 L. T. O. S. 181.

698. Effect of condition being unreasonable—Purchaser to pay all expenses of investigating title.] —

Pltf. contracted to purchase of deft. the lease, etc., of a public-house, by a memorandum in the following form:—"Received from Mr. Moeser the sum of £80, being the deposit on account of £800, the purchase-money for the Wheat Sheaf Tavern, the contract for which is now being prepared, to be signed by the vendor & purchaser when completed & ready for signature. B. B. Wisker." The contract tendered to pltf. for signature contained, amongst others, stipulations that the purchaser should pay the expenses of the investigation of the vendor's title, & that,

if the purchaser should insist on any objection or requisition as to title which the vendor should be unable or unwilling to remove or comply with, the vendor might annul the sale, & return the deposit, but without any interest or costs of investigating the title; & that if the purchaser should fail to comply with the above conditions his deposit should thereupon be forfeited to the vendor, who should be at liberty to resell the property. Pltf. refused to sign this contract, on the ground that it contained unreasonable terms, & deft. resold the property:—*Held*: that pltf. was entitled to recover back his deposit.—*MOESER v. WISKER* (1871), L. R. 6 C. P. 120; 40 L. J. C. P. 94; 24 L. T. 134; 19 W. R. 351.

Annotation:—Expld. Chillingworth v. Esche, [1924] 1 Ch. 97.

699. Purchaser insisting on objection he was precluded from making.] —A contract for the sale of freehold land stipulated that the title should commence with a conveyance of the land to a railway co., & that the purchaser should "assume & admit that everything, if anything were necessary, was done & performed by the co. to enable them to sell & effectually convey the said land as surplus lands," & should "not call for or require production of any evidence to this effect." There was also a condition that, if the purchaser failed to comply with the terms of the contract, his deposit should be forfeited.

The vendor having refused to comply with a requisition by the purchaser requiring some evidence to be furnished that a waiver of the rights of pre-emption conferred on the prior & adjoining owners by Lands Clauses Consolidation Act, 1845 (c. 18), had been obtained, the purchaser brought an action for the return of his deposit & for damages for breach of contract. The vendor then rescinded the contract, & forfeited the deposit.

Pending the action the vendor obtained a waiver of the rights of pre-emption & sold the land to a third party:—*Held*: the purchaser was bound by the contract to accept such title as the vendor had, & having insisted on an objection which he was precluded from taking by the terms of the contract, was not entitled to any relief.—*BEST v. HAMAND* (1879), 12 Ch. D. 1; 27 W. R. 742; *sub nom. HAMAND v. BEST*, 48 L. J. Ch. 503; *sub nom. HAMMOND v. BEST*, 40 L. T. 769, C. A.

Annotation:—Reifd. Re Davis & Cavey (1888), 40 Ch. D. 601.

700. Object of reserving right.] —A. contracted with B. for purchase of the hereditaments described in the schedule to the agreement in fee simple in possession. Clause 6 of the agreement provided that any error therein should not annul the sale, but that compensation should be allowed in respect thereof, & clause 8 gave the vendor the usual right to rescind; but there was no stipulation as to the lands being sold subject to all rights of way, etc. It subsequently appeared that a right of way existed over a portion of the lands, & as A. insisted on compensation in respect thereof, B. rescinded the contract:—*Held*: notwithstanding clause 6, the right of way was a defect of title, & B. was entitled to rescind.—*ASHBURNER v. SEWELL*, [1891] 3 Ch. 405; 60 L. J. Ch. 784; 65 L. T. 524; 40 W. R. 169; 7 T. L. R. 736.

Annotations:—Apld. Vowles v. Bristol, etc. Bldg. Soc. (1900), 44 Sol. Jo. 592. *Consd. Re Jackson & Haden's Contract*, [1906] 1 Ch. 412. *Apld. Yandle v. Sutton, Young v. Samo*, [1922] 2 Ch. 199.

701. Effect of condition for compensation—Whether right to rescind excluded—Substantial compensation claimed.] —*VOWLES v. BRISTOL, ETC. BUILDING SOCIETY* (1900), 44 Sol. Jo. 592.

702. Notice of rescission—Without prejudice.]—Re WESTON & THOMAS'S CONTRACT, No. 721, *post*.

(b) *To What Objections or Requisitions Right Applicable.*

i. *Objections in respect of Easements.*

703. Inclosed right of way.]—ASHBURNER v. SEWELL, No. 700, *ante*.

ii. *Objections as to Title.*

704. No title shown to minerals.]—Re JACKSON & HADEN'S CONTRACT, No. 734, *post*.

705. No title shown at all.]—In an agreement for sale of real estate it was stipulated that, if there should be any objection or requisition on the purchaser's part which the vendor should be unwilling on the ground of expense or otherwise to comply with, the vendor should be at liberty to rescind the contract on the repayment to the purchaser of the deposit without interest or damage. It turned out that the vendor had absolutely no title. After considerable delay the vendor gave notice of rescission to the purchaser, & tendered him his deposit, which was refused. The purchaser brought an action for specific performance or damages:—*Held*: this case was not within the clause in the agreement, & *pltf.* was entitled to the return of the deposit & an inquiry as to damages.—BOWMAN v. HYLAND (1878), 8 Ch. D. 588; 47 L. J. Ch. 581; 39 L. T. 90; 26 W. R. 877.

Annotations:—Distd. Heppenstall v. Hose (1884), 51 L. T. 589; *Re* Ramuz & Edwards's Contract (1893), 37 Sol. Jo. 701; *Isaacs v. Towell*, [1898] 2 Ch. 285. *Expld.* *Re* Delighton & Harris's Contract, [1898] 1 Ch. 458; *Re* Jackson & Haden's Contract, [1906] 1 Ch. 412.

706. Possessory title as to part objected to.]—Trustees of the will of H. who died in 1858, contracted to sell to *pltf.* freehold premises containing 5 acres. The conditions of sale provided that if the purchaser took any objection or made any requisition which the vendors were unable or unwilling to remove or comply with the vendors might rescind. The abstract showed a conveyance to testator in 1855 of about 3½ acres of the property. The other 1½ acres had been inclosed by testator himself & had ever since been held with the property, & no other title was shown. There was no want of *bona fides* on the part of the vendors. The purchaser required & insisted on further evidence as to the 1½ acres:—*Held*: the vendors were entitled to rescind under the conditions.—HEPPENSTALL v. HOSE (1884), 51 L. T. 589; 49 J. P. 100; 33 W. R. 30.

707. No title shown as to one lot sold.]—Re RAMUZ & EDWARDS'S CONTRACT (1893), 37 Sol. Jo. 701.

708. Objection that property subject to restrictive covenants.]—On Apr. 30, 1920, *deft.*, vendor, agreed with *pltf.*, purchaser, for the sale of a house, the contract providing that the condition of the London conditions of sale should apply. Condition 4 provided that if the purchaser should insist on any requisition as to the title with which the vendor should be unable or unwilling to comply, the vendor might "notwithstanding any negotiation or litigation" in respect thereof rescind the

contract unless the requisition was withdrawn within seven days. The purchaser sent in a requisition that the property was subject to restrictive covenants, not disclosed by the contract, & that he reserved his right to object to the title on this ground. On July 22, 1920, the purchaser issued a vendor & purchaser summons for a declaration that a good title had not been shown, & for a return of the deposit paid by him under the contract. On July 29, 1920, the purchaser's solrs. wrote repudiating the contract. In Oct. the vendor's solrs. wrote that she was not disposed to continue the litigation & giving notice of rescission under condition 4. Nothing further occurred in the litigation, & the vendor paid the purchaser's costs of it. In an action by the purchaser to recover from the vendor the costs & expenses of the investigation of the title:—*Held*: the vendor was entitled to rescind, & the purchaser's claim failed.—PROCTER v. PUGH, [1921] 2 Ch. 256; 91 L. J. Ch. 1; 127 L. T. 126.

iii. *Objections as to Conveyance.*

709. Whether proper condition.]—HARDMAN v. CHILD, No. 715, *post*.

710. Condition empowering rescission on objection to title.]—A person contracted to sell property, & showed only an equitable title, & the purchaser required the vendor to get in the legal estate:—*Held*: such requisition was as to a matter of conveyance only, & the vendor could not rescind the contract under a condition empowering him to rescind if any objection to title were made which he was unable or unwilling to remove.—KITCHEN v. PALMER (1877), 46 L. J. Ch. 611.

711. —.]—(1) On a sale of a freehold house by auction one of the conditions of sale provided that "all objections & requisitions in respect of the title, or the abstract, or particulars, or anything appearing therein, respectively, shall be sent to the vendors' solrs. within fourteen days from the delivery of the abstract, & all objections & requisitions not sent in within that time shall be considered to be waived. If any objection or requisition shall be made & insisted on, which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty by notice in writing to rescind the sale." The purchaser accepted the vendors' title as shown by the abstract & sent them a draft conveyance for approval. The vendors then required that the conveyance should be taken subject to certain "covenants, conditions, & restrictions," the nature of which they did not explain, but which they alleged were contained in a deed recited in an abstracted deed forming the commencement of title. As the abstract did not show the existence of any such covenants, conditions, or restrictions, & as the conveyance to the vendors' immediate predecessor in title did not in any way refer to them, the purchaser declined to take a conveyance subject to them without, at all events, being first informed of their nature, whereupon the vendors wrote purporting to rescind the contract. Upon a summons by the purchaser under Vendor & Purchaser Act, 1874 (c. 78):—*Held*: the vendors had no power to rescind, & the purchaser was entitled to a conveyance without the insertion of the words required by the vendors.

PART IV. SECT. 2, SUB-SECT. 7.—
B. (b) i.

b. *Right of way.]—*GRACE v. MITCHELL (1926), 20 S. R. N. S. W. 330; 43 N. S. W. N. 12.—AUS.

c. —.]—JEWER v. THOMPSON (1912), 22 O. W. R. 610; 3 O. W. N.

1122, 1150; 3 D. L. R. 628, 886.—CAN.

PART IV. SECT. 2, SUB-SECT. 7.—
B. (b) ii.

d. *Land not under Torrens system as represented—Whether demand for*

*certificate of title sufficient objection.]—*MATTHEWS v. JAMES (1882), 8 V. L. R. 188.—AUS.

e. *No title shown to party walls.]—*HORNING v. PINK (1913), 13 S. R. N. S. W. 529; 30 N. S. W. N. 114.

Sect. 2.—Rights under particular conditions: Subsect. 7, B. (b) iii., iv., v. & vi.]

(2) Another condition of sale provided for payment of a deposit & for the completion of the purchase on a certain day; & that "if from any cause whatever" the purchase should not be completed on that day, the purchaser should pay interest at 5 per cent. *per annum* on the remainder of his purchase-money, until completion. After receiving the vendors' notice of rescission the purchaser, on the day fixed for completion, placed the balance of her purchase-money to a separate account on deposit with a bank at $2\frac{1}{2}$ per cent. interest, & gave notice of the deposit to the vendors:—*Held*: the purchaser could not, under the circumstances, be required to pay, on actual completion, higher interest than that allowed by the bank.—*Re MONCKTON & GILZEAN* (1884), 27 Ch. D. 555; 54 L. J. Ch. 257; 51 L. T. 320; 32 W. R. 973.

Annotation:—*As to* (2) *Distd. Re Riley & Streatfield* (1886), 34 Ch. D. 386.

712. — "Or any other matter relating to sale."—A condition of sale empowering the vendor to annul the sale if the purchaser makes any objection or requisition "as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale," which the vendor is unable or unwilling to comply with, extends to a matter of conveyance as well as of title.

Where a vendor mtgee. of leaseholds who, having contracted to sell the entire term, turned out, on the investigation of the title by the purchaser, to hold by a sub-demise the bare legal estate in which was outstanding, & expressed himself as unable or unwilling to comply with a requisition by the purchaser that the person having the legal estate should join in the conveyance:—*Held*: the vendor was entitled, under a condition in the above form, to annul the sale.—*Re DEIGHTON & HARRIS'S CONTRACT*, [1898] 1 Ch. 458; 67 L. J. Ch. 240; 78 L. T. 430; 46 W. R. 341; 42 Sol. Jo. 321, C. A.

Annotations:—*Consd. Re Jackson & Haden's Contract*, [1906] 1 Ch. 412; *Procter v. Pugh*, [1921] 2 Ch. 256. *Refd. Isaacs v. Towell* (1898), 67 L. J. Ch. 508.

iv. *Requisitions for Concurrence of Other Parties.*

713. Annuitants—On sale by executor.—A testator gave his real & personal estate to A., subject to the payment of his debts & certain annuities, & appointed him exor.:—*Held*: A. could make a good title to the real estate, without the concurrence of the annuitants, & a purchaser from A. was not bound to see to the application of the purchase-money.—*PAGE v. ADAM* (1841), 4 Beav. 269; 10 L. J. Ch. 407; 5 Jur. 793; 49 E. R. 342.

Annotations:—*Consd. Morley v. Cook* (1842), 2 Hare, 106; *Stroughill v. Anstey* (1852), 1 Do G. M. & G. 635; *Greaves v. Wilson* (1858), 25 Beav. 290. *Refd. Forbes v. Peacock* (1846), 1 Ph. 717; *Wood v. Machu* (1846), 8 L. T. O. S. 210.

714. Mortgagees—On sale by mortgagor.—*GRAEVES v. WILSON*, No. 530, *ante*.

715. Persons beneficially interested—On sale by trustee.—Trustees of a will put up land for sale, subject to a condition that, if any objection or requisition as to (*inter alia*) title, or abstract or conveyance should be insisted on, & the vendors should be unable or unwilling to remove or comply therewith, they should be at liberty to annul the

sale. The abstract delivered to the purchaser showed that the conveyance to the vendors' testator was of the land, together with a wall on the east side of it, "which wall is to be ever hereafter repaired & kept in repair" by testator, his heirs, & assigns. This obligation was not mentioned in the particulars & conditions of sale, & the purchaser did not know of it until the delivery of the abstract. He accepted the title, & tendered to the vendors the draft of a conveyance to himself of the land with the wall, omitting all reference to the obligation to repair the wall. The vendors' solrs. added the words "subject to & with the liability for ever to repair the wall" by the purchaser, his heirs & assigns. The purchaser would not agree to the addition, & the vendors thereupon gave notice to rescind the contract. The purchaser then brought an action for specific performance of the contract, claiming the right to a conveyance without the additional words:—

Held: (1) if the obligation to repair the wall ran with the land, it was immaterial whether it was mentioned in the conveyance or not, because the purchaser would be bound by it in either case; but, if it did not run with the land, the vendors, not having mentioned it in the particulars of sale, could not impose it on the purchaser. Consequently, the vendors were not entitled to rescind the contract. (2) *Seem*: a condition of sale giving the vendor a right to rescind the contract, in the event of his being unable or unwilling to comply with a purchaser's requisition as to conveyance, is not in general a proper condition.

Only one case occurs to me in which it would be proper to insert such a condition. If the sale were made by trustees the purchaser might require that the persons beneficially interested in the property should be made parties to the conveyance to him, & I can conceive it possible that the vendors might not be able to procure their concurrence. In such a case it might be very reasonable that the vendors should be able to say to the purchaser, "You may be in strictness entitled to have the concurrence of the beneficiaries, but you will get a perfectly good title without it, & as we are unable to procure their concurrence we will rescind the contract (PEARSON, J.).—*HARDMAN v. CHILD* (1885), 28 Ch. D. 712; 51 L. J. Ch. 695; 52 L. T. 465; *sub nom. Re HARDMAN & CHILD*, 33 W. R. 544.

Annotation:—*As to* (2) *Distd. Re Glenton & Saunders to Haden* (1885), 53 L. T. 434.

v. *Insistence on Discharge of Incumbrances.*

716. Mortgage.—At a sale by auction of leasehold property by a mtgee. under a power one condition of sale was that within the time limited from the delivery of the abstract, the purchaser should send to the vendor's solrs. his requisitions on the title or evidence, & in default of any he should be deemed to have accepted the title, & for the purpose of requisitions the abstract was to be deemed to be perfect if it supplied the information suggesting the same; & if the purchaser should insist on any requisition which the vendor should be unable or should decline to comply with, he should be at liberty to rescind the contract. An abstract was delivered, but it did not show the real state of the title. After requisitions were sent & replies received, the purchaser's solrs. were informed by mtgees. that the property had been mortgaged by deposit of an underlease to them. The vendor,

vendor to rescind if unable or unwilling to remove any objection which the purchaser was entitled to make under the conditions. The purchaser claimed that the property was subject

PART IV. SECT. 2, SUB-SECT. 7.—

B. (b) iv.

1. *Legatees—On sale by executor.*—*Re RYAN & CAVANAGH* (1885), 17 L. R. Ir. 42.—*IR.*

PART IV. SECT. 2, SUB-SECT. 7.—

B. (b) v.

g. *Charge for overdue rates.*—The contract of sale of real estate contained a rescission clause entitling the

who was not aware of the mtge., was required to pay the amount due to the mtgees., but his reply was that he was unable & unwilling to satisfy the claim, & that he would rescind the contract. The purchasers insisted on the mtge. being discharged, & upon a summons under Vendor & Purchaser Act, 1874 (c. 78), a declaration was made that the vendor was not entitled under the condition & circumstances to rescind.—*Re JACKSON & OAKSHOTT* (1880), 14 Ch. D. 851; 28 W. R. 791.

717. —[Resp. agreed to sell certain land to applt. The conditions of sale provided that, if the purchaser made any objection or requisition on the title which the vendor should be unwilling or unable to remove, it should be lawful for the vendor to annul the sale. The title disclosed an incumbrance created by one T. & the vendor immediately commenced legal proceedings to remove it, but considerable delay was caused in consequence of the absence of T. from the colony. The purchaser thereupon required the vendor to give an undertaking to remove the incumbrance within a fixed time, or to give an indemnity. This the vendor declined to do, & rescinded the contract. In an action for specific performance:—*Held*: he was entitled to do so.—*WOOLCOTT v. PEGGIE* (1889), 15 App. Cas. 42; 59 L. J. P. C. 44; 61 L. T. 845; 38 W. R. 465, P. C.

Annotations:—*Consd.* Quinlan v. Horne, [1906] 1 Ch. 596. *Refd.* Isaacs v. Towell (1898), 67 L. J. Ch. 508.

718. Rentcharge.—The ct. will not, under the power given to it by Conveyancing & Law of Property Act, 1881 (c. 41), s. 5, compel a vendor of land to pay money into ct. for the purpose of discharging an incumbrance upon the land, when the result of so doing would be to inflict a great hardship on him, as, for instance, if the incumbrance is a perpetual rentcharge, & the sum necessary to procure its discharge would far exceed the amount of the purchase-money payable to the vendor.

A railway co. contracted to sell some superfluous land "free from incumbrances," for £868. The contract provided that, if the purchaser should decline to waive any valid objection to the title, the co. might at any time rescind the contract, without paying the purchaser any costs or compensation. The abstract of title showed that the land was subject to a perpetual rentcharge of £63 issuing out of it, this being the consideration for which the co. had purchased it under their statutory powers, for the making of a railway, which, by a subsequent Act, they were authorised to abandon. The purchaser required the co. to procure the release of the land from the rentcharge. This they declined to do, but offered to indemnify him against it. He declined to waive his requisition:—*Held*: the co. were entitled to rescind the contract under the condition, & they were not bound to apply to the ct., under Conveyancing & Law of Property Act, 1881 (c. 41), s. 5, to declare the land freed from the rentcharge, or to take any other steps to procure the release of the rentcharge.—*Re GREAT NORTHERN RY. CO. & SANDERSON* (1884), 25 Ch. D. 788; 53 L. J. Ch. 445; 50 L. T. 87; 32 W. R. 519.

Annotations:—*Refd.* *Re Monckton & Gilgean* (1884), 27 Ch. D. 555; *Re Simpson & Moy's Contract* (1909), 53 Sol. Jo. 376.

to a charge for overdue municipal rates, which he called upon the vendor to pay off:—*Held*: the vendor was entitled to rescind as he had reasonable grounds for disputing the existence of the charge, although he would not have been entitled to rescind if the existence of the charge had been admitted.—*RODRICK v. CITY MUTUAL*

LIFE ASSURANCE SOCIETY, LTD. (1897), 18 N. S. W. Eq. 128; 14 N. S. W. W. N. 65.—*AUS.*

PART IV. SECT. 2, SUB-SECT. 7.— B. (b) vi.

h. Whether condition for compensation excludes right of rescission.—*Re*

719. — Vendor acting reasonably.—Appets. purchased certain premises for £300 at a sale by auction from resps. The premises were described in the particulars as freehold & without mention of incumbrances. The premises were in fact subject to a rentcharge of £5 7s. 9d., as might have been discovered by resps. on any examination of their title. By the conditions of sale it was (*inter alia*) provided that each lot was sold subject to all chief rents, that the vendors might be at liberty to rescind the sale if the purchasers insisted on any objection or requisition which the vendors might be unwilling to remove or comply with; & that any incorrect statement, error, or omission should not annul the sale or entitle either the vendors or the purchaser to any compensation. Appets. insisted upon resps. discharging the incumbrance, & thereupon resps. claimed to rescind the sale:—*Held*: resps. had acted honestly under a mistake, & not recklessly or unreasonably, & had done nothing to disentitle them to rescind.—*Re SIMPSON & MOY (THOMAS), LTD.'S CONTRACT* (1909), 53 Sol. Jo. 376.

720. Refusal to accept indemnity.—*Re GREAT NORTHERN RY. CO. & SANDERSON*, No. 718, *ante*.

721. — In respect of contingent incumbrance.—(1) A purchaser is not bound to accept an indemnity for a contingent incumbrance, however small the amount or remote the contingency, but is entitled to have it discharged.

(2) Refusal to accept an indemnity is not in itself a "reasonable ground" for rescission under the usual condition.

(3) A notice of rescission signed "without prejudice" is void.

In my opinion a letter written "without prejudice" was not a valid notice to annul the sale within condition 12 (*SWINFEN EADY, J.*).—*Re WESTON & THOMAS' CONTRACT*, [1907] 1 Ch. 241; 76 L. J. Ch. 179; 96 L. T. 324.

vi. Objections in respect of Misdescription.

722. Effect of condition excluding compensation —Purchaser insisting on performance with compensation.—An agreement for the sale of a manor; fine, two years' improved value. The eighth condition of sale provided, "If any purchaser insist on any objection or requisition as to the vendor's title, evidence of title, conveyance, or otherwise, which the vendor shall be unable or unwilling to answer, remove, or comply with, the vendor may, by notice in writing, . . . annul the contract." The eleventh condition provided, "No mistake as to quantity or tenure, or other omission in the particulars, as to the description or quality of the property, or as to the vendor's interest or otherwise, if capable of compensation, shall annul the sale, but compensation shall in every case be given or taken. But this condition shall not limit the vendor's right to rescind the contract under the eighth condition." It was afterwards discovered that the fine was one year's & not two years' improved value; & the purchaser claimed compensation by reason of the misdescription. He also raised a question of title. The vendor refused to give compensation, but offered to rescind the contract. The purchaser filed his bill for specific performance, & insisted by his bill

COOK & PREECE'S CONTRACT, [1910] V. L. R. 328.—*AUS.*

k. ——[*ORCHARD v. TAYLOR* (1910), 10 S. L. N. S. W. 93; 72 N. S. W. W. N. 3.—*AUS.*

l. Misdescription of boundaries.—*WEST v. HEDGELAND*, [1909] V. L. R. 178.—*AUS.*

Sect. 2.—Rights under particular conditions: Subsect. 7, B. (b) vi., (c) & (d).]

upon the requisition as to title. The vendor subsequently gave notice in writing to rescind the contract:—*Held*: upon the question of title the vendor was entitled, under the eighth condition, to rescind the contract.—*HOY v. SMYTHIES* (1856), 22 Beav. 510; 28 L. T. O. S. 183; 2 Jur. N. S. 1011; 52 E. R. 1205.

Annotations:—*Consd.* *Falkner v. Equitable Reversionary Soc.* (1858), 4 Drew. 352; *Shoreditch Vestry v. Hughes* (1864), 17 C. B. N. S. 135; *Isaacs v. Towell*, [1898] 2 Ch. 285. *Refd.* *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212.

723. ———.] — *Re TERRY & WHITE'S CONTRACT*, No. 770, *post*.

724. ———.] *Title to minerals after enfranchisement.*—Upon a sale of land, one of the conditions provided that if any objection was persisted in, the vendors might rescind the contract; & another condition provided that if any mistake should appear to have been made in the description of the property, or of the vendor's interest therein, such mistake should not vitiate the sale, but compensation should be given. The purchaser objected that certain minerals under the land appeared to belong to the lord of the manor; the vendors answered that this would not be compensated for, being the result of an enfranchisement as to which there was a condition. The purchaser persisted in the objection, & the vendors gave notice that they should rescind the contract. The purchaser then filed his bill for specific performance with compensation, & the vendors by their answer alleged that they had in fact a title to these minerals, but had rescinded under the conditions:—*Held*: the objection taken by the purchaser was an objection to title to part of the property sold, the removal of which might involve a long & expensive inquiry; the vendors had a right to rescind, & performance with compensation would not be compelled.—*MAWSON v. FLETCHER* (1870), 6 Ch. App. 91; 40 L. J. Ch. 131; 23 L. T. 545; 35 J. P. 391; 19 W. R. 141, L. J.

Annotations:—*Apld.* *Heppenstall v. Hose* (1884), 51 L. T. 589. *Consd.* *Re Danics & Wood* (1885), 29 Ch. D. 626.

Apld. *Ashburner v. Sewell*, [1891] 3 Ch. 405. *Distd.* *Re Jackson & Haden's Contract*, [1905] 1 Ch. 603. *Refd.* *Re Terry & White* (1886), 2 T. L. R. 327.

725. *Effect of bonâ fide belief in truth of representation—On reasonable grounds.*—A statement made by a vendor on the faith of a promise or representation by a third party that he will concur in the sale, without having previously made an agreement with that third party binding him to do so, is not necessarily "reckless" within the meaning of the authorities on the point.

A vendor ought not to be held disentitled to exercise a clear & unambiguous power of rescission reserved to him in the contract because he has made an untrue statement of fact concerning the property agreed to be sold, if the statement was made under the *bonâ fide* belief & with some substantial ground for believing that it was true.

At a sale of lands by public auction in lots the particulars stated that the tenancy of lot 3 would expire at Michaelmas, 1919, when vacant possession might be had. The fifth condition of sale provided that if the purchaser should insist on any objection or requisition as to the title, which the vendor should "be unable or on the ground of expense unwilling to remove or comply with," the vendor might by notice in writing at any time & notwithstanding any negotiations or pending litigation, rescind the sale. Lot 3 was held on a yearly tenancy determinable only by a year's notice on either side expiring at Michaelmas in any year. The result of interviews which the

vendor had some months previously to the sale, with the exors. of deceased tenant & with their sub-tenant, was that the vendor, although no formal notice to quit was given on either side, had substantial grounds for believing that their tenancies would determine at Michaelmas, 1919. Pltf. purchased lot 3 at the sale & then the question arose as to vacant possession being given of that lot, & eventually the exors. declined to give up possession on the ground that no notice to quit had been given & their sub-tenant claimed to remain in possession until Michaelmas, 1921. On pltf. suing the vendor for specific performance with compensation the vendor gave notice to rescind the contract under the fifth condition of sale:—*Held*: under the circumstances the vendor was not guilty of such recklessness in stating the termination of the tenancy & the giving of vacant possession of lot 3 as disentitled him to exercise the power of rescission reserved to him by the fifth condition of sale, & consequently the notice to rescind was valid.—*MERRETT v. SCHUSTER*, [1920] 2 Ch. 240; 89 L. J. Ch. 399; 123 L. T. 405; 61 Sol. Jo. 550.

(c) *Exercise of Right.*

726. *Must be exercised reasonably.*—*Re DAMES & WOOD*, No. 739, *post*.

727. ———.] — *Re STARR-BOWKETT BUILDING SOCIETY & SIBUN'S CONTRACT*, No. 741, *post*.

728. ———.] — A vendor's power to rescind the contract may be exercised only in good faith.

Where a vendor having such power under the agreement took advantage of it for purposes of delay while he opened negotiations, unknown to the purchaser, for sale to a third person:—*Held*: by his conduct he deprived himself of his election to affirm the contract, & the purchaser was entitled to treat it as rescinded.—*SMITH v. WALLACE*, [1895] 1 Ch. 385; 64 L. J. Ch. 240; 71 L. T. 814; 43 W. R. 539; 13 R. 201.

729. ———.] — Resp. contracted to sell a house to appct. The contract incorporated the public sale conditions of the Somerset Law Society, clause 5 of which provided that: "... If the purchaser shall insist on any objection or requisition which the vendor shall be unable, or on the ground of expense, unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser, & notwithstanding any intermediate negotiation or litigation, rescind the contract for sale. ..." The abstract of title disclosed the fact that the legal estate was not vested in resp. Resp. was aware of that fact at the time he entered into the contract, but he hoped to make good the title with the concurrence of the trustee. After much negotiation, appct. submitted a requisition containing a demand that resp. should make certain applications to the ct. with a view to perfecting the title. This resp. refused to do on the ground of expense, & on appct. persisting in his demand, resp.'s solrs., by a notice in writing, purported, on his behalf, to rescind the contract:—*Held*: resp. had acted recklessly & unreasonably; he was not entitled to rescind the contract under clause 5; the notice to rescind was void & of no effect, & he was bound to make the necessary application to the ct.—*Re DES REAUX & SETCHFIELD'S CONTRACT*, [1926] Ch. 178; 95 L. J. Ch. 338; 134 L. T. 623; 70 Sol. Jo. 137.

730. *Necessity for statement of reasons.*—By conditions of sale it was provided that if any purchaser should insist on any requisition as to the title, etc., which the vendors should consider themselves unable, or on the ground of expense

Sect. 2.—Rights under particular conditions: Subsect. 7, B. (d), (e) & (f).]

738. ———.]—Conditions of sale provided, that if the purchaser should insist on any requisitions, which the vendor might be unable or unwilling to remove or comply with, the vendor might, if he should think fit, annul the sale. The purchaser, having made some requisitions, the vendor, without answering any, rescinded the contract:—*Held*: he ought to have answered them, & having done so after a suit by the purchaser for specific performance, & *pltf.* having accepted the title, a decree was made against the vendor for specific performance, with costs.—*TURPIN v. CHAMBERS* (1861), 29 Beav. 104; 30 L. J. Ch. 470; 7 Jur. N. S. 459; 9 W. R. 363; 54 E. R. 566.

739. What amounts to insistence.]—Land was contracted to be sold under a condition that “if the purchaser should take any objection or make any requisition” which the vendor “was unable or unwilling to remove or comply with,” the vendor might rescind the contract. The purchasers made requisitions, & the vendor, for reasons stated, declined to comply with several of them. The purchasers insisted, & the vendor served them with notice that “being unable or unwilling to remove or comply with” the requisitions, he rescinded the contract. The purchasers, in reply, denied the vendor’s right to rescind, withdrew their requisitions, & stated that they were willing to complete:—*Held*: the contract had been duly rescinded.

A vendor cannot avail himself of such a condition arbitrarily, or unless he shows some reasonable ground for his unwillingness to answer the requisitions (*COTTON, L.J.*).—*Re DAMES & WOOD* (1885), 29 Ch. D. 626; 54 L. J. Ch. 771; 53 L. T. 177; 33 W. R. 685, C. A.

Annotations:—*Consd. Re Glenton & Saunders to Haden* (1885), 53 L. T. 434; *Re Terry & White’s Contract* (1886), 32 Ch. D. 14; *Re Jackson & Woodburn’s Contract* (1887), 37 Ch. D. 44; *Re Starr-Bowkett Bldg. Soc. & Sibun’s Contract* (1889), 42 Ch. D. 375. *Apld. Vowles v. British, etc. Bldg. Soc.* (1900), 44 Sol. Jo. 592. *Consd. Quinlon v. Horne*, [1906] 1 Ch. 596.

740. Conditions precedent to exercise.]—Where a sale takes place under a condition providing that if the purchaser makes any requisition which the vendor is unable or unwilling to comply with the vendor may, by notice in writing, annul the sale, the vendor may, if the purchaser insists upon a requisition, after being informed that the vendor is unable to comply with it, rescind the sale by notice, & such notice need not give the purchaser a time within which to waive his requisition.

A vendor entitled to an underlease for a term of twenty-four years, less three days, put up the property for sale, as held under a lease for twenty-four years, relying on the promise of the persons entitled to the three days to concur. They afterwards refused to concur:—*Held*: the vendor could not be considered to have made a misrepresentation, so as to disentitle him to the benefit of the above condition.

Upon the construction of that condition, there are four matters which must concur before there is a right to give a notice to rescind the contract. First, there must be an objection to the title; secondly, there must be an inability or unwilling-

ness on the part of the vendor to remove that objection; thirdly, there must be a communication to the purchaser of the existence of this inability or unwillingness; & fourthly, there must be an insisting by the purchaser on his objection, notwithstanding this communication (*CAIRNS, L.J.*).—*BUDELL v. SIMPSON* (1866), 2 Ch. App. 102; 36 L. J. Ch. 70; 15 L. T. 305; 12 Jur. N. S. 969; 15 W. R. 115, L. J.J.

Annotations:—*Consd. Re Dames & Wood* (1885), 29 Ch. D. 626. *Apld. Re Starr-Bowkett Bldg. Soc. & Sibun’s Contract* (1889), 42 Ch. D. 375; *Re Spindler & Mear’s Contract*, [1901] 1 Ch. 908. *Consd. Re Jackson & Haden’s Contract*, [1906] 1 Ch. 412. *Apld. Merrett v. Schuster*, [1920] 2 Ch. 240. *Consd. Re Des Reaux & Setchfield’s Contract*, [1926] Ch. 178. *Refd. Mawson v. Fletcher* (1870), 6 Ch. App. 91; *Gray v. Fowler* (1873), L. R. 8 Exch. 249; *Re Terry & White* (1886), 2 T. L. R. 327; *Isaacs v. Towell* (1898), 67 L. J. Ch. 508.

741. Condition for rescission if purchaser should “make” objection—Right to rescind on making of requisition.]—Land was contracted to be sold under a condition that if the purchaser should “make any objection to or requisition on the title” which the vendors should be “unable or unwilling to remove or comply with” the vendors might by notice in writing annul the contract. Requisitions were sent in, & thereupon the vendors, who were trustees, passed a resolution that as some of the requisitions could not be complied with, & others would cause great trouble & expense, notice should be given to rescind the contract; &, without attempting to answer them, they served a formal notice on the purchaser annulling the contract & stating that they were “unwilling to remove or comply with” the requisitions or any of them:—*Held*: the right to rescind arose directly the requisitions were made; the vendors were not bound to state their reasons for rescinding; though the word “unwilling” ought to be interpreted “reasonably unwilling,” yet on a general statement that the rescission was *bonâ fide*, & in the absence of any evidence of caprice or *mala fides*, the ct. ought not to infer that the vendors were acting unreasonably, & consequently the contract had been duly annulled.—*Re STARR-BOWKETTS BUILDING SOCIETY & SIBUN’S CONTRACT* (1889), 42 Ch. D. 375; 58 L. J. Ch. 651; 61 L. T. 346; 38 W. R. 1; 5 T. L. R. 701, C. A.

Annotation:—*Consd. Quinlon v. Horne*, [1906] 1 Ch. 596.

742. ———.]—Freeholds were put up for sale by auction subject to conditions which stated that the vendor was a trustee for sale, & that if any purchaser should make any objection or requisition which the vendor should be “unwilling to remove or comply with,” the vendor might annul the sale. The abstract of title supplied to a purchaser showed that the property was devised by the will of testator, who died in 1858, upon trust for A. for life, & after her death upon trust for sale & division amongst her children, but if A. died without leaving a child the property was to be conveyed to B. & C. as tenants in common. In answer to the purchaser’s requisitions the vendor gave the date & place of A.’s marriage & the names, but not the addresses, of her children. The purchaser pressed for the date of birth of any one child of A. living at her death in order to obtain a certificate of birth to prove that

notice in writing, to annul the sale, is to be taken strictly against the vendor. A vendor under such a condition is not entitled, on receiving requisitions, at once to rescind, but must answer each of them, & say whether he is unable or unwilling to comply, & bring the matter to a point with the purchaser, showing how far he is unable or unwilling to comply. The purchaser is to have a reasonable

time to consider whether he will insist upon his objections or take the land withdrawing his objections.—*MACGREGOR v. TEMPLETON* (1882), 8 V. L. R. 195.—*AUS.*

741 i. Condition for rescission if purchaser should make objection—Right to rescind on making of requisition.]—*Held*: where a contract for the sale of certain lands provided that if pur-

chaser made objections to title which vendor should be unwilling or unable to remove, the agreement should be null & void, & objections were made which the vendor was unable to remove, but where nevertheless he made a tender of a signed conveyance which was not accepted, that the agreement was at an end.—*FINE v. CREIGHTON* (1914), 26 O. W. R. 386; 6 O. W. N. 115; 16 D. L. R. 872.—*CAN.*

the trust for sale had arisen. The vendor not having this information in his possession, although he knew the address of one child & the address of the solrs. who acted for the other children, declined for reasons stated to comply with the requisition, & rescinded the contract. In an action by the purchaser for specific performance:—*Held*: the requisition was reasonable, under the circumstances the vendor's rescission was arbitrary & unreasonable, & therefore the purchaser was entitled to specific performance.—*QUINION v. HORNE*, [1906] 1 Ch. 596; 75 L. J. Ch. 293; 54 W. R. 344; 50 Sol. Jo. 272.

Annotation:—*Refd.* *Mills v. Cannon Brewery Co.*, [1920] 2 Ch. 38.

(c) *Time for Exercise.*

743. Must be within reasonable time.]—By a memorandum of Aug. 19, 1862, defts. contracted to sell certain freehold premises to plffs. for £2,850, £285 to be paid at once to the vendors' solr. as a deposit, & the residue on Oct. 29, & it was mutually agreed that the vendors should deliver an abstract, & that the purchasers should within twenty-one days after the delivery of the abstract, deliver in writing to the vendors' solr. their objections, if any, to, or requisitions on, the title. It then went on to provide that, "in case any objection or requisition shall be so delivered, & the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice, etc., to rescind their contract & return the deposit money, without interest or other compensation, notwithstanding any attempt made to remove or comply with such objection or requisition." An abstract was delivered to the purchasers' solr. on Sept. 6. On Sept. 22, objections & requisitions were delivered to the vendors' solr. On Nov. 4, which was six days after the time mentioned in the contract for the completion thereof, the vendors' solr. forwarded to the purchasers' solr. replies to the requisitions on title. Nothing further was done until Nov. 29, when plffs. issued a writ against the vendors' solr. to recover back the £285 deposited with him. The deposit was thereupon returned; & on Dec. 11, the vendors gave notice to rescind the contract. In an action brought by the purchasers on Dec. 16, to recover interest on the deposit, & their costs of investigating the title:—*Held*: the vendors were not bound to exercise their option to rescind immediately on receiving the objections & requisitions, or before the day named for the completion of the contract; but, time not being the essence of the contract, they might do so within a reasonable time, & their notice was given within a reasonable time.—*SHOREDITCH VESTRY v. HUGHES* (1864), 17 C. B. N. S. 137; 4 New Rep. 465; 33 L. J. C. P. 349; 10 L. T. 723; 12 W. R. 1106; 144 E. R. 55.

Annotation:—*Mentd.* *Kensington Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 118 L. T. 532.

744. After time fixed for completion.]—*SHOREDITCH VESTRY v. HUGHES*, No. 743, *ante*.

745. After judgment.]—A vendor sold an estate under conditions of sale, one of which was, that if the vendor should be unable or unwilling to meet

any requisition or objection, he might annul the sale & return the purchaser's deposit, without interest or costs, notwithstanding any previous negotiation or litigation. An objection to the title having been taken by the purchaser, the vendor took out a summons under Vendor & Purchaser Act, 1874 (c. 78), to decide the question, & judgment was given against him:—*Held*: it was too late for the vendor, after the judgment, to exercise his power of annulling the sale.—*RE ARBIB & CLASS'S CONTRACT*, [1891] 1 Ch. 601; 60 L. J. Ch. 263; 64 L. T. 217; 39 W. R. 305, C. A.

Annotation:—*Refd.* *Re Spindler & Mear's Contract* (1901), 84 L. T. 295.

746. Before final judgment.]—Property was sold under conditions of sale empowering the vendor by notice to rescind the sale if any objection should be insisted on which the vendor should be unable to remove, "notwithstanding any intermediate negotiation," & that on rescission the purchaser should be entitled to receive back his deposit without interest or costs. The condition was silent as to intermediate litigation. The purchaser insisted on an objection that the particulars misrepresented that the property was freehold, & that the title shown was only to a term under an underlease; & on this ground he commenced an action on Nov. 30, 1896, for rescission of the contract, return of his deposit, & payment of the expenses of investigating the title. Before further proceedings were taken the vendor, on Dec. 4, 1896, gave the purchaser notice of the rescission of the contract, & offered to repay the deposit. On the evidence it was held that the misrepresentation was not made out:—*Held*: the notice was in time, & the purchaser was only entitled to a return of his deposit without interest, & to the costs of the action up to the time of the receipt of the notice to rescind, & he must pay deft.'s costs as from that date.—*ISAACS v. TOWELL*, [1898] 2 Ch. 285; 67 L. J. Ch. 508; 78 L. T. 619; 42 Sol. Jo. 469.

Annotation:—*Refd.* *Proctor v. Pugh*, [1921] 2 Ch. 256.

747. Litigation pending.]—*ISAACS v. TOWELL*, No. 746, *ante*.

748. —Purchaser acting reasonably—Costs.]—A condition of sale providing that if the purchaser should insist on any requisition which the vendors should be unwilling to comply with, & should not withdraw the same after being required so to do, the vendors should, notwithstanding "any intermediate or pending negotiations, proceedings, or litigation," be at liberty to rescind the contract, & should thereupon return to the purchaser his deposit, "but without any interest, costs of investigating the title, or other compensation or payment whatsoever," does not oust the jurisdiction of the ct. to order the vendors to pay the costs of a litigation pending at the date of rescission.—*RE SPINDLER & MEAR'S CONTRACT*, [1901] 1 Ch. 908; 70 L. J. Ch. 120; 81 L. T. 295; 49 W. R. 410; 45 Sol. Jo. 361.

(f) *Waiver of Right.*

749. Expression of willingness to answer.]—One of the conditions of sale provided that, if the purchaser should raise objections to the title which

PART IV. SECT. 2, SUB-SECT. 7.—
B. (e).

743 i. Must be within reasonable time.]—*KER v. CROWE* (1873), 1 R. 7 C. L. 181.—*IR.*

745 i. After judgment.]—A condition of sale providing that "if the purchaser shall insist on any objection or requisition which the vendor shall

be unable or unwilling to remove or comply with, the vendor may . . . at any time thereafter, & notwithstanding any negotiation or litigation in respect of such objection or requisition, or attempts to remove or comply with the same, annul the sale, & shall thereupon return to the purchaser his deposit, but without any interest, costs, or other compensation whatsoever," does not entitle a vendor to

rescind without compensation after the purchaser's requisition has been upheld by a judicial decision.—*RE QUIGLEY & MCCLAY'S CONTRACT*, [1918] 1 I. R. 317.—*IR.*

PART IV. SECT. 2, SUB-SECT. 7.—
B. (f).

m. Negotiations & attempt to answer.]—*McFARLANE v. WILKINSON*, [1927]

Sect. 2.—Rights under particular conditions: Sub-sect. 7, B. (f) & (g); sub-sect. 8, A. & B.; sub-sect. 9, A.]

the vendor should not be able or willing to remove, the vendor should be at liberty to rescind the contract, & that all objections which should not be taken, in writing, within ten days after the delivery of the abstract, should be considered as waived:—*Held*: the condition referred to the first delivery of objections, & if the vendor expressed his willingness to answer them, he could never afterwards rescind the contract.—*TANNER v. SMITH* (1840), 10 Sim. 410; 59 E. R. 073; *on appeal*, 4 Jur. 310, L. C.

Annotations:—Apld. Morley v. Cook (1842), 2 Hare, 106. *Distd.* Shoreditch Vestry v. Hughes (1864), 17 C. B. N. S. 135. *Apld.* Gardom v. Lee (1865), 3 H. & C. 651. *Refd.* Bennett v. Harrison (1843), 7 Jur. 436; Blackburn v. Smith (1848), 2 Exch. 783; Kell v. Nokes (1863), 32 L. J. Ch. 785; Mawson v. Fletcher (1870), 18 W. R. 798

750. —[Plff. purchased land of defts., subject amongst others to the following conditions of sale: (1) that within twenty-one days from the date of the sale the vendors shall deliver an abstract of title to the purchaser; (b) that if any purchaser make any objections or requisitions in respect of the title within thirty-five days from the day of sale, the vendors shall be at liberty at their election either to answer such objection or to rescind the sale on repaying the deposit without interest, & without incurring any liability to pay any of the expenses for investigating the title; (c) that all rights of the vendors to hold the purchaser to have waived all objections or requisitions not made within the time specified as aforesaid, & such right of the vendors to rescind the contract shall not be deemed to be waived or in any manner affected or prejudiced by any negotiation as to any objections or requisitions or attempt to obviate or comply with the same. The sale took place on July 30, 1861, & a deposit of £100 was paid to the vendors' solr. The abstract of title was not delivered until Nov. 2. On Nov. 8 the vendees' solr. wrote to the vendors' solr., stating that the vendors, who were trustees, in his opinion "had no power to sell, & that it was not worth while going into the title"; he also wrote on Nov. 28, desiring "to know whether the vendors would rescind the contract or insist upon specific performance." On Nov. 30 the vendors' solr. answered, "That he was satisfied that they had power to sell, & that his clients would expect the vendee to complete the purchase." The vendees thereupon incurred expenses in investigating the title, & it turned out that the trustees had no power to sell, & they, on Dec. 31, 1861, declined to complete the purchase, & claimed to be paid interest on their deposit & the expenses of investigating the title. A further correspondence was continued until Nov. 17, 1862:—*Held*: on these facts, the vendors could not elect to rescind the contract under condition & there was no negotiation within the meaning of the condition, & therefore the vendee was entitled to recover interest on the deposit & the expenses of investigating the title.—*GARDOM v. LEE* (1865), 3 H. & C. 651; 6 New Rep. 161; 34 L. J. Ex. 113; 12 L. T. 430; 11 Jur. N. S. 393; 13 W. R. 719; 159 E. R. 687.

Annotation:—Distd. Re Deighton & Harris's Contract, [1898] 1 Ch. 458.

V. L. R. 359; 49 A. L. T. 34; [1927] Argus L. R. 252.—AUS.

n. —[The benefit of a provision in a contract for the sale of land that if any objection or requisition be made by the purchaser which the vendor shall be unable or unwilling to

comply with, the vendor shall be at liberty, by notice in writing, to rescind the agreement, is lost if the vendor's solr. attempts to answer the requisitions & enters into negotiations with the purchaser's solr. in regard to them. A vendor should either cancel the contract when he first reads the requi-

751. Continuance of treaty for completion of title after first objection.]—MORLEY v. COOK, No. 616, *ante*.

752. Election to insist on specific performance.]—GARDOM v. LEE, No. 750, *ante*.

753. —[Motor Carriage Supply Co., Ltd. v. British & Colonial Motor Co., Ltd. (1901), 45 Sol. Jo. 672.

754. —Vendor submitting to jurisdiction of court.]—Where leasehold property which is sold in separate lots is held under one lease, it is incumbent on the vendor to state that fact in plain & distinct terms.

Leasehold property was put up for sale by auction in lots, being described in the particulars as "long leaseholds, held for upwards of ninety years unexpired, at various ground rents," with a statement that as to lots 1 & 2 a separate lease would be granted to the purchaser for ninety-eight years from a day named, at a peppercorn rent, & that as to lot 3, a lease would be granted for the same term & from the same day at a rent of £60; one of the conditions stipulating that no purchaser should call for the production of the vendor's title, or make any objection in respect of his right to grant the lease. There was also the usual condition, enabling the vendor to rescind the contract on returning the deposit without interest. The purchaser of lots 1 & 2, having subsequently discovered that such lots were held with lot 3, under one lease, & were jointly liable therewith to the £60 rent, objected to complete without a release from the superior landlord in respect of the liability of lots 1 & 2, under the original lease. The release was refused, & upon bill filed by the vendor for specific performance, the ct. holding that there was no sufficient notice of the fact that the premises purchased were held with others under one lease, & that the condition above mentioned did not apply to the purchaser's objection, dismissed the bill with costs, & decreed a return of the deposit with interest.

That condition does not apply, & I shall make the order asked. I think the true principle to be this, that the vendor, by filing his bill in this ct. submits himself to the jurisdiction of the ct. as to the whole matter of the contract (*MALINS, V. (C.)*).—*SHEARD v. VENABLES* (1867), 36 L. J. Ch. 922; 17 L. T. 10; 15 W. R. 1166.

755. Vendors purporting to sell as trustees—Subsequently offering to sell as personal representatives.]—By a contract containing the usual rescission clause the vendors agreed to sell as trustees. Subsequently they discovered that on the construction of the will they were unable to make a title as trustees, but they offered to convey as legal personal representatives. This course the purchaser declined to adopt, but he offered to accept a new contract. This the vendors in turn refused & purported to rescind the contract:—*Held*: the vendors had not by their conduct deprived themselves of the right to rescind.—*Re MILNER & ORGAN'S CONTRACT* (1920), 89 L. J. Ch. 315; 123 L. T. 168; 64 Sol. Jo. 463.

(g) Rescission or Compensation.

756. Contract by agent without authority.]—HAMMOND v. CHUBB (1915), 138 L. T. Jo. 360.

sitions: or, when embarking on the attempt to comply with them, or to remove the objections, should reserve to himself the benefit of the right to rescind further on during the negotiations.—*CRABBE v. LITTLE MOSES v. LITTLE* (1907), 9 O. W. R. 561; 14 O. L. R. 631.—CAN.

SUB-SECT. 8.—IDENTITY.

A. In General.

757. Sufficiency of identification—On sale of copyhold property.]—The generality & vagueness of descriptions of copyhold property on the ct. rolls are so well known, that a vendor is not bound to show how the description on the ct. roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed & passed under that description for upwards of sixty years.—*LONG v. COLLIER* (1828), 4 Russ. 267; 38 E. R. 806.

*Annotations:—***Refd.** *Townsend v. Champenowne* (1839), 3 Y. & C. Ex. 505; *Abbott v. Swoode* (1852), 19 L. T. O. S. 311; *Wilkinson v. Hartley* (1852), 15 Beav. 183; *Freer v. Hesse* (1853), 4 De G. M. & G. 495.

758. Identity is matter of title.]—Identity is as much matter of title as devolution.—*BROWN v. WALES* (1872), L. R. 15 Eq. 142; 42 L. J. Ch. 45; 27 L. T. 410; 21 W. R. 157.

*Annotation:—***Mentd.** *Lyell v. Kennedy* (1883), 8 App. Cas. 217.

759. Effect of stipulation limiting identification—Where descriptions in documents differ.]—By the conditions of sale, no further evidence of identity was to be required than what was afforded by the abstract & the documents therein abstracted. The descriptions held in the documents differed amongst themselves, & from the description in the particulars of sale:—**Held:** the purchaser was entitled to have further proof of the identity.—*FLOWER v. HARTOPP* (1843), 6 Beav. 476; 12 L. J. Ch. 507; 1 L. T. O. S. 252, 384; 7 Jur. 613; 49 E. R. 910.

*Annotation:—***Refd.** *Nicoll v. Chambers* (1852), 11 C. B. 996.

760. — Vendor exempt from producing further evidence.]—(1) A clause in an agreement for purchase, that purchaser is not to require any further proof of identity than that given by the title deeds, exempts the vendor from producing further evidence; but he cannot force the title on the purchaser unless the evidence is complete upon the deeds.

(2) On the sale of a house or stables in a *cul de sac*, the vendor is not bound to show a title to the roadway.—*CURLING v. AUSTIN* (1862), 2 Drew. & Sm. 129; 10 W. R. 682; 62 E. R. 570.

*Annotations:—***Generally, Refd.** *Upperton v. Nickolson* (1871), 6 Ch. App. 436; *Lawrie v. Lees* (1881), 7 App. Cas. 19; *McGrory v. Alderdale Estate Co.*, [1918] A. C. 503.

761. — Evidence must be complete on deeds.]—*CURLING v. AUSTIN*, No. 760, *ante*.

762. — Coupled with representation as to acreage.]—One of the articles of the contract provided that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds:—**Held:** this was merely a conveyancing condition as to identity, & coupled with the representation as to the acreage, it did not estop the co. from rescinding on the ground of deficiency in acreage.—*ABERAMAN IRONWORKS v. WICKENS* (1868), 4 Ch. App. 101; 20 L. T. 89; 17 W. R. 211, L. C.

*Annotations:—***Refd.** *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165; *Torrance v. Bolton* (1872), L. R. 14 Eq. 124; *Mycock v. Beaton* (1879), 13 Ch. D. 384; *Fleming v. Loe*, [1901] 2 Ch. 594. **Mentd.** *Goodford v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307.

763. Right of purchaser to affidavit—That best description is given.]—*BIRD v. FOX* (1853), 11 Hare, 40; 68 E. R. 1178.

B. Mixed Land of Different Tenure.

764. Effect of stipulation limiting identification—Sale of freehold & copyhold.]—A. became the

purchaser of a mansion house & park under conditions of sale, which stated that the whole property was freehold except 8 acres which were copyhold, but undistinguished except as to not including any of the buildings. The abstract of title having been delivered & discussions thereon having taken place, which raised difficulties in the way of completing the purchase, a supplemental agreement was entered into, detailing what requisitions as to title, etc., should be complied with. Among these requisitions was one in the following words: "Declaration of identity of lands mentioned in deeds to those now sold." On a bill filed by the vendor for specific performance:—**Held:** the supplemental agreement was a substitution for the original contract, & A. was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises so as to show that the latter did not include any of the buildings.—*DAWSON v. BRINCKMAN* (1850), 3 Mac. & G. 53; 42 E. R. 181, L. C.

765. — — & timber on both lands.]—*CROSSE v. LAWRENCE*, No. 583, *ante*.

766. — On sale of freehold & leasehold.]—In a contract for sale the lands were described as partly freehold & partly leasehold. The title deeds did not clearly define the boundaries & extent of the two properties; but the uncertainty did not arise from an instrument incapable of legal construction in that respect:—**Held:** such an uncertainty was not an objection to a decree for specific performance.—*MONRO v. TAYLOR* (1852), 3 Mac. & G. 713; 21 L. J. Ch. 525; 19 L. T. O. S. 97; 42 E. R. 434, L. C.

*Annotation:—***Refd.** *Abbott v. Calton* (1853), 22 L. J. Ch. 936.

SUB-SECT. 9.—MISDESCRIPTION.

A. In General.

767. Application of provision for error—To intentional misrepresentation.]—If it is provided by conditions of sale, that any error or misstatement in the particular shall not vitiate the sale, but that an allowance shall be made for it in the purchase-money, this will be extended only to any error or misstatement inserted through ignorance or inadvertency, & the sale will still be vitiated by a misstatement introduced with a view to raise the apparent value of the premises.—*NORFOLK (DUKE) v. WORTHY* (1808), 1 Camp. 337; 170 E. R. 977, N. P.

*Annotations:—***Consd.** *Leach v. Mullett* (1827), 3 C. & P. 115; *Flight v. Booth* (1834), 1 Bing. N. C. 370. **Apld.** *Taylor v. Bullen* (1850), 5 Exch. 779. **Refd.** *Wright v. Wilson* (1832), 1 Mood. & R. 207. **Mentd.** *Bickerton v. Burrell* (1816), 5 M. & S. 383; *Marston v. Roe d. Fox* (1838), 8 Ad. & El. 14; *Humble v. Hunter* (1848), 12 Q. B. 310; *Re Davis & Cavey* (1888), 40 Ch. D. 601; *Ellis v. Goulton*, [1893] 1 Q. B. 350.

768. — —.]—No compensation in a case of great intentional misrepresentation, although so provided by the conditions of sale in case of "any error or misstatement" in the particulars.—*STEWART v. ALLISTON* (1815), 1 Mer. 26; 35 E. R. 587, L. C.

*Annotations:—***Consd.** *Taylor v. Martindale* (1842), 1 Y. & C. Ch. Cas. 658. **Apld.** *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *Brooke v. Rounthwaite* (1846), 5 Hare. 298; *Leyland v. Illingworth* (1860), 2 De G. F. & J. 248. **Distd.** *Denny v. Hancock* (1870), 18 W. R. 566. **Refd.** *Trower v. Newcombe* (1813), 3 Mer. 704; *Scott v. Hanson* (1826), 1 Sim. 13; *Flight v. Booth* (1834), 1 Bing. N. C. 370; *Price v. Macaulay* (1852), 2 De G. M. & G. 339; *Re Davis & Cavey* (1888), 40 Ch. D. 601.

intended to cover difficulties arising from facts uncommunicated, they will not preclude the purchaser from taking the objection.—*JACKSON v. WHITEHEAD* (1860), 28 Beav. 154; 6 Jur. N. S. 133; 54 E. R. 324.

776. ———.] —(1) Neither a condition of sale which provides that a property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, nor the provisions of Conveyancing Act, 1881 (c. 41), s. 3 (3), relieve a vendor from disclosing any incumbrance or liability of which he is aware or which he has the means of knowing.

(2) Where a vendor of property or his agent makes a statement which is calculated to mislead the purchaser into believing it to be a statement of facts within his knowledge & the purchaser, relying on such statement, enters into a contract to purchase the property & pays a deposit the vendor cannot enforce the contract, but the purchaser is entitled to rescind the contract & to recover the deposit from the vendor.—*NOTTINGHAM PATENT BRICK & TILE CO. v. BUTLER* (1886), 16 Q. B. D. 778; 55 L. J. Q. B. 280; 54 L. T. 444; 34 W. R. 405; 2 T. L. R. 391, C. A.

Annotations:—As to (1) Consd. Simpson v. Gilley (1922), 92 L. J. Ch. 194. *As to (2) Consd. Beyfus v. Lodge*, [1925] 1 Ch. 350. *Refd. Saxby v. Thomas* (1890), 63 L. T. 695. *Generally, Refd. Collins v. Castle* (1887), 36 Ch. D. 243; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Spicer v. Martin* (1888), 14 App. Cas. 12; *Bower v. Sandford* (1889), 5 T. L. R. 570; *Re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 342; *Davis v. Leicester Corpn.*, [1894] 2 Ch. 208; *Nalder & Collyer's Brewery Co. v. Harman* (1900), 82 L. T. 591; *Rogers v. Hoscgood*, [1900] 2 Ch. 388; *Formby v. Barker*, [1903] 2 Ch. 539; *Whitehouse v. Hugh*, [1906] 1 Ch. 253; *Reid v. Bickorstaff*, [1909] 2 Ch. 305; *Willis v. St. John*, [1910] 1 Ch. 84; *Kelly v. Barrett*, [1924] 2 Ch. 379.

B. Recovery of Compensation.

(a) In General.

777. Application of condition for compensation
General rule—Not applicable to intentional misrepresentation.—*STEWART v. ALLISTON*, No. 768, *ante*.

778. ———.] —*DIMMOCK v. HALLETT*, No. 322, *ante*.

779. ———.] —**Compensation not ascertainable.**—*WHITE v. CUDDON*, No. 305, *ante*.

780. ———.] —**Number of trees not stated.**—*BROOKE (LORD) v. ROUNTHWAITE*, No. 306, *ante*.

781. ———.] —**Misstatement as to occupation under lease.**—Purchaser not entitled to compensation, where the misdescription consisted in stating that the premises sold were in the joint occupation of A. & B. as lessees, the fact being that the premises had been demised to C., & by C. assigned to A., who was, together with B., in the occupation of them at the time of sale. The purchaser could not, in this case, be compelled to accept an indemnity.—*RIDGWAY v. GRAY* (1849), 1 Mac. & G. 109; 1 H. & Tw. 195; 41 E. R. 1204, L. C.

782. ———.] —**Right to take coal.**—Advertisement of an estate for sale by auction described as containing "coal which was then in the course of working in the adjoining estate; the vendor having no right to the coal & minerals under the surface; the conditions of sale, which did not allude to the vendor having such a right, & which at the sale was stated by the auctioneer to be in another party, stipulated that the vendor's title should be deemed accepted unless the purchaser declared within one month after the delivery of the abstract of title his dissatisfaction, & that if any error, misstatement, or omission should be discovered in the description of the property, the same should not vitiate, the sale, but should be the

subject for compensation. On the face of the abstract, which was duly delivered, the right to dig coals, etc., appeared not to be in the vendors. A purchaser made no objection to the vendors' title within the stipulated time. On a claim filed by the vendors for specific performance, & a cross-claim by the purchaser for compensation, the judge dismissed them both without costs. An appeal from that decree by the purchaser was dismissed &, by consent, a decree was made for specific performance.

Whether the ct. could grant compensation, even if it were of opinion that the case required it, is a question of some doubt. I am of opinion that it would not grant compensation for the right to take coal (*LORD ST. LEONARDS, C.*).—*SMITHSON v. POWELL, POWELL v. SMITHSON* (1852), 20 L. T. O. S. 105, L. C.

783. ———.] —**Effect of purchaser's knowledge of condition of land.**—*LETT v. RANDALL*, No. 832, *post*.

784. ———.] —*Re EDWARDS TO DANIEL SYKES & Co., LTD.*, No. 830, *post*.

785. ———.] —The particulars of a contract for the sale of land contained a misdescription of the quantity of land in one parcel:—*Held*: the purchaser was not entitled to compensation under the contract, as he was well acquainted with the land he was buying.—*COBBETT v. LOCKE-KING* (1900), 16 T. L. R. 379.

786. ———.] —**Defect of title.**—*SHERWOOD v. ROBINS*, No. 863, *post*.

787. ———.] —*Ex p. RICHES* (1883), 27 Sol. Jo. 313, C. A.

Annotation:—Apld. Debenham v. Sawbridge, [1901] 2 Ch. 98.

788. ———.] —*DEBENHAM v. SAWBRIDGE*, No. 872, *post*.

789. ———.] —**Non-disclosure of notice to pave.**—*Re LEYLAND & TAYLOR'S CONTRACT*, No. 577, *ante*.

790. Condition against non-completion—Whether purchaser precluded from compensation.—Where it was stated by one of the conditions of sale that the quantity of a particular lot of the estates sold under a decree was stated from estimation, & that the purchaser should not object to complete his purchase if the quantity should turn out less than that stated:—*Held*: the purchaser was not, by such condition, precluded from his right to compensation, in the event of the quantity having turned out deficient.—*FROST v. BREWER* (1839), 3 Jur. 165.

791. Against trustee—To prejudice of cestui que trust.—*WHITE v. CUDDON*, No. 305, *ante*.

792. Construction of condition—Error must be such as would annul contract.—*LESLIE v. TOMPSON*, No. 571, *ante*.

(b) Time for Claim.

793. After order for reference to master.—A purchaser, who was deft. in a suit for specific performance, did not in his answer mention any warranty given, or representation made by the vendor, & insisted merely that a good title was not shown; a reference on the question of title was ordered; the master reported in favour of the title, & a decree for specific performance was pronounced. After the order of reference had been made, deft. discovered that the timber on the estate, which constituted its principal value, was much less in quantity than it had been represented to be in a statement, the accuracy of which was alleged to have been warranted at the sale; but the fact of such warranty having been given was strongly controverted; under these circumstances leave was given to file a supplemental bill in the nature of a bill of review, in order that deft. might

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815. — Miscalculation by surveyor.]—Purchasers who were in occupation of certain premises, contracted to buy for £1,100, relying on a valuation shown to them by the vendor, which described the premises as containing about 1,244 square yards, & valued them at £1,200. The particulars stated that the premises contained about 1,200 square yards, & provided that, in case of error or mistake in the description compensation should be given or allowed. The purchasers discovered that the premises contained only 935 square yards, the surveyor having made a miscalculation. Neither vendors nor purchasers previously knew the actual area. The purchasers claimed compensation under the condition which the vendors refused offering to cancel the contract. On a summons by the purchasers under Vendor & Purchaser Act, 1874 (c. 78):—*Held*: the purchasers were entitled to a reference as to what deduction should be made from the contract price.—*ASPINALLS TO POWELL & SCHOLEFIELD* (1889), 60 L. T. 595; 5 T. L. R. 446.

816. Condition excluding compensation—Purchaser having notice that area may be less—Statement in court rolls & title deeds.]—(1) A contract of sale by auction described the property as “the freehold cottage & copyhold paddock, comprising 1 acre 2 roods 8 poles, situate, etc., described in the particulars attached hereto as lot 1.” In the annexed particulars, lot 1 was thus described:—“The property is freehold, with the exception of the paddock, which is copyhold, & comprises 1 acre 2 roods 8 poles, situated, etc. The premises consist of a double cottage, etc., & paddock, in the occupation of P.” The contract contained the usual clause, that the title & conveyance should be completed according to the conditions of sale. The sixth condition was as follows: “The several properties comprised in the foregoing particulars are presumed to be correctly described; & the quantities of the land shall be taken as stated, whether more or less, although the title deeds & ct. rolls state such quantities to be less, without any equivalent or compensation on either side; & no other evidence of identity shall be required than that furnished by the documents of title; & the statements contained therein shall be deemed conclusive evidence of the identity of the properties respectively.” The abstract of title delivered showed a title only to 3 roods 24 poles in the whole:—*Held*: the purchaser, having distinct notice by the above condition that the deeds would show a less quantity than that mentioned in the particulars & contract of sale, was bound to take the title as offered; & failing to do so, the vendor was entitled to resell, & to claim the deposit as forfeited.

(2) It is no objection to a title, upon a sale by auction, that a memorandum appears amongst the title deeds showing that a former owner of the property, under whom the vendor derives title, had raised money thereon by way of equitable mtge., & there is no evidence that such charge has been released, other than that afforded by the vendor's possession of the deeds & memorandum.—*NICOLL v. CHAMBERS* (1852), 11 C. B. 996; 138 E. R. 770; *sub nom.* *NICHOLL v. CHAMBERS*, 21 L. J. C. P. 54; 18 L. T. O. S. 243.

Annotation:—As to (2) *Consd.* *Farmer v. Turner* (1899), 15 T. L. R. 522.

817. — Substantial error.]—On a sale one of the conditions provided that if the purchasers should make any objection to, or requisition as to the title, evidence, conveyance, or as to compensation or otherwise which the vendor should be

unwilling to remove or comply with, the vendor should be at liberty to vacate for sale.

Another condition was that the admeasurements were presumed to be correct, but that if any error were discovered therein no allowance should be made or required either way. Another provided that if any error of any kind should be made in the description of the premises, such error should not invalidate the sale, but that compensation should be settled by a referee named in the condition. On a bill for specific performance by the purchaser with a deduction to be assessed by the referee for a deficiency in quantity of nearly one-half:—*Held*: although the ct. would not have enforced against the purchaser the condition as to erroneous admeasurements where the error was so great that condition was sufficient to exclude any right in the purchaser to a specific performance with a deduction, & the ct. in his suit for that relief decreed specific performance without deduction.—*CORDINGLEY v. CHEESEBOROUGH* (1862), 4 De G. F. & J. 379; 6 L. T. 342; 26 J. P. 614; 8 Jur. N. S. 755; 45 E. R. 1230, L. C.

Annotations:—*Distd.* *Whittemore v. Whittemore* (1869), 1 L. R. 8 Eq. 603. *Consd.* *Lett v. Randall* (1883), 49 L. T. 71. *Apld.* *Re Terry & White's Contract* (1886), 32 Ch. D. 14. *Consd.* *Jacobs v. Revell*, [1900] 2 Ch. 858.

818. ——*J*—At a sale by auction under a decree the property sold was stated in the particulars to contain 753 square yards or thereabouts, & one of the conditions of sale provided that if any error, misstatement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 square yards only:—*Held*: the condition only applied to small errors, & did not cover so large a deficiency, & the purchaser was entitled to compensation.—*WHITTEMORE v. WHITTEMORE* (1869), L. R. 8 Eq. 603.

Annotations:—*Distd.* *Denny v. Hancock* (1870), 18 W. R.

v. Baker (1883), 11 Q. B. D. 255; *Re Fawcett's Trustees & Holmes* (1889), 61 L. T. 105.

819. ——*J*—*Re TERRY & WHITE'S CONTRACT*, No. 770, *ante*.

820. — Exclusion of purchaser's right to specific performance with deduction.]—*CORDINGLEY v. CHEESEBOROUGH*, No. 817, *ante*.

821. — Error in estimation of area.]—(1) After the purchaser of real estate has taken a conveyance, & the purchase-money has been paid, no action can be maintained for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such errors amount to breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser.

(2) In the conveyance to a purchaser the land sold was described as two parcels, each defined in the most particular manner by metes & bounds, & other details, & each “as containing by estimation 1½ acres or thereabouts.” Subsequently to the conveyance the lands were measured, & the two parcels together amounted to only 2 acres 1 rood 12 poles:—*Held*: this misdescription as to quantity did not amount to a breach of any warranty so as to entitle a purchaser to maintain an action for damages against the vendor.

(3) It is a question of fact whether the parcels have or have not, in truth & in fact, been estimated to contain the quantity stated or thereabouts, the answer to which will mainly depend on whether the error is so small as to lead to the assumption that it might have been so estimated, or so great

as to make the estimate an irrational or impossible one.—*JOLIFFE v. BAKER* (1883), 11 Q. B. D. 255; 48 L. T. 966; 47 J. P. 678; *sub nom.* *JOLIFFE v. BAKER*, 52 L. J. Q. B. 609; 32 W. R. 59.

Annotations:—*As to* (1) *Apld.* *Nash v. Wooderson* (1884), 52 L. T. 49. *Dtd.* *Palmer v. Johnson* (1884), 13 Q. B. D. 351. *Consd.* *Saunders v. Cockrill* (1902), 87 L. T. 30.

822. Right of vendor to compensation—In respect of excess.—*LESLIE v. TOMPSON*, No. 571, *ante*.

823. ——— “About sixty-three feet.”—*BOURNE v. LONDON & COUNTY LAND & BUILDING CO.*, [1885] W. N. 109.

824. ——— “Forty acres or thereabouts.”—Vendors agreed to sell a parcel of land “containing forty acres or thereabouts, be the same more or less, delineated in the plan hereunto annexed, & therein edged pink,” for £9,000. The agreement provided for the purchaser taking partial conveyances from time to time at prices fixed with reference to quantity, & also that “if any mistake or omission be made in the description of the property the same shall not vitiate or annul the sale, but a compensation or an allowance shall be made” as therein provided. The purchaser had taken conveyances of part of the land; but the vendors, having discovered that the acreage was 41 acres, 1 rood, 10 perches, instead of 40 acres, refused to convey the residue without compensation being made for the excess of 1 acre, 1 rood, 10 perches:—*Held*: the vendors were not entitled to any compensation, & must convey the residue on payment of the balance of the purchase-money.—*ORANGE TO WRIGHT* (1885), 54 L. J. Ch. 590; 52 L. T. 606.

ii. Easements.

825. Condition excluding compensation—Innocent misrepresentation by auctioneer—As to existence of right of way.—In Aug. 1878, deft. B. offered for sale by public auction a lease of a public-house. By the conditions of sale it was provided that “the lease to be granted shall contain the covenants, clauses, & provisions, & be in the form or to the effect set forth in the draft lease which will be produced on the sale & may be seen at the office of the auctioneers for seven days previous to the day of sale,” & that “the property is presumed to be correctly described; but, as the premises may be viewed & the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof; & no error, misdescription or omission in the particulars shall annul the sale, & no compensation shall be required for any such error, misdescription, or omission.” There was no reference either in the conditions of sale or in the draft lease to the existence of any right of way from the garden of the public-house to Hampstead Heath; but at the time of the sale, the auctioneer *bonâ fide*, but without any authority from B., & acting entirely upon an inference drawn by himself from the appearance of the premises, & believing that there was a right of way through same & over the private road & so to Hampstead Heath, stated publicly that there was such a way, & spoke of it as enhancing the value of the premises:—*Held*: the evidence of what passed at the time of the sale was admissible as against the vendor; but no action could be maintained against him to recover compensation for this innocent misrepresentation by the auctioneer.—*BRETT v. CLOUSER* (1880), 5 C. P. D. 376.

Annotation:—*Apld.* *Angel v. Jay*, [1911] 1 K. B. 666.

iii. Reservation of Minerals.

826. Condition allowing compensation.—*SMITHSON v. POWELL*, *POWELL v. SMITHSON*, No. 782, *ante*.

827. ———.]—*Re NEALE & DREW'S CONTRACT* (1897), 41 Sol. Jo. 274.

iv. Value of Property.

828. Condition providing for compensation—Rental.—*CANN v. CANN*, No. 796, *ante*.

829. ———.]—Pltf. purchased at a sale by auction certain property belonging to deft. described in the particulars of sale as producing a net annual rental of £39, & one of the conditions of sale was, “if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser as the case may require.” After the conveyance, without any covenants, had been executed by deft. to pltf., it was discovered by pltf. that the rental of £39 was a gross rental, the net rental being considerably less:—*Held*: notwithstanding the error was not discovered until after the conveyance, pltf. was entitled to compensation under the conditions of sale.—*PALMER v. JOHNSON* (1884), 13 Q. B. D. 351; 53 L. J. Q. B. 348; 51 L. T. 211; 33 W. R. 36, C. A.

Annotations:—*Expld.* *Clayton v. Leech* (1889), 41 Ch. D. 103. *Consd.* *Saunders v. Cockrill* (1902), 87 L. T. 30. *Refd.* *Re Orange & Wright's Contract* (1885), 52 L. T. 606; *A.-G. & Hare v. Met. Ry.* (1893), 69 L. T. 811; *Mason v. Schuppisser* (1899), 81 L. T. 147; *Greswolde-Williams v. Barnely* (1900), 49 W. R. 203; *De Lassalle v. Guildford*, [1901] 2 K. B. 215.

830. ———.]—**Purchaser's knowledge of circumstances.**—The particulars of sale of certain leasehold property described the same as being occupied at an “annual rental,” but omitted to state that the vendor as landlord paid the rates & taxes on the property, the tenancy being a monthly one. The purchasers alleged that they were thereby led to infer that the tenancy was a yearly tenancy, & that the tenant paid the rates & taxes. Accordingly they claimed compensation pursuant to the conditions of sale. The vendor asserted that the purchasers had knowledge of the true facts of the case at the time of the sale, & evidence was adduced to prove that in the auction room a question was raised by a person present at the sale on the words “annual rental,” & that in reply to an inquiry it was distinctly stated by the auctioneer that the landlord paid the rates & taxes, & that the tenancy was a monthly tenancy:—*Held*: the evidence was admissible, & accordingly the purchasers must be taken to have had knowledge of the facts, & to have known all the circumstances affecting the property for which they bid, & were not entitled to compensation.—*Re EDWARDS TO DANIEL SYKES & Co., LTD.* (1890), 62 L. T. 445.

Annotation:—*Refd.* *Re Hare & O'More's Contract*, [1901] 1 Ch. 93.

831. ———.]—**Manorial fines—Annual profits exceeding estimated amount.**—*WHITE v. CUDDON*, No. 305, *ante*.

832. ———.]—**Time at which reversion of leasehold falls in.**—Where the particulars of sale of certain leasehold property contained a misstatement, thereby causing the reversion to the full rack rental value of the premises to appear as if it would fall in eight years earlier than actually was the case, of which misstatement the vendors asserted that the purchaser had knowledge at the time of the sale, although the evidence on this point was

822.1. Right of vendor to compensation—In respect of excess.—*MONAGHAN v. GLEESON* (1887), 13 V. L. R. 384.—**AUS.**

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conflicting; & where the conditions of sale provided that any error or misstatement in the particulars should not annul the sale, but compensation should be made to or by the purchaser, as the case might be:—*Held*: even if the purchaser were aware of the misstatement in the particulars, the vendors were not thereby relieved from the liability to make him compensation, in accordance with the terms of the conditions of sale.—*LETT v. RANDALL* (1883), 49 L. T. 71.

Annotations:—*Distd.* *Cobbett v. Locke-King* (1900), 16 T. L. R. 379; *Re Hare & O'More's Contract*, [1901] 1 Ch. 93.

v. Vendor's Interest Different from Interest Offered for Sale.

833. Condition allowing compensation—Under-lease described as lease.—*MADELEY v. BOOTH*, No. 560, *post*.

834. — Lease described as renewable.—Customary leasehold property held for a term of twenty-one years was described as customary renewable leasehold, & sold subject to usual condition as to compensation in case of misdescription, error, or mistake in the particulars:—*Held*: on claim by the purchaser:—*Held*: the error was one of description, & not a defect of title, & *pltf.* was entitled under the condition to a decree for specific performance; & an inquiry was directed in respect of the compensation for the difference in value between the actual & the stated tenure of the property.—*PAINTER v. NEWBY* (1853), 11 Hare, 26; 1 Eq. Rep. 173; 1 W. R. 284; 68 E. R. 1172; *sub nom.* *NEWBY v. PAYNTER*, 22 L. J. Ch. 871; 21 L. T. O. S. 299; 17 Jur. 483.

Annotations:—*Refd.* *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212; *Ashburner v. Sewell*, [1891] 3 Ch. 405.

835. — Life estate sold as fee simple.—*Ex p. RICHES* (1883), 27 Sol. Jo. 313, C. A.

Annotation:—*Consd.* *Debenham v. Sawbridge*, [1901] 2 Ch. 98.

836. Condition excluding compensation—Under-lease described as lease.—*TOMPKINS v. TRATT* (1915), 139 L. T. Jo. 541.

vi. Other Cases.

837. Condition allowing compensation—Road described as "made up"—Misdescription as to extent—Measure of compensation.—Land was sold under a condition that in case of misdescription compensation should be paid. A road over the land was described in the particulars as "made up." The *ct.* held there was a misdescription as to the extent to which the road was made up:—*Held*: the measure of compensation to the purchaser was not the sum it would cost to make up the road to the extent represented; but the difference between the value of the property as it existed at the time of purchase & the value it would have had if the road had been "made up."—*Re CHIFFERIEL, CHIFFERIEL v. WATSON* (1880), 40 Ch. D. 45; 58 L. J. Ch. 263; 60 L. T. 99; 37 W. R. 120; 5 T. L. R. 14.

Annotation:—*Refd.* *Re Aspinall & Powell's Contract* (1889), 5 T. L. R. 446.

838. — Land not sold for building purposes—Underground sewer.—The conditions of sale relating to a dwelling-house & grounds, not sold for building purposes, provided (*inter alia*) that any error or omission which might be discovered in the particulars of sale affecting the nature of the property should not annul the sale, but should be a matter for compensation; & that the property was sold subject to all rights of way or other easements. A deed of mutual covenants, subject

to which also the property was sold, precluded any building on the property.

The purchaser discovered that there was a public sewer passing under the garden at the rear of, & some distance from, the house, & a manhole used for obtaining access to the sewer.

The vendor was entirely ignorant at the time of the sale of the existence of such sewer. The sewer was vested in the local authority under Public Health Act, 1875 (c. 55), & no buildings could be erected over it without the sanction of the local authority. The purchaser objected to complete, on the ground that the vendor was unable to make a title to the property:—*Held*: the circumstances did not justify the *ct.* in releasing the purchaser from his contract to take the property; the existence of the sewer did not so alter the character of the piece of ground that the purchaser could say that he did not get what was intended to be sold; & the case was a matter for compensation.—*Re BREWER & HANKINS'S CONTRACT* (1899), 80 L. T. 127, C. A.

Annotations:—*Distd.* *Re Puckett & Smith's Contract*, [1902] 2 Ch. 258. *Refd.* *Shepherd v. Croft*, [1911] 1 Ch. 521.

839. Condition excluding compensation—Sale of land "having building advantages"—Underground watercourse.—*SHEPHERD v. CROFT*, No. 282, *ante*.

C. Rescission.

(a) In General.

840. Application of condition—Substantial error.—*PORTMAN v. MILL*, No. 848, *post*.

841. — — ——The particulars of sale at a public auction described two houses as Nos. 3 & 4, & stated, that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 & 3, but the names of the occupiers were correct; & it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses, Nos. 2 & 4, were of the same rate; but No. 4 was in the best state of repair:—*Held*: these misdescriptions were not cured by a condition, which provided, that if any error or misstatement should be found in the particular, it should not vitiate the sale.

If it is merely an error or a misstatement from error, then it is cured by the conditions. But there must be this limitation, if the description is of any other property than that intended to be sold, though it is made by the conditions, the conditions do not cure it (*BEST, C.J.*).—*LEACH v. MULLETT* (1827), 3 C. & P. 115; 172 E. R. 348, N. P.

842. — — ——Where a misdescription in the particulars on a sale by auction, although unintentional, is in a material & substantial point, & of such a nature as to lead to a reasonable inference, that, but for such misdescription, the purchaser would never have entered into the contract of sale, he is not bound to resort to the usual clause of compensation in case of error, etc., but may rescind the contract, & recover back his deposit. Thus, where the particulars, on the sale of the lease of a house, under the Piazza in Covent Garden, stated, that the lessee was restricted from carrying on any offensive trade, or the trade of a coffee-house keeper, or working hatter; & the lease contained a clause of forfeiture for carrying on several other trades not offensive (*inter alia*) that of a fruiterer or herb seller:—*Held*: the purchaser was entitled to recover back his deposit, by reason of the omission in the particulars of the restriction as to the other inoffensive trades.—*FLIGHT v. BOOTH* (1834), 1 Bing. N. C. 370; 1 Scott, 190; 4 L. J. C. P. 66; 131 E. R. 1160.

Annotations:—*Expld.* *Pope v. Garland* (1841), 4 Y. & C. Ex. 394. *Consd.* *Re Davis & Cavey* (1888), 40 Ch. D. 601;

Re Fawcett & Holmes Contract (1889), 42 Ch. D. 150; *Jacobs v. Revell*, [1900] 2 Ch. 858. *Apld. Re Puckett & Smith's Contract*, [1902] 2 Ch. 258. *Distd. Shepherd v. Croft*, [1911] 1 Ch. 521. *Consd. Re Courcier & Harrold's Contract*, [1923] 1 Ch. 565. *Refd. Dykes v. Blake* (1838), 6 Scott, 320; *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *Pemsel & Wilson v. Tucker*, [1907] 2 Ch. 191; *Lee v. Rayson*, [1917] 1 Ch. 613.

843. ——— Defective title.]—*Re BEYFUS & MASTERS'S CONTRACT*, No. 1134, *post*.

844. ——— ———.]—Defts. sold by auction to pltf. a freehold property described in the particulars of sale as containing 5 acres 0 roods 26 poles, & as bordering on a lake on S. Common, the sale being subject to conditions of sale, one of which was as follows: "The property is believed & shall be taken to be correctly described in the particulars as to quantity & otherwise . . . & if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof." The only part of the property to which a good title was shown contained 4 acres 3 roods. Another part of the property offered for sale bordered on the lake, & as to this the only title offered was what purported to be a title by possession for less than forty years. Pltf. claimed rescission of the contract & a return of the deposit paid by him, & defts. counter-claimed for specific performance:—*Held*: even if defts. had established a possessory title to the border land for twelve years, that would not have been sufficient, as the contract, so far as it related to that land, was an open one, in which case a forty years' title by possession was required; defts. were not entitled to specific performance in respect of the part of the property to which a good title had been shown; & pltf. was entitled to rescission of the contract & the return of his deposit.—*JACOBS v. REVELL*, [1900] 2 Ch. 858; 69 L. J. Ch. 879; 83 L. T. 629; 49 W. R. 109.

Annotations:—Refd. Re Nisbet & Potts' Contract, [1905] 1 Ch. 391; *Lee v. Rayson*, [1917] 1 Ch. 613.

845. ——— Condition excluding compensation.]—*JACOBS v. REVELL*, No. 844, *ante*.

846. ——— Error not material—Failure of vendor to disclose.]—*SHEPHERD v. CROFT*, No. 282, *ante*.

847. ——— Misdescription obvious on inspection—Vendee not released unless misdescription wilful.]—Where it is provided by the conditions of sale by auction, that "if any mistake be made in the description of the premises, or any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made," the vendee is not released from his contract by reason of a misdescription in the particulars of sale, obvious on inspection of the premises, unless such misdescription was wilful & designed.—*WRIGHT v. WILSON* (1832), 1 Mood. & R. 207.

Annotations:—Refd. Flight v. Booth (1834), 1 Bing. N. C. 370; *Mills v. Oddy* (1834), 6 C. & P. 728; *Dykes v. Blake* (1838), 6 Scott, 320; *Taylor v. Bullen* (1850), 5 Exch. 779; *Re Davis & Cavey* (1888), 40 Ch. D. 601.

(b) Particular Instances.

i. Area of Property.

848. Customary instead of statute acres — Area calculated by estimation.]—A contract for the purchase of a farm described it as containing "349 acres or thereabouts, be the same more or less"; & stipulated that the premises should be taken at the quantity above stated, whether more or less, in fact, the farm consisted of only 349 customary

acres, which were less than the same number of statute acres by about 100 acres or upwards. On a bill being filed for specific performance, the purchaser, admitting that he had been for several months in possession of the property, & had exercised acts of ownership over it, on the faith that a good title to 349 acres would be shown, insisted, that, in the contract, acres meant statute acres, & that he was not bound to perform the contract, unless 349 statute acres were conveyed to him. *Semble*: the stipulation that the premises should be taken at the quantity before stated, be the same more or less, would not cover so large a deficiency as existed here.—*PORTMAN v. MILL* (1826), 2 Russ. 570; 38 E. R. 449, L. C.

Annotations:—Apld. Whittemore v. Whittemore (1869), L. R. 8 Eq. 603. *Consd. Jacobs v. Revell*, [1900] 2 Ch. 858. *Refd. Nicoll v. Chambers* (1852), 11 C. B. 996; *Beaufort v. Glynn* (1855), 3 W. R. 463; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Re Terry & White's Contract* (1886), 32 Ch. D. 14.

849. Misstatement as to length of frontage—Condition excluding rescission.]—*Re DEFTFORD CREEK BRIDGE CO. & BEVAN* (1884), 28 Sol. Jo. 327, C. A.

850. ——— ———.]—*FLEWITT v. WALKER*, No. 813, *ante*.

ii. Copyhold or Freehold.

851. Land sold as freehold—Of copyhold tenure slightly different from freehold.]—*PRICE v. MACAULAY*, No. 298, *ante*.

852. Land sold as copyhold—Partly freehold—Condition against restriction.]—Property, sold as copyhold, turned out to be partly freehold:—*Held*: the vendor could not compel a specific performance, & special conditions, providing that errors in the description should not invalidate the sale, & for a compensation, did not alter the case.—*AYLES v. COX* (1852), 16 Beav. 23; 20 L. T. O. S. 4; 51 E. R. 684.

Annotation:—Refd. Hopcraft v. Hopcraft (1897), 76 L. T. 341.

iii. Covenants.

853. Restrictive covenants insufficiently stated.]—*FLIGHT v. BOOTH*, No. 842, *ante*.

854. ——— Condition excluding rescission & compensation.]—By an agreement dated Sept. 28, 1922, a freehold residence was contracted to be sold subject to the conditions of sale on which the property had been previously offered for sale by auction. These conditions consisted of certain special conditions & the general conditions known as the London Conditions of Sale. By condition 7 of the special conditions the property was sold subject to the following restrictions & stipulations: "That neither the land or (*sic*) any existing or future building thereon should be used for carrying on any trade or business nor as a school, hospital, nursing home, public workshop, or otherwise than as a private dwelling-house, but not precluding the practice of a profession thereon." By a mistake some words had been omitted from this statement of the restrictions. Instead of the words "public workshop" the restrictions should have read "or public institution, or charity, nor for holding public meetings, nor for public worship." Condition 6 of the general conditions contained the following provision: ". . . If any error, misstatement or omission shall be discovered in the particulars, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect

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thereof." The purchaser took the objection that the restrictions had not been sufficiently disclosed:—*Held*: (1) the restrictions to which the property was subject had been sufficiently disclosed in the conditions; (2) even if they had not, the mistake was "an error, misstatement or omission" within the general condition, & the purchaser was not entitled to require the release of the omitted restrictions.—*Re COURCIER & HARROLD'S CONTRACT*, [1923] 1 Ch. 565; 92 L. J. Ch. 498; 129 L. T. 457; 39 T. L. R. 283; 67 Sol. Jo. 484.

iv. Easements.

855. Land described as fit for building—Sale in lots—Foot way over one lot.]—Certain property was offered for sale by public auction, in lots. The particulars, in describing lot 12, stated that the purchaser of that lot would be entitled to a right of carriage & foot way 13 feet wide over lot 13, as shown upon a plan annexed to the particulars, bearing & paying one moiety of the expense of keeping the road in repair. Lot 13 was described as "a first-rate building plot," with a frontage to a place called the Crescent sweep; & it was stated that that lot would include the ground forming part of the Crescent sweep comprised within the boundary of lot 13 by a line marked upon the plan, "subject for ever hereafter to the same rights of way & passage, & other rights & easements over the same, as are now enjoyed under the existing leases of the Crescent houses." The particulars of lot 7 described the two Crescent houses comprised in that lot as let on lease for a certain term, & stated that the lease might be seen at the office of the vendor's attorney, & would be produced at the sale. Pltf. attended & bid at the sale; lots 12 & 13 were severally knocked down to him; & he signed a single contract of purchase for the two at the foot of one of the printed particulars, & paid a deposit. Pltf. afterwards discovered, that, in the leases of the Crescent houses, there was reserved to the occupiers a right of way over lot 13, on foot & for the conveyance of gravel, manure, etc., from their gardens to the road. This right of way did not appear upon the plan:—*Held*: inasmuch as there was no sufficient disclosure of this right of way to enable a bidder by the exercise of ordinary vigilance to discover that such right existed, but, on the contrary, the plan being calculated to mislead, the misdescription, however unintentional, was such as to justify pltf. in refusing to accept either lot, the two being comprised in one contract, & the purchase of the one appearing to have induced the purchase of the other, but was entitled to recover back with interest the deposit paid to the auctioneer; & this notwithstanding a condition annexed to the particulars of sale, that, if any mistake were made in the description of the premises, or any other error should appear in the particulars, such mistake or error should not annul the sale, but a compensation or equivalent should be given or taken, as the case might require.—*DYKES v. BLAKE* (1838), 4 Bing. N. C. 463; 6 Scott, 320; 1 Arn. 209; 7 L. J. C. P. 282; 132 E. R. 866.

Annotations:—*Consd.* Holliday v. Lockwood, [1917] 2 Ch. 47. The question is whether TINDAL, C.J., intended to define two separate grounds on either of which the purchaser was entitled to rescind, or was he merely describing a composite ground. On the whole I incline to the latter view (ASTBURY, J.). *Refd.* Gibson v. D'Este (1843), 2 Y. & C. Ch. Cas. 542.

856. — Underground watercourse — Right of third parties to cleanse & repair.]—*SHACKLETON v. SUTCLIFFE*, No. 1154, *post*.

857. —.]—Re PUCKETT & SMITH'S CONTRACT, No. 286, *ante*.

858. General condition as to easements—Right of entry to premises—Use of kitchen.]—A dwelling-house & offices were put up for sale by public auction under a printed condition in a common form that the lot was sold subject to any existing rights & easements of whatever nature, & the printed particulars made no mention of any easement or of any claim to an easement. As the result of evidence it appeared that the house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes & that the vendor's solr. knew of the rumoured existence of some such easement but forbore to make inquiries. No grant of an easement appeared from the abstract & its existence was, in fact, disputed on the pleadings. In the auction room pltf.'s solr. said he had heard of some such claim but had no definite information about it & the auctioneer, in hearing of pltf.'s solr., on being questioned told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again:—*Held*: the conditions were misleading & the statements in the auction room insufficient & specific performance of the contract refused.—*HEYWOOD v. MALLALIEU* (1883), 25 Ch. D. 357; 53 L. J. Ch. 402; 49 L. T. 658; 32 W. R. 538.

Annotations:—*Apld.* Nottingham Patent Brick & Tile Co. v. Butler (1886), 16 Q. B. D. 778. *Distd.* Beyfus v. Lodge, [1925] 1 Ch. 350. *Refd.* Simpson v. Gilley (1922), 92 L. J. Ch. 194.

859. — Underground sewer.]—Re BREWER & HANKINS'S CONTRACT, No. 838, *ante*.

v. Sale of Leaseholds.

860. Underlease described as lease.]—Messuages described in a particular of sale as held for the residue of a term of ninety-nine years from June 24, 1838, but not as being held by an original lease, were sold subject to conditions that the purchaser should not be entitled to call for the lessor's title, & that any error or misstatement of the term of years should not vitiate the sale, but should be the subject of compensation, under a provision for arbn., authorising the arbitrator of either party to proceed in certain events *ex parte*. The title proved to be an underlease, for a term less by three days than the term of ninety-nine years granted by the original lease. The vendor filed the bill to enforce specific performance, with compensation to an amount which had been assessed, in conformity with the conditions, by one arbitrator, nominated by the vendor, the purchaser having taken no part in the arbn. The ct. dismissed the bill with costs.—*MADELEY v. BOOTH* (1848), 2 De G. & Sm. 718; 64 E. R. 321.

Annotations:—*Consd.* Darlington v. Hamilton (1854), Kay 550. *Dtd.* Camberwell & South London Bldg. Soc. v. Holloway (1879), 13 Ch. D. 754. *Apprvd.* *Re* Beyfus & Masters's Contract (1888), 39 Ch. D. 110. *Distd.* Waring v. Scotland (1888), 57 L. J. Ch. 1016.

861. —.]—Re BEYFUS & MASTERS'S CONTRACT, No. 1134, *post*.

862. Title to commence with underlease—Underlease invalid.]—Pltf. on Mar. 12, 1880, entered into an agreement by private contract to buy certain leasehold houses in Walworth for £700. The agreement contained a statement that the property was held for a term of fifty years, less ten days, from Christmas, 1856, & also a condition that the title should commence with two underleases, dated Apr. 20 & 27, 1857, under which the vendor held the property, & that the purchaser should make no requisition or objection in respect

of the prior title or the right to grant the under-leases. The purchase was completed. Four years afterwards the purchaser brought an action to set aside the conveyance, having discovered the under-leases to be invalid:—*Held*: the purchaser had a right to rely on the statement that the property was held for a term of fifty years, & the condition could not prevail against it; the purchaser was entitled to have the conveyance set aside, but the parties agreeing that damages should be paid him instead, the proper measure of such damages was the difference between £700 & the true value of the property for a term with only nine & a half years to run from the date of the contract, calculated on the assumption that £700 was its true value if held for the longer term.—*NASH v. WOODERSON* (1881), 52 L. T. 49; 33 W. R. 301.

vi. Value of Property.

863. Sale of reversionary interest — Misdescription of interest & age of reversioner.]—On a sale of a reversionary interest, with the usual condition, that no error of description, etc., should vitiate the sale, but a compensation be allowed; the reversion was described as absolute, on the death of a person aged sixty-six. In fact, the person was only sixty-four, & the reversion was not absolute, as the property would be divided if he left more children than one:—*Held*: this sale was void, & the offer of a compensation would not support it; but if it had been a mere difference of the age, *semble*, it would have been otherwise.—*SHERWOOD v. ROBINS* (1828), 3 C. & P. 339; *Mood. & M.* 191; 172 E. R. 447, N. P.

864. Rental value.]—*PRICE v. MACAULAY*, No. 298, *ante*.

865. —.]—*DIMMOCK v. HALLETT*, No. 322, *ante*.

866. —.]—In deciding whether a purchaser is getting substantially that which he bargained for, the ct. is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract.

By an agreement in writing a vendor agreed to sell, & a purchaser agreed to purchase, thirteen freehold houses let on six leases for a term of ninety-nine years at ground rents amounting in the aggregate to £72. One pair of houses was described in the contract as let at one entire rent of £11 10s. each of the next four pairs at one rent of £11 & the last three houses at one rent of £16 10s. The title shown was for twelve houses at a rent of £5 10s. each, & one at a rent of £8, each of such rents issuing out of & secured by one of the thirteen houses instead of the six rents described in the agreement. The agreement contained a provision that "if there be any misstatement or error in the description of the premises" no compensation should be allowed or the sale annulled. In an action by the purchaser for rescission of the contract & a return of the deposit on the ground of misdescription:—*Held*: the property which the vendor offered to convey was substantially different from that which the purchaser contracted to buy; the clause providing that a misstatement or error should not annul the contract did not apply, & the purchaser was entitled to rescission & a return of his deposit.—*LEE v. RAYSON*, [1917]

1 Ch. 613; 86 L. J. Ch. 405; 116 L. T. 536; 61 Sol. Jo. 368.

vii. Vendor Having No Title to Part of Property.

867. Condition allowing compensation — Lease described as comprising yard—Yard held at yearly rent—Effect of subsequent procurement of lease of yard.]—*DOBELL v. HUTCHINSON*, No. 91, *ante*.

868. — Good title to be made to whole — No title to part.]—Vendors who by the contract bound themselves to make out a good title to the lands included in the contract, but were unable to show a title to one three hundred & thirtieth part, not necessary to the enjoyment of the other parts included in the contract, which provided for compensation for errors in dimensions in the land, the bill averring that they could make title to all the lands sold, seeking specific performance as to all:—*Held*: it was not competent to the vendors at the hearing to seek specific performance with compensation.—*ASHTON v. WOOD* (1857), 3 Sm. & G. 436; 30 L. T. O. S. 85; 3 Jur. N. S. 1161; 65 E. R. 727.

Annotations:—*Mentl. Stevens v. Austen* (1861), 3 E. & E. 685; *Osborne v. Rowlett* (1860), 13 Ch. D. 771.

869. — Sale of freehold—& leasehold stable—Stable held on underlease.]—*TURNER v. TURNER*, [1881] W. N. 70.

870. — Sale of mine—Part of mine belonging to third party.]—In an agreement for the sale of seventeen undivided shares of a coal mine there was an article stating two conveyances by which six undivided shares of the land beneath which the coal lay had been conveyed to the vendors' predecessor in title, but stating that there was no express mention in the conveyances of the minerals under the land, & requiring that the purchasers should assume that six undivided shares of the minerals passed by the conveyances of the land, & thereby became absolutely vested in the vendors' predecessor in title. In the abstract of the vendors' title sent to the purchasers mention was made of a certain indenture, but nothing further was said about it. The purchasers' solr. inquired of the vendors' solr. what this deed was, & was told that it could not be found, & no abstract of it or information about it could be furnished, but that it was believed not to affect the property sold. The vendors' solr. also said, as he really believed to be the case, that though the title to the six undivided shares could not be strictly proved, yet the vendors had a good holding title to them. After these transactions the purchasers entered into the agreement, & paid the deposit money. Subsequently, the deed which was supposed to have been lost was found, when it was discovered that by virtue of it the six undivided shares of the mine belonged to some person quite different from the vendors, & that neither they, nor their predecessor in title, had ever had any title to those shares. The purchasers refused to proceed with the agreement, whereupon the vendors brought this action for specific performance of it. The purchasers contended that without these six shares the mine would be useless to them, & claimed to be entitled to be released from the agreement:—*Held*: as there had been no fraud in the matter, but the vendors had acted under a *bonâ fide* mistake, & the purchasers had had the fact that there was a doubt as to the title brought to their notice before entering into the agreement, & had thought fit to run the risk of taking the property without having the matter cleared up, specific performance of the agreement ought to be decreed, but a deduction must be made from the purchase-money as compensation to the purchasers

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for the loss of the six shares.—*ENGLISH v. MURRAY* (1883), 49 L. T. 35; 32 W. R. 84.

871. — Sale of garden enclosed by wall—Vendor knowing purchaser's intention to build.]—The particulars of sale of a freehold property described the garden as "inclosed by a rustic wall with tradesmen's side entrance." The wall did not form part of the property, & the tradesmen's side entrance was used on sufferance. This was known to the vendor, but not disclosed to the purchaser. The conditions of sale provided that mistakes or errors in the description of particulars should not annul the sale, but that compensation should be given:—*Held*: it was not a case for compensation, & the purchaser was entitled to have the contract rescinded.—*BREWER v. BROWN* (1884), 28 Ch. D. 309; 54 L. J. Ch. 605.

872. — Part of house belonging to third party.]—On a sale by the ct. of property described in the particulars as freehold stabling with dwelling rooms over, one of the conditions provided that if any error or misstatement should appear to have been made in the particulars of sale or conditions, it should not annul the sale, but compensation, to be settled by the judge in chambers, should be made in respect thereof; the property was conveyed to *pltf.* the purchaser, in Oct. 1897, & the purchase-money was paid into ct., & the bulk of it distributed among the beneficiaries. A year after completion it was discovered that some of the dwelling rooms over & a cellar underneath a portion of the property belonged to third persons, & *pltf.* eventually had to pay £300 to acquire a title to these dwelling rooms. In Feb. 1900, the present action was commenced against the vendor trustee & the beneficiaries, claiming compensation for the errors & misstatements in the particulars & conditions of sale, or, in the alternative, to set aside the sale on the ground of common mistake, & obtain repayment of the purchase-money:—*Held*: *pltf.* was not entitled to compensation under the above condition of sale, which did not, & was not intended to, apply to the case of a defect of title, but only to error or misstatement in the subject-matter of the sale; even assuming there had been a common mistake, & assuming that there need not be a total failure of consideration to justify rescission after conveyance, the error made in the present case was not sufficient to justify rescission, & *pltf.*'s action therefore failed & must be dismissed.—*DEBENHAM v. SAWBRIDGE*, [1901] 2 Ch. 98; 70 L. J. Ch. 525; 84 L. T. 519; 49 W. R. 502; 17 T. J. R. 441; 45 Sol. Jo. 466.

873. Condition excluding compensation—No title to part of farm sold.]—*Re ARNOLD, ARNOLD v. ARNOLD*, No. 274, *ante*.

viii. Other Cases.

874. Condition providing for compensation—Property not in existence—Or unable to be found.]—*ROBINSON v. MUSGROVE*, No. 769, *ante*.

875. Condition providing against compensation—Misdescription as to water supply.]—*Re EVER-*

SHED TRUSTEES & CHAMPION'S CONTRACTS (1900), 45 Sol. Jo. 44.

876. — Spruce described as timber.]—*Re TOWLER'S CONTRACT*, [1924] W. N. 331.

SUB-SECT. 10.—COMPLETION.

A. Time for Completion.

(a) In General.

877. No condition as to time—Effect on validity of contract.]—*SOUTHWELL v. NICHOLAS & ABDY* (1732), 1 Madd. 9, n.; 56 E. R. 4.
Annotation:—*Mentd.* *Falcke v. Gray* (1859), 4 Drew. 651.

878. — —.]—*GRAY v. SMITH*, No. 72, *ante*.

879. Time dependent on good title being shown.]—(1) Upon a bill filed by a vendor for the specific performance of the contract, it appeared, that he could make a good title before the commencement of the suit, but did not show a good title to the purchaser until afterwards:—*Held*: though a specific performance must be decreed, the purchaser was entitled to the costs of the suit generally.

(2) By an agreement between vendor & purchaser, it was agreed, that the purchaser should be entitled to the rents on May 1, 1813, or from such time as the purchase should be completed. An abstract of title was afterwards furnished to the purchaser, & the title appeared to be satisfactory to the purchaser; & in May 1816, he sent the vendor a draft conveyance for his approval, which was returned approved in July, 1816. Afterwards, the purchaser, on the suggestion of counsel, made several objections to the title, & delayed completing the purchase. In Nov. 1817, the vendor filed his bill for specific performance, & in that suit the master found, that the vendor could make a good title before the bill was filed, & did not show a good title to the purchaser till Jan. 20, 1825. Upon a decree for the specific performance of the contract:—*Held*: the proper date of the conveyance was Jan. 20, 1825.

Qu.: upon what principle the increased value of an estate, arising from the dropping of lives, between the commencement & completion of the contract, is to be calculated.—*TOWNSEND v. CHAMPERNOWNE* (1839), 3 Y. & C. Ex. 505; 160 E. R. 801.

880. "Twenty-elghth day of December next"—Sale in December—Meaning.]—The conditions of a sale by auction of certain property held on Dec. 15, 1885, provided for the payment of the remainder of the purchase-money "on the 28th day of Dec. next":—*Held*: by the words "the 28th day of Dec. next," the 28th of Dec. in the same month in which the conditions were issued was meant, & not the 28th day of the next month of Dec.—*DAWES v. CHARLEY* (1886), 2 T. L. R. 530, C. A.

(b) Time of the Essence of the Contract.

See Law of Property Act, 1925 (c. 20), s. 41.

881. General rule—Court looks at substance of contract.]—*ROBERTS v. BERRY*, No. 636, *ante*.

PART IV. SECT. 2, SUB-SECT. 10.—A. (a).

877 i. No condition as to time—Effect on validity of contract.]—Failure to specify a time for completion is not fatal to a written agreement for sale of an interest in a mining claim, a reasonable time being in that case inferred.—*Re CONNELL & WELLS* (1906), M. C. C. 17.—*CAN.*

877 ii. — —.]—*PEDDLE v. ORR* (1907), 26 N. Z. L. R. 1240.—*N.Z.*

b. — Right of purchaser to reasonable time after notice of vendor's readiness to complete.]—*CANNING v. TENBY* (1905), 3 C. L. R. 419.—*AUS.*

c. Purchase-money payable by instalments—Date for completion fixed before date of payment.]—Where a contract for the sale of land fixes a day for

completion of the purchase before the date named for payment of an instalment of purchase-money, a jury must fix a reasonable time after that date for completion.—*CAMPBELL v. BENT* (1879), 5 V. L. R. (L.) 337.—*AUS.*

d. Conveyance on receipt of purchase-money within ten years—Right of vendor to withhold conveyance till last day of period.]—*BURNS v. BOYD* (1860), 19 U. C. R. 547.—*CAN.*

882. ———.]—Equity, which governed the rights of the parties in cases of specific performance of contracts to sell real estate, looked not at the letter but at the substance of the agreement, to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really & in substance intended no more than that it should take place within a reasonable time. . . .

. . . The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract were to be taken as having really & in substance intended as regards the time of its performance might be excluded by any plainly expressed stipulation. But to have that effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the prescribed time limits in a fashion which was unmistakable. The language would have that effect if it plainly excluded the notion that those time limits were of merely secondary importance in the bargain, & that to disregard them would be to disregard nothing that lay at its foundation. *Primâ facie*, equity treated the importance of such time limits as being subordinate to the main purpose of the parties, & would enjoin specific performance notwithstanding that from the point of view of a ct. of law the contract had not been literally performed by plff. as regards the time limit specified. That was merely an illustration of that general principle of disregarding the letter for the substance which cts. of equity applied when, for instance, they decreed specific performance with compensation for a non-essential deficiency in subject-matter. But equity would not assist where there had been undue delay on the part of one party to the contract & the other had given him reasonable notice that he must complete within a definite time. Nor would it exercise its jurisdiction when the character of the property or when other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, excluded the jurisdiction. Equity would further infer an intention that time should be of the essence from what had passed between the parties before the signing of the contract. . . . But in such a case the intention must appear from what had passed before the contract, & its construction could not be affected in the contemplation of equity by what took place after it had once been entered into (LORD HALDANE).—JAMSHED KHODARAM IRANI v. BURJORJI DHUNJIBHAI (1915), 32 T. L. R. 156, P. C.

883. Whether time material.]—The time for performance of a contract is material.—OMEROD v. HARDMAN (1801), 5 Ves. 722; 31 E. R. 825.

Annotation:—Mentd. Wilbraham v. Scarisbrick (1847), 1 H. L. Cas. 167, n.

884. ———.]—The time at which a contract is to be performed, is not essential in equity, as at law.

The relief against the lapse of time is in the discretion of the ct. upon the circumstances; as, if the contract is abandoned.—RADCLIFFE v. WARRINGTON (1806), 12 Ves. 326; 33 E. R. 124, L. C.

885. Failure to assure at specified time—Whether illiteracy a defence.]—ANDREWS v. EDDON (1584), 1 And. 122; 123 E. R. 387.

886. ———.]—Though a vendor of an estate does not produce his deeds, or tender a conveyance within the time limited by the arts., the ct. does not regard this neglect, but will decree a sale notwithstanding.—GIBSON v. PATTINSON (1737), West temp. Hard. 235; 1 Atk. 12; 25 E. R. 913, L. C.

Annotations:—Dtd. Fordyce v. Ford (1794), 4 Bro. C. C. 494; Hartington v. Wheeler (1799), 4 Ves. 686; Allev v. Deschamps (1806), 13 Ves. 225.

887. Title not clear by specified day—Outstanding legal estate.]—GREGSON v. RIDDLE (1784), cited in 7 Ves. at p. 268; 32 E. R. 109, L. C.

Annotations:—Reld. Seton v. Slade, Hunter v. Seton (1802), 7 Ves. 265; Radcliffe v. Warrington (1806), 12 Ves. 326.

888. Terms of contract—Express stipulation.]—PARKIN v. THOROLD, No. 913, *post*.

889. ———.]—ROBERTS v. BERRY, No. 636, *ante*.

890. ———.]—If a vendor of leaseholds makes time the essence of a contract, & on the day specified for the completion of the purchase insists upon the money being paid, he may, in the event of the purchaser's neglect, omission or refusal to comply with such request, avail himself of a power in the contract to annul the sale, though two objections to the title, which he had given his written undertaking to remove, remained unsatisfied, & though he had executed a deed which he had delivered to his solr. as an escrow, assigning the premises to the purchaser.—HUDSON v. TEMPLE (1860), 29 Beav. 536; 30 L. J. Ch. 251; 3 L. T. 495; 7 Jur. N. S. 248; 9 W. R. 243; 54 E. R. 735.

891. ———.]—PATRICK v. MILNER, No. 891, *post*.

892. ———.]—JAMSHED KHODARAM IRANI v. BURJORJI DHUNJIBHAI, No. 882, *ante*.

893. Postponement contemplated by contract.]—Upon a contract for the sale of a house & land required for immediate residence, the conditions were that the purchase should be completed at noon on Feb. 26, on which day the purchaser, having paid his purchase-money, was to be entitled to possession; but if, from any cause whatever, the purchase should not then be completed, the purchaser was to pay interest on the purchase-money from that day until the completion; & if any objections or requisitions as to title should be made upon the delivery of the abstract which the vendor should be unable or unwilling to remove, then the vendor was to be at liberty to cancel the contract. The vendor failed to complete his title by the day named; but negotiations were continued till Apr. 7 on which day notice was given by the purchaser of immediate abandonment of the contract. Upon bill filed by the vendor for specific performance:—*Held*: as a possible postponement of completion of the contract was contemplated by the terms of the agreement, time was not of the essence of the contract, & if it had been so the purchaser, by continuing the negotiations as to title after the day fixed for completion, had waived it, & could not rescind without reasonable notice.—WEBB v. HUGHES (1870), L. R. 10 Eq. 281; 39 L. J. Ch. 606; 18 W. R. 749.

Annotation:—Fold. Patrick v. Milner (1877), 2 C. P. D. 342.

894. ———.]—In a contract for the sale of a reversion, where the conditions of sale contain a clause providing for the payment of interest, if for any cause whatever the completion be delayed beyond the day fixed, time is not of the essence of the contract; & a parenthesis

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to such provision, saving the vendor's rights to resell upon breach of the conditions of sale, does not alter the general effect of it.

The very clause which speaks of the completion of the sale by a certain period contains words showing that the parties did not intend that the contract should be necessarily & finally completed by that day. . . . If it has been the rule in equity, as seems to be the case, that time is of the essence of the contract only where it is either expressly stated to be so, or there is a necessary implication to that effect, here there is an almost necessary implication the other way (GROVE, J.).—PATRICK v. MILNER (1877), 2 C. P. D. 342; 46 L. J. Q. B. 537; 36 L. T. 738; 41 J. P. 568; 25 W. R. 790.

Annotation:—Mentid. Akt. Reidar v. Arcos, [1927] 1 K. B. 352.

895. —.]—Where a contract for purchase provides that possession shall be given by a certain day, the word "possession" must be understood to mean possession with a good title shown. This construction is the same in equity as at law, although a ct. of equity will consider time not to be of the essence of the contract, & will relieve against a breach of performance at the date assigned, unless there is something in the contract, the nature of the property, or the circumstances, which renders it inequitable for the ct. to interfere.

A person agreed to purchase a leasehold house for his own residence, & contracted that he should have possession by a certain day; but the vendor, although he tendered possession, failed to show a good title by the day named:—*Held*: the stipulation as to time was of the essence of the contract, & bill for specific performance of the agreement dismissed.

A ct. of equity will indeed relieve against, & enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, & if, as TURNER, L.J., said in *Roberts v. Berry*, No. 636, *ante*, there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances" which would make it inequitable to interfere with & modify the legal right. This is what is meant, & all that is meant, when it is said that in equity time is not of the essence of the contract (CAIRNS, L.J.).—TILLEY v. THOMAS (1867), 3 Ch. App. 61; 17 L. T. 422; 32 J. P. 180; 16 W. R. 166, L.J.J.

Annotations:—Distd. Webb v. Hughes (1870), L. R. 10 Eq. 281. Afd. Jamshed Khodaram Irani v. Burjorji Dhunjibhai (1915), 32 T. L. R. 156. Consd. Stickney v. Keeble, [1915] A. C. 386.

896. Conduct of the party.]—SETON v. SLADE, HUNTER v. SETON, No. 175, *ante*.

895 i. —.]—JONES v. MORRIS (1910), 12 W. L. R. 651.—CAN.

897 i. Surrounding circumstances.]—In determining whether time is of the essence of the contract in respect of a condition in a contract of sale of land, the ct. will consider not only the express terms of the condition, but also the surrounding circumstances at the time of entering upon it, & the object the purchaser had in view, if the vendor was aware of it.—SPRIGG v. ENGLISH, SCOTTISH & AUSTRALIAN CHARTERED BANK (1886), 12 V. L. R. 489.—AUS.

897 ii. —.]—HILL v. ROWE (1910), 19 Man. L. R. 702.—CAN.

897 iii. —.]—Even if time is

not expressly made of the essence of a contract for the sale & purchase of land the circumstances may be such as to show that it was of the essence.—WILSON v. PATTERSON, [1918] 1 W. W. R. 999; 14 Alta. L. R. 162; 39 D. L. R. 642.—CAN.

e. Nature of contract—Government contract.]—EWING v. GOOD & A.-G. (1839), 1 O. S. 65.—CAN.

f. —Speculative purchase.]—MANSON v. HOWISON (1896), 4 B. C. R. p. 411.—CAN.

g. Nature of property—Sale of farm.]—Suit for the specific performance of a contract for the sale of a farm:—*Held*: the more fact that it was a

897. Surrounding circumstances.]—SETON v. SLADE, HUNTER v. SETON, No. 175, *ante*.

898. —.]—ROBERTS v. BERRY, No. 636, *ante*.

899. —.]—TILLEY v. THOMAS, No. 895, *ante*.

900. Nature of contract—Purchase for commercial purposes.]—*Qu.*: to what extent time is of the essence of a contract, where the purchase is intended with a view to commercial purposes as the erection of a manufactory.

If, at the hearing of the cause, it appears that the vendor could not make a good title, either then, or at the time of the bill filed, or at the time of the notice given, an opportunity of mending his title in the master's office will not be given him, but his bill will be dismissed with costs.—WRIGHT v. HOWARD (1823), 1 Sim. & St. 190; 1 L. J. O. S. Ch. 94; 57 E. R. 76.

Annotations:—Afd. Macbryde v. Weekes (1856), 22 Beav. 533. Refd. Walker v. Jeffreys (1842), 1 Haro. 341. Mentid. Mason v. Hill (1833), 5 B. & Ad. 1; Acton v. Blundell (1843), 12 M. & W. 324; Bower v. Cooper (1843), 2 Haro. 408; Embrey v. Owen (1851), 6 Exch. 353; Sampson v. Hoddinott (1857), 1 C. B. N. S. 590; Chasemore v. Richards (1859), 7 H. L. Cas. 349; Knorr v. Barwell (1860), 2 Giff. 410; Wilts & Berks Canal Navigation Co. v. Swindon Waterworks Co. (1874), 9 Ch. App. 453, n.

901. —Sale of public-house—As going concern.]—In an agreement by a tenant at will of a public-house for the sale of the possession, trade, & goodwill of the house at a fixed sum, & of the stock & furniture at a valuation, one of the terms being that possession should be taken, & the money paid on a given day, time is of the essence of the contract; & a purchaser, who was not in a condition to fulfil his part of the contract on that day, cannot compel a specific performance, though he was ready on the following day to have proceeded to complete the purchase. *Qu.*: whether a ct. of equity will enforce the performance of a contract for the purchase of a subject-matter, of which the goodwill of a public-house, unconnected with any fixed interest in the premises, forms the principal part.—COSLAKE v. TILL (1826), 1 Russ. 376; 38 E. R. 146.

Annotations:—Afd. Macbryde v. Weekes (1856), 22 Beav. 533. Refd. Walker v. Jeffreys (1842), 1 Haro. 341; Gray v. Smith (1889), 43 Ch. D. 208.

902. —.]—Upon the sale of a public-house as a going concern, time is of the essence of the contract; &, in the absence of express stipulation to the contrary, the license of the house must be transferred under General Licensing Act, 1828 (c. 61), s. 11, & not under General Licensing Act, 1828 (c. 61), s. 14. Where, therefore, upon the day fixed for completion of a sale of a public-house as a going concern, the vendors were not in a position to procure a transfer of the license under General Licensing Act, 1828 (c. 61), s. 11:—*Held*: the purchaser was entitled to repudiate the contract.—DAY v. LUIKE (1868), L. R. 5 Eq. 336; 37 L. J. Ch. 330; 32 J. P. 499; 16 W. R. 717.

Annotations:—Follid. Claydon v. Green (1868), L. R. 3 C. P. 511; Cowies v. Gale (1871), 7 Ch. App. 12. Refd. Weston

farm that was being worked, that was the subject-matter of the agreement did not make time of the essence of the contract.—STOCKMAN v. WHITLEY (1912), 13 S. L. N. S. W. 203; 30 N. S. W. W. N. 13.—AUS.

h. —Sale of timber limits.]—CROSSFIELD v. GOULD (1883), 9 A. R. 218.—CAN.

k. —Sale of mineral claims.]—Where the contract is for the sale of property of a fluctuating value, such as mineral claims, although there is no stipulation that time shall be of the essence of the contract, yet by the very nature of the property dealt with, it is clear that time shall be of the essence.—MORTON & SYMONDS v.

v. Savage (1879), 48 L. J. Ch. 239; *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705. **Mentd.** *Sharpe v. Wakefield* (1888), 21 Q. B. D. 66.

903. ———.—]—Upon the sale of a public-house as a going concern time is of the essence of the contract. Where, therefore, upon the day for the completion of the contract the vendors were not in a position to transfer the license under General Licensing Act, 1828 (c. 61), s. 11, the purchaser was held entitled to repudiate the contract. The exors. of the late owner of a public-house renewed the license in the name of deceased owner:—**Held**: the license was absolutely void, & the exors. could not make a good title to the public-house.—*COWLES v. GALE* (1871), 7 Ch. App. 12; 41 L. J. Ch. 14; 25 L. T. 524; 20 W. R. 70, L.J.J.

Annotations:—**Refd.** *Rutter v. Daniel* (1882), 30 W. R. 801; *Sharpe v. Wakefield* (1888), 21 Q. B. D. 66; *Farnham Brewery Co. v. Hunt* (1893), 68 L. T. 440; *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705; *Warren v. Moore* (1897), 14 T. L. R. 138.

904. ———.—]—**Building agreement.**—*BARCLAY v. MESSENGER*, No. 925, *post*.

905. ———.—]—**JAMSHED KHODARAM IRANI v. BURJORJI DHUNJIBHAI**, No. 882, *ante*.

906. **Nature of property.**—*ROBERTS v. BERRY*, No. 636, *ante*.

907. ———.—]—*TILLEY v. THOMAS*, No. 895, *ante*.

908. **Relief in discretion of court.**—*RADCLIFFE v. WARRINGTON*, No. 884, *ante*.

Exercise of option to purchase.—*See LANDLORD & TENANT*, Vol. XXX., pp. 475, 476, Nos. 1377, 1378.

Effect of notice to complete.—*See Sub-sect. 10, A. (c), post*.

(c) *Notice Fixing Time.*

909. **Time not originally of the essence—Reasonable time fixed by notice—Unreasonable delay by either party.**—Though time be not of the essence of a contract, it may be made so by notice, where there has been great & improper delay on one side in completing. It may, however, be waived by proceeding in the purchase after the expiration of the time fixed by the notice.—*KING v. WILSON* (1843), 6 Beav. 124; 49 E. R. 772.

Annotations:—**Refd.** *Southcomb v. Exeter* (Bp.) (1847), 6

NICHOLS (1906), 12 B. C. R. 9; 3 W. L. R. 161.—**CAN.**

1. ———.—]—**Reclamation lease.**—*JAMSHED KHODARAM IRANI v. BURJORJI DHUNJIBHAI* (1915), 32 T. L. R. 156, P. C.—**IND.**

m. *Whether purchaser obtains property contracted for.*—In considering whether time is the essence of the contract where not expressly so made by the parties, the fact that the purchaser has got what he contracted for is a determining factor.—*Re WESTON & TUTTLES CONTRACT* (1915), 11 Tas. L. R. 74.—**AUS.**

908 i. **Relief in discretion of court.**—*MCWENNEY v. KAY* (1868), 15 Gr. 432.—**CAN.**

908 ii. ———.—]—In an action for specific performance, even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the ct. may, in the exercise of its discretion, grant the relief claimed.—*CUDNEY v. GIVES* (1890), 20 O. R. 500.—**CAN.**

908 iii. ———.—]—In a contract of sale & purchase of land when time is of the essence of the contract & there has been no waiver a purchaser in default cannot insist on specific performance, but in a proper case will be relieved from forfeiture or penalties.—*WILSON v. MCGEE*, [1925] N. Z. L. R. 241.—**N.Z.**

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Hare, 213; *Parkin v. Thorold* (1851), 2 Sm. N. S. 1; *Manson v. Thacker* (1878), 7 Ch. D. 620; *Green v. Sevin* (1879), 13 Ch. D. 589.

910. ———.—]—Where time is not made of the essence of the contract, & there is no unreasonable delay or negligence on the part of the vendor in answering the purchaser's requisitions the purchaser is not at liberty to rescind the contract by a notice requiring completion in a limited time.—*WELLS v. MAXWELL* (1863), 33 L. J. Ch. 44; 8 L. T. 713; 9 Jur. N. S. 1021; 11 W. R. 842, L. J.J.

Annotations:—**Consd.** *Green v. Sevin* (1879), 13 Ch. D. 589. **Refd.** *Greenhill v. Isle of Wight* (Newport Junction) Ry. (1871), 23 L. T. 885; *Re Young & Harston's Contract* (1885), 52 L. T. 571.

911. ———.—]—When time is not originally made of the essence of a contract for the sale of land one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party.

After a delay of two years on the part of a vendor, he gave notice to the purchaser to complete his contract within three weeks, & that, if he did not do so, the vendor would treat the contract as at an end:—**Held**: the time limited for completion was, under the circumstances, unreasonably short, & the notice therefore of no effect.—*GREEN v. SEVIN* (1879), 13 Ch. D. 589; 49 L. J. Ch. 166; 41 L. T. 724; 44 J. P. 282.

Annotations:—**Refd.** *Lee v. Soames* (1888), 59 L. T. 366; *Stickney v. Keeble*, [1915] A. C. 386. **Mentd.** *Phillips v. Howell*, [1901] 2 Ch. 773.

912. ———.—]—Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, & in determining the reasonableness of the time so limited the ct. will consider not merely what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the vendor & the attitude of the purchaser in relation thereto.

In June, 1911, pltf., a farmer, agreed to purchase from defts. agricultural land for occupation as a

n. *Whether stipulation essential.*—The time for the final execution of a contract for the sale of land is not ordinarily regarded as of the essence of the contract, & may be varied by verbal agreement.—*M'PHAIL v. DAUBY* (1864), 2 N. S. W. S. C. R. N. S. 225.—**AUS.**

o. ———.—]—Time may be of the essence of a contract even without any express stipulation if it appear that such was the intention.—*OLDFIELD v. DICKSON* (1889), 18 O. R. 188.—**CAN.**

p. ———.—]—In a contract for the sale of land, time is not of the essence of the contract unless it is stipulated that it shall be so.—*BURKE v. DRAKE* (1876), 2 N. Z. Jur. N. S. 102.—**N.Z.**

q. ———.—]—The equitable rule that time was not deemed of the essence of the contract unless made so by express stipulation or necessary implication was now, by reason of Judicature Act, 1908, ss. 90 & 99, the law not only in equitable actions but in common-law actions for damages.—*COBBETT v. SEXTON*, [1920] N. Z. L. R. 223.—**N.Z.**

r. *Burden of proof—Where party seeks to escape effect of provision.*—*SPRINGER v. OLIVER* (1907), 7 Terr. L. R. 126; 6 W. L. R. 519.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 10.—**A. (c).**

909 i. *Time not originally of the essence—Reasonable time fixed by notice*

—*Unreasonable delay by either party.*—*PEARCE v. KELBY* (1919), 20 S. R. N. S. W. 88; 37 N. S. W. W. N. 115.—**AUS.**

909 ii. ———.—]—When one party to a contract, in which time is not of the essence, desires to put an end to the contract, in consequence of the laches of the other party thereto, the proper mode of doing so is to give notice that unless completed within a period to be fixed, the contract will be considered at an end.—*O'KEEFE v. TAYLOR* (1850), 2 Gr. 95.—**CAN.**

909 iii. ———.—]—*ROUSECH v. SCHINDLER* (1903), 7 Terr. L. R. 92.—**CAN.**

909 iv. ———.—]—If either party is not ready to complete at the appointed time, a time may be fixed by a notice to the other party, giving a reasonable time for completion & making time of the essence on non-compliance with which the party giving the notice may call the contract off.—*GOODCHILD v. BETHEL* (1914), 30 W. L. R. 280; 7 W. W. R. 832; 8 Alta. L. R. 98; 19 D. L. R. 161.—**CAN.**

909 v. ———.—]—*WILLIAMS v. BLACK* (1915), 31 W. L. R. 844; 23 D. L. R. 287.—**CAN.**

t. ———.—]—*After judgment for part of purchase-money.*—A vendor who has recovered judgment against the purchaser for the balance of purchase-money, due on a contract for the sale

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farm & paid a deposit on the purchase-money. The date fixed for completion was Oct. 11. At the date of the contract defts. had no legal title to the land, it being part of a larger estate which defts. had agreed to purchase as a speculation & which they resold in lots to twenty-three purchasers. Defts. delayed completion of pltf.'s contract in order to complete their title & to procure the simultaneous execution of the conveyances to the sub-purchasers. On Jan. 30, 1912, pltf., who had repeatedly pressed for completion, gave notice to defts., requiring them to complete in a fortnight, &, on their failure to complete within the time brought an action for the return of his deposit. At the date of the notice pltf.'s conveyance awaited the approval of certain mtges. on the estate & required execution by eight parties residing in various parts of England:—*Held*: there had been unnecessary delay in completion for which defts. were responsible, & in the circumstances the time limited by the notice was sufficient.—*STICKNEY v. KEEBLE*, [1915] A. C. 386; 84 L. J. Ch. 259; 112 L. T. 664, H. L. *Annotations*:—*Apld.* Jamshed Khodaram Irani v. Burjorji Dhunjibhai (1915), 32 T. L. R. 156. *Refd.* *Re Bayley & Shoemith's Contract* (1918), 87 L. J. Ch. 626.

913. ———. (1) In equity, the time appointed for the completion of a contract is not, as at law, of the essence of the contract; but it may be made so by direct stipulation or necessary implication.

(2) Though time be not originally an essential part of a contract, yet either party may, by notice, insist on its being completed within a reasonable time.—*PARKIN v. THOROLD* (1852), 16 Beav. 59; 22 L. J. Ch. 170; 16 Jur. 959; 51 E. R. 698; *affd.*, see L. R. 5 Eq. at p. 543. L. J.

Annotations:—*As to* (1) *Folld.* *Roberts v. Berry* (1852), 16 Beav. 31. *Consd.* *Barclay v. Messenger* (1874), 43 L. J. Ch. 449. *Refd.* *Patrick v. Milner* (1877), 2 C. P. D. 342. *As to* (2) *Apld.* *Nott v. Riecard* (1856), 22 Beav. 307; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527. *Refd.* *Wells v. Maxwell* (No. 1) (1863), 32 Beav. 408.

914. ———. *Right of purchaser to give short notice—Where vendor without power to sell at time of contract.*—The rule that, where time is not made of the essence of a contract for purchase of land, the purchaser cannot, in the absence of unreasonable delay on the part of the vendor, arbitrarily fix a short day after which he will not be bound; held not to apply to a case where at the date of the contract the vendor had not power to sell the estate.—*LEE v. SOAMES* (1888), 59 L. T. 366; 36 W. R. 884.

Annotation:—*Refd.* *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295.

915. *Time of the essence—Extension of time limited by notice.*—The agreement for sale of a public-house as a going concern fixed Dec. 31, 1896, as the date of completion. Shortly after the date of the agreement the purchaser sold the benefit thereof to another person, who, after considerable delay, sold his interest therein to a third person, & the original vendor had notice of

these transactions. In addition to this an action, of which the original vendor had notice, was subsequently commenced against the original purchaser by a fourth person for specific performance of an alleged agreement for the sale of the public-house to him by such purchaser, & was registered as a *lis pendens*, which prevented the original purchaser from borrowing on the security of the public-house the money necessary to complete her purchase. Meanwhile negotiations between the original vendor & purchaser continued after the date fixed for completion; & when the title had been accepted & the draft conveyance approved, the original vendor on Feb. 13, 1897, gave notice to the original purchaser to complete in ten days, to which the latter replied that she had already commenced proceedings to get the *lis pendens* vacated, &, when this was accomplished, would complete as soon as possible, & objected that a ten days' notice was not reasonable under the circumstances. The original vendor, however, at the expiration of the ten days, notified to the original purchaser that the contract was at an end. Upon motion by the latter for an injunction to restrain the original vendor from dealing with the public-house without regard to her rights under their agreement:—*Held*: the notice was reasonable under the circumstances; & the motion was dismissed.—*SMITH v. BATSFORD* (1897), 76 L. T. 179.

916. *What is reasonable notice—Judged at date of giving notice.*—When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given.—*CRAWFORD v. TOOGOOD* (1879), 13 Ch. D. 153; 49 L. J. Ch. 108; 41 L. T. 549; 28 W. R. 248.

917. ———. *Matters for consideration—What remains to be done at time of notice.*—*STICKNEY v. KEEBLE*, No. 912, *ante*.

918. ———. *Previous delay of vendor—Attitude of purchaser.*—*STICKNEY v. KEEBLE*, No. 912, *ante*.

(d) *Waiver of Fixed Time.*

919. *What amounts to waiver—Delay of both parties.*—Where, by the terms of an auction the sale is to be completed by a certain day yet if neither party takes any step to quicken the other, till it becomes impossible to execute the agreement by the day fixed the time is waived & equity will interfere to prevent the purchaser taking advantage of it at law.—*JONES v. PRICE* (1797), 3 Anst. 724; 145 E. R. 1083.

920. ———. *Continuing negotiations after fixed time.*—Vendor & vendee proceeding in treaty beyond the time for completing the contract, the vendor, having brought an action, & withdrawn his record, not having got in a judgment amounting to half the purchase-money, refused an injunction. Time, as of the essence of the contract, waived by a protracted treaty.—*WOOD v. BERNAL* (1812), 19 Ves. 220; 34 E. R. 500, L. C.

of land in which time is not of the essence of the contract, is not estopped by such judgment, from afterwards making time of the essence by notice terminating the contract within a reasonable time on non-payment of the balance due.—(*HIBBONS v. COZENS* (1898), 29 O. L. 356.—*CAN.*)

a. ———. *Right of purchaser to give short notice.*—*KARSONDAS KALIDAS GHIA v. CHHOTALAL MOTICHAND* (1923), I. L. R. 48 Bom. 259.—*IND.*

b. ———. *Notice by assignee of ven-*

dor.—*WICKSON v. PEARSON* (1886), 3 Man. L. R. 457.—*CAN.*

c. ———. ———. If time is not of the essence of the contract, it can be made so by notice.—*MCAULEY v. DICK* (1905), 1 W. L. R. 381.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 10.—A. (d).

919 i. *What amounts to waiver—Delay of both parties.*—*GORDON v. MAHONY* (1850), 13 L. Eq. R. 383.—*IR.*

920 i. ———. *Continuing negotiations after fixed time.*—An agreement of sale contained provision for forfeiture for non-performance by the purchaser of conditions, time being "of the essence of the agreement," or at the option of the vendor a right of resale. After the conditions had been broken, the vendor entered into negotiations with the purchaser to induce him to live up to his agreement, & delayed for some months to give notice of forfeiture required:—*Held*: the vendor did not possess the right to cancel the agreement as against

921. — — —.]—WEBB v. HUGHES, No. 893, ante.

922. — — — Conduct of purchaser.]—Time may be made of the essence of a contract, but though made so, yet the strict performance of the contract may be waived by conduct.—HUDSON v. BARTRAM (1818), 3 Madd. 440; 56 E. R. 566.

Annotation:—Folld. Barclay v. Messenger (1874), 43 L. J. Ch. 449.

923. — — — Inducing vendor to incur expenses.]—NOKES v. KILMOREY (LORD), No. 1003, post.

924. — — — Purchaser in possession—Confessing judgment in ejectment.]—Agreement for sale of real property, with a stipulation that, if the residue of the purchase-money is not paid by a certain day, the agreement shall be void, & the vendors shall have power to resell. The money is not paid on the day, but the purchaser retains possession, giving a warrant of attorney to confess judgment in ejectment. The stipulation as to time in the agreement is waived.—*Re* EASTERN COUNTIES RAILWAY ACT, *Ex p.* GARDNER (1841), 4 Y. & C. Ex. 503; 10 L. J. Ex. Eq. 46; 160 E. R. 1106.

925. — — — Extension of time by notice—Terms of notice not accepted—Conditional waiver.]—By an agreement dated Jan. 1, 1873 the Clothworkers' co. agreed to grant a lease of a piece of land to M. & W. for eighty years from Dec. 15, 1872, M. & W. covenanting to erect a house of a specified value thereon within one year from Dec. 25, 1872; & in case of default in completing the buildings for two months from the expiration of the year the Clothworkers' co. were entitled to put an end to the agreement & take possession of the premises.

By an agreement dated July 15, 1873, M. & W. agreed to sell their interest under the agreement of Jan. 1, 1873, to plffs. for £2,000; of which sum £1,000 was paid on the execution of the agreement, & the remaining £1,000 was to be paid on July 31, 1873, or at such deferred date as the parties might agree upon, & it was provided that plffs. should accept the title of M. & W., & that they should not require a formal assignment of the agreement, & that the purchasers should take upon themselves every liability under which M. & W. were; & the agreement provided that if plffs. should fail to pay the £1,000 on July 31, or at such deferred date

as the parties might agree upon, all money paid previously to such default should be absolutely forfeited, & the agreement should become null & void.

The £1,000 was not paid on July 31, nor was any deferred time for payment agreed on. On Aug. 16, 1873, at which time plffs. were in possession of the ground, but had not commenced building, M. & W. gave plffs. notice that unless the works were commenced on the following Monday, the £1,000 must be paid within one week from the following Tuesday which would be Aug. 26. The works were not commenced, nor was the £1,000 paid; & on Oct. 2, M. & W. gave plffs. notice that in consequence of default having been made in the payment of the £1,000, the agreement had become void; & that they would proceed to deal with the property as if the agreement had not been entered into. On the same day plffs. gave M. & W. a counter notice requiring them to perform the agreement, but without offering to pay the £1,000. On Oct. 17 the Clothworkers' co. sent M. & W. a notice, requiring them to proceed with the buildings, & on Oct. 20 M. & W. assigned the benefit of the agreement to B., who, on Dec. 26 took possession of the ground, commenced building.

On Jan. 8, 1874, plffs. filed a bill offering to pay the £1,000, & interest, & praying for specific performance of the agreement of July 15, 1873, & that B. might be restrained from continuing in possession of the ground, & M. & W. from assigning their interest under the agreement with the Clothworkers' co., except to plffs.:—*Held*: time was of the essence of the contract, & the notice of Aug. 16 was only a qualified & conditional waiver, the terms of which were not complied with, & therefore the waiver did not take effect.

Where time is of the essence of the contract, the mere extension of time is only a waiver to the extent of substituting the extended time for the original time, & not an utter destruction of the essential character of the time.—BARCLAY v. MESSENGER (1874), 43 L. J. Ch. 449; 30 L. T. 351; 22 W. R. 522.

926. — — — Effect of—Whether destructive of essential character of time.]—BARCLAY v. MESSENGER, No. 925, ante.

927. Form of waiver—Waiver by parol—Original contract in writing.]—The day for the

the purchaser.—CRAWFORD v. PATTERSON (1908), 7 W. L. R. 183; 1 Alta. L. R. 27.—CAN.

920 li. — — —.]—DYAS v. ROONEY (1890), 25 L. R. Ir. 342.—IR.

922 l. — — — Conduct of purchaser.]—By a contract for the sale of land belonging to infants, it was a condition that, if in seventeen months the approval of the ct. of chancery had not been obtained to the sale then made, the contract should be at an end, thus rendering time of the essence of the contract. The sale was not completed by the time specified, & some months afterwards the purchaser acquiesced in the proceedings then taken to perfect the title:—*Held*: he had waived the condition.—MCDONALD v. GARRETT (1859), 7 Gr. 606.—CAN.

922 li. — — —.]—Where time is of the essence of the contract the condition may be waived by the purchaser by paying a portion of the money on the day named for completion & consenting to wait for production of title.—PORTER v. SHIPLEY (1863), 2 Man. L. R. 269.—CAN.

922 li. — — —.]—Where under the terms of a written agreement for the sale of land, time was made of the essence, & the purchasers were ready & willing to close on the day fixing for

closing, but the vendors were unable to complete:—*Held*: the purchasers were not by certain later interviews had by their solr. with the vendors' solrs., or by certain acts of their own, precluded from relying upon the condition as a defence to the vendors' action for specific performance, such interviews & acts not amounting to a recognition by the purchasers of the contract as still subsisting or to a communication to the vendors of a willingness on the part of the purchasers to complete, notwithstanding the lapse of time.—DANFORTH HEIGHTS, LTD. v. McDERMID BROTHERS, [1923] 3 D. L. R. 757; 52 O. L. R. 412.—CAN.

d. — — — Purchaser in possession—Acceptance of interest by vendor's attorney after judgment for ejectment.]—

In a contract of sale, the vendor covenanted for quiet enjoyment until default in payment of the purchase money & interest. It was also stipulated that time was to be considered the essence of the agreement, & unless the payments were punctually made, the vendor was to be at liberty to resell. On ejectment for non-payment of a half-year's interest:—*Held*: the receipt of the interest by the vendor's attorney after action, without costs,

amounted to a waiver.—BARNER v. ALLEN (1857), 6 C. P. 329.—CAN.

926 li. — — — Extension of time by notice—Effect of—Whether destructive of essential character of time.]—Where in an agreement for sale of land time is expressed to be of the essence of a contract consent to an extension of the time, even to another definite date, prevents time from being any longer of the essence.—TOOLEY v. HADWIN, [1918] 2 W. W. R. 812; 13 Alta. L. R. 447; 41 D. L. R. 190.—CAN.

926 li. — — —.]—DHYDEN v. MCCOY, [1921] N. Z. L. R. 882.—N.Z.

e. — — — By indorsement under seal on agreement.]—MARCUS v. SMITH & RAY (1867), 17 C. P. 416.—CAN.

f. — — — By vendor's agent.]—TIMMINN v. SMITH (1910), 14 W. L. R. 503; 3 Sask. L. R. 264.—CAN.

g. — — — Default after extended time.]—HICKS v. LAIDLAW (Man.) (1912), 20 W. L. R. 479; 1 W. W. R. 1008; 2 D. L. R. 460.—CAN.

h. — — — Renewed stipulation for time to be of essence for extended period.]—DOBBS v. WIEBERGALL (1920), 48 O. L. R. 343; 56 D. L. R. 510; 19 O. W. N. 180.—CAN.

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completion of the purchase of an interest in land inserted in a written contract, cannot be waived by oral agreement & another day be substituted in its place.—*STOWELL v. ROBINSON* (1837), 3 Bing. N. C. 928; 3 Hodg. 197; 5 Scott, 196; 6 L. J. C. P. 326; 132 E. R. 668.

Annotations:—*Apld.* *Hickman v. Haynes* (1875), L. R. 10 C. P. 598. *Refd.* *Horne v. Wingfield* (1841), 3 Scott, N. R. 340; *Emmet v. Dewhurst* (1851), 3 Mac. & G. 587; *Parkin v. Thorold* (1851), 2 Sim. N. S. 1; *St. Leonard's, Shoreditch Vestry v. Hughes* (1864), 17 C. B. N. S. 135; *Howe v. Smith* (1884), 27 Ch. D. 89; *Morrell v. Studd & Millington* (1913), 109 L. T. 628; *Williams v. Moss' Empires*, [1915] 3 K. B. 242; *Morris v. Baron*, [1918] A. C. 1. *Mentd.* *Coldham v. Showler* (1846), 3 C. B. 312.

B. Payment of Purchase-Money.

928. Payment on good title being made—Necessity for showing title—Effect of execution of bond by vendor.]—A purchaser, who has paid a deposit under a prior engagement, & taken possession, contracts to pay the residue of the purchase-money on a day certain, upon the vendor making a good title to the premises; or, otherwise, if such title shall not be complete, upon the vendor's executing a bond to complete the title, & to convey the estate as soon as same can be completed:—*Held*: the vendor is bound to show that he can make a good title, & the purchaser is not to rely merely on his bond.—*CLARKE v. FAUX* (1827), 3 Russ. 320; 38 E. R. 596; *sub nom.* *CLARKE v. VAUX*, 6 L. J. O. S. (Ch. 17).

929. —Purchaser let into possession—Objection to title.]—On a contract for the sale of an estate, the vendor agreed, on or before July 1, 1831, upon receiving the purchase-money, to execute conveyances; & the purchaser agreed, on

having a good title made out, to pay the purchase-money; & it was further agreed, that, upon payment of the purchase-money, the purchaser should be let into possession. The purchaser, with the consent of the vendor, entered into possession, & afterwards objected to the title:—*Held*: he was ordered, on motion, either to give up possession or pay the purchase-money into ct.—*TINDAL v. COBHAM* (1835), 2 My. & K. 385; 4 L. J. Ch. 98; 39 E. R. 991.

Annotation:—*Refd.* *Greenwood v. Turner*, [1891] 2 Ch. 144.

930. Payment irrespective of conveyance.]—

A deed executed by pltf. & deft., after reciting that a co. had been formed for the purpose of constructing a railway which would pass through pltf.'s estate, & that an application to Parliament for an Act of incorporation was then pending, contained a covenant by deft., that within six months from the time of the passing the proposed bill, & before the co. should enter upon, take, or use the estate, except for the purpose of setting out & ascertaining the land required, deft. should pay to pltf. the sum of £4,000 for the purchase of the estate as thereafter described. There was also a covenant, that, on payment by deft. of the sum of £4,000 & interest, after the expiration of six months after the passing of the bill to the day of payment of the sum, pltf. should convey to deft. so much of the estate as should be required for the construction of the railway. In an action on the covenant, for the non-payment of the purchase-money, after six months from the passing of the bill:—*Held*: the covenant to pay the purchase-money, & to convey the property, were independent covenants.—*SIBTHORP v. BRUNEL* (1819), 3 Exch. 826; 13 L. T. O. S. 122.

Annotation:—*Refd.* *Baggallay v. Pettit* (1859), 5 C. B. N. S. 637.

k. ———.]—*GUTHRIE v. CLARK* (1886), 3 Man. L. R. 318.—**CAN.**

l. ———.]—*ARMSTRONG v. ERICSON* (N. W. T.) (1905), 2 W. L. R. 185.—**CAN.**

———.]—*SIMSON & FARLANE v. YOUNG*, [1918] 56 S. C. R. 388.—**CAN.**

n. ———.]—*Receipt of purchase-money after default.]—**DEMORREST v. HELME* (1875), 22 Gr. 433.—**CAN.**

o. ———.]—*HUDSON'S BAY Co. v. MACDONALD* (1887), 4 Man. L. R. 480.—**CAN.**

p. ———.]—*FORFAR v. SAGE, Exp. WILKINS* (1902), 5 Terr. L. R. 255.—**CAN.**

q. ———.]—*PETERSON v. IL* (1889), 2 Exch. C. R. 67.—**CAN.**

r. ———.]—*Parties treating contract as subsisting after fixed time.]—*Although, where the property in a contract for the sale or exchange of lands is of a speculative character, the presumption is that time is of the essence of the agreement, such presumption may, as when a time is expressly fixed, be rebutted, by the parties treating the contract as still subsisting after the time fixed for its completion.—*ROBINSON v. HARRIS* (1892), 21 S. C. R. 390.—**CAN.**

t. ———.]—*Request for extension of time unanswered.]—**LEBELLE v. O'CONNOR* (1908), 15 O. L. R. 519; 11 O. W. R. 95.—**CAN.**

a. ———.]—*Delay by vendor in tender of conveyance.]—**FOSTER v. ANDERSON* (1908), 16 O. L. R. 565; 11 O. W. R. 1037.—**CAN.**

b. ———.]—*Delay of either party where obligations reciprocal.]—**NORMAN v. McMURRAY* (1913), 24 O. W. R. 532; 4 O. W. N. 1256; 10 D. L. R. 757.—**CAN.**

c. Form of waiver—Waiver by parol.]

—CONDELL v. LIGHTFOOT (1907), 5 W. L. R. 333.—CAN.****

d. Quit claim to vendor—Right of re-purchase by fixed date—Extension for re-purchase on payment of sum on account by fixed date.]—*HARRIS v. BETHUNE*, [1921] 2 W. W. R. 259.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 10.—B.

e. Payment on good title being made—Necessity for tender of conveyance.]—*MCKINDSEY v. JOHNSTON* (1856), 14 U. C. R. 209.—**CAN.**

f. ———.]—*Whether conditions mutual or dependent.]—**MCDONALD v. MURRAY* (1885), 11 A. R. 101.—**CAN.**

g. ———.]—*ARENBURG v. WAGNER* (1900), 33 N. S. R. 396.—**CAN.**

h. ———.]—*Title to be approved by purchaser's solicitor.]—**QUAIL v. BEATTY* (Alta.) (1913), 24 W. L. R. 242; 4 W. W. R. 55; 9 D. L. R. 784.—**CAN.**

aa. ———.]—*In a suit for specific performance of a contract for the sale of a house, the entire contract being contained in letters which provided that entry was to be given to the purchaser by a fixed date, & that the title-deeds were to be sent to the purchaser's solrs., & "on approval of the same the purchase-money to be paid prompt":—**Held*: the carrying out of the contract was in no way conditional upon the approval of the solrs., but that their approval was a condition precedent to the prompt payment of the purchase-money without waiting for a conveyance, & that the title was to be investigated & approved in the ordinary way.—*COHEN v. SUTHERLAND* (1890), 1 L. R. 17 Calc. 919.—**IND.**

bb. ———.]—*TODD v. WORTHINGTON* (1915), 32 W. L. R. 366.—**CAN.**

cc. ———.]—*Whether deposit of purchase-money with trust company in*

*escrow sufficient.]—*Where an agreement called for unconditional payments against title, deposit of a payment with a trust company in escrow until title was passed & conveyance executed is not a payment within the meaning of the agreement, & if the escrow holder misappropriates the money while the escrow is still running the loss must fall upon the purchaser.—*HAYES v. PACIFIC GREAT EASTERN* (1916), 34 W. L. R. 819; 10 W. W. R. 831.—**CAN.**

*Conduct of purchaser in possession preventing vendor from acquiring title.]—**MEEKER v. NICOLA VALLEY LUMBER Co.* (B. C.) (1917), 55 S. C. R. 494; 39 D. L. R. 497.—**CAN.**

930 i. Payment irrespective of conveyance.]—In a contract for the sale of land, payment of the balance of purchase-money, though usually dependent on completion by conveyance is not necessarily so. It depends upon the terms of the contract.—*GARSKE v. URQUHART* (1921), 21 S. R. N. S. W. 483; 38 N. S. W. W. N. 141.—**AUS.**

930 ii. ———.]—*RUWALD v. HALLING* (1927), 27 S. R. N. S. W. 334.—**AUS.**

930 iii. ———.]—*SWORD v. TEDDEN* (1901), 13 Man. L. R. 572; 21 C. L. T. 546.—**CAN.**

930 iv. ———.]—*MAYBERY v. WILLIAMS* (1910), 15 W. L. R. 553; 3 Sask. L. R. 350.—**CAN.**

930 v. ———.]—*MURPHY v. THORNTON* (1877), 3 N. Z. Jur. N. S. 46.—**N.Z.**

930 vi. ———.]—On the failure or refusal of a purchaser to complete an executory contract for the purchase of land, the vendor is not entitled to sue for the purchase-money unless the contract is expressed in such a way as to give a right to recover the purchase-money as a debt, without regard to the

931. —.]—A declaration in *assumpsit* stated that *pltf.* agreed to sell, & *deft.* to buy, certain land, & that *deft.* agreed to pay the purchase-money on Jan. 1, 1845, & that *pltf.* agreed, upon payment of the purchase-money, to convey the land to *deft.*; breach, non-payment of the purchase-money. There was also a count on an account stated. Pleas, *non assumpsit*, Stat. Limitations, & other pleas. *Deft.*, by a written agreement "agreed to pay the purchase-money, on Jan. 1, 1845," & *pltf.* agreed, upon payment of the purchase-money, to convey the land to *deft.* *Pltf.*, in support of the account stated, put in evidence a document, dated Jan. 19, 1849, in these terms:—"I hereby acknowledge the above account to be correct, the amount owing by me as cash, Jan. 12, 1849, being £1,053 7s. 1d. Signed, H. (s.)" (*deft.*). The jury found a verdict for *deft.* on Stat. Limitations, & for *pltf.* on the account stated:—*Held*: the *deft.* became bound to pay the purchase-money on Jan. 1, without a conveyance, & *pltf.* was entitled to recover upon the account stated.—*YATES v. GARDINER* (1851), 20 L. J. Ex. 327.

question of conveyance.—*TATTLE v. GIBSON*, [1925] N. Z. L. R. 602.—N.Z.

o. —.]—*Or of making good title.*—An agreement for the sale of land provided for the payment of the purchase-money by instalments, & that on payment of the purchase-money by the vendee, the vendor would convey by a good & sufficient deed in fee simple, free from encumbrances:—*Held*: the vendee was not entitled to call for a title until after payment by them of the purchase-money.—*FOOT & CARTER v. MARON & NICHOLLES* (1894), 3 B. C. R. 377.—CAN.

p. *Payment by instalments—Transfer conditional on final payment—Concurrent conditions.*—Where a contract for the sale of land provides for payment of the purchase-money by instalments, that the final payment shall be made within a stated period, & that "the vendor will upon payment of the full amount of the purchase-money sign a transfer of the land to the purchaser," the execution of the transfer is a condition precedent to or concurrent with the payment of the final balance of the purchase-money.—*HARRY DAVIES & CO. PTY., LTD. v. EAST* (1925), 47 A. L. T. 79; 31 Argus L. R. 463; [1925] V. L. R. 681.—AUS.

q. —.]—*Right of purchaser to accelerate payment.*—A purchaser under an agreement of sale of land has no right to accelerate the due date of future instalments of the purchase money, even though he tender interest, at the rate provided by the agreement, up to the date of the final payment.—*RUTHERFORD v. WALKER* (1907), 8 W. L. R. 52; 1 Alta. L. R. 122.—CAN.

r. —.]—*Application of acceleration clause—Right of purchaser to relief.*—Where an agreement provided that, in the event of default, the whole purchase-money should become due & payable; & *deft.* having made default as to the first deferred instalment, *pltf.* sued for the whole balance & interest:—*Held*: such an acceleration clause cannot be relieved against.—*HOUGHTON v. NICOLL* (1912), 22 W. L. R. 59; 6 D. L. R. 108; 22 Man. L. R. 489; 2 W. W. R. 1020.—CAN.

t. —.]—*Waiver by subsequent acceptance.*—*WEEKES v. SCHRADER* (Sask.) (1913), 25 W. L. R. 34; 4 W. W. R. 1115; 13 D. L. R. 70.—CAN.

a. —.]—*Reduction according to average of crop or damage by hail.*—*CHAPIN v. DIEBERT* (Sask.), [1924] 2 W. W. R. 252.—CAN.

b. *Reservation of right to rescind on*

default of payment—Without notice—Right of purchaser to tender within reasonable time of default.—*SOLOMONS v. HALLORAN* (1906), 7 S. R. N. S. W. 32; 23 N. S. W. W. N. 211.—AUS.

c. —.]—*Time essence of contract—Rescission within reasonable time of default.*—*PEIRSON v. CANADA FARMANENT & WESTERN CANADA MORTGAGE CORP.* (1905), 11 B. C. R. 139; 1 W. L. R. 99.—CAN.

d. —.]—*Right of purchaser to relief.*—*STEELE v. MCCARTHY* (1907), 7 Terr. L. R. 351; 6 W. L. R. 396.—CAN.

e. —.]—*MIDGELEY v. BACON* (1911), 16 W. L. R. 496; 4 Sask. L. R. 152.—CAN.

f. —.]—*WOODWARD v. KOSOWAN* (1908), 7 W. L. R. 632.—CAN.

g. —.]—*Waiver by acceptance of overdue instalment.*—*CHADWICK v. STUCKEY* (1912), 21 W. L. R. 788; 2 W. W. R. 671; 5 Alta. L. R. 514.—CAN.

h. —.]—*Sufficiency of notice—Notice according to agreement.*—*MARCH BROTHERS & WELLS v. BANTON* (1911), 20 W. L. R. 322; 45 S. C. R. 338; 1 W. W. R. 541.—CAN.

k. —.]—*A proviso in the agreement of sale between *pltf.*, purchaser, & *deft.*, vendor, authorised *deft.* to cancel it after two months' default by giving one month's notice in writing. *Deft.* on Mar. 26 gave *pltf.* notice allowing *pltf.* only thirty days to make payment:—*Held*: the notice was not sufficient to effect a cancellation of the agreement.*—*LE NEVEU v. McQUARRIE* (1907), 21 Man. L. R. 399.—CAN.

l. —.]—*CANADIAN FAIRBANKS Co. v. JOHNSTON* (1909), 18 Man. L. R. 589; 10 W. L. R. 571.—CAN.

m. —.]—*Where a contract for the sale of land provided for its cancellation on notice being sent to an address in Vancouver, & the vendor, with knowledge that the purchaser was in England, sent the notice to the address in Vancouver in an envelope addressed in a woman's handwriting & marked private, the notice was held bad.*—*MILLS v. MARRIOTT & FELLOWS & BOYD* (1912), 17 B. C. R. 171.—CAN.

n. —.]—*KUM JOW v. ELLIOTT*, [1921] 1 W. W. R. 785; 55 D. L. R. 622.—CAN.

aa. —.]—*O'NEILL v. GROVE* (1906), 25 N. Z. L. R. 961.—N.Z.

932. —.]—*& of making title.*—Where it appears by the terms of the contract, consisting of letters, *deft.* agreed to buy & the *pltf.* to sell the lease of a house & premises, the business to become *deft.*'s from a day named, & the purchase-money to be paid on a day named, *pltf.* are entitled, after the day named, to sue for the purchase-money, though they have not then completed the title or executed an assignment of the lease.—*ANDERSON v. BAIGENT* (1856), 26 L. T. O. S. 237; 4 W. R. 265.

933. *Payment into bank—Assent of vendor—Bankruptcy of bankers—On whom loss falls.*—A landowner agreed to sell land to a railway co., & the co., requiring immediate possession of it, offered to deposit the purchase-money in a certain bank in the joint names of the vendor & the chairman of the co., pending the investigation of the title. The vendor assented to the deposit being made, but in a different bank, & stipulated also that he should be paid 45 per cent. interest from the time possession was given. The deposit was accordingly made, & possession taken by the co. Before the conveyance was completed the

bb. —.]—*Waiver—By judgment for purchase-money.*—*WALDON v. ROSTREVE ESTATE, LTD.* (1926), 38 C. L. R. 280.—AUS.

cc. —.]—*A vendor obtained judgment against a purchaser for certain instalments of the purchase-money, less a sum allowed to the purchaser by way of set-off. The agreement for sale provided that the vendor might rescind in case of default, & that all moneys theretofore paid should be forfeited; & after execution under the judgment had been returned unsatisfied, & after default in payment of further instalments, the vendor gave notice of rescission:—*Held*: he was entitled to do this, & that his doing so did not entitle *deft.* to an order setting aside the judgment & for payment to him of the amount allowed by way of set-off.*—*JACKSON v. SCOTT* (1901), 21 C. L. T. 227; 1 O. L. R. 488.—CAN.

dd. —.]—*By extension of time for payment.*—*SCOTT v. MILNE* (1908), 8 W. L. R. 23; 13 B. C. R. 378.—CAN.

ee. —.]—*By resumption of possession by vendor.*—*TYTLER v. GENTING* (1911), 27 W. L. R. 330; 6 W. W. R. 191; 16 D. L. R. 581; 21 Man. L. R. 148.—CAN.

ff. —.]—*Right of purchaser to refuse to pay until mortgage apportioned.*—*CUSHING v. KNIGHT* (1912), 22 W. L. R. 220; 46 S. C. R. 555; 6 D. L. R. 820.—CAN.

gg. —.]—*PAGET v. BENNETT* (1907), 17 Man. L. R. 356.—CAN.

hh. —.]—*HOLE v. WILSON* (1911), 16 W. L. R. 352; 5 Sask. L. R. 28.—CAN.

kk. *Payment on survey of property.*—In an agreement for the sale of lands, where it was stipulated, that when the land was surveyed *pltf.* should give *deft.* a bond for a deed, or a deed on being secured the purchase-money:—*Held*: the survey was not a condition precedent which would prevent the *pltf.* from recovering the consideration money.—*MORSE v. HEUSTON* (1859), 4 N. S. R. (Coch.), 61.—CAN.

ll. *When covenant to pay implied.*—*JOSEPH v. TODD* (1863), 23 U. C. R. 80.—CAN.

mm. —.]—*Where a purchaser agrees to purchase land at a named price payable by instalments & providing for the conveyance of the land on completion of the payment though there is no express covenant by the purchaser to pay the purchase-money, such a covenant may be implied.*

Sect. 2.—Rights under particular conditions :

bankers with whom the money stood became bkpt., & most of it was lost:—*Held*: the loss must be borne by the vendor, the deposit having been made & accepted as payment, & not merely as security.—*ST. PAUL v. BIRMINGHAM, WOLVERHAMPTON & STOUR VALLEY RY. CO.* (1853), 11 Hare, 305; 1 Eq. Rep. 274; 21 L. T. O. S. 226; 17 Jur. 1176; 1 W. R. 494; 68 E. R. 1291.

934. Purchaser in possession—Order to pay money into court—Option of retiring from possession—Unless security of vendor interfered with.—*GREENWOOD v. TURNER*, No. 945, *post*.

*C. Interest on Purchase-Money.**(a) In General.*

935. Interest payable from certain day—Whether absolute condition—Delay by vendor.—Where the conditions of sale provide that interest shall be paid from a certain day, if the purchase be not then completed, the purchaser cannot relieve himself from payment of interest, by alleging that the delay in completing the contract was caused by the vendor; but it is otherwise where there is no express stipulation.—*ESDAILE v. STEPHENSON* (1822), 1 Sim. & St. 122; 57 E. R. 49.

Annotations:—*Appl.* *Jones v. Mudd* (1827), 4 Russ. 118; *Portman v. Mill* (1839), 3 Jur. 356. *N.E. De Visne v. De Visne* (1819), 1 H. & Tw. 408. *Reid. Catling v. G. N. Ry.* (1869), 21 L. T. 17.

HIEBERT & DOERN v. (HIESBRECHT (Man.)), [1919] 2 W. W. R. 24.—**CAN.**

g. Payment by labour without time fixed—*Request for work to be done essential.*—*BRAND v. MARTIN* (1869), 16 Gr. 666.—**CAN.**

h. Payment at time of sale—Strict performance of condition essential.—*MACDONALD v. ST. JOHN CORPN.* (1880), 20 N. B. R. 114.—**CAN.**

k. Mode of payment—Construction of agreement.—*WOLFFE v. HUGHES* (1882), 1 O. R. 322.—**CAN.**

l. Payment "as soon as we are able"—*Payment on proof of ability to pay.*—*SYLVESTER v. MURRAY* (1895), 26 O. R. 599.—**CAN.**

m. Balance "to be paid when possible"—*Payment due within reasonable time.*—*WATERMAN v. WATERMAN*, [1921] 2 W. W. R. 924.—**CAN.**

n. Payment on resale of lots—Minimum number of lots to be sold each year.—*DIAMOND v. WESTERN REALTY CO. (Ont.)* (1919), 58 S. C. R. 620; 47 D. L. R. 333.—**CAN.**

o. Part payment by conveyance of other land—Option of payment in cash.—*ROWES v. CHRISTIE* (1909), 11 W. L. R. 565; *affd.*, 12 W. L. R. 497.—**CAN.**

p. Crop payment—Application of clause for acceleration on default.—*WELLINGTON v. SELIG*, [1920] 1 W. W. R. 224; 50 D. L. R. 253; 13 Alta. L. R. 12.—**CAN.**

q. — Action by assignee of vendor.—*CENTRAL CANADIAN SECURITIES, LTD. v. BROWN* (1922), 62 D. L. R. 682; 15 Sask. L. R. 97; [1922] 1 W. W. R. 277.—**CAN.**

r. ——*LEMCKE v. NEW-LOVE*, (Sask.), [1927] 2 D. L. R. 1049; [1927] S. C. R. 389.—**CAN.**

t. — Effect of failure of purchaser to deliver or account.—*R. v. CURTIS*, [1920] 1 W. W. R. 1058; 52 D. L. R. 427; 33 Can. Crim. Cas. 106; 13 Sask. L. R. 80.—**CAN.**

a. — Extension of time for payment on failure of crop.—*MC EWAN v. BUMSTAD* (1922), 65 D. L. R. 607; 15 Sask. L. R. 403; [1922] 2 W. W. R. 334.—**CAN.**

b. ——*McMILLAN v. GRENIER (Alta.)*, [1927] 3 D. L. R. 240.—**CAN.**

c. — (Hattel mortgage as collateral security—Whether mortgage continues in face of proviso for determination.)—*GLASS v. BOEVERS (Sask.)*, [1923] 4 D. L. R. 48; [1923] 3 W. W. R. 28.—**CAN.**

d. — Right of vendor to take share of crop before time for delivery.—Under Crop Payments Act, 1920, a vendor has a right to take his share of the grain although the time for making delivery by the purchaser has not yet arrived; but he cannot so take it at the expense of the purchaser when the latter is not in default under the agreement.—*RACKNER v. ARMSTRONG & MUIRHEAD*, [1924] 1 D. L. R. 629; [1924] 1 W. W. R. 261; 18 Sask. L. R. 77.—**CAN.**

——*Where under an agreement of sale of land the purchase price is payable by delivering to a certain elevator in the name of the vendor the crop or a specified portion of it grown on the land, the agreement providing that the crop shall be the personal property of the vendor, the vendor has a legal interest in the crop before its delivery at the elevator & may enter on the land & seize his proper quantity of the grain threshed & stored thereon. The right to seize extends only to the portion belonging to the vendor for that year under the agreement.*—*ROSE v. EDMONDS (Sask.)*, [1919] 3 W. W. R. 47.—**CAN.**

z. — Right of vendor to crops grown on land by third party.—The covenant on behalf of himself & his assigns by a purchaser of land under a crop-payment agreement to grow a crop & deliver a part thereof to the vendor is binding only on himself & his successors in interest under the covenant. Therefore, a crop grown by a stranger to the contract, e.g., a lessee under an assignee of the purchaser, is not affected by Crop Payments Act, 1920, & is free from an assignment of the vendor.—*Re SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS, LTD., Re SINGER & HOUCK*

936. ——*If parties stipulate that interest shall be paid from a certain time, & the rents & profits shall belong to the other party from that time, that contract must be carried into effect, notwithstanding the delay that may arise in the completion of the contract.*—*PORTMAN v. MILL* (1839), 8 L. J. Ch. 161; 3 Jur. 356, L. C.

937. Discharge of purchaser's share of auction duty—Out of deposit—Payment by auctioneer—Whether interest chargeable.—By conditions of sale, the purchase-money was to carry interest, a deposit of £20 per cent. was to be paid, & the auction duty was to be borne equally by the purchaser & the vendor; the purchaser paid only the amount of the deposit, & out of it the auctioneer paid the whole of the auction duty:—*Held*: the portion of the deposit, applied in discharge of the purchaser's moiety of the auction duty, was to be considered as an unpaid part of the purchase-money, & the vendor was entitled to interest on it.—*TOWNSHEND v. TOWNSHEND* (1826), 2 Russ. 303; 38 E. R. 350.

938. Delay from unforeseen circumstances—Defect in vendor's title—Presumption against ignorance of defect.—Where a vendor agreed to sell an estate, & the title was to be made good on a day certain, on which day the remainder of the purchase-money was to be paid, but if any unforeseen circumstance occurred to retard the completion of the contract, interest was to be paid on the purchase-money; the ct., in decreeing a specific performance of the agreement, gave

(Sask.), [1927] 4 D. L. R. 1090; [1927] 3 W. W. R. 547.—**CAN.**

aa. Forfeiture of purchase-money paid on default of payment of balance—Right of purchaser to relief.—*MOODIE v. YOUNG* (1908), 18 W. L. R. 310; 1 Alta. L. R. 337.—**CAN.**

bb. ——*Where an agreement for sale of land, of which time is of the essence, provides for payment of the purchase price in instalments, contains an acceleration clause & permits the vendor to cancel the agreement upon any default, the ct. will relieve a cancelled purchaser from the forfeiture of the amounts paid under the agreement.*—*STEDMAN v. DRINKLE* (1915), 33 W. L. R. 483.—**CAN.**

cc. — Loss of right by delay.—*BAIR-FONG v. COOPER* (1911), 27 W. L. R. 174; 5 W. W. R. 701; 49 S. C. R. 14.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 10.—C. (a).

935 i. Interest payable from certain day—Whether absolute condition—Delay by vendor.—Where in the contract for the sale & purchase of land, the parties fix the time for payment of the purchase-money & the period from which interest thereon is to be computed, irrespective of the time fixed for completion, interest must, in the absence of default or breach of contract or of actual misconduct in relation thereto on the part of the vendor, be paid from the period named, notwithstanding the existence of difficulties as to title justifying the purchaser in refusing to complete until they are removed.—*Re DINGMAN & HALL'S CONTRACT* (1890), 17 A. R. 398.—**CAN.**

dd. Payment of purchase-money by instalments—Whether interest payable on whole balance or each instalment.—Where an agreement of sale, in respect of which a "cash" or "down" payment had been made at the time of execution, provided for payment of the balance of the purchase price in instalments, & contained a covenant that the purchaser "shall pay . . . the said sum above mentioned, together with interest thereon . . . on the days & times,"

interest from the date of the decree, *pltf.*s. taking the rents to that time; it appearing to the satisfaction of the *ct.* that the delay which had occurred was occasioned by a defect in *pltf.*'s title, of which he could not be presumed ignorant, & such defect not being such circumstance as was contemplated by the conditions of sale.—*HOGGART v. SCOTT* (1830), as reported in *Taml.* 500; 9 *L. J. O. S. Ch.* 54; 48 *E. R.* 199.

939. Right to benefit of rise in funds—Purchase-money paid into court—With interest.—*SUTTON v. DEERE* (1836), *Donnelly*, 113; 47 *E. R.* 262.

940. Calculation of increased value of estate—Arising from dropping of lives.—*TOWNSEND v. CHAMPERNOWNE*, No. 879, *ante*.

941. Payment of purchase-money by instalments—Whether compound interest payable—Claim by vendor for specific performance—Vendor not prepared to make good title.—Agreement for the payment of the purchase-money of an estate by yearly instalments with interest, the four last of which are to be retained by the purchaser, as an indemnity until a good title shall be made, does not entitle the vendor to compound interest in such instalments, upon a bill by him for specific performance of the agreement, it appearing that until such bill was filed he was not prepared to make a good title to the premises in question.—*STRATTON v. SYMON* (1838), 2 *Moo. P. C. C.* 125; 12 *E. R.* 951.

942. Several covenant—Who may sue for interest.—Covenant by one *pltf.*, on a deed executed by one A. A. D. of the first part, *pltf.* of the second part, & *defts.* of the third part. The deed, after reciting that A. A. D. had agreed to purchase certain land of *pltf.*, which same land A. A. D. had agreed to sell to *defts.*, stated that it was thereby covenanted by each party thereto, that A. A. D. should sell, & *defts.* should purchase, the said land at £7,335, £900 to be paid upon the execution of the deed, & £6,435 on Nov. 27, 1851. The deed then contained the following covenant, “& the said R. W. & H. W., *defts.*, for themselves, their heirs, etc., hereby covenant with the said W. T. K., *pltf.*, his exors., etc., & as a separate covenant, with the said A. A. D. his exors., etc., that they the said R. W. & H. W. their heirs, etc., shall, on performance of the covenant & agreement hereinbefore contained on the part of the said A. A. D. pay to the said W. T. K. his exors., etc., or to the said A. A. D. his exors., etc., in case the said W. T. K. his exors., etc., shall then have been paid his or their purchase-money, payable, etc., the sum of £6,435, being the remainder of the said purchase-money, on or before Nov. 27, 1851, & further, that the said R. W. & H. W. their heirs, etc., shall, in the meantime, & until the whole of the said sum of £6,435 shall be paid off, pay to the said W. T. K. his exors., etc., interest on so much of the purchase-money as shall from time to time remain unpaid, at the rate of 5 per cent. *per annum*, from the date of these presents,” etc.:—*Held*: W. T. K., *pltf.*, might properly sue alone for interest on the unpaid portion of the purchase-money, the covenant being several.—*KEIGHTLEY v. WATSON* (1849), 3 *Exch.* 716; 18 *L. J. Ex.* 339; 154 *E. R.* 1034.

943. Ascending scale of interest—Payable in certain events—Whether purchaser may be relieved—In absence of fraud.—A contract for sale of land provided that the purchaser should pay interest on the purchase-money at 4 per cent., from the time of taking possession until July 1, 1858, the day appointed by the contract for the payment of the purchase-money, & after that day at 5 per cent.; if the purchase-money should not be then paid, & after Jan. 1, 1859, at 8 per cent., with a proviso that this should not give the purchaser the right to delay the payment of the purchase-money on paying such higher rate of interest. The purchaser took possession of the land in 1857, but owing to circumstances, not caused by the misconduct or negligence of the vendor, the purchase was not completed until 1865:—*Held*: the stipulation for payment of a higher rate of interest was not in the nature of a penalty to secure the punctual payment of the purchase-money, against which the purchaser was entitled to be relieved, but a separate & distinct contract which he was bound to perform.—*HERBERT v. SALISBURY & YEOMIL RY. CO.* (1866), *L. R.* 2 *Eq.* 221; 14 *L. T.* 507; 14 *W. R.* 706.

944. Recovery of interest—After payment in error—Recovery under vendor & purchaser summons.—*Re YOUNG & HARSTON'S CONTRACT*, No. 957, *post*.

945. Purchase-money unpaid—Option to pay or give up possession—Interest payable on giving up possession.—Where a purchaser of real estate fails to complete his contract by payment of the balance of his purchase-money by the stipulated day, but, being in possession on that day, retains possession thereafter without paying interest or rent, the *ct.* will not, on a motion by the vendor in an action for specific performance, order him to pay the balance of purchase-money into *ct.* without giving him the option either of retiring from possession on a certain day or of paying the balance into *ct.* on that day, with interest from the day fixed by the contract for completion, even though the purchaser is in possession under the contract and has made no objection to the vendor's title; but that option will not be given if the purchaser has done any thing to prejudice the value of the property as a security for the balance.—*GREENWOOD v. TURNER*, [1891] 2 *Ch.* 141; 60 *L. J. Ch.* 351; 64 *L. T.* 261; 39 *W. R.* 315.

Annotations:—*Apld. Re Cossano & Mackay's Contract* (1919), 64 *Sol. Jo.* 259. *Refd. Cook v. Andrews* (1896), 66 *L. J. Ch.* 137.

946. —————Where title has been accepted & the purchaser has gone into possession before completion & has failed to complete & the vendor has commenced proceedings for specific performance the vendor can obtain on motion an order directing the purchaser to lodge the balance of the purchase-money in *ct.* together with the interest under the contract from the date fixed for completion within four days or in default to deliver up possession to the vendor & in that event to lodge in *ct.* the interest due under the contract.—*Re CASSANO & MACKAY'S CONTRACT* (1919), 64 *Sol. Jo.* 259.

cto.:—*Held*: as the words “the said sum” could not possibly refer to the whole purchase price, & as the total sum of the deferred payments was not mentioned, interest was only payable on each instalment, as each fell due, & not on the whole balance of the purchase price.—*GREAT WEST LUMBER CO. v. WILKINS* (1907), 7 *W. L. R.* 166; 1 *Alta. L. R.* 155.—*CAN.*

m. —————*D'HART v. MC-DERMAID* (N. S.) (1910), 9 *E. L. R.* 183.—*CAN.*

n. —————Interest payable yearly on balance unpaid—Whether interest payable on instalments after maturity.—*KENNEDY v. INMAN*, [1920] 3 *W. W. L.* 564; 51 *D. L. R.* 155; 15 *Alta. L. R.* 196.—*CAN.*

o. Crop payments agreement—Liability on failure of crop to equal interest payable—Deductions for interest before repayment of capital.—*PATTISON v. BEHR*, [1920] 1 *W. W. R.* 417; 13 *Sask. L. R.* 137.—*CAN.*

p. —————Where proviso for compound interest.—*RINK v. MARCH*, [1921] 1 *W. W. R.* 919; 14 *Sask. L. R.* 176.—*CAN.*

Sect. 2.—Rights under particular conditions: Sub-sect. 10, C. (a), (b) & (c).]

In cases of compulsory purchase.]—*See* COMPULSORY PURCHASER OF LAND, Vol. XI, pp. 231, 232, Nos. 1203–1215.

(b) *Delay through Default of Purchaser.*

947. Delay by purchaser — Subsequent delay by vendor when purchaser ready.]—A purchaser agreed, that if the completion of the purchase "should be delayed on his part," beyond June 27 he would pay interest. The vendor & his trustee were willing to complete on that day, but the purchaser was not prepared; but on Nov. 28, when the purchaser was ready, the vendor's trustee would not join:—*Held:* the purchaser was liable to interest only from June 27 to Nov. 28.—*PERRY v. SMITH* (1842), Car. & M. 554.

*Annotations:—***Refd.** *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648. **Mentd.** *British & Beningtons v. North Western Cachar Tea Co.*, [1923] A. C. 48.

948. What amounts to default—Inability to find purchase-money—At specified time.]—*Re* LONDON CORPN. & TUBBS' CONTRACT, No. 954, *post*.

949. — Unnecessary requisition.]—By a contract for purchase, interest was to be paid on the purchase-money from Dec. 26, 1852, if the purchase was not then completed. Certain objections & requisitions were made with regard to the title. The purchaser declining to complete until these were satisfactorily answered, the vendor filed a claim for specific performance on May 2, 1853, & in the following month sent copies of certain deeds, upon receiving which the purchaser, in Nov. accepted the title. The claim came on to be heard, when the ct., considering that these deeds were not essential to the title, decreed specific performance, with costs, & interest to be paid by the purchaser from Dec. 26, 1852.—*LITCHFIELD v. BROWN* (1853), 23 L. J. Ch. 176.

950. — Untenable requisition.]—By the conditions of sale it was provided that if the purchase should not be completed at the time appointed, the purchaser should pay interest on the remainder of the purchase-money at the rate of 5 per cent. *per annum* from that time until the same should be paid, or the vendor might take the rents & discharge the outgoings. Provided always that if the delay in completion should arise from any cause other than the neglect or default of the purchaser, & if the purchaser should at his own risk & expense deposit the remainder of the purchase-money at any bank upon a deposit account bearing interest & should give notice thereof to the vendor, the vendor should from the time of the notice only be entitled to such interest as should be actually produced by the amount so deposited. The day fixed for completion was Sept. 2, 1907. On Sept. 4, 1907, after the decision of *NEVILLE, J.*, the purchaser placed the balance of the purchase-money, £99,000, on deposit with a bank, & gave notice to the vendors. On Feb. 28, 1908, he took the money off the deposit account & paid it into ct. under an order made in lunacy proceedings. The purchase was not yet completed, & the vendors now claimed interest at 5 per cent. *per annum* on the balance of the purchase-money from the date fixed for completion up to Feb. 28,

1908. The purchaser maintained that they were only entitled to the interest actually produced by the deposit account, & pleaded a settled account:—*Held:* (1) a decision by the ct. that a requisition is untenable is equivalent to a decision that the purchaser is in default in refusing to complete until the objection is removed; that default involved breach of some duty owed to another; (2) a person guilty of a breach of duty is guilty of default, but in considering whether he is under that duty the ct. will be guided by the nature of the contract & all the circumstances of the case; (3) there is no rule that conduct amounting to default must be conduct which is unreasonable; the words "doing what is reasonable under the circumstances" used by *BOWEN, L.J.*, in *Re Young & Harston's Contract*, No. 957, *ante*, mean the same thing as doing what a person ought to do having regard to his relations to others, & do not suggest any standard based on what a prudent man would do for his own protection; the rule there suggested that a vendor of real estate is not guilty of default so long as he acts reasonably having regard to his relations towards other persons interested in the contract applies to purchasers as well as to vendors; in the present case the delay had been caused by the conduct of the purchaser, who though acting reasonably for his own protection had committed a breach of duty towards the vendors in repudiating the contract although the title was good; & the settled account under the circumstances was no defence to the claim for interest at 5 per cent.—*Re* BAYLEY-WORTHINGTON & COHEN'S CONTRACT, [1909] 1 Ch. 648; 78 L. J. Ch. 351; 100 L. T. 650.

*Annotation:—**As to* (3) **Refd.** *British & Beningtons v. North Western Cachar Tea Co.*, [1923] A. C. 48.

951. — Breach of duty—Repudiation of contract—When good title made.]—*Re* BAYLEY-WORTHINGTON & COHEN'S CONTRACT, No. 950, *ante*.

952. Delay due to vendor.]—A purchaser cannot be compelled to pay interest for delay under a condition that "the purchaser in default" shall pay interest on the remainder of his purchase-money, where the delay has been occasioned by the default of the vendor.—*JONES v. GARDINER*, [1902] 1 Ch. 191; 71 L. J. Ch. 93; 86 L. T. 71; 50 W. R. 265.

953. Effect of honest belief of purchaser — Invalidity of his own view.]—*Re* BAYLEY-WORTHINGTON & COHEN'S CONTRACT, No. 950, *ante*.

(c) *Delay through Wilful Default of Vendor.*

954. Onus of proof on purchaser.]—On a sale of real estate by auction one of the conditions, after fixing June 24, 1892, for completion of the purchase, provided that, "if from any cause whatever, other than wilful default on the part of the vendors," the purchase-money should not then be paid, it should bear interest at 5 per cent. Another condition purported to describe the statutory title under which the vendors, who were a corp., & had been in possession for a long period, were selling. Upon subsequent investigation it appeared that, through having omitted to examine their alleged statutory title, the vendors had misdescribed it in the condition, an important part

PART IV. SECT. 2, SUB-SECT. 10.— C. (b).

947 i. Delay by purchaser—Subsequent delay by vendor when purchaser ready.]—A contract of sale provided that the purchaser should pay interest upon the unpaid purchase-money, if "from any cause whatever" the purchase should not be completed on a

certain date. Purchaser did not complete on that date but when he afterwards tendered the conveyance for execution, one of the vendors was absent from the country & several months elapsed before his execution was obtained:—*Held:* the purchaser must continue to pay interest until the conveyance was delivered.—*SHILL-*

TON v. BUTT (1877), 3 V. L. R. (L.) 323.—**AUS.**

PART IV. SECT. 2, SUB-SECT. 10.— C. (c).

q. What amounts to wilful default —Repudiation of contract—On refusal of purchaser to accept defective title.]—

of the property being held under an entirely different statutory title, & eventually the title to the whole was not finally accepted by the purchaser until Sept. 29, but the purchaser did not in fact complete until some months afterwards, having been unable previously to find his purchase-money. He paid interest from Sept. 29, until completion, but contended that he was not liable for interest from June 24 to Sept. 29, on the ground that the delay in making a good title had arisen from the "wilful default" of the vendors in having omitted to verify their title by proper investigation before making the positive statement in the conditions:—*Held*: (1) there had been no "wilful default" on the part of the vendors within the meaning of the condition; but, even assuming there had been such "wilful default," the non-completion on June 24 was really attributable to the purchaser's voluntary delay in making requisitions & examining into the title, & to his inability to find his purchase-money, & he was therefore liable to interest from that date.

(2) In order to exonerate the purchaser from liability to pay interest, he must prove some "wilful default" on the part of the vendors which caused delay in the completion of the purchase. Proof by the purchaser that he could not prudently complete the purchase by the day named owing to some difficulty arising on the investigation of the vendor's title, is not of itself enough to exonerate the purchaser from payment of interest, for it is quite possible that the difficulty may not be owing to any wilful default on the part of the vendors (*LINDLEY, L.J.*).—*Re LONDON CORPN. & TUBBS' CONTRACT*, [1894] 2 Ch. 524; 63 L. J. Ch. 580; 7 R. 265; *sub nom. Re TUBBS & LONDON CORPN.'S CONTRACT*, 70 L. T. 719; 10 T. L. R. 481; 38 Sol. Jo. 476, C. A.

Annotations:—As to (1) *Consd. Re Wilsons & Stevens Contract*, [1894] 3 Ch. 546. *Appl. Bennett v. Stone*, [1903] 1 Ch. 509. *Consd. Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648. *Generally, Mentd. Re City Equitable Fire Insce.*, [1925] 1 Ch. 407.

955. What purchaser must prove—Wilful default.—*Re LONDON CORPN. & TUBBS' CONTRACT*, No. 954, *ante*.

956. — Non-completion due to wilful default.—*Re LONDON CORPN. & TUBBS' CONTRACT*, No. 954, *ante*.

957. What amounts to wilful default—Going abroad—Immediately before day fixed for completion.—Conditions of sale provided that the purchase was to be completed by Sept. 8, & that "if from any cause whatever other than wilful default on the part of the vendor" completion of the purchase was delayed beyond that day the purchase-money was to bear interest from that day to the day of actual payment. The property was in mtge., & the draft conveyance was not returned approved by the mtgees. to the purchasers until Sept. 6. On Sept. 8, the engrossment was sent to the vendor's solrs., but the vendor had gone abroad for his autumn holiday on Sept. 6, & the engrossment executed by him was not returned until Sept. 18. The mtgees. were also out of town, & the vendor's solrs. declined to incur the expenses of a special messenger to procure execution by them. The purchase was not completed until Oct. 14. On summons by the purchasers under the Vendor & Purchaser Act, 1874 (c. 78), s. 9, for

recovery of interest on the purchase-money paid by them under protest:—*Held*: by his going abroad two days before the time known by him to have been fixed for completion of the purchase, there had been so far "wilful default on the part of the vendor" within the exception contained in the conditions of sale, that the purchasers were entitled to recover out of the interest paid by them a sum proportionate to the delay. *Qu.*: whether the ct. has jurisdiction upon summons under Vendor & Purchaser Act, 1874 (c. 78), s. 9, to order interest which has been erroneously paid by a purchaser to be repaid to him.—*Re YOUNG & HARSTON'S CONTRACT* (1885), 31 Ch. D. 168; 53 L. T. 837; 34 W. R. 84, C. A.

Annotations:—*Consd. Re Riley to Streetfield* (1886), 56 L. T. 48. *Appl. Re Hetling & Merton's Contract*, [1893] 3 Ch. 269. *Distd. Re London Corpn. & Tubbs' Contract*, [1894] 2 Ch. 524. *Appl. Re Wilson & Stevens Contract*, [1894] 3 Ch. 546; *Re Woods & Lewis' Contract*, [1898] 2 Ch. 211. *Consd. Bennett v. Stone*, [1903] 1 Ch. 509; *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648. *Mentd. Asiatic Petroleum Co. v. Lennard's Carrying Co.*, [1914] 1 K. B. 419; *Ingram & Royle v. Services Maritimes Du Tréport*, [1914] 1 K. B. 541; *Metropolitan Water Board v. L. & N. E. Ry.* (1924), 131 L. T. 123; *Re City Equitable Fire Insce.*, [1925] 1 Ch. 407.

958. — Conveyance not secured from mortgagee—Mortgagee going abroad—Vendor relying on power of attorney.—On Sept. 14, 1892, vendors contracted to sell a piece of freehold land subject to the condition, that "if from any cause whatever other than the wilful default of the vendors" the purchase should not be completed by the day fixed for completion, the purchaser should pay interest on the purchase-money until completion. The property was subject to a mtge. to two trustees, one of whom, P., a solr., had gone abroad before the date of the contract, having given to his partner a general power of attorney, authorising him to execute deeds & transfer any property held by P. as trustee or mtgee. The vendors knew that it would be difficult to communicate with P., but, relying on the sufficiency of the power of attorney, they fixed Nov. 10, 1892, for the completion of the purchase. The purchaser, however, declined to complete without a conveyance from P. himself, alleging that, notwithstanding Trustee Act, 1888 (c. 59), s. 2, there was no person to whom the mtge. money could safely be paid. A conveyance from P. was ultimately obtained; but, owing to the delay thus caused the purchase was not completed until Mar. 1, 1893, & the vendors claimed interest on the purchase-money from Nov. 10, 1892:—*Held*: (1) the case was not within Trustee Act, 1888 (c. 59), s. 2, & the purchaser was justified in refusing to complete without a release from P.; (2) the delay in completion was attributable to the wilful default of the vendors, & they were not entitled to any interest on the purchase-money.

The vendors here knew all the facts, but they hoped that the power of attorney would enable them to remove the difficulty occasioned by the facts with which they were fully acquainted. This hope & the mistake they made are not enough to enable the ct. to hold that there was no wilful default on their part (*LINDLEY, L.J.*).—*Re HETLING & MERTON'S CONTRACT*, [1893] 3 Ch. 269; 62 L. J. Ch. 783; 69 L. T. 266; 42 W. R. 19; 9 T. L. R. 553; 37 Sol. Jo. 617; 2 R. 543, C. A.

Annotations:—As to (2) *Distd. Re London Corpn. & Tubbs' Contract*, [1894] 2 Ch. 524. *Appl. Re Wilsons & Stevens*

HAYES v. ELSLEY (1893), 23 S. C. R. 623.—CAN.

r.—Unreasonable delay in proof of title.—*CLARE v. LAWRENCE* (1916), 34 W. L. R. 643.—CAN.

t.—Negligent assumption of length of tenancy of party in possession.]

—*Re POSTMASTER-GENERAL & COLGAN'S CONTRACT*, [1906] 1 I. R. 287, 477.—IR.

a.—Taking out summons on date of agreement to remove cloud from title.—*Re KISSOCK & TAYLOR'S CONTRACT*, [1916] 1 I. R. 393.—IR.

b. Where purchaser in possession.]—*VANZANT v. BURKE* (1876), 38 U. C. R. 104.—CAN.

c.—]—*NIMPKISH LAKE LOGGING CO. v. WOOD & ENGLISH* (B. C.), [1927] 3 D. L. R. 926.—CAN.

Sect. 2.—Rights under particular conditions: Subsect. 10, C. (c) & (d).]

Contract, [1894] 3 Ch. 546. **Folld.** *Re* Strafford & Maples, [1896] 1 Ch. 235. **Distd.** *Re* Woods & Lewis' Contract, [1898] 67 L. J. Ch. 475. **Apld.** *Re* Pelly & Jacob's Contract (1899), 80 L. T. 45. **Consd.** *Bennett v. Stone*, [1903] 1 Ch. 509; *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648.

959. — Failure to examine statutory title—Consequent misdescription in particulars.]—*Re* LONDON CORPN. & TUBBS' CONTRACT, No. 954, *ante*.

960. — Delay in procuring admissions to copyholds.]—(1) Delay in completing a sale occasioned by the vendors having omitted to take steps to procure certain admissions to copyholds, held to arise from the wilful default of the vendors.

(2) Damages to the purchaser by reason of such delay, held not recoverable as compensation under Vendor & Purchaser Act, 1874 (c. 78), s. 9.—*Re* WILSONS & STEVENS' CONTRACT, [1894] 3 Ch. 546; 63 L. J. Ch. 863; 71 L. T. 388; 43 W. R. 23; 38 Sol. Jo. 682; 8 R. 640.

Annotation:—*As to* (1) **Refd.** *Bennett v. Stone*, [1902] 1 Ch. 226.

961. — Failure to obtain concurrence of necessary parties.]—Where a purchase cannot be completed by the appointed day through the failure of the vendor to obtain the concurrence of necessary parties he cannot claim interest from the purchaser under the usual condition requiring the purchaser to pay interest on the purchase-money "if from any cause whatever other than the wilful default of the vendor" the purchase is not completed by the appointed day the delay being attributable to the vendor's "wilful default" (*KEKEWICH, J.*).—*Re* STRAFFORD (EARL) & MAPLES, as reported in, [1896] 1 Ch. 235; 65 L. J. Ch. 124; *on appeal*, [1896] 1 Ch. 240.

Annotation:—**Refd.** *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648.

962. — Repudiation of contract—By resisting action for specific performance.]—An agreement for the sale of 36 acres of land, part of a larger amount belonging to the vendor, for the sum of £3,600, left the boundary of the land on one side, where there was no visible division between the land sold & the land retained, to be subsequently marked out by a fence; & concluded with the words, "subject to approval of conditions & form of agreement by purchaser's solr." The vendor was mistaken as to the acreage of his land, & the portion he had intended to sell measured out at 42 acres, which amount he required the purchaser to take at £100 an acre. In an action by the purchaser to enforce the original agreement which the vendor repudiated:—**Held:** by repudiating the contract the vendor had not been guilty of "wilful default" so as to disentitle him to interest payable under the contract until completion.

"Wilful default" is obstruction in the completion of the contract (*KEKEWICH, J.*).—*NORTH v. PERCIVAL*, [1898] 2 Ch. 128; 67 L. J. Ch. 321; 78 L. T. 615; 40 W. R. 552; 42 Sol. Jo. 431.

Annotations:—**Consd.** *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648. **Refd.** *Bennett v. Stone*, [1902] 1 Ch. 226. **Mentd.** *Santa Fé Land Co. v. Forestal Land, Timber & Rys.* (1910), 26 T. L. R. 534; *Hatzfeldt v. Alexander* (1911), 105 L. T. 434; *Rosdale v. Denny*, [1921] 1 Ch. 57; *Chillingworth v. Esche* (1923), 129 L. T. 808.

963. — Obstruction in completion of contract.]—*NORTH v. PERCIVAL*, No. 962, *ante*.

964. — Refusal to deliver abstract—Due to misinterpretation of conditions.]—On a sale of land by auction the particulars stated that "those purchasers who wished to avoid unnecessary expense & to accept conveyances prepared by the

vendors' solrs. may have such conveyances free of expenses, except stamp duty," but the conditions of sale did not provide that purchasers who agreed to accept free conveyances should not be entitled to the delivery of abstracts of title or to investigate the title to the lots purchased by them. They, however, contained the usual provision requiring the purchaser to pay interest on his unpaid purchase-money in case of non-completion on the appointed day, if not caused by wilful neglect or default of the vendors. A purchaser of several lots agreed in his contract to take a free conveyance, but requested delivery of an abstract to enable him to investigate the title, before completion. The vendors, however, refused to deliver the abstract until completion, on the ground that the purchaser by agreeing to accept a free conveyance had waived his right to delivery of an abstract & to investigate the title. Upon a summons under Vendor & Purchaser Act, 1874 (c. 78), taken out by the purchaser:—**Held:** the vendors were bound to deliver an abstract to the purchaser to enable him to investigate the title before completion, & their refusal to do this, though owing to misinterpretation of the conditions of sale, constituted wilful neglect or default on their part, so as to free the purchaser from liability to pay interest on his unpaid purchase-money from the day fixed for completion.—*Re* PELLY & JACOB'S CONTRACT (1899), 80 L. T. 45.

965. — Honest mistake.]—An agreement dated Sept. 26, 1898, for the sale of land provided that, if from any cause whatever, other than wilful default on the part of the vendors, the completion of the purchase should be delayed beyond Jan. 2, 1899, the purchase-money should bear interest at 5 per cent. *per annum*. The title having been accepted, a dispute arose about the form of the conveyance, & the purchase was not completed on the day fixed. On June 12, 1899, the vendors threatened in effect that, if the purchaser did not within ten days assent to the form of conveyance which they proposed, they would cancel the contract & forfeit the deposit. On June 22, 1899, the purchaser commenced an action for specific performance of the contract. At the trial on Feb. 2, 1900, the judge held that the purchaser was in the right as to the form of the conveyance, & gave judgment for specific performance, with costs up to the date of the judgment. The judgment directed that interest (if any) should be computed on the balance of the purchase-money from Jan. 2, 1899, & an account should be taken of the rents & profits of the land received by defts. since Jan. 2, 1899, & it was ordered that what should be coming on the account of rents & profits should be deducted from the amount of the purchase-money & interest when computed. On a motion by *pltf.* to vary the master's certificate, the judge held that there had been no "wilful default" by the vendors, & that, even if there had been, the delay in completion was due, not to the default, but to the inability of the purchaser to find the money to complete the purchase, & consequently that the purchaser must pay interest on the balance of the purchase-money from Jan. 2, 1899, down to completion:—**Held:** either there had been no wilful default by the vendors, or, if there had been, the delay in completion was not due to the default, & the decision as to payment of interest was right.

In *Re London Corporation & Tubbs' Contract*, No. 954, *ante*, the Ct. of Appeal did not intend to depart from the general rule laid down in *Re Young & Harston's Contract*, No. 957, *ante*. Nor was it intended to lay down that every case of

honest mistake by a vendor is without that rule. So to hold would be inconsistent with *Re Helling & Merton's Contract*, No. 958, *ante*.—*BENNETT v. STONE*, [1903] 1 Ch. 509; 72 L. J. Ch. 240; 88 L. T. 35; 51 W. R. 338; 47 Sol. Jo. 278, C. A.

Annotation.—*Consd. Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648.

966. — Insisting on wrong form of conveyance.—*BENNETT v. STONE*, No. 965, *ante*.

967. Delay not attributable to default of vendor—*Ignorance of defect in title*—*No breach of duty on part of vendor.*—A clause in a contract for the sale of lands provided that, if from any cause whatever other than the "default of the vendor," the purchase should not be completed by the day fixed, the purchaser should pay interest until completion. Upon investigation of the title a defect in it was discovered by the vigilance of the purchaser's advisers, which was not known to or suspected by the vendor when he entered into the contract, & the time occupied in remedying the defect delayed the completion of the purchase for nearly three months after the day fixed. The purchaser did not have, & keep, his money ready at the proper time, making no interest of it:—*Held*: there being no want of reasonable care on the part of the vendor & no abstention from doing anything that he ought to have done, the delay was not attributable to his "default," & the purchaser must pay interest until completion.—*Re WOOD & LEWIS' CONTRACT*, [1898] 2 Ch. 211; 67 L. J. Ch. 475; 78 L. T. 665; 46 W. R. 643; 14 T. L. R. 457; 42 Sol. Jo. 552, C. A.

Annotations.—*Distd. North v. Percival*, [1898] 2 Ch. 128. *Consd. Bennett v. Stone*, [1903] 1 Ch. 509.

968. — Due to purchaser's default.—*BENNETT v. STONE*, No. 965, *ante*.

969. Repudiation of contract by purchaser—Action for specific performance rendered necessary.—*OXENDEN v. FALMOUTH (LORD)* (1833), Sugden's Vendors & Purchasers, 14th ed. pp. 637–8, 650.

Annotations.—*Refd. De Visme v. De Visme* (1849), 1 H. & Tw. 408; *Stocks v. Holdsworth* (1854), 2 W. R. 450.

970. Purchase-money set apart—Notice of appropriation given to vendor.—*Re GOLDS' & NORTON'S CONTRACT*, No. 997, *post*.

971. ——Where there is a condition that the purchaser shall pay interest from the day fixed for completion in case of delay from any cause "except the wilful neglect or default of the vendor," the purchaser cannot relieve himself from the liability to pay interest by setting apart the unpaid purchase-money & giving the vendor notice of such appropriation.—*Re RILEY TO STREATFIELD* (1886), 34 Ch. D. 386; 56 L. J. Ch. 442; 56 L. T. 48; 35 W. R. 470.

(d) *Delay From Any Cause Whatever.*

972. Commencement of liability—On good title being shown.—A contract of purchase contained a stipulation, that if by reason of any unforeseen or unavoidable obstacles, the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at 5 per cent. on his purchase-money, & be entitled to the rents & profits of the premises; the vendor did not show a good title till long after the specified day:—*Held*: he was not entitled to interest except from the time when a good title was first shown.—*MONK v. HUSKISSON* (1827), 4 Russ. 121, n.

973. ——By the conditions of sale under a decree, it was provided, that the purchaser of each lot should pay the remainder of his purchase-money into the bank, to the credit of the cause, on or before Dec. 26, 1845, & should

then be entitled to the receipt of the rents from Dec. 25; but if the purchaser should fail in making such payment, then & in such case, & from whatever cause the delay might have arisen, he should pay interest at the rate of 5 per cent. *per annum*, on the balance of his purchase-money, from that day until the payment thereof. It was also provided, that the vendor should, within three days from the confirmation of the purchase, deliver an abstract & deduce a good title to the lots sold. The order *nisi* was confirmed absolutely on Dec. 4, 1845, & no abstract was delivered to the purchaser until Jan. 3, 1846, & the title was not completed until Aug. 1847. On Dec. 23, 1845, the purchaser deposited the balance of his purchase-money with his private bankers, at 2½ per cent. *per annum* interest, & gave notice thereof to the vendors, & that the difference of interest between 5 per cent. & 2½ per cent. from Dec. 7, 1845, must be at the loss of the vendors, so long as they delayed the delivery of the abstract. In Aug. 1847, the purchaser paid the balance of his purchase-money, with 5 per cent. interest, into ct., without prejudice to his right to compensation or allowance, by reason of the delay on the part of the vendors in completing the title to the purchased estate:—*Held*: the purchaser was entitled to compensation, & for that purpose a reference was ordered to the master to inquire & ascertain from what time a good title was shown, the payment of interest by the purchaser to commence from that time, & not earlier.

In cases like the present, the principle strictly carried out, is, to postpone the payment of the purchase-money till the time when a good title was shown, the vendor being entitled to the rents up to that time, & the purchaser paying interest from that time; such time to be ascertained by the master under the order of reference.—*DE VISME v. DE VISME* (1849), 1 Mac. & G. 336; 1 H. & Tw. 408; 19 L. J. Ch. 52; 14 L. T. O. S. 169; 13 Jur. 1037; 41 E. R. 1295, L. C.

Annotations.—*Apld. Monro v. Taylor* (1850), 8 Hare. 51. *Consd. Folld. Robertson v. Skelton* (1850), 12 Beav. 363. *Rowley v. Adams* (1850), 12 Beav. 476; *Dyson v. Hornby* (1851), 4 De G. & Sm. 481. *Distd. Lewis v. South Wales Ry.* (1852), 10 Hare. 113. *Consd. Sherwin v. Shakespeare* (1854), 5 De G. M. & G. 517; *Tewart v. Lawson* (1856), 3 Sm. & G. 307. *N.F. Vickers v. Hand* (1859), 26 Beav. 630. *Consd. Re Ridley to Streatfield* (1886), 34 Ch. D. 386. *Refd. Crosse v. Laurence, Crosse v. Keene* (1851), 16 Jur. 142; *Wallis v. Sarel* (1852), 21 L. J. Ch. 717; *Stocks v. Holdsworth* (1854), 2 W. R. 450; *Palmerston v. Turner* (1864), 4 New Rep. 46; *Herbert v. Salisbury & Yeovil Ry.* (1866), L. R. 2 Eq. 221; *Re London Corpn. & Tubbs' Contract*, [1894] 2 Ch. 524.

974. ——By conditions of sale, interest was payable from Nov. 1846, if, "from any cause whatever," the purchase should not be then completed. The vendors did not make out their title until Mar. 1849:—*Held*: interest was payable only from the last-mentioned period.—*ROBERTSON v. SKELTON* (1850), 12 Beav. 363; 19 L. J. Ch. 140; 15 L. T. O. S. 129; 50 E. R. 1100; *sub nom. SKELTON v. ROBERTSON*, 14 Jur. 323.

975. — Delivery of abstract.—*SHERWIN v. SHAKESPEAR*, No. 674, *ante*.

976. Liability of purchaser—Delay occasioned by state of title.—(1) A purchaser under a decree cannot be permitted to pay his purchase-money into ct. without accepting the title, although all parties consent, & although the conditions provide that, if from any cause whatever the money should not be paid by a particular day, the purchaser making default shall pay interest from that day.

(2) The above condition does not render the purchaser liable to pay interest where he has given notice, as is the fact, that his money is lying unproductive, & the delay arises from the state

Sect. 2.—Rights under particular conditions: Subsect. 10, C. (d) & (e).]

of the title.—DENNING v. HENDERSON (1847), 1 De G. & Sm. 689; 17 L. J. Ch. 8; 10 L. T. O. S. 302; 12 Jur. 89; 63 E. R. 1252.

Annotations:—As to (2) Apld. Jones v. Gardiner, [1902] 1 Ch. 191. Generally, Rejd. Re Riley to Streatfield (1886), 34 Ch. D. 386.

977. ———.]—On a sale under the decree of the ct., in Oct. 1849, of a reversion in fee, subject to a term of ninety-nine years, determinable on the death of the survivor of two lives, at a small chief rent, it was provided by one of the conditions that the vendors should procure & confirm the master's report, & obtain an order for the purchaser to pay his purchase-money into ct. on or before Dec. 25, 1849, when the purchaser was to pay his purchase-money, & be entitled to the receipt of the rents; "but if from any cause whatever the purchase-money shall not be so paid in" on or before that day, the purchaser should pay interest at the rate of 5 per cent. from that day to the time of payment. The vendors delivered their abstract of title in Sept. 1851, but did not make out a good title till March, 1852. On a motion then made, that the purchaser might pay his purchase-money into ct. with interest, according to the condition:—*Held*: the condition did not apply; but as the purchaser had had the benefit of the wearing out of the lives, he must pay interest at the rate of 4 per cent.—*WALLIS v. SAREL* (1852), 5 De G. & Sm. 429; 21 L. J. Ch. 717; 19 L. T. O. S. 152; 64 E. R. 1184.

Annotation:—Rejd. Bannerman v. Clarke (1856), 26 L. J. Ch. 77.

978. ——— No default on part of vendor.]—*SHERWIN v. SHAKSPEAR*, No. 674, *ante*.

979. ——— Delivery of imperfect abstract.]—Where conditions of sale fix periods for the delivery of the abstract & the completion of the purchase, & provide that interest shall run, "if, from any cause whatever," the purchase should not be completed, the purchaser must pay interest from the time fixed, though the completion is delayed beyond the time specified, in consequence of the state of the title, if there be no fraud or wilful delay on the part of the vendor.

By conditions of sale, the abstract was to be delivered before Feb. 18, the purchaser was to take the rents from Mar. 25, & the purchase was to be completed on June 24. If, from any cause whatever, the completion should be delayed after that time, the purchaser was to pay interest at 5 per cent. Imperfect abstracts were delivered, & a complete abstract was not delivered until June 17. Further delay having occurred in completing, the purchaser deposited the purchase-money at a bankers', & gave notice, in Aug. that he would pay no interest:—*Held*: as there was no fraud or wilful delay on the part of the vendors, & as the delivery of an imperfect abstract arose simply from the state of the title, the purchaser must pay interest.—*VICKERS v. HAND* (1859), 26 Beav. 630; 53 E. R. 1041.

Annotations:—Rejd. Palmerston v. Turner (1864), 33 Beav. 524; Re Riley to Streatfield (1886), 34 Ch. D. 386.

980. ———.]—S. contracted to sell a moiety of an estate to G., the purchase to be completed on June 24, 1854, & if, "from any cause whatever," the purchase should not be completed on that day, the purchaser to pay interest. Just before June 24, the other part owner set up a claim to the entirety, & refused to produce the deeds. G. applied at distant intervals to know when the vendor would complete, & never expressed a wish to rescind. In 1857, S. filed a bill for partition, & died in Mar. 1858, leaving a will

made in 1850, by which he devised his estates to infants, two of whom were his heirs. In July, 1861, S.'s exors. revived the partition suit, & in Jan. 1862, G. was made a party by amendment, pursuant to an arrangement made at his request in May, 1861. In July, 1862, a decree for partition was obtained & the certificate made in July, 1863. G., who had in June, 1854, when the dispute arose with the co-owner, given notice that he would not pay interest, but had ever since employed the purchase-money in his trade, refusing to pay interest, S.'s exors., in 1864, filed a bill against him & the infant devisees for specific performance, & the M.R. decreed specific performance, & ordered G. to pay interest from June, 1854:—*Held*: the circumstances were not such as to exempt the purchaser from payment of interest according to the contract.—*WILLIAMS v. GLENTON* (1866), 1 Ch. App. 200; 35 L. J. Ch. 284; 13 L. T. 727; 12 Jur. N. S. 175; 14 W. R. 294, L. JJ.

Annotations:—Consd. Re Riley to Streatfield (1886), 34 Ch. D. 386. Distd. Re Hetling & Merton's Contract, [1893] 3 Ch. 269; Re London Corp. & Tubbs' Contract, [1894] 2 Ch. 524. Consd. Re Woods & Lewis' Contract, [1898] 2 Ch. 211. Rejd. North v. Percival, [1898] 2 Ch. 125; Day v. Singleton, [1899] 2 Ch. 320; Bennett v. Stone, [1903] 1 Ch. 509.

981. ——— Notice given that money lying unproductive.]—*DENNING v. HENDERSON*, No. 976, *ante*.

982. ——— Notice that money deposited at bank.]—*RE GOLDS' & NORTON'S CONTRACT*, No. 997, *post*.

983. ——— Delay in delivering abstract.]—*DE VISME v. DE VISME*, No. 973, *ante*.

984. ———.]—Upon a sale under the ct. on Sept. 14, there was a condition that the purchaser should confirm the report, & before Nov. 10, pay his purchase-money & interest from Sept. 29, & be entitled to the rents from that time; & "under no circumstances" was he to be excused paying interest from that time. The purchaser was unable to obtain & serve the order of confirmation until Nov. 29. The abstract was delivered on Dec. 6, & the requisitions finally answered on Jan. 17:—*Held*: there was no such delay on the part of the vendor as to release the purchaser from payment of interest.—*ROWLEY v. ADAMS* (1850), 12 Beav. 476; 50 E. R. 1143.

985. ———.]—A purchase was to be completed on a given day when the purchaser was to have possession, & it was provided, "that if, from any cause whatever," the purchase-money should not be then paid, the purchaser should pay interest. A delay of six months occurred from the default of the vendor in not furnishing proper abstracts:—*Held*: the purchaser must pay interest, unless he gave up the rent, during that period.—*COWPE v. BAKEWELL* (1851), 13 Beav. 421; 51 E. R. 162.

986. ———.]—*SHERWIN v. SHAKSPEAR*, No. 674, *ante*.

987. ——— Non-completion by day fixed.]—By the particulars & conditions of sale an estate was described as 1,015 acres of meadow, pasture, & arable land, & the purchaser was to pay part of the purchase-money on signing the agreement, & the remainder on completion of the purchase, "on Oct. 11, from which time the purchaser was to be entitled to the rents & profits"; but if, from any cause, the purchase should not be completed by Oct. 11, the purchaser should pay interest till the completion of the purchase; the vendor was to deliver an abstract of title within fourteen days of the day of sale, & deduce a good title. The estate was sold by deft. to pltf. on July 9, & an abstract of title delivered on July 14. It then appeared that the estate was subject to two mtges. & that

the mtgees. had not received the usual six months' notice of redemption; that some of the mtgees. were dead; that letters of administration *de bonis non* had to be taken out to one of them; & that a deed of declaration of trust by parties beneficially interested in the mtge. had to be produced & executed. These & other matters rendered it impossible for the vendor to convey by Oct. 11; & the purchase was ultimately completed in the following Apr.:—*Held*: debt. did deduce an abstract of title, & show a good title, according to the conditions.—*SAVORY v. UNDERWOOD* (1854), 23 L. T. O. S. 141.

988. — Delay in proving payment of testator's debts.—E. by will, appointed R. & T. trustees & exors. of her will, & she gave to them & the survivor £2,000, upon trust to invest it & pay the produce to her daughter for life, with remainder to her children; & in default of children or descendants of a child who should attain a vested interest, in trust for R. She also gave her residuary real & personal estate, "subject to the payment of her debts & legacies," to R. absolutely. R. died; T. by a deed which recited that all debts & legacies had been paid, conveyed testatrix's real estate to the devisees of R. Pltf. purchased the rectory of J.; & on a resale the conditions provided "that if from any cause whatever the purchase-money was not paid at the time appointed interest should be payable." It was objected, that there was no proof that the debts & legacies were paid, & it was found that the £2,000 had not been duly invested; but after some delay & expense, the objection was removed. Upon the vendor claiming interest upon the purchase-money:—*Held*: the fact of proving the payment of the debts & legacies did not dispense with the conditions of sale; but the vendor was entitled to interest upon the balance of the purchase-money.—*STORRY v. WALSH* (1854), 18 Beav. 559; 27 L. J. Ch. 338; 23 L. T. O. S. 35; 18 Jur. 503; 2 W. R. 300; 52 E. R. 219.

Annotations:—*Mentd.* *Howard v. Chaffers*, *Howard v. Robinson* (1863), 2 Drew. & Sm. 236; *Graham v. Drummond*, [1896] 1 Ch. 968.

989. — No steps taken to investigate title.—*STOCKS v. HOLDSWORTH*, No. 994, *post*.

990. — Payment prevented—Failure to get bills discounted.—*STOCKS v. HOLDSWORTH*, No. 994, *post*.

991. — Neither party in default—Delay in obtaining money out of court.—One of the conditions at an attempted sale by auction under a decree provided that the purchase should be completed on a day named, & that if from any cause whatever the purchase-money should not then be paid, interest should be paid from that date. The purchase was by private contract, subject to the conditions of sale, & also subject to the purchase being approved by the ct. The purchase-money was a fund in ct., & after a long delay the conveyancing counsel approved of the title for the purchasers:—*Held*: neither party being to blame for the delay, the purchasers could not be relieved from their obligation to pay interest.—*Re NEWCASTLE & DARLINGTON JUNCTION RY. CO.'S ACT, Re YORK, NEWCASTLE & BERWICK RY. CO.'S ACT*, 1847, *Ex p. DURHAM* (DEAN & CHAPTER), *TEWART v. LAWSON, TEWART v. TEWART* (1856), 3 Sm. & G. 307; 2 Jur. N. S. 345; 65 E. R. 671; *sub nom. Re YORK, NEWCASTLE & BERWICK RY. CO.'S*

ACT, Ex p. DURHAM (DEAN & CHAPTER), *TEWART v. LAWSON, TEWART v. TEWART*, 4 W. R. 419.

992. — Legal proceedings necessitated—Death of vendor.—Conditions of sale provided that the purchase should be completed on a given day, & that "if from any cause whatever the purchase should not be then completed," the purchaser should pay interest from that time till the day of completion. The title was accepted, & the deeds prepared & tendered some days before the time fixed. Two days before that time the vendor died, having devised her estates to an infant, which rendered a suit necessary to obtain completion, & delay was occasioned. After the filing of the bill, the purchaser paid his money into ct., to the general credit of the cause:—*Held*: the death of the vendor was an event within the contemplation of the parties, & the purchaser was liable to pay interest; the payment into ct. was not a payment to the purchaser; & there being no fault in either party, the decree must be without costs.—*BANNERMAN v. CLARKE* (1850), 3 Drew. 632; 26 L. J. Ch. 77; 28 L. T. O. S. 96; 5 W. R. 37; 61 E. R. 1045.

Annotation:—*Mentd.* *Hale v. Bushill* (1866), 35 Beav. 343.

993. — To make good title—Ratification of vendor's power of sale.—By a contract for the sale of an estate, it was stipulated, "that if, from any cause whatsoever, the purchase should not be completed," on a day named, the purchaser should pay interest on his purchase-money from that day until the completion. It became necessary to institute a suit to rectify the power under which the vendors sold, in order to make a good title, & a delay occurred in completing. There being no wilful default on the part of the vendor:—*Held*: the purchaser was bound to pay interest, & was entitled to the corresponding rents.—*PALMERSTON (LORD) v. TURNER* (1864), 33 Beav. 524; 4 New Rep. 46; 33 L. J. Ch. 457; 10 L. T. 364; 10 Jur. N. S. 577; 12 W. R. 816; 55 E. R. 472.

Annotation:—*Reid.* *Re Riley to Stratfield* (1886), 56 L. T.

(e) *Payment of Purchase-Money into Bank.*

994. Whether purchaser liable to interest—After giving notice of payment into bank.—A purchaser agreed that, "if from any cause whatever" the purchase should not be completed by a day named, interest should be payable. He spent a considerable part of the intervening time without taking any steps towards investigating the title, having been prevented from paying the purchase-money before the appointed day only by reason of his having been disappointed in procuring the discounting of some bills for that purpose; on receiving a notice after the day from the vendor that he should be charged with interest, he paid the money into a banker's & informed the vendor that it should lie there until the completion of the purchase, having meanwhile raised some objections of little weight to the title, which were removed after a reasonable time:—*Held*: under these circumstances the vendor was entitled to the stipulated interest.

It appears that the purchaser would have paid the balance of the purchase-money on Jan. 7, but for the failure of his attempt to get some bills discounted. After that date the solr. for the purchaser searched for judgments & discovered that the vendor was a debtor to the Crown in respect

PART IV. SECT. 2, SUB-SECT. 10.—C. (e).

994.1. Whether purchaser liable to interest—After giving notice of payment into bank.—The vendee is

from the duty of paying interest by a tender of the purchase-money when it becomes due & a continued readiness to pay it since, or by depositing it in a bank, with notice to the vendor,

subject to his order, to be delivered to him on the execution & delivery of a deed.—*QUINLAN v. O'CONNELL* (1911), 16 W. L. R. 288; 4 Sask. L. R. 61.—*CAN.*

Sect. 2.—Rights under particular conditions: Subsect. 10, C. (e), D., E. & F. (a).]

of a judgment; & that was released after forty-five days, which was not an unreasonable length of time. In this respect there is nothing improper in the conduct of the vendor unless he was bound to disclose judgments on his abstract; but until the recent Act that was not necessary (*STUART, V.-C.*).—*STOCKS v. HOLDSWORTH* (1854), 2 W. R. 450.

995. ———.]—*VICKERS v. HAND*, No. 979,

————.]—A purchaser contracted for the purchase of certain real estate at the price of £38,500, which was to carry interest at 5 per cent. until payment, & he was let into possession. Afterwards, difficulties having arisen in completing the purchase, he paid £38,000 into a bank to a separate account, & gave notice to the vendors that this sum was appropriated for the purposes of the purchase, & that he would refuse to pay interest under the contract. The vendors replied that they disputed the sufficiency of the notice, but did not point out that the sum paid in was deficient by £500. On discovering the deficiency, the purchaser paid in £500 with interest at 5 per cent.:—*Held*: the purchaser was not liable for interest subsequently to the time when he paid £38,000 into the bank.—*KERSHAW v. KERSHAW* (1869), L. R. 9 Eq. 56; 21 L. T. 651; 18 W. R. 477.

Annotations.—*Fold*. *Re Golds' & Norton's Contract* (1885), 52 L. T. 321. *Distd. Re Riley to Streatfield* (1886), 34 Ch. D. 386.

997. ———.]—Where the delay in the completion of a purchase by the stipulated day arises from the default of the vendor, & the purchaser then deposits his purchase-money in a bank to a separate account, & gives notice of the fact to the vendor, the purchaser is relieved, as from the receipt of such notice by the vendor, from payment of interest on his purchase-money, notwithstanding that he has been in possession or receipt of the rents under the contract, & that the contract provides that he shall pay interest "if from any cause whatever" the purchase is not completed on the day named. The vendor is, however, entitled to the interest, if any, allowed by the bank on the deposit.—*Re Golds' & Norton's Contract* (1885), 52 L. T. 321; 33 W. R. 333; 1 T. L. R. 204.

Annotation.—*N.F. Re Riley to Streatfield* (1886), 34 Ch. D. 386.

998. Vendor entitled to bank interest.]—*Re MONCKTON & GILZEAN*, No. 711, *ante*.

999. ———.]—*Re Golds' & Norton's Contract*, No. 997, *ante*.

1000. ———.]—Although otherwise provided by conditions.]—*Re Bayley-Worthington & Cohen's Contract*, No. 950, *ante*.

D. Possession.

1001. Meaning of "possession."]—Pltf. agreed to sell deft. an orchard, described as being in the "occupation of L. P." & that the purchaser should have "possession" on the day appointed for completion:—*Held*: "possession" did not mean "personal occupation" & a decree for specific performance was made against deft., although pltf. was unable, by reason of L. P.'s

tenancy, to put him in actual occupation of the premises.—*LAKE v. DEAN* (1860), 28 Beav. 607; 54 E. R. 499.

Annotation.—*Mentd. Carroll v. Keays, Keays v. Carroll* (1873), 22 W. R. 243.

1002. Payment of purchase-money condition precedent.]—The purchaser of an estate, sold as tithe free, cannot be compelled to take it subject to tithe on terms of compensation; but an estate of 140 acres being sold under a decree, the particulars stating about 32 acres to be tithe free, & no evidence of exception having been produced on the reference of the title, the master was directed to certify the proper amount of compensation. A purchaser under a decree for sale having accepted, & on a report of an objection to the title, for which compensation was ordered, returned possession, must pay interest on the purchase-money, from the time at which he took, or at which a title was shown under which he might have safely taken, possession, & is entitled to an allowance for prior, not for subsequent, deterioration of the estate.

With regard to possession, the purchaser was not to take possession till he had paid the purchase-money, & that condition of payment could not be performed unless prior to the time appointed for giving possession, the vendor could show a title under which the purchaser would be safe in taking possession & paying his purchase-money (*LORD ELDON, C.*).—*BINKS v. ROKEYBY (LORD)* (1818), 2 Swan. 222; 36 E. R. 600, L. C.

Annotations.—*Reid. Bowyer v. Bright* (1824), M'Cle. 479; *Smith v. Tolcher* (1828), 4 Russ. 302.

1003. Possession essence of contract—Vacant possession.]—(1) In a suit by a vendor for specific performance against a purchaser, if the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time & a vacant possession are of the essence of his contract; & the ct. will receive, as evidence that such was the purchaser's object, statements made by the agent of the purchaser at the time of signing the contract.

(2) Where a purchaser has consented to enlarge the time for completion, & where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time if the possession is not then vacant, & if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day. But where a purchaser had by his acts waived the time of completion in the first instance, & had gone on for some time inducing the vendor to incur expenses to perfect his title, & suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the ct., although it dismissed a bill filed against such a purchaser for a specific performance, dismissed it without costs.—*NOKES v. KILMOREY (LORD)* (1847), 1 De G. & Sm. 444; 63 E. R. 1141.

1004. ———.]—Evidence—Statement made by purchaser's agent—At time of signing contract.]—*NOKES v. KILMOREY (LORD)*, No. 1003, *ante*.

1005. ———.]—Contemporary parol agreement—Vendor to remain in possession.]—Where the vendor of a piece of land, of which he was himself in occupation, contracted to sell the land under

PART IV. SECT. 2, SUB-SECT. 10.—D.

d. What amounts to possession—Letting purchaser into receipt of rents & profits.]—*PEOPLE'S LOAN & DEPOSIT CO. v. BACON* (1879), 27 Gr. 294.—*CAN.*

e. ———.]—Delivery of key to buildings.]—The delivery to a purchaser of a house of the key thereof is not of itself delivery of possession; it is but a symbolical delivery, & may be evidence of possession if given or received with that view. Merely

obtaining the keys of a building in order to view the premises, so as to estimate alterations intended to be made & to perform other acts to preserve the premises from deterioration is not such a taking possession under a contract for sale as will bind the

conditions of sale by one of which it was provided that the purchaser should be entitled "to the possession or the receipt of the rents & profits" of the land from a specified date :—*Held* : on the construction of the written agreement, the vendor was bound to give possession to the purchaser on the date specified, & no effect could be given to the words referring in the alternative to the receipt of the rents & profits ; & evidence was not admissible to prove an alleged contemporary parol agreement by which the vendor was to retain possession of the land to a later date, paying the purchaser in the meantime, by way of rent, interest on his purchase-money.—*ANKER v. FRANKLIN* (1880), 43 L. T. 317 ; *sub nom.* *ANKIN v. FRANKLIN*, 44 J. P. 830.

1006. — "Possession or receipt of rent & profits"—Construction.]—ANKER v. FRANKLIN, No. 1005, *ante*.

E. Receipt of Rents and Profits.

1007. Right of purchaser—Paying interest till completion.]—By conditions of sale, the purchase-money was to be paid in May, & if not paid, from any cause whatever, interest was to be paid till the purchase was completed, & the purchaser to be let into possession from the quarter day next preceding the day of payment. Payment was made in Dec. :—*Held*: the purchaser paying interest from May was entitled to the rents from Mar. 25.—*NICHOLSON v. NICHOLSON* (1835), 5 L. J. Ch. 51.

1008. — — —.]—PORTMAN v. MILL, No. 936,
ante.

1009. Application of condition—Sale of property subject to leases—Purchaser ignorant of existence of leases.]—An estate was put up for sale by a particular describing it as "now or late in the several occupations of H. R. & others," & by one of the conditions, it was provided, that on completion, the purchaser should be "let into the receipt of the rents & profits." Some parts of the property were subject to leases for lives at a low rent:—*Held*: a purchaser, who entered into the contract without knowing of the existence of such leases, could not be compelled to take the title without compensation.—*HUGHES v. JONES* (1861), 3 De G. F. & J. 307; 31 L. J. Ch. 83; 5 L. T. 407; 8 Jur. N. S. 399; 10 W. R. 139; 45 E. R. 892, L. J.J.

*Annotations:—***Reid.** Carroll v. Keays, Keays v. Carroll (1873), 22 W. R. 243; Phillips v. Miller (1875), 44 L. J. C. P. 265; Royal Bristol Permanent Bldg. Soc. v. Bomash (1887), 35 Ch. D. 390.

F. Outgoings.

(a) *In General.*

Rights of parties on open contract.]—See Part VI., Sect. 1, sub-sect. 5, *post*.

1010. Date to which vendor has to bear outgoings—Date of good title being shown.]—Conditions of sale provided for completion of the purchaser on a certain day, & for the apportionment of rents, rates, taxes, & outgoings up to that date, & also in the event of completion being delayed beyond such day for the purchase-money bearing interest or. at the vendor's option, he to

receive the rents up to the day of actual completion of the purchase:—*Held*: in the event of completion being delayed beyond the appointed day the vendor had the option of either claiming interest & accounting to the purchaser for rents since the appointed day, or of keeping all sums in fact received by the vendor since that day from tenants; but there being no words expressly relieving the purchaser from the obligation to discharge outgoings after the appointed day, & no ground for inserting anything by implication, the expense of complying with a sanitary notice under Public Health (London) Act, 1891 (c. 76), after the appointed day & after the title having been accepted, must be borne by the purchaser.—*BARSHT v. TAGG*, [1900] 1 Ch. 231; 69 L. J. (Ch. 91; 81 L. T. 777; 48 W. R. 220; 16 T. L. R. 100; 44 Sol. Jo. 133.

Annotations.—**Apd.** *Re* Highett & Bird's Contract, [1902] 2 Ch. 214. **Reid.** *Re* Waterhouse's Contract (1900), 11 Sol. Jo. 645.

1011. Liability of purchaser for outgoings — Wrongful refusal to complete.]—By an agreement entered into with exors. for the purchase of a leasehold public-house, & the goodwill & licences connected with it, the household furniture, stock-in-trade, & other effects upon the premises, were to be taken by the purchaser at a valuation, & possession was to be delivered up to him on Sept. 29, 1821: the valuation was made, but, on Sept. 29, the purchaser, alleging that there was a defect in the title to the leasehold, refused to perform his contract: the exors. filed a bill for specific performance, but in the meantime remained in possession of the house, & carried on the business:—*Held*: (1) though the exors. were entitled to a decree for specific performance, & though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since Sept., 1821; (2) he could not be compelled to take that portion of the stock-in-trade on the premises at the time of the decree, which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business; (3) the purchaser ought to be charged with rent, taxes, & other outgoings, paid by the exors. since Sept. 1821, & with interest on the sums so paid by them; (4) the purchaser was not entitled to any occupation-rent, or other allowance for the use of the house & furniture by the exors. during the period that elapsed after Sept. 29, 1821.—*DAKIN v. COPE* (1827), 2 Russ. 170; 38 E. R. 299.

Annotations:—As to (1) **Distd.** Golden Bread Co. v. Hemmings, [1922] 1 Ch. 162. **Generally**, **Reid**. Darbey v. Whitaker (1857), 29 L. T. O. S. 351; Day v. Luhke (1868), L. R. 5 Eq. 336. **Generally**, **Mentd.** Bowser v. Colby (1841), 11 L. J. Ch. 132.

1012. What are outgoings—Ground rent.]—Conditions of sale of leasehold property provided that the vendors should pay "all outgoings" up to the half-quarter day, when the purchase was to be completed:—*Held*: under the term "outgoings," the above half-quarter's rent was payable by the vendors.—*LAWES v. GIBSON* (1865), L. R. 1 Eq. 135; 35 L. J. Ch. 148; 13

purchaser & render him liable to pay interest on the purchase-money.—PEOPLE'S LOAN & DEPOSIT Co. v. BACON (1879), 27 Gr. 294.—CAN.

PART IV. SECT. 2, SUB-SECT. 10.—E.

10071. *Right of purchaser—Paying interest till completion.*—**SUTTON v. CARY** (1916), 16 S. R. N. S. W. 254.—AUS.

PART IV. SECT. 2, SUB-SECT. 10.—
F. (a).

1. *Liability of purchaser for outgoings—Purchaser in possession with rents & profits—Condition for payment of all rates & taxes till completion.*—**BARROWMAN v. FADER** (1898), 31 N. S. R. (19 R. & G.) 20.—**CAN.**

F. — Covenant by purchaser to pay

—Rates assessed before but not due until after agreement.]—DEVANNEY v. DORR (1883), 4 O. R. 206.—CAN.

h. Vendor to pay all outgoings "now due"—Liability of vendor for rates due but payable by instalments.]
MUNROE v. McDONALD (1915), 49 N. S. R. 110.—CAN.

k. Vendor to pay all outgoings

Sect. 2.—Rights under particular conditions: Sub-sect. 10, F. (a), (b) & (c); sub-sects. 11, 12, 13 & 14.]

L. T. 316; 29 J. P. 702; 11 Jur. N. S. 873; 1 W. R. 25.

1013. — Land tax—Where part of estate purchased will be exempt.]—Where resp. had contracted to purchase from appts. less than the 640 acres which is the minimum quantity of land liable to land tax under Land Tax Act, 1877:—*Held*: appts. were not entitled on completion to charge resp. with the land tax thereon from the date of his possession, either as his proportionate part of the tax paid by themselves on their entire holding, or as an outgoing contracted to be paid for in respect of his purchase.—*COUNTRY ESTATES Co. v. GRAVES*, [1895] A. C. 113; 64 L. J. P. C. 44; 72 L. T. 31; 11 R. 381, P. C.

— Paving & street improvement expenses.]—See Sub-sect. 10, F. (b), *post*.

— Other Public Authority charges.]—See Sub-sect. 10, F. (c), *post*.

(b) *Paving and Street Improvement Expenses.*

1014. Constitute an "outgoing."]—Pltfs. bought of deft. three houses, & by the contract of sale the latter agreed to discharge "all rates, taxes, & outgoings" up to the time of completion. The purchase was completed, & afterwards payment was demanded from pltfs. of the expenses incurred under a local Act in improving the street in which the houses stood. The work had been done some time before the houses belonged to deft., & at the time of sale to pltfs. neither party was aware of the charge. Pltfs., having paid the sum demanded, sued to recover the same from deft.:—*Held*: the charge for improving the street was an "outgoing" which deft. had bound himself to discharge, & pltfs. were entitled to recover it from him.

Some taxes, such as the property tax, & some rates, such as the poor rate, are apportionable, & accordingly would be apportioned under the clause [in the contract for sale]: but the words, "if necessary," show that it extends to "outgoings" which need not & cannot be apportioned (*LORD COLERIDGE, C.J.*).—*MIDGLEY v. COPPOCK* (1879), 4 Ex. D. 309; 48 L. J. Q. B. 674; 40 L. T. 870; 43 J. P. 683; 28 W. R. 161, C. A.

Annotation:—*Folld. Tubbs v. Wynne*, [1897] 1 Q. B. 74.

1015. —.]—*STOCK v. MEAKIN*, No. 1017, *post*.

1016. Condition relieving vendor of liability on notices served after sale—Whether representation that no such notice served before sale.]—*Re LEYLAND & TAYLOR'S CONTRACT*, No. 577, *ante*.

1017. Whether charge upon premises—Apportionment under Private Street Works Act, 1892 (c. 57).]—Freehold property in an urban district abutting on a private street was sold by private contract, which provided (*inter alia*) that "all rent, if any, & outgoings" were, if necessary, to be apportioned. The vendor conveyed, as "beneficial owner," the land to the purchaser. At the date of the contract, works had been executed in the street by the urban authority under above Act. The demand for payment of the sum finally apportioned in respect of the premises was served after the completion of the contract:—*Held*: the charge under above Act took effect from the date of the completion of the works; it was therefore an "outgoing" which the vendor

was bound by his contract to discharge; & further, the charge was an "incumbrance, claim, or demand" suffered by the vendor within his implied covenant against incumbrances, notwithstanding the fact that the expenses were incurred without any default on his part, & the time for payment had not arrived before the conveyance was executed.

The charge for such works is an "outgoing" which the vendor is liable to discharge under the usual clause in a contract for sale for the payment of "outgoings" by the vendor, & is also an incumbrance which the vendor is liable for under the covenant against incumbrances implied by a conveyance "as beneficial owner."—*STOCK v. MEAKIN*, [1900] 1 Ch. 683; 69 L. J. Ch. 401; 82 L. T. 248; 48 W. R. 420; 16 T. L. R. 284, C. A.

Annotations:—*Apld. Surtees v. Woodhouse*, [1903] 1 K. R. 396; *Re Allen & Driscoll's Contract*, [1904] 2 Ch. 226. *Distd. Re Farrer & Gilbert's Contract*, [1914] 1 Ch. 125. *Reid. Re Leyland & Taylor* (1900), 69 L. J. Ch. 764; *Re Waterhouse's Contract* (1900), 44 Sol. Jo. 645; *Lumby v. Faupel* (1903), 88 L. T. 562.

1018. Liability as between vendor & purchaser.]

—*MIDGLEY v. COPPOCK*, No. 1014, *ante*.

—See *HIGHWAYS*, Vol. XXVI., p. 539, Nos. 2379, 2380.

1019. Time at which liability fixed—Completion of works.]—*Re WATERHOUSE'S CONTRACT* (1900), 44 Sol. Jo. 645.

—See *HIGHWAYS*, Vol. XXVI., pp. 533, 536, 537, Nos. 2319–2322, 2359–2361.

(c) *Other Public Authority Requirements.*

1020. Expenses incurred under dangerous structure notice—Whether an outgoing.]—By conditions of sale of land within the metropolis the date fixed for completion was May 8, all outgoings up to that day being cleared by the vendor. Before May 8 a magistrate made an order to take down dangerous structures on the land. This order was not complied with, & after May 8 the county council took down the structures, & demanded & received from the purchaser the expenses of so doing:—*Held*: the liability having been incurred before May 8, the expenses were "outgoings," within the meaning of the conditions, which the purchaser was entitled to recover from the vendor.—*TUBBS v. WYNNE*, [1897] 1 Q. B. 74; 66 L. J. Q. B. 116.

Annotations:—*Distd. Re Allen & Driscoll's Contract*, [1904] 2 Ch. 226. *Reid. Barsht v. Tagg*, [1900] 1 Ch. 231; *Re Waterhouse's Contract* (1900), 44 Sol. Jo. 645; *Re Hightt & Bird's Contract*, [1902] 2 Ch. 214.

1021. — From what date notice effective—Date of order to pull down.]—*TUBBS v. WYNNE*, No. 1020, *ante*.

1022. Expenses of abating nuisance—Incurred after date of completion—Purchaser in default.]—*BARSHT v. TAGG*, No. 1010, *ante*.

SUB-SECT. 11.—CONVEYANCE.

Costs incidental to conveyance.]—See Part IX., Sect. 6, *post*.

SUB-SECT. 12.—TITLE DEEDS.

1023. Condition as to production of title deeds—Right to evidence as to possible dower.]—Real estate was sold, under a decree, by public auction,

down to payment of purchase-money—Liability for rates due but pay in instalments.]—BELFAST BANK v. CALLAN, [1910] 1 I. R. 38.—*IR.*

PART IV. SECT. 2, SUB-SECT. 10.—F. (b).

1. *Liability of vendor for frontage rate*

—Work done before contract—Bye-law authorising payment passed after.]—Re GRAYDON & HAMMILL (1890), 20 O. R. 199.—*CAN.*

one of the conditions being that the purchaser should not be entitled to require the production of any deed or document mentioned or referred to in the abstract not in the possession of the vendor. By the abstract A. appeared to have sold in 1824, & an assignment of an old term was then made in trust for the then purchaser, & to attend the inheritance. In 1829 the term was again assigned in trust for C., testator in the cause, & to attend the inheritance. The purchaser under the decree was held not to be entitled to evidence as to the dower or possible dower of the wife of A., but only to be satisfied as to the deeds relating to the term being in the vendor's possession or not.—*BASS v. WELSTED* (1848), 10 L. T. O. S. 480; 12 Jur. 347.

1024. — Attested copies at purchaser's expense.]—Where, by the conditions of sale, it is agreed that the vendor shall retain the title-deeds, " & that a covenant will be entered into for the production of such of them as are not enrolled, & for giving attested or other copies thereof to the respective purchasers at their expense," a purchaser has not, on completion, a right to attested copies at the expense of the vendor.—*COTTON v. SCUDAMORE* (1855), 1 K. & J. 321; 69 E. R. 481.

1025. — —.]—One of the conditions of a sale by public auction stated that the purchaser should not require the production of any title deeds, etc., which were not in the possession of the vendors, & all recitals of births, etc., or other facts contained in any deed dated thirty years since, should be deemed conclusive evidence thereof; & all attested copies of or extracts from deeds, etc., & all other evidence as to deaths, etc., which might be required by the purchaser for the purpose of examination with the abstract, should be respectively sought for & procured at the expense of the purchaser. A. became the purchaser of two lots. After the title had been approved, & a deed of conveyance prepared, a question arose as to whether or not the purchaser was entitled to attested copies of the title deeds at the expense of the vendors; & thereupon the vendors, under the power contained in the fourth condition, annulled the sale. On bill filed for the specific performance of the contract, the ct. held that the purchaser was not entitled to attested copies of the title deeds at the expense of the vendors, & dismissed the bill, with costs.—*ABBOTT v. DARNELL* (1856), 2 Jur. N. S. 631; 4 W. R. 314.

1026. — — Purchasers of different lots.]—A condition of sale of real estate, sold under an order of the ct., provided that all attested copies of deeds "whether required for the verification of the abstract or delivery to the purchaser, or for any other purpose, shall be procured at the expense of the purchaser":—*Held*: the condition was not sufficiently explicit to throw upon the purchaser of a smaller lot, the purchaser of a larger lot being entitled to the possession of the title deeds, the expenses of attested copies of the deeds handed over to the purchaser of the larger lot, but such expenses must be borne by the estate.—*PETERSON v. ELWES* (1858), 31 L. T. O. S. 341; 6 W. R. 611.

Production for proof & investigation of title.]—*See* Part V., Sect. 5, sub-sect. 5, *post*.

Custody of title deeds.]—*See* Part X., Sect. 2, *post*.

SUB-SECT. 13.—COVENANTS FOR TITLE.

1027. Sale by trustees—Statutory covenant against incumbrances—Covenant for title by tenant for life—Right of purchaser to require.]—Trustees, in whom lands were vested upon trust for one for life, & with power to sell on his request, sold the same under a condition that the vendors, being trustees, were to be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees:—*Held*: the purchasers were entitled to require that the equitable tenant for life should enter into the usual covenants for title.—*Re SAWYER & BARING'S CONTRACT* (1884), 53 L. J. Ch. 1104; 51 L. T. 356; 33 W. R. 26.

SUB-SECT. 14.—LEASES AND EASEMENTS.

1028. Sale subject to easements—Right of way as between adjoining tenants—Vendor subject to no liability as to right of way.]—There being two tenants of adjoining houses held under the same landlord, the tenant of one of the houses acquired a right of way to his vaults through the adjoining vaults. The landlord sold both properties at one sale, with a condition that they were to be subject to & with the benefit, as the case might be, of all subsisting rights or easements of way or passage so far as any lot might be affected thereby:—*Held*: vendor being subject to no liability as to right of way, the purchaser of one tenement could not enforce a right of way as against the other.—*DANIEL v. ANDERSON* (1862), 31 L. J. Ch. 610; 7 L. T. 183; 8 Jur. N. S. 328; 10 W. R. 366.

Annotations:—Refd. Wheaton v. Maple, [1893] 3 Ch. 48; Kilgour v. Gaddes, [1904] 1 K. B. 457; Schwann v. Cotton, [1916] 2 Ch. 120.

1029. — Use of water pipe by licence of common owner.]—A. & B. were tenants of adjoining premises, under the same landlord. A. had a well upon his premises, from which B.'s premises were supplied with water by means of a pipe. Both premises, with others, were put up for sale by auction, in lots, one of the conditions being that each lot was subject to all rights of way & water & other easements, if any, subsisting thereon. A. & B. both purchased the lots of which they had been tenants. The vendor insisted that A. had purchased subject to B.'s right of water. A. filed a bill for specific performance of the contract, without any liability to such easement:—*Held*: B. had no easement or right of water, but merely a licence from his landlord during his tenancy; & A. was entitled to the relief asked.—*RUSSELL v. HARFORD* (1866), L. R. 2 Eq. 507; 15 L. T. 171; 14 W. R. 982.

1030. — Undisclosed right of way known to vendor.]—Trustees put up for sale by auction two adjoining freehold properties. Lot 2 was a hotel standing in its own grounds & approached from the main road by a carriage drive. Lot 3 was a house the only access to which from the road was by a carriage sweep opening into the carriage drive of lot 2. Both properties were leased, & the lease of lot 2 reserved to the lessors a right of way over the carriage drive to get access to lot 3. By an error the particulars of sale of both lots 2 & 3 made no mention of the right of way. but on the sale plan, which formed no part of the contract, it was apparent that the only access to lot 3 was

water for benefit of purchaser.]—Deft. agreed to purchase a piece of land, "with a water privilege attached," for the avowed purpose of erecting a

mill on the land, & storing or booming the logs for his mill in the water adjoining:—*Held*: this did not bind the vendor to retain the water in its

Sect. 2.—Rights under particular conditions: Sub-sects. 14, 15 & 16.]

over the carriage drive. By the conditions of sale the properties were sold subject to all rights of way & other easements "whether or not the same shall be mentioned . . . in or upon the particulars . . . or the sale plan, if any, . . . but if there shall be found to be any such . . . easement . . . not disclosed or partially or inaccurately disclosed in the particulars . . . or the sale plan, if any, such non-disclosure or partial or inaccurate disclosure shall be deemed to be an omission or error within the meaning of clause 15." By condition 15, "If any error, misstatement or omission shall be discovered in the particulars or sale plan, if any . . . the same shall not annul the sale, nor shall any abatement or compensation be allowed or paid by the vendor or purchaser." The lease of lot 2 was produced to G., the purchaser, before the auction & was perused by his solr. G. was almost blind; but the particulars were read to him, & he bought lot 2 with the intention of building over the carriage drive. The abstract included the lease of lot 2, with a plan showing the carriage sweep to lot 3, but G.'s solr. made no requisition about it, & sent a draft conveyance of the property unincumbered in which the vendor's solr. inserted a reservation of the right of way to lot 3. G. refused to accept this addition. The vendors brought an action for specific performance with the reservation, or, alternatively, rescission & retention of the deposit. G. counterclaimed for rescission & return of the deposit:—*Held*: the vendors were not entitled to specific performance with a reservation of the right of way; there was not, in the circumstances, any patent defect on the title; the condition as to errors only applied to errors which were not known to the vendors; the purchaser was not bound to make a requisition as to the right of way, when the abstract showed a title to an unincumbered freehold; & the purchaser was entitled to rescission & return of the deposit.—*SIMPSON v. GILLEY* (1922), 92 L. J. Ch. 194; 128 L. T. 622.

1031. — Confined to easements in existence at date of sale.]—*DELAPARELLE v. ST. MARTIN-IN-THE-FIELDS VESTRY* (1890), 34 Sol. Jo. 545.

1032. Reservation of easement for sewer—Right to exclusive use.]—A conveyance of land from deft. to pltf. contained the following clause, "Save & except & always reserved unto pltf., his heirs & assigns, the power to enter upon the said land, & to dig & make a covered sewer or watercourse through the said land, in order to convey the waste water from the premises of pltf. into the river W., on making reasonable compensation to deft. for any damage or injury which might be occasioned thereby, either to the surface of the ground, or the buildings under which the same might be made." Pltf. having constructed a covered drain or sewer, in pursuance of the power, deft. made an opening in it, & drained his premises through it:—*Held*: the reservation gave pltf. a right to the exclusive use of the sewer.—*LEE v. STEVENSON* (1858), E. B. & E. 512; 27 L. J. Q. B. 263; 4 Jur. N. S. 950; 120 E. R. 600.

Annotation:—*Reid*, *Sutherland v. Heathcote*, [1891] 3 Ch. 504.

1033. Sale subject to tenancies—Agricultural land—Terms arranged with tenants by vendor.]—Part of an estate consisted of three farms in Hampshire, & in that county, valuations between

outgoing & incoming tenants for hay, straw, & manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements, from year to year, according to the custom of Hampshire. Defts. were devisees of the estate in trust for sale, & in contemplation of a sale, they gave notice to the tenants to quit at Michaelmas, 1869. The tenants alleged that they had been promised leases by the devisor, & although there was nothing to show that such promises were binding in law or equity, defts. thinking the claim binding in honour & conscience, entered into agreements with the tenants, by which, in consideration of their giving up possession of their farms according to the notices, defts. promised to remit the half-year's rent due at Michaelmas, 1868, to pay £100 to the tenant, & to pay for hay, etc., at the termination of the tenancy, at "market value." In June, 1868, the estate was put up for sale by auction. In the particulars & conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents, & certain incumbrances, subject to which the sale was made, were specified, viz. land tax & tithe rentcharge; but no express mention was made of the above-mentioned agreements with the tenants. The conditions stipulated that the property should be taken to be correctly described as to quantity & otherwise, & that if any error, misstatement, or omission should be discovered, the same should not annul the sale, nor should any compensation be allowed, & that the rent or possession should be received or retained & the outgoing discharged by the vendors up to Sept. 29 & from that day by the purchaser. The property was bought in at the sale by auction, & afterwards sold by private contract on July 18, 1868, to pltf. The contract described the property as in the foregoing particulars, & as being purchased subject to the foregoing conditions. At the time of the purchase pltf. had no knowledge of the above-mentioned agreements with the tenants. Upon his becoming aware of & objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay market value for the hay, etc. Pltf. afterwards paid the tenants the amount of the valuations of hay, etc., at market value, & now sought to recover the difference between that & fodder value from defts.:—*Held*: the agreements with the tenants to pay market value were collateral agreements binding only on defts. personally, & did not amount to fresh demises; & by the arrangement between the parties, pltf., having paid the tenants' claims, could recover the difference between market & fodder value from defts. as money paid for their use.—*PHILLIPS v. MILLER* (1875), L. R. 10 C. P. 420; 44 L. J. C. P. 265; 32 L. T. 638; 23 W. R. 834, Ex. Ch.

1034. — Liability to compensate tenants.]—Agricultural lands were put up for sale by public auction. The particulars described certain parts of the lands as "bush fruit." One of the conditions provided that the purchasers were to be deemed to have notice of, & to take subject to the terms of all the existing tenancies. The purchaser of the lot under "bush fruit" did not inspect, or ask to inspect, the lease or agreement affecting the property, either previously to or at the sale. Before completion, the vendor, at the

then state for the purpose of securing to deft. the benefit of such booming or storage; & notwithstanding the

loss of the water privilege by reason of one of the dams having fallen into decay, deft. was bound to perform

the agreement.—*HICKSON v. CLARKE* (1877), 26 Gr. 173.—*CAN.*

request of the purchaser, gave the tenant notice determining his tenancy. Subsequently it was discovered that the tenant had received the written consent of his landlord, the vendor's predecessor in title, to plant the land with "bush fruit," & he put in a claim for compensation under Agricultural Holdings Act, 1908 (c. 28), s. 2, in respect of the improvement:—*Held*: the claim for compensation must be borne by the purchaser.—*Re DERBY (EARL) & FERGUSON'S CONTRACT*, [1912] 1 Ch. 479; 81 L. J. Ch. 567; 105 L. T. 943; *sub nom. Re DERBY'S (LORD) CONTRACT*, *FERGUSON v. DERBY*, 56 Sol. Jo. 71.

Annotations:—*Refd.* *Bradshaw v. Bird*, [1920] 3 K. B. 144; *Dale v. Hatfield Chase Corp.*, [1922] 2 K. B. 282.

1035. — Public-house.—A public-house & premises put up for sale by auction were described in the particulars as in the occupation of certain persons at certain rents. The conditions stated that the property was sold "subject to existing tenancies." Defts., who were brewers, by their agent became the purchasers of the property at the auction. Shortly afterwards they discovered that the property was in lease to another brewer for a term of years, of which about nine remained unexpired. Thereupon they refused to complete their contract. In a suit against them by the vendor for specific performance:—*Held*: there was a misdescription of the property, which precluded the vendor from enforcing the agreement, & the purchasers had not constructive notice of the lease.—*CARALLERO v. HENTY* (1874), 9 Ch. App. 447; 43 L. J. Ch. 635; 30 L. T. 314; 22 W. R. 446, L. J.

Annotations:—*Consd.* *Phillips v. Miller* (1875), L. R. 10 C. P. 420; *L. & N. W. Ry. v. Boulton* (1890), 62 L. T. 393. *Refd.* *Manson v. Thacker* (1878), 7 Ch. D. 620.

SUB-SECT. 15.—PERFORMANCE OF COVENANTS IN LEASE.

See, now, Law of Property Act, 1925 (c. 20), s. 45 (2).

1036. Possession to be evidence of performance.—Date to which breaches covered.—Under special conditions, on the sale of leaseholds, it was provided, "that possession should be deemed conclusive evidence of the due performance or sufficient waiver of any breach in the covenants in the lease, up to the completion of the sale":—*Held*: this would cover all breaches down to the contract, but not breaches of covenant subsequently committed by the vendor, by which a forfeiture was incurred.—*HOWELL v. KIGHTLEY* (1856), 21 Beav. 331; 25 L. J. Ch. 868; 52 E. R. 887; *affd.* on other grounds, 8 De G. M. & G. 325, L. J.

Annotations:—*Consd.* *Lawrie v. Lees* (1881), 7 App. Cas. 19. *Mentd.* *Ashton v. Wood* (1857), 26 L. J. Ch. 275; *Briant v. Tebutt* (1869), 20 L. T. 62; *Re McMurdo*, *Penfield v. McMurdo*, [1902] 2 Ch. 684.

1037. Production of last receipt to be evidence of performance.—Objection to risk of forfeiture precluded.—Dilapidated state of premises.—(1) By the conditions of sale relating to leaseholds, it was stipulated that the production of the last receipt should be conclusive evidence that all the covenants had been performed:—*Held*: the production of such a receipt prevented the purchaser from taking the objection that the lease had been forfeited by reason of the dilapidated state of the premises.

(2) A registered *lis pendens* does not create a charge or lien on the property, nor does it excuse a purchaser from completing his contract. It merely puts him upon an inquiry into the validity of pltf.'s claim.—*BULL v. HUTCHENS* (1863), 32

Beav. 615; 2 New Rep. 306; 8 L. T. 716; 9 Jur. N. S. 954; 11 W. R. 866; 55 E. R. 242.

Annotations:—*As to* (1) *Distd.* *Re Highett & Bird's Contract*, [1902] 2 Ch. 214. *Generally, Refd.* *Bell v. Holtby* (1873), L. R. 15 Eq. 178.

1038. — Breach of restrictive covenant.—A leasehold public-house was sold subject to a condition that the production of the last receipt for rent paid should be taken as conclusive evidence of the due performance of the lessee's covenants or the waiver of any breaches up to the time of completion, whether the lessor should be cognisant of such breaches or not. The lease contained a covenant to use the premises for the business of a public-house only, & not to permit any other trade to be carried on on any part of the premises without lessor's written consent. The particulars on which the contract of purchase was indorsed showed that parts of the premises were underlet to persons who carried on other trades there. From the answers to objections to title it appeared that the lessors had received rent with knowledge of the underlettings, & the last receipt for rent was produced. Specific performance of the contract having been decreed & a reference as to title directed by an order which was not appealed from:—*Held*: whether the breach of covenant was or was not a continuing breach such as to render the purchaser liable to be ejected after the completion of the purchase, & whether this would or would not have furnished a valid reason for not decreeing specific performance, the vendor had made a good title in accordance with the contract, which the purchaser was bound to accept, the decree for specific performance having been made & not appealed from.—*LAWRIE v. LEES* (1881), 7 App. Cas. 19; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185, H. L.

Annotations:—*Distd.* *Re Highett & Bird's Contract*, [1902] 2 Ch. 214. *Mentd.* *Re Swire*, *Mellor v. Swire* (1885), 53 L. T. 205; *Re Gist* (1904), 90 L. T. 35.

1039. Covenant indemnifying vendor against rent as covenants—Referable to future breaches only.—Mtgees. by assignment of leasehold property agreed to sell it for the residue of the term. The contract provided that the property was sold subject to the covenants & conditions contained in the lease & to the rent thereby reserved, & that the assignment to the purchaser should contain a covenant indemnifying the vendors against the rent & covenants. At the time when the contract was entered into there were continuing breaches of the lessee's covenants to repair & paint, which were not usual covenants, in respect of which the lessors were threatening proceedings, but neither the vendors nor the purchaser knew or had notice of the breaches, & the purchaser did not know the nature of the covenants:—*Held*: the contractual provision above mentioned only meant that when the purchaser obtained his assignment, he should take subject to the rent & covenants & should indemnify the vendors against payment of rent & performance of covenants in the future, not that he was to pay arrears of rent or make good breaches of covenant in the past.—*Re TAUNTON & WEST OF ENGLAND PERPETUAL BENEFIT BUILDING SOCIETY & ROBERTS' CONTRACT*, [1912] 2 Ch. 381; 81 L. J. Ch. 690; 107 L. T. 378; 56 Sol. Jo. 688. *Annotation*:—*Refd.* *Lockharts v. Bernard*, *Rosen*, [1922] 1 Ch. 433.

SUB-SECT. 16.—FORFEITURE OF DEPOSIT.

Forfeiture & recovery of deposit.—*See* Part VIII., Sect. 2, *post*.

1040. Forfeiture on default by purchaser—Re-sale at increased price—Purchaser not entitled to

Sect. 2.—Rights under particular conditions: Subsect. 16.]

account of surplus.—Strictly speaking, it is not in the nature of a mtge.; for if the second sale produced more than the original purchase-money, the purchaser, who had violated his agreement, could not call for an account of the surplus (LORD ELDON, C.).—*Er p. HUNTER* (1801), 6 Ves. 94 31 E. R. 955.

Annotations:—Mentd. Re Bulmer, Er p. Johnson (1853), 1 De G. M. & G. 218; *Re Fox & Jacobs, Er p. Discount Banking Co. of England & Wales*, [1894] 1 Q. B. 438.

1041. — Resale at reduced price—Recovery of deficiency & expenses by vendor.—By the conditions of sale it was provided as follows: "Should the purchaser neglect or fail to comply with any of the above conditions, his deposit money shall be absolutely forfeited to the vendor, who shall be at liberty to resell the property by public auction or private sale; & if the amount or price which shall be obtained by such second sale shall not be sufficient to cover the amount bid for the same at the present sale & all the expenses of or incidental to the present sale, the deficiency shall be paid by the defaulter to the vendor." The purchaser paid a deposit, but failed to complete the purchase. There was no resale.—*Held*: the vendor was entitled to retain the deposit, & also to recover the auctioneer's charges for the abortive sale, & the costs incurred by him in preparing to complete the sale.

The deposit, therefore, is absolutely forfeited, & the vendor is at liberty, not bound, to resell, & may recover against the purchaser any deficiency on the second sale, together with the expenses of the first sale (LORD COLERIDGE, C.J.).—*ESSEX v. DANIELL, DANIELL v. ESSEX* (1875), L. R. 10 C. P. 538; 32 L. T. 476.

1042. — Condition for forfeiture as liquidated damages.—Where, in a contract of sale entered into at an auction, one of several conditions is, that if the purchaser shall fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages; such condition forms no qualification of the general promise to complete the purchase.

Therefore, upon a wrongful abandonment of the contract, on the part of the purchaser, the vendor may recover damages *ultra* the forfeited deposit; & is not bound to state this condition in declaring upon the contract.—*ICELY v. GREW* (1830), 6 Nev. & M. K. B. 467.

1043. — Difference not covered by deposit.—One of the conditions of a sale by auction "If the purchaser shall fail to comply with the conditions, the deposit shall be actually forfeited to the vendor, who shall be at liberty to resell, & any deficiency upon resale, together with the expenses, shall be made good by the defaulter, & on non-payment shall be recoverable as liquidated damages, but any increase of price at the second sale shall belong to the vendor." Default having been made by a purchaser at the auction, & the property resold at a reduced price.—*Held*: the vendor could recover from the defaulter, in addition to the deposit, only so much of the difference be-

tween the two prices & of the expenses of resale, as the deposit did not cover.—*OCKENDEN v. HENLY* (1858), E. B. & E. 485; 27 L. J. Q. B. 361; 31 L. T. O. S. 179; 4 Jur. N. S. 999; 120 E. R. 590.

Annotations:—Apld. Hinton v. Sparkes (1868), L. R. 3 C. P. 161. *Distd. Essex v. Daniell, Daniell v. Essex* (1875), L. R. 10 C. P. 538. *Apld. Howe v. Smith* (1884), 27 Ch. D. 89.

Damages recoverable.—*See DAMAGES*, Vol. XVII., p. 147, Nos. 494-497.

1044. — Retention of deposit—Vendor not bound to resell.—*ESSEX v. DANIELL, DANIELL v. ESSEX*, No. 1041, *ante*.

1045. — Declaration in action for specific performance.—An agreement for the sale of real estate contained the usual condition empowering the vendor, in case the purchaser should fail to comply with any of the conditions, to forfeit the deposit. In an action by the vendor for specific performance of the agreement, the purchaser having accepted the title but failed to complete at the time fixed by the agreement:—*Held*: although deft. had not appeared to the writ, & did not appear at the trial, a declaration that the vendor was entitled to forfeit the deposit might be made, in lieu of the ordinary judgment for specific performance, if the writ, as well as the statement of claim, claimed such a declaration in the alternative.—*KINGDON v. KIRK* (1887), 37 Ch. D. 141; 57 L. J. Ch. 328; 58 L. T. 383; 36 W. R. 430.

Annotation:—Refd. Farrant v. Olver (1922), 91 L. J. Ch. 758.

1046. — —.—Where judgment for specific performance of a contract for purchase of land has been given against the purchaser, & he fails to comply with the judgment, the vendor is entitled if the contract contained a clause forfeiting the deposit, & giving the vendor power to proceed to a fresh sale, to an order declaring the deposit forfeited & for payment of any deficiency on a fresh sale & costs instead of the usual order rescinding the contract.—*GRIFFITHS v. VEZEY*, [1906] 1 Ch. 98; 75 L. J. Ch. 462; 94 L. T. 574; 54 W. R. 490; 50 Sol. Jo. 360.

Annotation:—Distd. Shuttleworth v. Clews, [1910] 1 Ch. 176.

1047. — —.—A contract for the sale of land contained a provision for the forfeiture of deposit on failure by the purchaser to comply with any of the conditions of sale, giving the vendor power to resell, & provided that any deficiency in price which might happen on the resale should be paid by the purchaser to the vendor & in case of non-payment be recoverable by the vendor as liquidated damages. The purchaser paid a deposit but failed to complete the contract. In an action for specific performance the vendor moved for an order forfeiting the deposit & for liberty to resell, & in case the property should be resold for less than the contract price that the purchaser should pay to the vendor the difference between the contract price & the price realised on the resale:—*Held*: the vendor must give credit for the amount of the deposit.—*SHUTTLEWORTH v. CLEWS*, [1910] 1 Ch. 176; 79 L. J. Ch. 21; 101 L. T. 708.

PART IV. SECT. 2, SUB-SECT. 16.

1041 i. Forfeiture on default by purchaser—Resale at reduced price—Recovery of deficiency & expenses by vendor.—*RENNICK v. ROBERTSON* (1894), 20 V. L. R. 165.—**AUS.**

n. — Forfeiture ipso facto on expiry of time limited.—*PERRY v. SHERLOCK* (1888), 14 V. L. R. 492.—**AUS.**

o. — Right of purchaser to relief—Effect of delay.—*GUDGEL v. CASE* (N. W. T.) (1906), 4 W. L. R. 462.—**CAN.**

p. — —.—The ct. will relieve a purchaser against a mere provision for forfeiture on default, if there has been no unreasonable delay, & if there is nothing in the express stipulations between the parties, the nature of the property, or the sur-

rounding circumstances, which would make it inequitable to interfere with or modify the legal right of the vendor.

—*MASSEY v. WALKER* (1913), 24 W. L. R. 168; 4 W. W. R. 557; 11 D. L. R. 278; 23 Man. L. R. 563.—**CAN.**

q. — —.—*LENNON v. NAPPER* (1802), 2 Sch. & Lef. 682.—**IR.**

r. — Treated as penalty.—An agreement for the sale & purchase of

1048. ——— Form of order.]—JONES v. BURNELL, [1911] W. N. 153.

1049. — Treated as penalty—Terms of relief—
Payment of purchase-money due.]—An agreement
for sale by resp. co. of lands in British Columbia
for a price to be paid in instalments at specified
dates contained a clause of forfeiture both of the
agreement & of all payments of past instalments of
purchase-money in case of default of punctual
payment of any one instalment; & time was
declared to be of the essence of the agreement.
Default having been made, the co. sued to enforce
the forfeiture; applt. paid into ct. the instalment
due & counterclaimed for specific performance :—
Held : by the law of British Columbia as well as
by English law the condition of forfeiture was in the
nature of a penalty from which applt. was entitled
to be relieved on payment of the purchase-money
due.—**KILMER v. BRITISH COLUMBIA ORCHARD**
LANDS, LTD., [1913] A. C. 319; 82 L. J. P. C. 77;
108 L. T. 306; 29 T. L. R. 319; 57 Sol. Jo. 338,
P. C.

Annotations:—**Expld.** Steedman v. Drinkle, [1916] 1 A. C. 275. **Refd.** Brickles v. Snell, [1916] 2 A. C. 599.

1050. ————, [1909].—By an agreement in writing dated Dec. 9, 1909, land in the province of S. was sold for \$16,000 of which \$1,000 were paid on signing the agreement & the balance was payable by six annual instalments on Dec. 1 of each year. The agreement provided that if the purchaser should make default in any of the payments the vendor should be at liberty to cancel the agreement & to retain as liquidated damages the payments already made & that time was to be considered as of the essence of the agreement. Default having been made on the payment of the first instalment the vendor cancelled the agreement assignees of the purchaser sued for specific performance:—*Held*: the parties having made time of the essence of the agreement specific performance could not be decreed but that the forfeiture of the money paid was a penalty from which relief should be granted on proper terms.—**STEEDMAN v. DRINKLE**, [1916] 1 A. C. 275; 85 L. J. P. C. 79; 114 L. T. 248; 32 T. L. R. 231. P.C.

Annotation :—*Refd.* *Brickles v. Snell*, [1916] 2 A. C. 599.

1051. Recovery of deposit by purchaser—Day for completion postponed by consent.—A. agreed to sell to B. his interest in a public-house, & his furniture, etc., at an appraisement to be made by two appraisers, the same to be paid for on B.'s taking possession, which was to be on or before Mar. 25 then next; & £30 was paid by B. as a deposit; & he agreed that if he should not complete his part of the agreement, the sum so paid should be forfeited. The buyer & seller appointed appraisers respectively. On Mar. 25, the two appraisers met, & the seller's, appraiser was then informed that the appraiser of the buyer could not conveniently on that day complete the valuation, but would finish the business the next day; no objection was then made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, & said he would not complete the contract:—*Held*: under the circumstances, it was incumbent on the seller, if he intended to insist that the contract

should be completed on the day mentioned in the agreement, to have notified such intention to the buyer; & not having so done, the latter was entitled to recover back the deposit.—*CARPENTER v. BLANDFORD* (1828), 8 B. & C. 575; Dan. & 11. 175; 3 Man. & Ry. K. B. 93; 7 L. J. O. S. K. B. 58; 108 E. R. 1156.

Annotation :—**Refd.** Tidey v. Mollett (1864), 16 C. B. N. S. 298.

1052. — Condition for return in case of misdescription—Parties to action.]—By an agreement under seal, three persons agreed to purchase a mine, & bills for £2,000 were to be paid as a deposit & it was stipulated that the sum of £2,000 was a conditional payment, to be returned “to the said purchasers,” should the property, upon the inspection “by an agent to be sent out by the purchasers,” prove to have been misrepresented in the description :—*Held* : (1) if the sum of £2,000 was recoverable back, it must be by all the three purchasers bringing an action of covenant, & one of them alone who had, under a subsequent agreement between the purchasers not under seal, given the bills & advanced the money to pay them when due, could not maintain an action for money had & received ; (2) the agent to be sent out must be a person distinct from the purchasers, & not one of themselves, & no evidence was receivable to show that the vendor assented to one of the purchasers going out as agent, except the objection had been waived by some instrument under seal.—*ENGLISH v. BLUNDELL* (1837), 8 C. & P. 332, N. P.

1053. — Vendor's title subsequently proved defective.]—The conditions in a contract of sale of land provided that the purchaser should pay a deposit, & that if he failed to comply with the conditions the deposit should be forfeited & the vendors should be at liberty to resell. The purchaser paid the deposit, & accepted the title, but when the time for completion arrived he could not provide the residue of the purchase-money. The vendors thereupon gave the purchaser notice that the contract was rescinded & the deposit forfeited. Three years afterwards, the vendors having contracted to sell to another purchaser, it was decided that their title was bad, owing to a defect which had appeared upon the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake & failure of consideration :—*Held* : the title having been accepted, & the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit.

The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business; & if there is a case in which a deposit is rightly & properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not, (*LORD MACNAGHTEN*).—*SOPER v. ARNOLD* (1889), 14 App. Cas. 429; 59 L. J. Ch. 214; 61 L. T. 702; 38 W. R. 449; 5 T. L. R. 698, H. L.

Annotations:—**Consd.** *Chillingworth v. Esche*, [1924] 1 Ch. 97. **Reid.** *Mav v. Platt*, [1900] 1 Ch. 616; *Monnickendam v. Leanse* (1923), 39 T. L. R. 445. **Mentd.** *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326.

land, at a price payable by instalments, contained in a clause to the effect that "time was to be of the essence, &, unless the payments were punctually made, the agreement should be void & of no effect, all moneys paid should be absolutely forfeited to the -----, & he should be at liberty to enter & resell, without notice to

the purchaser." Default having been made by the purchaser, the vendor served notice of cancellation, & brought this action for the rescission of the agreement. After action dft. tendered the full amount due, which plff. refused to accept, having previously resold the land:—*Held*: the forfeiture part of the above clause,

being purely penal & *in terrorem*, was void, the remainder mere surplusage, & the clause void in its entirety.—*STEWART v. MARSH* (Alta.) (1911), 17 W. L. R. 522.—CAN.

1053 i. *Recovery of deposit by purchaser—Vendor's title subsequently proved defective.*—TUHTEN v. LOEWEN (1910), 13 W. L. R. 374.—CAN.

Sect. 2.—Rights under particular conditions: Sub-sect. 10. Part V. Sect. 1: Sub-sects. 1 & 2, A. & B.]

1054. — Condition precluding forfeiture—Vendor's right to retain—Pending action for damages.]—By a contract for the sale of real property it was provided that the purchaser should, within fourteen days after signing the contract, pay to the vendors a certain sum as part payment of the purchase price, but that such sum should not be forfeited if the purchaser failed to complete. It was also provided that if the purchaser made default, the vendors might resell & recover from the purchaser, as liquidated damages, any loss resulting from resale. The purchaser paid the said sum to the vendors, but made default in

completion, whereupon the vendors endeavoured to resell the property, but without success. The purchaser then sued to recover back the sum so paid as part of the purchase price as having been paid on a consideration which had failed, & was met by a claim on the part of the vendors to retain the amount for a reasonable time as security for any loss they might sustain on the resale of the property:—*Held*: the ct. could not read into the contract by implication a term that the money might be retained for the purpose suggested, & upon the cancellation of the contract the purchaser was entitled to recover it back.—*HARRISON v. HOLLAND*, [1922] 1 K. B. 211; 91 L. J. K. B. 337; 126 L. T. 390; 38 T. L. R. 157; 66 Sol. Jo. 217, C. A.

Annotation:—*Consd. Mayson v. Clouet*, [1924] A. C. 980.

Part V.—Vendor's Title.

SECT. 1.—DUTY TO DISCLOSE.

SUB-SECT. 1.—IN GENERAL.

1055. Duty to give full information.]—A vendor, in his particulars of sale, described certain cottages as part of lot 6, & as in the occupation of the owners of the Sedghill Collieries, or their under-tenants or workmen. By a further particular he stated that "the mines & minerals within & under such of the collieries as were situate within certain townships, were reserved to the owners thereof, with such powers & privileges as belonged to them." It turned out that the mine under lot 6 was not the Sedghill Colliery, but the Hazelrigg Colliery, & the owners of the Hazelrigg Colliery had in some way obtained or long used a right to build & use cottages on lot 6 without paying rent, except a trifling compensation for surface damage, & they had transferred their right to the owners of the Sedghill Colliery:—*Held*: the particulars did not, on the face of them, convey such information as the vendor ought to have given; but inquiries were directed as to the circumstances under which the cottages were occupied, & whether the owners of the Sedghill Colliery had any right against the vendor.

It is the obvious duty of a vendor to make himself fully acquainted with all the peculiarities & incidents of the property which he is going to sell; & when he describes the property for the information of the purchaser, it is his duty to describe everything which it is material to know, in order to judge of the nature & value of the property (*KINDERSLEY, V.-C.*).—*BRANDLING v. PLUMMER* (1854), 2 Drew. 427; 2 Eq. Rep. 1260; 23 L. J. Ch. 960; 23 L. T. O. S. 329; 2 W. R. 662; 61 E. R. 785.

1056. — & remove ambiguities.]—A contract entered into in 1882 for the sale of freehold estate provided that the title should commence "with an indenture dated Oct. 18, 1845," & made between persons whose names were mentioned, & that the earlier title should not be investigated or objected to. From the abstract of title delivered by the vendors to the purchaser it appeared that the deed of 1845 was a conveyance by a person, who

purported to be the absolute owner, of freehold & leasehold property to trustees, on trust for himself for life, & after his death on trust to sell the property, & to hold the proceeds of sale on the trusts declared by a deed of even date. An express power was reserved to the grantor to revoke the trusts. The deed was a voluntary one, except for the consideration which resulted from the liability assumed by the trustees in respect of the leaseholds. By a deed executed in 1858, after the death of settlor, the trustees conveyed the property to a purchaser for value. This deed contained a recital of the deed of 1845, & a recital that the trustees "in pursuance of the trust for sale conferred on them" by that deed, had caused the property to be put up for sale:—*Held*: by virtue of Vendor & Purchaser Act, 1874 (c. 78), s. 2, this recital, not being shown to be inaccurate, was conclusive evidence that the deed of 1845 had not been revoked either by an exercise by the settlor of the power of revocation, or by a sale of the property by him for value during his lifetime.

A vendor should give full information to the purchaser; he ought to state that which, if it is not stated, makes that which he does state ambiguous or misleading. . . . A vendor who desires to limit the rights of a purchaser must do so by explicit & plain conditions, & he must tell the truth, & all the truth, which is relevant to the matter in hand (*FRY, J.*).—*Re MARSH & GRANVILLE (EARL)* (1882), 24 Ch. D. 11; *sub nom. MARSH v. GRANVILLE (EARL)*, 52 L. J. Ch. 189; 47 L. T. 471; 31 W. R. 239; *on appeal* (1883), 24 Ch. D. p. 20, C. A.

Annotations:—*Distd. Farnham Brewery v. Hunt* (1893), 68 L. T. 440. *Consd. Re Williams & Parry's Contract* (1895), 72 L. T. 869. *Mentd. Re Lulham, Brinton v. Lulham* (1884), 53 L. J. Ch. 928.

1057. — Party suppressing deed or other evidence—Presumed to have defective title.]—Where a deed or other evidence is suppressed by either party, a ct. of equity will always presume a title against him who suppressed it.—*LEWIS v. LEWIS* (1680), *Cas. temp. Finch*, 471; 23 E. R. 254, L. C.

1058. Trustees' duty to disclose—Debts making sale necessary.]—*FLUX v. BEST*, No. 1165, *post*.

PART V. SECT. 1, SUB-SECT. 1.
1055.1. Duty to give full information.]
—*McHORY v. HENDERSON* (1868), 14

Gr. 271.—*CAN.*

t. Omission of purchaser to take possession—Sale by him to another—

Effect of want of possession.]—*SHIVRAM v. SAVA* (1888), 1 L. R. 13 Bom. 229.—*IND.*

SUB-SECT. 2.—WHAT MUST BE DISCLOSED.

A. In General.

1059. Person liable under covenants in lease Sale of reversion.]—The ct. may not decree specific performance of a contract for the sale of a reversion if the vendor has misled the purchaser by stating that it was subject to a lease containing all the usual covenants for repairs, etc., the vendor knowing at the same time that there was no person against whom the covenants could be enforced; but where property is sold subject to a lease so described, & tenants are in possession of the property, & pay their rent according to the terms of the lease, & the vendor is not aware, at the time of the contract, of any difficulty in enforcing the covenants, the ct. will not refuse to decree specific performance, on the ground that the vendor cannot show upon whom the liability of the covenants in the lease has devolved; & the vendor is not bound to find out, & acquaint the purchaser with, the name of the party who may be liable to such covenants.—*FLINT v. WOODIN* (1852), 9 Hare, 618; 22 L. J. Ch. 92; 19 L. T. O. S. 240; 16 Jur. 719; 68 E. R. 660.

Annotations:—*Mentd.* *Mortimer v. Bell* (1865), 1 Ch. App. 10; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527.

1060. Incumbrance or liability affecting property sold—Incumbrance subsequently discharged.]—*DRUMMOND v. TRACY*, No. 1313, *post*.

1061. Duty not affected by provision in conditions of sale.]—*NOTTINGHAM PATENT BRICK & TILE CO. v. BUTLER*, No. 776, *ante*.

1062. Vendor making title as heir—Presumption that ancestor took by purchase—Duty to disclose matters rebutting presumption.]—*DORLING v. CLAYDON*, No. 1393, *post*.

1063. All facts within vendor's knowledge—Relating to title.]—A vendor is bound to disclose every fact within his knowledge relating to his title.

Where a vendor has knowingly suppressed a defect in title, the ct. will not allow him to force the title upon a purchaser, although in the conditions of sale he has employed general words large enough to include the defect.—*EDWARDS v. WICKWAR* (1865), L. R. 1 Eq. 68; 13 L. T. 428; 29 J. P. 820; 14 W. R. 79; *sub nom.* *EDWARDS v. WICKWAR*, *Re BRAYNE'S PURCHASE*, 35 L. J. Ch. 48; *subsequent proceedings* (1866), L. R. 1 Eq. 403.

Annotations:—*Refd.* *Re Scott & Alvarez's Contract*, *Scott v. Alvarez* (1895), 12 R. 474; *Beyfus v. Lodge*, [1925] Ch. 350.

1064. All facts necessary to protect vendor.]—(1) When an agreement has been entered into for the purchase of an existing lease, the purchaser is not affected with constructive notice of the covenants contained in the lease, & is not bound to complete the contract if the lease is subject to onerous covenants of an unusual character, unless before the agreement was made he had a fair opportunity of ascertaining for himself the terms of such covenants.

(2) There is great practical convenience in requiring the vendor, who knows his own title, to disclose all that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title deeds before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, & which is not, in our opinion, in accordance with the usual course of business in sales by private contract (*FRY, L.J.*).—*REEVE v. BERRIDGE*

(1888), 20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836; 52 J. P. 549; 36 W. R. 517, C. A.

Annotations:—*As to* (1) *Refd.* *Bishop v. Taylor & Harris* (1891), 60 L. J. Q. B. 556; *Melzak v. Lillienfeld*, [1926] Ch. 480. *As to* (2) *Apld.* *Re White & Smith's Contract*, (1896), 1 Ch. 637; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487. *Refd.* *Dougherty v. Oates* (1900), 45 Sol. Jo. 119; *Re Haedicke & Lipski's Contract*, [1901] 2 Ch. 666.

1065. Duty on sale by private contract—Or sale by auction.]—The rule laid down in *Reeve v. Berridge*, No. 1064, *ante*, that it is *prima facie* the duty of a vendor to disclose all that is necessary to protect himself, & not the duty of the purchaser to demand inspection of the vendor's title deed before entering into a contract, is not confined to sales by private contract, but is equally applicable to sales by auction.

Where, on a sale of leaseholds by auction the particulars & conditions of sale contained no statement as to the nature of the covenants in the lease, which were in fact onerous, nor any notice that the lease might be inspected at the office of the vendor's solrs. or elsewhere:—*Held*: the purchaser was not affected with constructive notice of the covenants; he had not had a fair opportunity of inspecting the lease, & was not bound to complete the contract.—*Re WHITE & SMITH'S CONTRACT*, [1896] 1 Ch. 637; 65 L. J. Ch. 481; 74 L. T. 377; 44 W. R. 424; 40 Sol. Jo. 373.

Annotations:—*Apld.* *Dougherty v. Oates* (1900), 45 Sol. Jo. 119; *Re Child & Hodgson's Contract* (1905), 54 W. R. 234; *Hone v. Gakstatter* (1909), 53 Sol. Jo. 286. *Refd.* *Re Haedicke & Lipski's Contract*, [1901] 2 Ch. 666; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487.

1066. Adverse claim.]—*Re HARRIS & RAWLINGS' CONTRACT* (1894), 38 Sol. Jo. 235.

1067. Material defects in title—Not reasonably discoverable by purchaser.]—The vendor of real estate is under an obligation to disclose any material defect in the title or in the subject of the sale which is exclusively within his own knowledge, & one which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions. The existence of a party wall notice under London Building Act, 1894 (c. cxxiii), ss. 90, 91, & an award made thereunder relating to a house which is the subject of a sale, constitute material facts which should be disclosed by the vendor to an intending purchaser.—*CARLISH v. SALT*, [1906] 1 Ch. 335; 75 L. J. Ch. 175; 94 L. T. 58; 54 W. R. 244; 50 Sol. Jo. 157.

Annotations:—*Distd.* *Shepherd v. Croft*, [1911] 1 Ch. 521; *Beyfus v. Lodge*, [1925] 1 Ch. 350. *Refd.* *Tingley v. Müller*, [1917] 2 Ch. 144.

1068. Restrictive covenant.]—(1) Where a vendor of freehold property mentioned to the purchaser that the property was subject to the same conditions as the adjoining property:—*Held*: the purchaser was not fixed with constructive notice of restrictive covenants, & specific performance was refused.

(2) Property described in a contract for sale as "Freehold" means unincumbered freehold, & such a description does not properly describe freeholds subject to restrictive covenants.

(3) There is an obligation on a vendor of freeholds to disclose restrictive covenants, & if he does not disclose them, the purchaser is entitled to a return of his deposit.—*HONE v. GAKSTATTER* (1909), 53 Sol. Jo. 286.

B. Sale of Leaseholds.

1069. Notice by landlord of intention to re-enter—Unless premises put in repair.]—A landlord having given notice to his lessee, under a covenant

Sect. 1.—Duty to disclose: Sub-sect. 2, B. Sect. 2: Sub-sect. 1.]

in the lease that he would re-enter if the premises were not put into repair within three months, if an auctioneer sell the lease without communicating the notice to the vendee, the latter may recover his deposit from the auctioneer, although he knew the dilapidated state of the premises, at the time of sale.—**STEVENS v. ADAMSON** (1818), 2 Stark. 422; 171 E. R. 692, N. P.

Annotations:—*Folld. Carlsh v. Salt*, [1906] 1 Ch. 335. *Consd. Beyfus v. Lodge*, [1925] Ch. 350. **Refd.** *Re Leyland & Taylor*, [1900] 69 L. J. Ch. 764.

1070. Covenant against obnoxious trades—Underleases not containing similar covenants.]—

A lessee of lands subject to a covenant against certain obnoxious trades, with a proviso for re-entry, grants underleases of houses erected on the land, not containing a similar covenant & proviso:—**Held**: a purchaser by auction of houses on the same land, & of the improved ground rents of the houses so underlet, might recover back his deposit money, this omission in the underleases not having been mentioned in the conditions of sale.—**WARING v. HOGGART** (1824), Ry. & M. 39; 171 E. R. 935, N. P.

Annotations:—*Refd. Flight v. Booth* (1834), 1 Bing. N. C. 370; *Re Davis & Caley* (1888), 40 Ch. D. 601.

1071. Sale in separate lots—Duty to disclose fact that property held under one lease.]—**SHEARD v. VENABLES**, No. 754, *ante*.

1072. Onerous & unusual covenants.]—A purchaser objected to complete the purchase of a term in leasehold premises, upon the ground that the lease contained a covenant which had not been disclosed to him, that the lessee was not to assign or part with possession of the premises without the consent of the lessor, such consent not to be unreasonably withheld:—**Held**: this was not a "usual covenant," & the purchaser was entitled to repudiate his contract.—**BISHOP v. TAYLOR & CO.** (1891), 60 L. J. Q. B. 556; 64 L. T. 529; 55 J. P. 695; 39 W. R. 542; 7 T. L. R. 419, D. C.

1073. —.]—It is settled that a vendor of leasehold property must disclose the existence of onerous & unusual covenants, or at least afford the purchaser an opportunity of inspecting the leases.

An agreement for the sale of certain leasehold houses contained the following stipulation, "The vendor's title is accepted by the purchasers." The leases under which the property was held contained onerous & unusual covenants, the existence of which had not been disclosed by the vendor before the contract was entered into, & of which the purchasers had no notice:—**Held**: the condition as to the acceptance of the title did not affect the vendor's general duty of disclosure, & the purchasers were entitled to rescind the contract & to have the deposit returned with interest.—*Re HAEDICKE & LIPSKI'S CONTRACT*, [1901] 2 Ch. 666; 70 L. J. Ch. 811; 85 L. T. 402; 50 W. R. 20; 17 T. L. R. 772; 45 Sol. Jo. 738.

Annotations:—*Folld. Hone v. Gakstatter* (1909), 53 Sol. Jo. 286. **Refd.** *Molyneux v. Hawtrey*, [1903] 2 K. B. 487.

PART V. SECT. 1, SUB-SECT. 2.—B.

1072i. Onerous & unusual covenants.]—The vendor of a leasehold interest is bound to know what covenants are in his lease; & if an intending purchaser state the object which he has in purchasing, the vendor is bound to communicate such knowledge to him, provided such covenants can be reasonably interpreted as affecting the object which he is aware the purchaser has in view in purchasing the premises;

& if the vendor is silent as to a covenant in the lease prohibiting or interfering with that object, his silence is equivalent to a representation that there is no such prohibitory covenant even though he is not aware of its extent or operation.—*Power v. Barrett* (1888), 19 L. R. Ir. 450.—IR.

PART V. SECT. 2, SUB-SECT. 1.

1076i. General rule.]—As between vendor & purchaser a doubt upon a

1074. —.]—On a sale of a lease containing unusual & onerous covenants it is the duty of the vendor, before the contract is made, to disclose the existence of the covenants to a purchaser ignorant of them. If he does not give the purchaser express notice of the covenants, he must, in order to affect the purchaser with notice of them, show that he gave him such an opportunity of acquainting himself with the terms of the lease under such circumstances that he ought reasonably to have done so.—*MOLYNEUX v. HAWTREY*, [1903] 2 K. B. 487; 72 L. J. K. B. 873; 89 L. T. 350; 52 W. R. 23, C. A.

Annotations:—*Distd. Re Child & Hodgson's Contract* (1905), 50 Sol. Jo. 59. **Refd.** *Molzak v. Lillienfeld*, [1926] Ch. 480.

1075. —.]—Deft., a married woman, signed a written agreement to purchase from pltf. a lease for ninety-nine years of a newly erected dwelling-house at Shepherd's Bush, London, in consideration of a premium of £527 10s. & a ground rent of £6 6s. Before signing the contract deft. asked to see a copy of the lease, & was told by the vendor's agent that it was quite in the "ordinary form." Relying on this representation deft. signed the contract for the purchase after paying £327 10s. as part of the premium or deposit, & was let into possession of the house. The draft lease when produced contained (*inter alia*) a covenant by the lessee "to pay all costs, charges & expenses, including solrs.' costs & surveyors' fees, incurred by the lessor for the purpose of or incidental to the preparation & service of a notice under Conveyancing Act, 1881 (c. 41), s. 14, requiring the lessee to remedy a breach of any of the covenants on the part of the lessee. . . ."

Pltf. alleged that this covenant was contained in the form of lease in use on this estate, & on deft. declining to sign the lease unless it was omitted therefrom, he brought an action for specific performance of the written agreement:—**Held**: in a case such as this, of a long lease of a new house at a moderate ground rent, the covenant in question was not an "ordinary" or even a reasonable one, but was an onerous covenant to which the purchaser's attention ought to be called by the vendor, & the lease containing this covenant was not a lease "in the ordinary form":—**Held**: therefore, that the action failed, & the deft. was entitled, on her counterclaim, to rescission of the contract, & repayment of £327 10s., with interest at 4 per cent.—*ALLEN v. SMITH*, [1924] 2 Ch. 308; 93 L. J. Ch. 538; 131 L. T. 667; 68 Sol. Jo. 718.

What are usual covenants.]—See *LANDLORD & TENANT*, Vol. XXXI., pp. 115–119, Nos. 2495–2537.

SECT. 2.—DUTY TO MAKE TITLE.

SUB-SECT. 1.—IN GENERAL.

1076. General rule.]—If a contract be made for the sale of leasehold property unconditionally, & without a stipulation in terms on the part of the vendor, that he means to sell his interest only in the residue of the term, & that he will not warrant

title makes it bad.—*HOYLE v. EDWARDS* (1869), 6 W. W. & A'B. 48.—AUS.

1076ii. —.]—A vendor of real estate must at law, as well as in equity, show an unassailable title.—*ENWRIGHT v. M'Caw* (1875), 1 V. L. R. 196.—AUS.

1076iii. —.]—Where a party binds himself to make a good & effectual conveyance of land, he must prove that he has the legal title, & that the land did actually pass by his deed.—

his lessor's title, he is bound to show to the satisfaction of the purchaser that his lessor, or the original grantor of the term, was entitled to grant the lease. He cannot otherwise oblige the purchaser to complete the contract made for the purchase of the premises. Nor is there anything in the circumstances of the lease having been originally granted by a lay corp., or of its being of very old date, to make it an exception to the general rule of law. Exception to report of title, that the abstract not having set out the title of the original lessor, & those under whom the lessee claimed, did not contain a good title, overruled. Accordingly a memorandum of an agreement, dated May 15, for sale & purchase of leasehold property described therein as "a messuage held for the remainder of a term of years under the corp. of Bath, & the late R. A. at the sum, etc., an abstract to be made out & delivered by the vendor, & the assignment to be made & prepared at the expense of the purchaser, the purchase-money to be paid at or before Midsummer," with other ordinary provisions:—*Held*: on exceptions to the master's general report of title, not to be binding on the purchaser against objections made on his part upon receiving the abstract of title, that the contents of two existing deeds were not introduced in the abstract delivered on May 24, though they were contained in an abstract delivered afterwards on Sept. 3, in consequence of which the purchaser abandoned the contract. *Semble*: such an agreement does not give such a description of the interest meant to be sold, as to preclude the purchaser's right to seek further into the title.

It is a general rule in equity, founded on principles of honesty & the dictates of good sense, that if a person, generally speaking, offers anything for sale, the vendee, or he who becomes the purchaser, is entitled to see that the vendor has it with the qualifications, & in the way in which he, the vendee, understood that he bought it; that is, so as to afford him an assurance of having bought what he wanted, & meant to buy, or at least, what was offered or professed to be sold, or he may reject the contract (*RICHARDS, C.B.*).—*PURVIS v. RAYER* (1821), 9 Price, 488; 147 E. R. 159, Ex. Ch.

Annotations:—*Apld.* Souter v. Drake (1834), 5 B. & Ad. 992. *Refd.* Spratt v. Jeffery (1829), 5 Man. & Ry. K. B. 188; Stranks v. St. John (1867), L. R. 2 C. P. 376.

1077. Duty implied by law—Independently of agreement.—Contractor for a purchase of a real estate, to which the title proves, without collusion, defective, is entitled to no satisfaction for the loss of his bargain.

These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest & costs, is all that can be expected (*BLACKSTONE, J.*).—*FLUREAU v. THORNHILL* (1776), 2 Wm. Bl. 1078; 96 E. R. 635.

Annotations:—*Distd.* Hopkins v. Grazebrook (1826), 6 B. & C. 31; Robinson v. Harman (1848), 1 Exch. 850. *Fold.* Pounsett v. Fuller (1856), 17 C. B. 660. *Apld.* Sikes v. Wild (1863), 4 B. & S. 421. *Distd.* Lock v. Furze (1866), L. R. 1 C. P. 441; Engell v. Fitch (1869), L. R. 4 Q. B.

TOLAND v. BRUCE (1851), 8 U. C. R. 11.—*CAN.*

1076 iv. —.]—Upon sale of land, there is an implied condition that vendor shall show a good title, unless the contrary is expressly agreed upon.—*GOODY v. CARLSON* (1914), 28 W. L. R. 651; 16 D. L. R. 822.—*CAN.*

1076 v. —.]—A vendor under an agreement of sale of land is not entitled to an order directing purchaser to pay the purchase-money or any instalment thereof until he establishes to the satisfaction of the ct. that he

has a good title to the premises sold.—*PEDLAR v. RYDER, GRANT & MURPHY* (1915), 8 W. W. R. 559; 24 D. L. R. 427.—*CAN.*

1076 vi. —.]—*MACKAY v. PROHAR & PAINE* (Sask.), [1923] 2 D. L. J. 1148; [1923] 2 W. W. R. 272.—*CAN.*

1076 vii. —.]—It is incumbent on plff. who sues for the purchase-price of land to tender title to deft. in his declaration upon payment by the latter of the purchase-price.—*UNION GOVERNMENT (MINISTER OF LANDS)*

659; *Wall v. London City Real Property Co.* (1874), L. R. 9 Q. B. 249. *Apprvd. & Fold.* Bain v. Fothergill (1874), L. R. 7 H. L. 158. *Apld.* Gas Light & Coke Co. v. Towse (1887), 35 Ch. D. 519. *Consd.* Day v. Singleton, [1899] 2 Ch. 320. *Apld.* Morgan v. Russell, [1909] 1 K. B. 357. *Distd.* Re Daniel, Daniel v. Vassall, [1917] 2 Ch. 405. *Fold.* Keen v. Bear, [1920] 2 Ch. 574. *Refd.* Walker v. Moore (1829), 10 B. & C. 416; London & Greenwich Ry. v. Goodchild (1844), 13 L. J. Ch. 224; Gray v. Fowler (1873), L. R. 8 Exch. 249; Re Great Northern Salt & Chemical Works, Ex p. Fenwick (1891), 36 Sol. Jo. 42; Baynes v. Lloyd, [1895] 2 Q. B. 610; Braybrooks v. Whaley, [1919] 1 K. B. 435. *Mentd.* Hodges v. Lichfield (1833), 2 L. J. C. P. 133; Godwin v. Francis (1870), L. R. 5 C. P. 295; Addis v. Gramophone Co., [1909] A. C. 488.

1078. —.]—A party who occupied a house as tenant from year to year, entered into the following agreement with his landlord, "Sept. 2, 1831, S. S., the tenant, purchased an estate in the parish of Corbey, bought of R. G., the landlord, at the sum of £100. Received on account, 10s. Mr. R. G. is willing to let the sum lie, by paying 4 per cent." :—*Held*: as there was an implied condition in the contract that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law.—*DOE d. GRAY v. STANION* (1836), 1 M. & W. 695; 2 Gale, 154; Tyr. & Gr. 1065; 5 L. J. Ex. 253; 150 E. R. 614.

Annotations:—*Fold.* Tarte v. Darby (1846), 15 M. & W. 601. *Distd.* Turner v. Watts (1927), 44 T. L. R. 105. *Refd.* Hodgson v. Hooper (1860), 3 E. & E. 149; Ellis v. Rogers (1885), 29 Ch. D. 661. *Mentd.* Jones v. Mills (1861), 10 C. B. N. S. 788; Vivian v. Moat (1881), 16 Ch. D. 730; Ellis v. Wright (1897), 76 L. T. 522.

1079. —.]—The declaration stated that it was agreed between plff. & deft. that plff. should purchase two houses of deft. for the residue of a term of years, etc.; that deft. should paper them, etc.; that plff. should pay part of the purchase-money, on the completion of the conveyance of the houses; & further, that deft. should make a good title. At the trial, an agreement was produced as follows: "Mr. II., plff., having agreed to purchase of Mr. B., deft., two leasehold houses, etc. Mr. B. hereby agreed to paper, etc.; Mr. II. to pay, etc. at the time of the conveyance, etc." Nothing was said in the agreement as to making a title :—*Held*: the agreement to purchase, though recited as an existing agreement, was to be considered as forming part of the agreement produced; also, there was no variance between the agreement stated in the declaration & the one produced in evidence, on the ground that the latter was silent as to the title, inasmuch as the contract to make a title was implied.—*HALL v. BETTY* (1842), 4 Man. & G. 410; 5 Scott, N. R. 508; 11 L. J. C. P. 256; 134 E. R. 168.

Annotations:—*Refd.* Kintrea v. Preston (1856), 25 L. J. Ex. 287; Want v. Stallibrass (1873), L. R. 8 Exch. 175.

1080. —.]—**Purchaser's notice of defect.**—*Ogilvie v. Foljambe*, No. 183, ante.

1081. —.]—**Implied duty to sell free from incumbrances.**—Independently of the question of merger, a party selling is taken, *prima facie*, to do so free from incumbrances (*PAGE-WOOD, V.-C.*).—*BULKELEY v. HOPE* (1858), as reported in 1 K. & J. 482; 26 L. T. O. S. 56; 1 Jur. N. S. 864; 3

v. FOSTER, [1915] C. P. D. 201.—*S. AF.*

e. Vendor selling such title as he has.—Where the vendor sells only such title as he has, the purchaser will be compelled to complete his purchase, although the vendor does not show a good title, or although the title appears to be not good.—*LESLIE v. PRESTON* (1859), 7 Gr. 434.—*CAN.*

d. Conveyance to vendor made more than forty years—Before contract for sale to purchaser.—*Re LEMON & DAVIES'*

Sect. 2.—Duty to make title: Sub-sects. 1 & 2.]

W. R. 360; 69 E. R. 549; *on appeal* (1856), 8 De G. M. & G. 36, L. J.J.

Annotation:—Mentd. Pryse v. Pryse (1872), L. R. 15 Eq. 86.

1082. ———. ———.]—**PHILLIPS v. (ALD-CLEUGH, No. 1108, post.**

1083. ———. ———.]—If you sell property, *prima facie* you sell it free from incumbrances, & it is for the person who made the contract to hand over the property to show, if he can, that it was not his intention to hand it over free from incumbrances. That has not been done by pltf. in this action (KAY, L.J.).—**SHARMAN v. SHARMAN** (1892), as reported in 67 L. T. 833; 4 R. 124, C. A.

1084. Duty to use reasonable diligence.] — **HAWKINS v. SHEWEN, No. 1396, post.**

1085. Sale of leaseholds.]—In every contract for the sale of an existing lease, there is an implied undertaking by the seller, if the contrary be not expressed, to make out the lessor's title to demise; & without showing such title, the seller cannot maintain an action at law against the buyer, for refusing to complete the purchase. Where a lessee in possession contracted to sell the residue of his term, being three years & a quarter, at the rent of £42 *per annum*, the vendee paying £30 for the fixtures, as per list:—**Held**: it was not to be inferred from the short residue of the term, the small value of the property, & the absence of any premium for the lease, that the vendee intended to waive his right to call for the production of the lessor's title.—**SOUTER v. DRAKE** (1834), 5 B. & Ad. 992; 3 Nev. & M. K. B. 40; 3 L. J. K. B. 31; 110 E. R. 1058.

Annotations:—Apld. Doe d. Gray v. Stanion (1836), 1 M. & W. 695. **Foll'd.** Hall v. Betty (1842), 11 L. J. C. P. 256. **Dist'd.** Kintrea v. Preston (1856), 25 L. J. Ex. 287. **Refd.** Ellis v. Rogers (1885), 29 Ch. D. 661. **Mentd.** Hall v. Conder (1857), 5 W. R. 491; Stranks v. St. John (1867), 36 L. J. C. P. 118.

1086. — Implied condition as to lessor's title.]

—Upon a contract for the sale of an agreement for a lease, it is not an implied condition that the lessor has power to grant the lease.—**KINTREA v. PERSTON** (1856), 1 H. & N. 357; 25 L. J. Ex. 287; 156 E. R. 1241.

Annotation:—Refd. Hall v. Conder (1857), 2 C. B. N. S. 22.

1087. ———.] — **PURVIS v. RAYER, No. 1076, ante.**

1088. Express contract to give good title—Purchaser entitled to withhold payment until good title made.]—In an action by the vendor against the purchaser of an estate for the non-payment of the residue of the purchase-money the declaration stated, that, on, etc., in consideration of £90, then paid to pltf. by deft., & of the further sum of £820 to be paid to pltf. on Nov. 1, then next, pltf. agreed to sell, & deft. agreed to buy a certain messuage, etc., & to pay pltf. the residue of the purchase-money on Nov. 1, then next; & that thereupon a conveyance of the said premises, & the freehold & inheritance thereof, should be made to deft. by all proper parties, at the expense of pltf., provided that pltf. should not be liable to pay the expenses of any attorney whom deft. should employ to investigate the title; & pltf. agreed to deduce a good marketable title to the premises, but deft. was to be satisfied with the usual conveyance of the freehold of the premises from the lords of

the manor, etc.; that it was further agreed between pltf. & deft., that, if the completion of the purchase should, from any cause on the part of pltf., be delayed beyond the said Nov. 1, deft. should pay interest on the unpaid portion of the purchase-money, at the rate of 10s. per cent. & if the delay should be caused by deft. at the rate of £5 per cent. from the said Nov. 1, until the day of payment, deft. being entitled to the rents & profits, & to the possession of the said premises, on & from the said Nov. 1. The declaration contained a general averment that pltf. had performed all things on his part, etc. Deft. pleaded first that pltf. was not ready & willing to convey the premises; secondly, that pltf. did not deduce a good marketable title; & thirdly, that pltf. did not tender any deed for conveying the premises to deft.; & these pleas each concluded with a verification:—**Held**: according to the true construction of the agreement, deft. was not bound to pay the residue of the purchase-money until a good title to the premises was made out by pltf., & he was ready to convey to deft.—**MANBY v. CREMONINI** (1851), 6 Exch. 808; 2 L. M. & P. 550; 21 L. J. Ex. 288; 155 E. R. 772.

1089. — Purchaser's notice of defect.]—Re GLOAG & MILLER'S CONTRACT, No. 1228, post.

1090. — Good marketable title.]—T. agreed to sell to C. certain freehold houses, & to make a good marketable title. On investigation of the title it appeared that the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restriction at the time of the contract, & the jury found that he did:—**Held**: this evidence could not be admitted to modify the terms of the express contract, & pltf. was entitled to recover.—**CATO v. THOMPSON** (1882), 9 Q. B. D. 616; 47 L. T. 491, C. A.

Annotations:—Cons'd. Simpson v. Gilley (1922), 92 L. J. Ch. 194. **Refd.** Ellis v. Rogers (1885), 29 Ch. D. 661; Ashburner v. Scwell, [1891] 3 Ch. 405; May v. Platt, [1900] 1 Ch. 616; Rudd v. Lascelles, [1900] 1 Ch. 815; Halkett v. Dudley, [1907] 1 Ch. 590; Alderdale Estate Co. v. McGrory, [1917] 1 Ch. 414.

1091. — Vendor selling such title as he has.]—Deft. sold & conveyed to pltf. some undivided shares in various properties. Disputes afterwards arose as to what shares had been purchased. They agreed to settle all these disputes & signed a written agreement that pltf. should pay deft. £9,500, & that deft. should execute such deeds as pltf. should require for the conveyance of the estates. Upon a bill for specific performance:—**Held**: deft. was not bound to deduce any title to the property.—**GODSON v. TURNER** (1851), 15 Beav. 46; 51 E. R. 453.

1092. Agreement for lease with option of purchase—Exercise of option.]—By an agreement entered into between pltf. & deft., the latter agreed with the former to grant him a lease for a term of ninety-nine years, subject to a yearly rent & certain covenants to be inserted in the proposed lease. The agreement contained an option on the part of pltf. to purchase the premises within three years. Pltf. having elected to purchase, deft. refused to produce his title to the premises:—

CONTRACT, [1919] V. L. R. 481.—AUS.

e. Duty of vendor to provide for statutory charge.]—There is a general rule of law that where a statutory charge is imposed upon land, at all events prior to the making of a con-

tract of sale, in the absence of express provision the vendor must provide for that charge.—**Re SNEESBY & ADES & BOWES' CONTRACT, [1919] V. L. R. 497.—AUS.**

1. Payment of part of purchase-money—Good title must be shown.]—

THOMPSON v. BRUNSKILL (1859), 7 Gr. 542.—CAN.

g. Right of purchaser to assume title is good.]—A purchaser of land has a right to assume that the title is good, & that it is free from incumbrance, & to require this to be

Held: the right of pltf. was that of an ordinary purchaser, who was entitled to have a good title produced, in the absence of any condition to the contrary, & the *onus* was upon deft. to show that that right had been waived.—*WELCHMAN v. SPINKS* (1861), 5 L. T. 385, L. C.

Sale by assignee of bankrupt.]—See BANKRUPTCY, Vol. IV., p. 230, Nos. 2151, 2152.

SUB-SECT. 2.—WHAT TITLE MUST BE MADE.

1093. Sale in one lot—Vendor must make title to whole.]—A. purchased, at a sale by auction, a lot described in the particulars of sale, as 11 houses, Nos. 1, 2, 3, etc., situate, etc., & it was stated that "the estate was held by lease of B." Previous to the lease a small part of the ground of No. 2 was subtracted from the possession of the lessee; but the lease, nevertheless, contained a description & plan, in the margin, of the whole ground plot, including that part:—**Held:** although in equity B. should not be entitled to enforce the covenants in the lease as to that part of the ground, yet that the particulars of sale being with reference to the lease, without an exception of the plot subtracted from the possession, A. the purchaser was entitled to call upon the vendor to complete his purchase, by making a good title to the whole estate contained in the lease, & an assignment of the lease was not a compliance with the conditions of sale, the vendor not being able to convey the above-mentioned small plot of ground.—*TOMKINS v. WHITE* (1806), 3 Smith, K. B. 435.

1094. ———.]—ROFFEY v. SHALLCROSS (1819), 4 Madd. 227; 56 E. R. 690.
Annotations:—Refd. Casamajor v. Strode (1834), 2 My. & K. 706; Holliday v. Lockwood, [1917] 2 Ch. 47.

1095. Sale in two lots—Whether title must be made to both.]—Ex p. TILSLEY (1819), cited 4 Madd. 227, n.; 56 E. R. 690.

Annotations:—Refd. Casamajor v. Strode (1834), 2 My. & K. 706; Holliday v. Lockwood, [1917] 2 Ch. 47.

1096. ———.]—LEWIN v. GUEST, No. 1277, post.

1097. ——— Lots more conveniently occupied together.]—Where a man purchases at an auction two distinct lots which adjoin, & which would more conveniently be occupied together, he is not obliged to go on with the purchase of either, unless the seller can make a good title to both.—*GIBSON v. SPURRIER* (1795), Peake, Add. Cas. 49; 170 E. R. 190, N. P.

Annotation:—Refd. Holliday v. Lockwood, [1917] 2 Ch. 47.

1098. Agreement for sale to railway company—Covenant to furnish sufficient title—Duty to make good & perfect title—Or title satisfactory to company.]—A. enters into an agreement with a railway co. to sell certain parcels of land, & covenants to furnish a sufficient title:—**Held:**

shown before he can be compelled to pay any part of his purchase-money.—*CAMERON v. CARTER* (1885), 9 O. R. 426.—**CAN.**

h. Sale of Crown leaseholds.]—MUNRO v. PEDERSEN (1921) N. Z. L. R. 115.—**N.Z.**

PART V. SECT. 2, SUB-SECT. 2.

k. General rule.]—The vendor is bound to show & make good title in accordance with the contract.—*AURIOL v. ALBERTA LAND & INVESTMENT CO. (Alta.)* (1912), 20 W. L. R. 185; 1 W. W. R. 787.—**CAN.**

l. ———.]—Under an agreement for the sale of land in which the place & manner of completion of the contract

are not mentioned, the vendor is only called upon to show that he has a good title.—*THOMPSON v. McDONALD & WILSON* (1914), 20 B. C. R. 223.—**CAN.**

m. ———.]—Under an agreement for the sale of land, a purchaser acquires (unless his rights are expressly or impliedly restricted) a right to receive a good title in fee simple to all the subjects, *usque ad calum et ad inferos* (within the description of the parcels) denoted by the term "land," as defined by law.—*ARMSTRONG v. SPARLING & KENNEDY*, [1925] 1 D. L. R. 914; [1925] 1 W. W. R. 390; 19 Sask. L. R. 227.—**CAN.**

n. ———.]—A purchaser must have such a title as he can force down

A. was bound under such an agreement to furnish either a good & perfect title, or, at all events, such a title as would satisfy the co.—*LONG v. BIGNOLD* (1849), 13 L. T. O. S. 285.

1099. Marketable title.]—(1) On a vendor's bill for specific performance, the opinion of the ct. was much in favour of the title, the question on which turned on the construction of a particular will; but the ct., being unable to found that opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy the ct. that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial & not merely idle litigation, refused to decree a specific performance.

(2) A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the ct. entertains doubts, but includes also a title which, although the ct. has a favourable opinion of it, yet may reasonably & fairly be questioned in the opinion of other competent persons, for the ct. has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favour of the title should turn out not to be well founded.

(3) If the doubts as to a title arise upon a question connected with the general law, the ct. is to judge whether the general law on the point is or is not settled; & if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the ct. can satisfactorily investigate, specific performance will be refused.

(4) It is the duty of the ct., on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen, & were in course of litigation.

(5) A marketable title is a title which, at all times, & under all circumstances, may be forced upon an unwilling purchaser.

(6) Every purchaser is entitled to require a marketable title; by which I understand to be meant, a title which, so far as its antecedents are concerned, may at all times, & under all circumstances, be forced upon an unwilling purchaser (*TURNER, V.-C.*).—*PYRKE v. WADDINGHAM* (1853), 10 Hare, 1; 68 E. R. 813.

Annotations:—As to (1) Refd. Collard v. Sampson (1853), 4 De G. M. & G. 224; Freer v. Hesse (1853), 4 De G. M. & G. 495; Burnaby v. Equitable Reversionary Interest Soc. (1885), 54 L. J. Ch. 466. *As to (2) Refd.* Green v. Jenkins (1860), 1 De G. F. & J. 454. *As to (3) Apld.* Falkner v. Equitable Reversionary Soc. (1858), 4 Drew. 352. *Consd.* Palmer v. Locke (1881), 18 Ch. D. 381. *Refd.* Bull v. Hutchens (1863), 32 Beav. 615; Hood v. Oglander (1865), 34 Beav. 513; Hamilton v. Buckmaster (1866), 36 L. J. Ch. 58; Mullings v. Trinder (1870), L. R. 10 Eq. 449. *Generally, Consd.* Re Frith's Contract, Frith v. Osborne (1876), 24 W. R. 1061. *Refd.* Bradshaw v. Fane (1856), 3 Drew. 534; Collier v. McBean (1865), 35 L. J. Ch. 144.

upon a re-purchaser from him at any time.—*MAGENNIS v. FALLON* (1829), 2 Mol. 561.—**IR.**

o. Title free from incumbrances—Dower.]—A party agreeing to convey is bound to do so free from dower.—*VAN NORMAN v. BEAUPRE* (1856), 5 Gr. 599.—**CAN.**

p. ———.]—An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower.—*LOUGHEAD v. STUBBS* (1880), 27 Gr. 387.—**CAN.**

q. ———.]—GRAHAM v. STEPHENS (1880), 27 Gr. 434.—**CAN.**

r. ———.]—Property sold upon credit *Whether purchase-money* as received

Sect. 2.—Duty to make title: Sub-sects. 2 & 3, A., B. & C.]

1100. *Prima facie* title in fee.]—A party proposing to borrow money on security, does not bind himself by implication of law, to produce a security of any particular degree of safety or of any particular title, as in the case of a contract of sale where *prima facie* the vendor is to make out a title in fee. On the contrary, the transaction of borrowing implies that a security of any degree of safety may be made available by a term compensating for the increased risk.—*MELBOURNE v. COTTRELL* (1857), 29 L. T. O. S. 293; 5 W. R. 884.

1101. Sale of enfranchised copyholds.]—*KERR v. PAWSON*, No. 1112, *post*.

1102. Sale of leaseholds—Vendor must show title to lease.]—(1) In the case of a sale of a lease [the law] requires the vendor to show that he has a valid title to the lease or to the term granted by the lease (*FRY, J.*).

(2) In the case of an agreement to lease the vendor is bound to show that there is a subsisting valid agreement to lease (*FRY, J.*).—*BREWER v. BROADWOOD* (1882), 22 Ch. D. 105; 52 L. J. Ch. 136; 47 L. T. 508; 31 W. R. 115.

Annotations:—As to (1) *Reid*. *Re Bayley & Shoemith's Contract* (1918), 87 L. J. Ch. 626. **As to (2) *Reid*.** *Ellis v. Rogers* (1885), 29 Ch. D. 661; *Lee v. Soames* (1888), 59 L. T. 366; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Brickles v. Snell*, [1916] 2 A. C. 599. **Generally, *Reid*** *Wylson v. Dunn* (1887), 34 Ch. D. 569; *Bellamy v. Debenham* (1891), 60 L. J. Ch. 166; *Farnham Brewery Co. v. Hunt* (1893), 68 L. T. 440.

1103. — Agreement for lease—Vendor must show subsisting valid agreement.]—*BREWER v. BROADWOOD*, No. 1102, *ante*.

1104. Option to purchase by lessees—"All estate," etc., at date of lease—Premises mortgaged at date of lease.]—By a lease dated Apr. 15, 1920, landlords demised premises to tenants for the term of three years. The lease contained a provision that the tenants should at any time during the term "have the option of purchasing all the estate, interest & title which is, at the date of these presents, vested in the landlords in & to the freehold premises hereby demised & the fixtures & fittings . . . at a price not exceeding £3,000." On Apr. 15, 1921, the tenants wrote exercising the option to purchase for £3,000. They subsequently found that the premises had not at the date of the lease been vested in the landlords for an unencumbered estate in fee simple, but had been mortgaged in 1910 to secure a loan of which £500 was at the date of the lease & was still owing:—*Held*: under the option the tenants were only entitled to acquire for £3,000 the actual interest

in the premises that the landlords had at the time of the lease, & therefore, the landlords were under no obligation to pay off the mtge. & convey the unencumbered fee simple in consideration of the purchase price of £3,000.—*FOWLER v. WILLIS*, [1922] 2 Ch. 514; 91 L. J. Ch. 772; 128 L. T. 500; 66 Sol. Jo. 576.

SUB-SECT. 3.—WHAT AMOUNTS TO GOOD TITLE.

A. In General.

1105. Good title having regard to terms of contract.]—*UPPERTON v. NICKOLSON*, No. 1114, *post*.

1106. Equitable title in vendor—Legal estate outstanding.]—An abstract showed the equitable fee to be in the vendor, & the legal estate to be in A. as a mtgee. for a term, & subject thereto, in B. in fee. By a supplemental abstract it appeared that, before the abstract was delivered, A. assigned the mtge. money to B. & was declared a trustee of the term for him, & that he had since died intestate; that his father, who first took out administration to him, was also dead, & that he remained unrepresented for some years; after which S. took out administration to him:—*Held*: the first abstract showed a complete title; the tracing of the title to the legal estate being matter of conveyance merely.—*AVARNE v. BROWN* (1844), 14 Sim. 303; 14 L. J. Ch. 30; 8 Jur. 1037; 60 E. R. 375.

1107. — — —.]—*KITCHEN v. PALMER*, No. 710, *ante*.

1108. Property sold as freehold.]—Pltf. contracted to purchase of defts. a house described as a "freehold" residence, etc., being lot 2 referred to in the particulars, subject to certain conditions of sale, & paid the deposit. Condition 5: "The abstract of title to lots 1, 2 & 3, being the freehold portion of the property, will commence with a conveyance of Apr. 17, 1860, & no purchaser shall investigate, or take any objection in respect of the title prior to the commencement of the abstract." Condition 9: "If any error or misstatement shall appear to have been made in the particulars of sale, it is not to annul the sale; but shall entitle the purchaser to compensation." The abstract of the deed of Apr. 17, 1860, recited an indenture of Mar. 2, 1850, whereby E. assigned to R. in fee, & another deed whereby R. assigned to certain trustees in fee, & by the deed the trustees conveyed to defts.' testator in fee, subject, so far as the premises were subject thereto, to the covenants

should be utilised to reduce mortgage-debt.—Where the property is sold upon credit, & the vendor executes a bond for a conveyance free from incumbrances, on payment of the last instalment, the purchaser cannot during the term of credit, call upon the vendor to remove a mtge. created by him upon the property, or to allow the purchase-money to be applied as it becomes payable in discharge of the incumbrance.—*CHANTLER v. INCE* (1859), 7 Gr. 432.—*CAN.*

t. — —.]—*SHAW v. LEDYARD* (1866), 12 Gr. 382.—*CAN.*

a. — —.]—A vendor agreed to pay off a mtge. existing on the property, & the decree directed a good & sufficient conveyance "according to said agreement." Deft., the vendor, neglected to pay off the mtge., & pltf. thereupon moved upon petition to amend the decree by ordering deft. to obtain a discharge of such incumbrance but the ct. directed that the

vendor pay off the mtge. within a limited time, or in default, that the purchaser, should be at liberty to do so, procure an assignment, & have his remedy against the vendor, whose conveyance he was not bound to accept till this mtge. was paid off, the purchase-money in ct. to be applied *pro tanto* thereto.—*STAMMERS v. O'DONOHUE* (1881), 29 Gr. 64.—*CAN.*

b. — —.]—*MACLIN v. DOWLING* (1890), 19 O. R. 441.—*CAN.*

c. — —.]—*FREE v. MACDONALD MANUFACTURING CO.* (1912), 23 O. W. R. 189; 4 O. W. N. 63; 6 D. L. R. 852.—*CAN.*

d. — —.]—An agreement between an owner of land & estate agents giving the latter an authority to sell on commission if registered against the land forms a cloud on the title which the vendor must remove at the instance of a purchaser.—*ROSENBERG v. BOCHLER* (1913), 24 O. W. N.

59; 4 O. W. N. 757; 10 D. L. R. 422.—*CAN.*

e. — — Legal estate of vendor not an encumbrance.]—The legal estate of a vendor who has made an agreement to sell does not constitute an encumbrance upon the equitable estate of the purchaser where the purchaser has entered into another agreement as vendor for the resale to a sub-purchaser.—*GREENE v. APPLETON* (1915), 31 W. L. R. 548; 8 W. W. R. 867.—*CAN.*

PART V. SECT. 2, SUB-SECT. 3.—A.

f. Title with equitable defect.]—*BRUNSKILL v. WILSON* (1866), 25 U. C. R. 248.—*CAN.*

PART V. SECT. 2, SUB-SECT. 3.—B.

1106 i. Equitable title in vendor—Legal estate outstanding.]—*TURNER v. MCGAVIN* (1915), 30 W. L. R. 505; 31 W. L. R. 465.—*CAN.*

& conditions on the part of the grantee, his heirs & assigns, in the indenture of Mar. 2, 1850. Pltf. refused to complete the purchase without further explanation of what these covenants & conditions were, & defts. refused any further abstract, relying on conditions 5 & 9 :—*Held* : the property having been sold as "freehold," pltf. was entitled to have an unencumbered freehold title ; under the deed of Apr. 17, 1860 ; & conditions 5 & 9 did not protect defts. ; & pltf. was therefore entitled to rescind the contract & recover the deposit, etc.—*PHILLIPS v. CALDCLEUGH* (1868), L. R. 4 Q. B. 159 ; 9 B. & S. 967 ; 38 L. J. Q. B. 68 ; 20 L. T. 80 ; 17 W. R. 575.

Annotations :—*Folld.* *Hone v. Gakstatter* (1909), 53 Sol. Jo. 286. *Reid.* *Cato v. Thompson* (1882), 9 Q. B. D. 616.

1109. ——— **Power to get in legal estate.]**—*CAMBERWELL & SOUTH LONDON BUILDING SOCIETY v. HOLLOWAY*, No. 1136, *post*.

C. Property Subject to Mining Rights.

1110. Whether title good.]—Reservation of salt works, mines, etc., in 1704, with a right of entry, though no instance of any claim, & the title had been transferred in 1761, without such reservation, upon the usual covenants, held an objection, giving a right to compensation : the purchaser not insisting upon it farther.—*SEAMAN v. VAWDREY* (1810), 16 Ves. 390 ; 33 E. R. 1032.

Annotations :—*Reid.* *Ramsden v. Hirst* (1858), 4 Jur. N. S. 200. *Mentd.* *Low Moor Co. v. Stanley Coal Co.* (1875), 33 L. T. 436.

1111. ——— **]**—On the purchase of an underlease, it is not a valid objection to the title that the underlease may become forfeited by the non-performance of the covenants in the original lease.

Where a contract is entered into to sell a freehold, & nothing is said about the minerals, if the purchaser finds the minerals are reserved, the title is bad, & he cannot be compelled to take it. But if, on a sale of copyholds, nothing is said as to the minerals, can a purchaser object that the title is bad because he cannot touch the minerals except with the consent of the lord ? Clearly not. . . . A contract to assign a lease is not satisfied by granting or assigning an underlease (*ROMILLY, M.R.*).—*HAYFORD v. CRIDDLE* (1855), 22 Beav. 477 ; 52 E. R. 1192.

Annotation :—*Reid.* *Re Beyfus & Masters's Contract* (1888), 39 Ch. D. 110.

1112. ——— **]**—The vendor of a copyhold estate enfranchised under Copyhold Act, 1852 (c. 31), is not bound to show the lord's title.

After the passing of Copyhold Act, 1841 (c. 34), Copyhold Act, 1852 (c. 51), an agreement was entered into for the sale of a copyhold estate, together with the timber " & all appurtenances to the same hereditaments belonging," as soon as the same should become freehold, under an agreement of the vendor to use his best endeavours to enfranchise. An enfranchisement was effected under the second Act, reserving the minerals to the lord :—*Held* : the contract had reference to the provisions in those Acts relative to minerals, etc., & the purchaser must complete, notwithstanding this reservation.—*KERR v. PAWSON* (1858), 25 Beav. 394 ; 27 L. J. Ch. 594 ; 31 L. T. O. S. 224 ; 22 J. P. 241 ; 4 Jur. N. S. 425 ; 6 W. R. 447 ; 53 E. R. 687.

Annotation :—*Reid.* *Jenkins v. Green* (No. 2) (1850), 27 Beav. 440.

1113. ——— **]**—Where coal mines are worked under an agreement which provides that, when the workings shall have finally ceased, the pits shall

be filled in, & the ground restored to cultivation ; the cessation of the works & the filling up of the pits & the restoration of the land does not prevent a reworking of the mines under the agreement.

An objection to the title on the ground of such right to rework is valid, & a purchaser is entitled to compensation, to be estimated by taking all the circumstances into consideration.—*RAMSDEN v. HURST* (1858), 27 L. J. Ch. 482 ; 31 L. T. O. S. 325 ; 4 Jur. N. S. 200 ; 6 W. R. 349.

Annotation :—*Distd.* *Rudd v. Lascelles*, [1900] 1 Ch. 815.

1114. ——— **]**—If a vendor does not deliver the abstract of title within the time specified in the conditions of sale, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated in the condition for sending in the objections that time in that respect should be of the essence of the contract. In such a case, the time within which objections will be considered as waived will depend upon the general principles of the ct. & the conduct of the parties. Where a decree is made for specific performance of a contract for sale, & an inquiry is directed in general terms whether the vendor can make a good title, it must be understood to mean a good title having regard to the terms of the contract ; but if the vendor wishes to prevent objections which have been waived before the suit from being renewed under the inquiry, that point should be considered at the hearing, & noticed in the decree. Land was described in a contract for sale as freehold, but it was shown by the abstract that it was formerly copyhold, & had been enfranchised under Enfranchisement Acts. A decree was afterwards made at the suit of the vendor for specific performance, & a general inquiry directed as to title, in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under Enfranchisement Acts :—*Held* : the objection was fatal to the title ; but as the purchaser had taken the objection so late he was not allowed his costs.

A man who sells land as freehold does not make a good marketable title, such as the purchaser is entitled to have, by producing a title under an Enfranchisement Act, which reserves to the lord of the manor his mineral rights to the manor (*JAMES, L.J.*).—*UPPERTON v. NICKOLSON* (1871), 6 Ch. App. 436 ; 40 L. J. Ch. 401 ; 25 L. T. 4 ; 35 J. P. 532 ; 19 W. R. 733, L. J.J.

Annotations :—*Reid.* *Re Jackson & Haden's Contract*, [1906] 1 Ch. 412 ; *McGrory v. Alderdale Estate Co.*, [1918] A. C. 503. *Mentd.* *Re Lord & Fullerton's Contract* (1895), 44 W. R. 195.

1115. ——— **]**—On Apr. 17, 1889, deft.'s agent wrote to pltf.'s agent offering £800 for a house of pltf. On Apr. 25, pltf.'s agent, by his authority, wrote, accepting the offer, & stating that possession would be given at Midsummer. Pltf.'s solrs. sent to deft.'s solr. a draft contract containing special conditions which deft.'s solr. struck out. On May 14, pltf.'s solrs. wrote to deft.'s solr. : " We cannot consent to all your alterations, which, in fact, make the contract almost an open one." On May 17, deft.'s solr. sent back the draft with a letter stating that he could not advise his client to go on with the negotiations. Pltf.'s solrs. sent back the draft with some variations & with the abstract of title, from which it appeared that the land was enfranchised copyhold, & that the vendor had not the mines. On May 20, deft.'s solr. wrote to pltf.'s solrs. that, as pltf. had not

Sect. 2.—Duty to make title: Sub-sect. 3, C. & D.]

the mines, he could not advise his client to go on with the matter. Deft. accordingly refused to proceed. Pltf. negotiated with the lord of the manor for the purchase of the mines, but did not obtain a conveyance of them till Sept. In the meantime, on June 22, 1889, pltf. commenced this action for specific performance or damages:—*Held*: (1) as in May, 1889, the vendor had not power to convey the mines, nor power to compel a conveyance of them from any other person, the purchaser was entitled, upon discovering this, to rescind the contract, though the time to be allowed for completion had not expired, & specific performance could not be decreed; (2) pltf. could not sustain a claim for damages for breach of contract, since he was not, on June 24, which must be treated as the end of the time allowed for completion, in a position to give deft. such a conveyance as the deft. was entitled to.

Qu.: whether, if on June 24, pltf. had been able & willing to give deft. a proper conveyance, he would not have been entitled to damages for deft.'s breach of contract.—*BELLAMY v. DEBENHAM*, [1891] 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 478; 39 W. R. 257; 7 T. L. R. 199, C. A.

Annotations:—*As to* (1) *Reid. Re Cooke & Holland's Contract* (1898), 78 L. T. 106; *Halkett v. Dudley*, [1907] 1 Ch. 590; *Brickles v. Snell*, [1916] 2 A. C. 599. *As to* (2) *Reid. Brickles v. Snell*, [1916] 2 A. C. 599. *Generally*, *Consd. Perry v. Suffields*, [1916] 2 Ch. 187. *Reid. Mason v. Von Buch* (1899), 15 T. L. R. 430.

D. Sale of Leaseholds.

1116. Sale by sheriff—Purchase-money not paid by execution debtor.—A. having sold certain leasehold premises to B., assigned them by indenture, containing a proviso that B. should not assign over until the whole of the purchase-money should have been paid, & B. & C. covenanted for themselves, their exors., administrators, & assigns for the payment of the money. The premises having been taken in execution for a debt of B. who had not paid the purchase-money, were sold by the sheriff to D., who paid down a deposit & agreed to complete the purchase on having a good title:—*Held*: the non-payment of the purchase-money by B. was a sufficient objection to the title, & D. might recover back his deposit in an action for money had & received.—*ELLIOT v. EDWARDS* (1802), 3 Bos. & P. 181; 127 E. R. 100.

Annotation:—*Consd. Mackreth v. Symmons* (1808), 15 Ves. 329.

1117. Liability to forfeiture—Sale in different lots—Purchaser of one lot exclusively subject to rent—Clause for re-entry on non-payment.—On a sale, in lots, of premises, the particulars of which state them to be held under one lease reserving rent, & that the purchaser of one lot is to be exclusively subject to the rent, the other purchasers cannot object to the title, on the ground of a clause of re-entry on non-payment, contained in the lease.—*WALTER v. MAUNDE* (1820), 1 Jac. & W. 181; 37 E. R. 344.

1118. ——— Liability for breach of covenant by purchaser of other lot.—Certain leasehold premises held under the same lease, & together subject to a ground rent of £8 *per annum*, were sold by public auction in two lots. It was stated in the particulars of sale, that the premises consisted of "a leasehold estate held of W. for a term of years," & that lots 1 & 2 respectively were to be sold, subject to a ground rent of £4 *per annum*; but no notice was given, by the particulars, of the special covenants contained in the original lease. In a suit by the vendor for a specific performance

of the contract for sale as to lot 1:—*Held*: he had made out a good title by showing that a good lease of lot 1 was subsisting, & vested in him; & the purchaser could not object to perform the contract because he might be liable to eviction by reason of a breach of covenant to be committed by the purchaser of lot 2, under the covenants of the original lease, concerning which no provision had been made in the conditions of sale.—*PATERSON v. LONG* (1843), 6 Beav. 590; 13 L. J. Ch. 1; 2 L. T. O. S. 116; 7 Jur. 1049; 49 E. R. 954.

Annotations:—*Consd. Brumfit v. Morton* (1857), 30 L. T. O. S. 98. *Reid. Evans v. Robins* (1863), 11 L. T. 211.

1119. ——— Non-payment of rent reserved in original demise.—(1) Property was put up for sale by auction, described as "a leasehold ground rent of £23, reserved by a mesne lease of certain premises for ninety-eight years wanting seven days, & assigned apart from the reversion for the remainder of the term by an indenture of 1817." By the conditions of sale no title prior to the assignment or the title of any ground or mesne landlord was to be produced. From a recital in the deed of 1817, it appeared that the property out of which the rent issued had been originally demised, with other property, at a rent of £10, subject to the covenants, conditions, & agreements in the original demise contained:—*Held*: under such circumstances, a good title was not made to the rent of £23, inasmuch as it appeared upon the face of the deed of 1817, that, upon failure of payment of the £10 rent, the rent of £23 might be liable to diminution or forfeiture.

(2) Where conditions of sale are so obscurely worded, that, when taken in connection with the particulars of sale, they are likely to mislead an ordinary purchaser as to the nature of the property offered for sale, *semble*, the ct. will discharge the purchaser from his bargain, on the argument of exceptions to the title, without putting him to the necessity of moving to be discharged from the purchase.—*TAYLOR v. MARTINDALE* (1842), 1 Y. & C. Ch. Cas. 658; 62 E. R. 1060.

1120. Non-performance of covenants in original lease.—On granting a building lease for ninety-two & three-quarters years the lessee covenanted that he would, within the first five years of the term, build thirty-four additional houses, of the dimensions therein mentioned, & keep same in repair, & same so repaired, at the end or other sooner determination of the term, deliver up to the lessor or his assigns. Some only of the thirty-four houses were built; but the lessor, notwithstanding, received the rent, payable under the lease, for forty-six years afterwards. On a sale of the property by public auction, by the assignees in bkpcy. of the lessee:—*Held*: although there had been a waiver by the lessor of the covenant to build, still the covenant to deliver up the houses, at the end or sooner determination of the term, continued in force, & was a valid objection to the title; & the purchaser could not be required to accept compensation or indemnity.—*NOUAILLE v. FLIGHT* (1844), 7 Beav. 521; 13 L. J. Ch. 414; 8 Jur. 838; 49 E. R. 1168.

Annotation:—*Distd. Hume v. Bentley* (1852), 5 De G. & Sm. 520.

1121. ————In an action by a purchaser against a vendor of leasehold premises, for breach of contract in failing to make out a good title, it appeared that the premises were demised by A. B. & C. to J., who assigned to deft. The lease contained a covenant by the lessee to insure the premises in the joint names of the lessors, with a proviso for re-entry on breach of covenant by the

lessee. The premises were insured in the joint names of A., B., C., & deft.:—*Held*: this was not a good performance of the covenant to insure; & deft. being bound to show a good lease, the liability to have the lease avoided by the landlord was a valid objection to the title.—*PENNIAL v. HARBORNE* (1848), 11 Q. B. 368; 17 L. J. Q. B. 94; 10 L. T. O. S. 305; 12 Jur. 159; 116 E. R. 514.

Annotations:—*Consd.* *Havens v. Middleton* (1853), 10 Hare, 641; *Wilson v. Wilson* (1854), 14 C. B. 616.

1122. —[.]—A purchaser of a leasehold may object to the vendor's title, on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the annual premium of insurance pursuant to his covenant; although it does not appear that the lessor has taken advantage of the forfeiture.—*WILSON v. WILSON* (1854), 14 C. B. 616; 2 C. L. R. 818; 23 L. J. C. P. 137; 23 L. T. O. S. 158; 18 Jur. 581; 2 W. R. 421; 139 E. R. 253.

Annotation:—*Mentd.* *Camillo Tank S.S. Co. v. Alexandria Engineering Works* (1921), 38 T. L. R. 134.

1123. —[.]—*HAYFORD v. CRIDDLE*, No. 1111, ante.

1124. *Property comprised in lease with other property*.—Particulars of sale described lot 5 as consisting of a leasehold house, No. 20, of a certain description, with a yard, at the end of which was a coach house, & stable, & small yard beyond, with extra stable; & stated, that the house was occupied by W., the yard, coach house, etc., by H. Lot 6 was described as a leasehold house, "No. 21, adjoining lot 5, & of similar design & accommodation. Is now & has been for years in the occupation of T." The two houses were built on adjoining strips of land, each held under a separate lease. The small yard & extra stable lay behind No. 21, & were comprised in the lease of lot 6. The occupations were as stated in the particulars. Pltf. purchased lot 5, deft. II. lot 6. Pltf. took an assignment from the vendor of the property in the lease of lot 5, & no more. H. on the following day, took an assignment of all the property comprised in the lease of lot 6, thus obtaining the legal estate in the small yard & extra stable:—*Held*: pltf. was entitled to an assignment, from II. of a small yard & extra stable, for, according to the true construction of the particulars, H. had not contracted to purchase them, but pltf. had.

Part of lot 5 is comprised in the same lease with other property & to that part pltf. will not get a good title, since he will be liable to be deprived of it by a forfeiture occasioned by the acts of other parties (*LORD CRANWORTH, C.*).—*LEUTY v. HILLAS* (1858), 2 De G. & J. 110; 27 L. J. Ch. 534; 22 J. P. 96; 4 Jur. N. S. 1166; 6 W. R. 217; 44 E. R. 929; *sub nom.* *LEUTY v. HILLAS*, 30 L. T. O. S. 299, L. C.; *subsequent proceedings, sub nom.* *WILD v. HILLAS*, 28 L. J. Ch. 170.

Annotations:—*Distd.* *Ellis v. Hills & Brighton & Preston A. B. C. Permanent Bldg. Soc.* (1892), 67 L. T. 287. *Apld.* *Craddock v. Hunt*, [1923] 2 Ch. 136.

1125. —[.]—A purchaser entered into an open contract to purchase a "leasehold" house & paid a deposit. It appeared on the face of the abstract of title that the property agreed to be sold was held upon an underlease & formed part of larger premises comprised in two head leases. The purchaser objected to the title on the ground that the property being so held she would be liable to eviction by the original lessor for breaches of covenant in respect of property not comprised in the underlease:—*Held*: a good title had not been shown by the vendors to the

property agreed to be sold, & the purchaser was entitled to a return of the deposit.—*Re LLOYDS BANK, LTD. & LILLINGTON'S CONTRACT*, [1912] 1 Ch. 601; 81 L. J. Ch. 386; 106 L. T. 561; 56 Sol. Jo. 380.

Annotation:—*Mentd.* *Hurd v. Whaley* (1918), 118 L. T. 593.

1126. *Lease subject to covenant against assignment*.—*Re MARSHALL & SALTS' CONTRACT*, No. 1222, *post*.

1127. *Non-compliance with dilapidation notice served by landlord—Acceptance of rent by landlord*.—An assignor of a lease who by non-compliance with a dilapidation notice served upon him by his landlord has rendered the lease liable to forfeiture cannot make a good title under an open contract, although the assignee has tendered & the landlord has accepted rent subsequently to the date of the contract, but before completion has been effected.—*Re MARTIN, Ex p. DIXON (TRUSTEE) v. TUCKER* (1912), 106 L. T. 381.

1128. *Outstanding judgments existing against former owner—No steps taken to enforce*.—Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, & to enforce which no steps appeared to have been taken, are no objection to the title.—*CAUSTON v. MACKLEW* (1828), 2 Sim. 242; 57 E. R. 779.

Annotation:—*Consd.* *Williams v. Craddock* (1831), 4 Sim 313.

1129. —[.]—Where, in 1862 a judgment was entered up against a mtgor. of leaseholds in Middlesex, & registered in the Common Pleas, but not in the Middlesex Registry; no writ of execution was ever issued, & the leaseholds were afterwards sold by order of the ct., but the purchaser objected to complete on the ground that the outstanding unsatisfied judgment vitiated the title:—*Held*: the objection was not a valid one; & the purchaser was ordered to pay his purchase-money into ct.—*WALLIS v. MORRIS* (1864), 10 L. T. 709; 10 Jur. N. S. 741; 12 W. R. 997.

1130. *Underlease granted with covenants omitted*.—(1) *Qu.*: if a lessee for a term of years, underlet for a less term, & the underlessee sell by auction, the lesser term describing it as a lease, & one of the conditions of sale is that the lessor's title shall not be inquired into; the vendor's title being good, whether the purchaser can refuse to complete because there is a term interposed between the vendor's interest & the freehold.

(2) In such a case, where the property was included in the original lease, together with other hereditaments, subject to general covenants, & a power of re-entry for breach of any of them, & the purchaser had discovered these facts *aliunde*:—*Held*: he was entitled to refuse to perform his contract, notwithstanding that the original lease contained provisions for the apportionment of the rent & of the power of re-entry.

(3) It is a formidable objection to the title of a vendor of leasehold property, that he has underlet it by a lease which does not contain similar covenants to those by which he is bound to his own lessor, for example, covenants to build, or to paint at certain periods; for the vendor may thus have put it out of his power, during the underlease, to perform covenants for the breach of which the original lessor can re-enter.

(4) *Qu.*: whether the doctrine that a purchaser of leaseholds, or of freeholds subject to a lease, has notice of the covenants in the lease can be extended to fix him with notice of collateral facts in such covenants. If such facts disclose a defect in the vendor's title the ct. will not compel

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the purchaser to perform his contract, whether he had notice or not.—**DARLINGTON v. HAMILTON** (1854), Kay, 550; 2 Eq. Rep. 906; 23 L. J. Ch. 1000; 24 L. T. O. S. 33; 69 E. R. 233.

Annotations:—As to (1) **Consd.** *Camberwell & South London Bldg. Soc. v. Holloway* (1879), 13 Ch. D. 754. As to (2) **Apld.** *Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515. **Foll.** *Creswell v. Davidson* (1887), 56 L. T. 811. **Consd.** *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190. **Apld.** *Re Lloyds Bank & Lillington's Contract*, [1912] 1 Ch. 601. **Refd.** *Best v. Hamand* (1879), 12 Ch. D. 1. **Generally, Mentd.** *Hurd v. Whaley* (1918), 118 L. T. 593.

1131. Underlease described as lease.]—MADELEY v. BOOTH, No. 860, *ante*.

1132. —.]—HAYFORD v. CRIDDLE, No. 1111, *ante*.

1133. —.]—HENDERSON v. HUDSON, No. 622, *ante*.

1134. —.]—Houses offered for sale were stated in the particulars to be held for ninety years from June 24, 1844, at a ground rent of £21. Condition 4 provided that the title should commence "with the lease under which the vendor holds, dated July 11, 1845." Condition 5 stated that "the description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendor was in fact entitled to an underlease for the residue of the term of ninety years less two days at a peppercorn rent, & the owner of the two days could not be found:—**Held**: the representation that the property was held by lease when it was in fact held by underlease was a fatal misdescription, unless it was cured by condition 5 & condition 5 did not apply, for that "error in the description of the property" meant a misdescription of the corporeal property, not a mistake in the description of the vendor's title; a good title was not shown.—*Re BEYFUS & MASTERS'S CONTRACT* (1888), 39 Ch. D. 110; 59 L. T. 740; 53 J. P. 293; 37 W. R. 261; 4 T. L. R. 590, C. A.

Annotations:—**Refd.** *Lee v. Rayson*, [1917] 1 Ch. 613; *Debenham v. Sawbridge*, [1901] 2 Ch. 98.

1135. — Vendor holding under agreement for underlease.]—CRESWELL v. DAVIDSON (1887), 56 L. T. 811.

Annotations:—**Foll.** *Re Lloyds Bank & Lillington's Contract*, [1912] 1 Ch. 601. **Mentd.** *Burt v. Gray*, [1891] 2 Q. B. 98; *Cholmeley School Highgate v. Sewell*, [1894] 2 Q. B. 906; *Nind v. Nineteenth Century Bldg. Soc.*, [1894] 2 Q. B. 226; *Hurd v. Whaley* (1918), 118 L. T. 593.

1136. — Effect of purchaser having notice.]—Although according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease, cannot, if nothing further is said, make a good title unless it is held under an original lease, yet in a case where the particulars & conditions of sale of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease:—**Held**: the purchaser could not on that account refuse to complete, or claim compensation on the ground of misdescription.

The general rule is this, that a man makes a

good title by showing a good equitable title & power to get in the legal estate. You are not bound to trace the legal estate further than to show that you can get at it (**JESSEL, M.R.**).—**CAMBERWELL & SOUTH LONDON BUILDING SOCIETY v. HOLLOWAY** (1879), 13 Ch. D. 754; 49 L. J. Ch. 361; 41 L. T. 752; 28 W. R. 222.

Annotations:—**Expld.** *Blenkhorn v. Penrose* (1880), 43 L. T. 668. **Consd.** *Re Beyfus & Masters's Contract* (1888), 39 Ch. D. 110; *Broom v. Phillips* (1896), 74 L. T. 459.

1137. — Property forming part of premises comprised in head leases.]—Re LLOYDS BANK, LTD. & LILLINGTON'S CONTRACT, No. 1125, *ante*.

1138. —.]—TOMPKINS v. TRATT (1915), 139 L. T. Jo. 541.

1139. Agreement to sell "all interest in lease"—Title shown to underlease.]—A vendor agreed to sell "all his interest in the lease" held by him of certain property. The title proved to be an underlease for a term less by three days than the term granted by the original lease:—**Held**: the purchaser could not on that account refuse to complete.—**WARING v. SCOTLAND** (1888), 57 L. J. Ch. 1016; 59 L. T. 132; 36 W. R. 756.

E. Other Cases.

1140. Outstanding term to attend inheritance—Trusts performed.]—Outstanding term, to attend the inheritance, the trusts being performed, may be an objection to the conveyance, not to the title.—**BERKELEY v. DAUH** (1810), 16 Ves. 380; 33 E. R. 1028.

Annotations:—**Distd.** *Sellick v. Trevor* (1843), 11 M. & W. 722. **Refd.** *Avarne v. Brown* (1844), 8 Jur. 1037.

1141. Fee farm rents not appearing extinguished—Proof that no claim made since ancient date—No proof of previous claim.]—SIMPSON v. GUTTERIDGE, No. 1329, *post*.

1142. Prior voluntary settlement by vendor.]—A ct. of equity will not assist a vendor in defeating a prior voluntary settlement made by himself. Purchaser objecting to title on the ground of a voluntary settlement made by the vendor; a bill for specific performance by the vendor was dismissed, & an exception to the master's report approving the title allowed.—**SMITH v. GARLAND** (1817), 2 Mer. 123; 35 E. R. 887.

Annotations:—**Distd.** *Peter v. Nicolls* (1871), L. R. 11 Eq. 391. **Consd.** *Re Briggs & Spicer*, [1891] 2 Ch. 127. **Refd.** *Clarke v. Willott* (1872), L. R. 7 Exch. 313; *Noyes v. Paterson* (1893), 8 R. 323.

—.]—On bill by a vendor for specific performance *deft.*, the purchaser, set up a voluntary settlement as an objection to the title but said he was willing to complete the purchase on having a good title. He had been let into possession as purchaser & paid part of his purchase-money & had paid off a mtge. & got a conveyance of the legal estate & possession of the title deeds:—**Held**: notwithstanding the voluntary settlement *pltf.* was entitled to a decree for completing the purchase. *Semble*: the principle of *Smith v. Garland*, No. 1142, *ante*, does not apply to a *deft.* who says he is willing to complete on having a good title.—**PETER v. NICOLLS** (1871), L. R. 11 Eq. 391; 24 L. T. 381; 19 W. R. 618.

PART V. SECT. 2, SUB-SECT. 3.—D.

1131. Underlease described as lease.]—WILLIS v. MILNER (1909), 28 N. Z. L. R. 62.—**N.Z.**

h. Failure to give purchaser vacant possession.]—A failure to give a purchaser actual vacant possession by reason of the wrongful holding over by a tenant is not an inability to show a good title, & substantial damages

may be recovered for such failure.—**HENSLEY v. RESCHKE** (1914), 18 C. L. R. 452.—**AUS.**

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k. Sale of road allowance—Public user.]—The owner had permitted for many years a public road to be used across his land, which he subsequently agreed to sell. No bye-law had been

passed by the municipality for closing up this road, although a resolution of the council had been passed for the purpose:—**Held**: a good title was not shown.—**KRONSBIEHN v. GAGE** (1864), 10 Gr. 572.—**CAN.**

l. Advertisements in newspapers insufficient.]—Trustees in selling some church property under R. S. O. 1887, c. 237, s. 13, advertised on the

1144. Continued enjoyment under title claimed.]—*NOUAILLE v. GREENWOOD* (1822), *Turn. & R.* 26; 37 E. R. 1003, L. C.

Annotation:—*Reid. Re Dudson's Contract* (1878), 8 Ch. D. 628.

1145. Legal estate outstanding.]—Where a legal fee is outstanding, which was vested long since in persons who would now be trustees for the vendor, & the abstract does not show in whom that legal fee at present is, the objection is a matter of title, & not of conveyance merely.—*WYNNE v. GRIFFITH* (1826), 1 Russ. 283; 38 E. R. 110.

Annotation:—*Distd. Avarne v. Brown* (1844), 14 Sim. 303.

1146. Deficiency in subject of sale.]—A deficiency in the smallest portion of interest, in the subject of sale, either as to quantity or duration, is, at law, a total want of title.—*ROPER v. COOMBS* (1827), 6 B. & C. 534; 9 Dow. & Ry. K. B. 562; 5 L. J. O. S. K. B. 200; 108 E. R. 548.

Annotations:—*Reid. Kintrea v. Preston* (1856), 25 L. J. Ex. 287; *Stranks v. St. John* (1867), L. R. 2 C. P. 376.

1147. Sale by devisee—Devise subject to debts, legacies & annuities—Concurrence of annuitants unnecessary.]—*PAGE v. ADAM*, No. 713, *ante*.

1148. Infringement of rule *cujus est solum, ejus est usque ad cælum*.]—(1) Upon the sale of leasehold property, it is the duty of the purchaser to inquire into the covenants & stipulations of the original lease. Therefore, where leasehold property about to be sold, was described in the particulars of sale as being held at a ground rent of £86 *per annum*, & it appeared from the lease that the ground rent was £80, & one-third of the improved yearly rent or value, & there were other stringent covenants in the lease, not noticed in the particulars, such as that no fine should be taken for an underlease or assignment, except with the consent of the reversioner, etc.:—*Held*: nevertheless, the purchaser must be held to his contract.

(2) An infringement of the rule, *cujus est solum, ejus est usque ad cælum*, is sufficient to avoid the contract between vendor & purchaser.—*POPE v. GARLAND* (1841), 4 Y. & C. Ex. 394; 10 L. J. Ex. Eq. 13, 92; 160 E. R. 1059.

Annotations:—*As to* (1) *Apld. Strangways v. Bishop* (1857), 29 L. T. O. S. 120. *Consd. Grosvenor v. Green* (1858), 28 L. J. Ch. 173. *Reid. Evans v. Robins* (1863), 11 L. T. 211; *Cullen v. O'Meara* (1867), 15 W. R. 1174.

1149. Outstanding judgment.]—(1) An outstanding docketed judgment not registered pursuant to Judgments Act, 1838 (c. 110), s. 19, & Judgments Act, 1883 (c. 11), ss. 2, 3, is not a valid objection to the title of a vendor on the sale of realty.

(2) The abstract ought to contain no misstatement or misrepresentation, such as that made in the present case, when heavy incumbrances are expressed to be paid off, & the deeds not yet executed, & the title should be complete at the time of the abstract being delivered, or the vendors were not in a position to enforce their contract. The practice of stating in an abstract deeds to be executed, which were not so is inconvenient & improper (*CRESSWELL, J.*).—*BEDFORD v. FORBES* (1843), 1 Car. & Kir. 33; 2 L. T. O. S. 192.

1150. Sale by trustees—Sale under statutory powers—Repugnancy of statutory provisions.]—Trustees were empowered by Act of Parliament to sell & exchange all or any of the heredita-

ments mentioned in the schedule to the Act, amongst which was a farm called the M. farm, parcel of the manor of W. In the body of the Act there was a proviso that the manor of W., should not be sold. The trustees having contracted to sell the M. farm: *Held*: the purchaser was not bound to accept the title.—*LINCOLN (EARL) v. ARCEDECKNE* (1844), 1 Coll. 98; 63 E. R. 338.

Annotation:—*Reid. Pyrke v. Waddingham* (1852), 10 Hare, 1.

1151. —Without power of sale—Concurrence of beneficiaries.]—A contract for sale of a freehold house—lot 1 provided that "The vendor of lots 1 & 2 who is the trustee under the will of James Baker deceased is selling the properties under the trusts & powers vested in him thereunder & shall not be required to enter into any covenant other than that implied by his conveying in such capacity as aforesaid." It also provided that "The tenant for life of lot 1 will join in the conveyance to the purchaser for the purpose of releasing her life interest therein." On the examination of title it appeared that the vendor had the entire legal estate as trustee of the will, but had no power or trust for sale thereunder. He had, however, entered into the contract at the written request of the life tenant & all the other beneficiaries, including himself, so that he could compel them to join:—*Held*: the vendor had shown a good title in accordance with the contract.—*Re BAKER & SELMON'S CONTRACT*, [1907] 1 Ch. 238; 76 L. J. Ch. 235; 96 L. T. 110.

Annotations:—*Apprvd. Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1. *Apld. Re Hailes & Hutchinson's Contract*, [1920] 1 Ch. 233.

1152. —Offer to make title as "personal representatives."]—*Re SPENCER & HAUSER'S CONTRACT*, [1928] W. N. 135.

1153. Property subject to incumbrance.]—This is a bill for the specific performance of a contract of purchase, against the representative & devisees of the vendor, & also against mtgees. who are not parties to the contract. The fact, that the premises, which are the subject of the contract, are subject to incumbrances, raises a question of conveyance, but not of title (*WIGRAM, V.-C.*).—*SOBER v. KEMP* (1847), 6 Hare, 155; 67 E. R. 1120.

Annotation:—*Mentd. Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726.

1154. Property subject to easement.]—The owner of land, situated on an acclivity, conveyed, by a deed of 1816, a portion of lower land, with liberty to enter on upper lands, & fetch water from a spring, & to cut open, cleanse & cover in such gutters & drains as might be necessary for the purpose of conducting the spring to the conveyed land; & also with liberty to pass & repass, for ingress & egress, on the upper land around or adjoining the conveyed land, & to put any ladders against the cottages then intended to be built upon the conveyed land. By another deed of 1820 other part of the lower land was conveyed, with liberty to take water from specified springs in the higher land, & to make such reservoirs in a particular field, part thereof, as might be necessary for taking up water for family use & other

day of the week for four successive weeks in a daily paper:—*Held*: not a sufficient compliance with the statute directing publication in a "weekly paper," to make a proper sale of the lands, & the purchaser had good ground for refusing to accept the title offered.

Re EAST PRESBYTERIAN CHURCH & McKAY (1888), 16 O. R. 30.—*CAN.*

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m. Grantee claiming through conveyance by way of exchange.]—Testator devised his lands to executors & trustees, to lease & pay the amount received to his widow for life, & after her death to sell & divide the proceeds between two sons. One of the sons sold & conveyed all his interest to his brother's wife. During the lifetime of the widow

the trustees, the widow, & the remaining son & his wife, all being *sui juris*, conveyed by way of exchange all their interests to a purchaser:—*Held*: the grantee claiming through that conveyance could make a good title.—*Re RATHBONE & WHITE* (1902), 22 O. L. 550.—*CAN.*

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necessary purposes, & with liberty to pass for ingress & egress in the upper land surrounding or adjoining the conveyed land. By other deeds of 1824 other portions of the lower land were released, with all watercourses, particularly as the same ran to an inn on the conveyed land from the upper land. By other deeds of 1825 further portions of the lower land were released, with liberty to fetch water for family & domestic uses at a well on the higher land. By other deeds of 1834 other part of the lower land was released, with liberty to the lessee to make a covered goit, or watercourse, across the bottom part of a field, part of the upper land, & to open & repair the same when necessary. Several years afterwards the upper land was sold, according to a particular describing it as fit for building, & subject to conditions of sale, providing that, if any mistake were made in the description of the premises, or if any other error should appear in the particulars, such error or omission should not annul the sale, but compensation should be given or taken. The existence of the easements was not stated in the particulars or conditions:—*Held*: (1) the circumstances of the purchaser living in the neighbourhood, being acquainted with the property, & passing constantly some of the wells on the lower land, supplied from the upper land, did not affect him with notice of the existence of the easements; (2) the existence of the easements, granted by any one of the deeds of 1816, 1820 & 1834, alone constituted a material defect in the title to the upper land; (3) the existence of the easements, granted by the deeds of 1824 & 1825, would have been alone sufficient to render the title subject to such serious doubt that a purchaser could not be compelled to accept it; (4) under the circumstances, & inasmuch as the whole purchased land did not exceed 30 acres, the purchaser could not be compelled to take the title, with compensation as to the lands prejudicially affected, which admeasured about $4\frac{1}{2}$ acres.—*SHACKLETON v. SUTCLIFFE* (1847), 1 De G. & Sm. 609; 10 L. T. O. S. 411; 12 Jur. 199; 63 E. R. 1217.

Annotations:—*As to* (1) *Distd.* *Yandle v. Sutton, Young v. Same*, [1922] 2 Ch. 199. *As to* (4) *Distd.* *Manson v. Thacker* (1878), 7 Ch. D. 620. *Generally*, *Reid, G. W. Ry. v. Fisher* (1905), 74 L. J. Ch. 241.

1155. Power of sale to trustees of testator—& heirs of survivor—Sale by devisee in trust of survivor—Release by cestuis que trust.—Testator gave a power of sale to two trustees & the survivor, “his heirs, exors., & administrators”:—*Held*: a title dependent on a sale by the devisee in trust of the survivor, was too doubtful to force on a purchaser; & the defect was cured, by the release of all the *cestuis que trust* to the representatives of the surviving trustee.—*MACDONALD v. WALKER* (1851), 14 Beav. 556; 51 E. R. 399. *Annotations*:—*Distd.* *Lane v. Debenham* (1853), 11 Hare. 188. *Consd.* *Re Morton & Hallett* (1880), 15 Ch. D. 143; *Osborne v. Rowlett* (1880), 13 Ch. D. 744.

1156. —Sale by customary heir of survivor.—Testator devised his freehold & copyhold estates to trustees & their heirs “upon trust that they, his trustees or the trustees or trustee for the time being of that his will,” should sell the estates. He empowered “his trustees, or the trustees or trustee for the time being of that his will,” to give receipts, & declared that if the trustees thereby appointed, or either of them, or any trustee or trustees to be appointed as thereafter provided should die, or desire to be discharged, then & so often the trustees or trustee might appoint a new trustee or new trustees. The trustees having died, the customary heir of the survivor con-

tracted to sell part of the copyholds:—*Held*: the customary heir was competent to execute the trust for sale.—*Re MORTON & HALLETT* (1880), 15 Ch. D. 143; 49 L. J. Ch. 559; 42 L. T. 602; 28 W. R. 895, C. A.

Annotations:—*Consd.* *Re Cunningham & Frayling*, [1891] 2 Ch. 667. *Reid.* *Re Pixton & Tong's Contract* (1897), 46 W. R. 187; *Re Rumney & Smith*, [1897] 2 Ch. 351; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

1157. —Sale by surviving trustee.—*LANE v. DEBENHAM*, No. 691, *ante*.

1158. Title on which court will compel specific performance.—In an action to recover the expenses incurred by pltf. in investigating deft.'s title to mortgage certain lands, upon the ground that deft.'s title had turned out to be defective, the declaration stated, that, in consideration pltf. would advance £2,000 upon the security of a mtge. of the land, upon deft.'s making out a good title to mortgage the lands to pltf., deft. promised pltf. to pay him the expenses to which he might be subjected in case the loan should go off by reason of deft. changing his views, or of the defectiveness of deft.'s title. The evidence of deft.'s title was as follows:—Deft., shortly before the agreement with pltf. had contracted to purchase the premises of W., who claimed as heir-at-law *ex parte materna* to B. the person last named seized. J., the father of B., married E., & died in 1787, aged fifty-nine, & devised the property to his son B. & his two daughters, & after their death, to B. in fee. The daughters both died, unmarried, before B., who died a bachelor, in 1839. In order to negative the existence of any heirs *ex parte paterna*, depositions in a Chancery suit of E. v. E., in 1843, had been forwarded to pltf., in which the deponents stated that they were well acquainted with B., who had told them that “he had no relation left,” & deponents stated, that they believed B. had no relation left, on his father's side, living at the time of his death. It further appeared that two issues had been directed in the same suit, in which both parties claimed the property as heir to B. *ex parte materna*; & that the jury had found, upon two occasions, the cause having been tried twice, that B. did not leave any heir *ex parte paterna*; & that pltf. in that suit (W. from whom deft. claimed) was the heir-at-law of B. *ex parte materna*. A statutory declaration had also been furnished to pltf., in which declarant stated, that B. & his sisters had told him, on several occasions, that they had no relations whatever, but that he was the last of his family:—*Held*: deft. had not made out a good title to the land; for by “a good title” was to be understood such a title as a Ct. of Ch. would adopt as a sufficient ground for compelling specific performance, & such a title as would be a good answer to an action of ejectment by any claimant.—*JEAKES v. WHITE* (1851), 6 Exch. 873; 21 L. J. Ex. 265; 18 L. T. O. S. 41; 155 E. R. 800.

Annotations:—*Consd.* *Simmons v. Heseltine* (1858), 5 C. B. N. S. 554. *Reid.* *Buchanan v. Poppleton, Poppleton v. Buchanan* (1858), 27 L. J. C. P. 210; *Stevens v. Austen* (1861), 3 E. & E. 685; *Osborne v. Rowlett* (1880), 13 Ch. D. 774.

1159. Title affording defence to action for ejectment.—*JEAKES v. WHITE*, No. 1158, *ante*.

1160. Title *ex parte materna*.—*JEAKES v. WHITE*, No. 1158, *ante*.

1161. Facts showing equitable mortgage by prior owner—No evidence of discharge.—*NICOLL v. CHAMBERS*, No. 816, *ante*.

1162. Title derived through conveyance from mortgagee—Owner of equity of redemption deceased—Personal representative not joining.—The vendor's title was derived through a convey-

ance from the mtgees. alone, without the concurrence of a personal representative of deceased owner of the equity of redemption. In a suit for specific performance of contract of sale:—*Held*: the title of the mtgees. was not absolute against the creditors of intestate any of whom might obtain administration to intestate's estate, & redeem the mtge., & therefore a good title was not shown to the premises.—*BEALE v. SYMONDS* (1853), 16 Beav. 406; 22 L. J. Ch. 708; 22 L. T. O. S. 61; 1 W. R. 137; 51 E. R. 835.

Annotations:—*Mentd.* *Kinderley v. Jervis* (1856), 22 Beav. 1; *Catley v. Sampson* (1864), 33 Beav. 551.

1163. Title commenced by general devise—Recital of seisin in old deed.—(1) A title more than sixty years old commenced by a general demise; a deed more than sixty years old recited the seisin of the devisor:—*Held*: that coupled with the continued possession was sufficient evidence of seisin.

(2) A title is first shown, when the abstract states all the matters which, if proved, make a good title. A title is made, when the matters are proved.

(3) Where a title commenced by a general demise, & seisin proved as stated [above], & there was ground to assume that the vendor had deeds earlier than those on the abstract:—*Held*: the purchaser was entitled to inspection of those deeds, if in the vendor's possession; but not to have them on the abstract.

(4) Whatever a vendor puts upon his abstract, he is bound to prove & verify.—*PARR v. LOVE-GROVE* (1858), 4 Drew. 170; 31 L. T. O. S. 364; 4 Jur. N. S. 600; 6 W. R. 201, 709; 62 E. R. 66.

1164. — Continued possession.—*PARR v. LOVEGROVE*, No. 1163, *ante*.

1165. Sale by executors—Implied power of sale.—Trustees, as vendors, are not bound to state whether there exist any debts which make a sale necessary.

Testator gave & devised all his freehold & copyhold estate to trustees "upon trusts thereafter declared," together with all his personal estate, & directed them to set apart, out of the proceeds arising from the sale of his estate a certain sum to provide for annuities, & gave the residue, "after payment of debts, legacies, etc." to the children of several nephews & nieces in equal shares & proportions:—*Held*: a good title could be made under the implied power of sale for payment of debts, legacies, etc., & under a power of sale for purposes of division amongst residuary legatees; & the vendors were not bound to state whether there existed any debts which made a sale necessary.—*FLUX v. BEST* (1874), 31 L. T. 645; 23 W. R. 228.

Annotation:—*Refd.* *Sissons v. Chichester-Constable*, [1916] 2 Ch. 75.

1166. Title derived from voluntary conveyance.—*Re MARSH & GRANVILLE* (EARL), No. 601, *ante*.

1167. — Purchase for value—Voluntary conveyance one link in title.—A person who has contracted to purchase land is not entitled to repudiate his contract simply because one link in the vendor's title consists of a voluntary conveyance to a person under whom the vendor claims by purchase for value.—*NOYES v. PATERSON*, [1894] 3 Ch. 267; 63 L. J. Ch. 748; 71 L. T. 228; 43 W. R. 377; 8 R. 323.

1168. — Before accrual of title of trustee in bankruptcy.—Purchasers from the trustees of a voluntary settlement of freehold lands objected to the title on the ground that under Bkpcy. Act, 1883 (c. 52), s. 47, the settlement would be void as against the trustee in bkpcy. of the settlor,

if he should become bkpt. within two years of the date of the settlement, & would be void if he should become bkpt. within ten years of such date, unless the "parties claiming under the settlement" could show that the settlor was at the time of making the settlement able to pay all his debts without the aid of the settled property. Upon a vendor's summons under the Vendor & Purchaser Act, 1874 (c. 78):—*Held*: (1) the purchasers would be "parties claiming under the settlement," & the title could not be forced upon the purchasers; (2) although a good title might possibly be made through the concurrence of the settlor, by his conveying to the purchasers & their paying the purchase-money by his direction to the trustees, yet such a title could not be forced upon unwilling purchasers; (a) because the ct. would not assist a settlor to get rid of his own settlement; & (b) because there was no means of ascertaining conclusively that the settlement was not in reality in the first instance, or had not subsequently become, a settlement for value.—*Re BRIGGS & SPICER*, [1891] 2 Ch. 127; 60 L. J. Ch. 514; 64 L. T. 187; 55 J. P. 278; 39 W. R. 377; 7 T. L. R. 274.

Annotations:—*As to* (1) *Distd.* *Re Vansittart*, *Ex p.* Brown [1893] 2 Q. B. 377. *Overd.* *Re Carter & Kenderdine's Contract*, [1897] 1 Ch. 776. *Refd.* *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599; *Re Hart*, *Ex p.* Green, [1912] 2 K. B. 257. *Generally*, *Mentd.* *Mogridge v. Clapp*, [1892] 3 Ch. 382.

1169. — — — — ——The expression "void" in Bkpcy. Act, 1883 (c. 52), s. 47, which enacts that voluntary settlements of property shall, if the settlor becomes bkpt. within two years after the date of the settlement, be void against the trustee in the bkpcy. must be considered as meaning "voidable" not absolutely void, & a *bond fide* purchaser for value from the donee under such a voluntary settlement has a good title against the trustee in bkpcy. even if he purchased with notice that the donee claimed under a voluntary settlement.—*Re BRALL*, *Ex p.* NORTON, [1893] 2 Q. B. 381; 69 L. T. 323; 41 W. R. 623; 10 Morr. 166; 5 R. 440; *sub nom.* *Re BRALL*, *Ex p.* NORTON *v.* BRALL & LONDON & WESTMINSTER BANK, 62 L. J. Q. B. 457.

Annotations:—*Apprvd.* *Re Carter & Kenderdine's Contract* [1897] 1 Ch. 776. *Consd.* *Re Hart*, *Ex p.* Green, [1912] 3 K. B. 6. *Refd.* *Re Naylor*, *Ex p.* Stephenson *v.* Pike (1893), 62 L. J. Q. B. 460; *Churston v. Buller* (1897), 77 L. T. 45; *Re Tankard*, *Ex p.* Official Receiver, [1899] 2 Q. B. 57; *Re Gunsbourg*, [1920] 2 K. B. 426.

1170. — — — — ——Bkpcy. Act, 1883 (c. 52), s. 47, avoiding voluntary settlements, which includes conveyances, as against the trustee in bkpcy. of the settlor, does not disable a grantee under a voluntary conveyance, pending bkpcy., making a good title to a purchaser, that is, a title which the ct. will force on the purchaser.—*Re CARTER & KENDERDINE'S CONTRACT*, [1897] 1 Ch. 776; 66 L. J. Ch. 408; 76 L. T. 476; 45 W. R. 484; 13 T. L. R. 314; 41 Sol. Jo. 384; 4 Mans. 34, C. A.

Annotations:—*Extd.* *Re Hart*, *Ex p.* Green, [1912] 3 K. B. 6. *Refd.* *Re Tankard*, *Ex p.* Official Receiver, [1899] 2 Q. B. 57; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599; *Re Gunsbourg*, [1920] 2 K. B. 426. *Mentd.* *Churston v. Buller* (1897), 77 L. T. 45; *Re Wigzell*, *Ex p.* Hart, [1921] 2 K. B. 835; *Seranton's Trustee v. Pearce*, [1922] 2 Ch. 87.

1171. Sale by beneficiaries under will.—By the conditions of sale of certain property it was stipulated that all objections & requisitions in respect of the title should be delivered within fourteen days from the delivery of the abstract. An abstract of title was duly delivered containing a full abstract of a will under which the property was sold. After the fourteen days had elapsed

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the purchaser made an objection as to the construction of the will. Testator had devised & bequeathed his real & personal estates to his wife during widowhood, & at her decease or marriage to his sons & daughters therein named in equal shares; & the will then proceeded as follows: "but if any of my children should die during my lifetime, or otherwise, leaving issue, such child or children, as the case may be to have their father's or mother's share, to be equally divided between them absolutely."

Testator's widow died in 1884, leaving all the sons & daughters named in the will her surviving, & all of them had attained twenty-one years. Such sons & daughters were the vendors of the property sold. One of the daughters had married in 1878.

The questions were whether the purchaser could make any requisition after the expiration of the time agreed upon by the conditions of sale; whether upon the construction of the will the shares of testator's sons & daughters became vested in them for an indefeasible estate in fee simple upon the death of his widow, or whether such shares were still subject to an executory devise over in any case any of such sons & daughters should die leaving issue:—*Held*: (1) the objection did not go to the root of the title, & the requisition, being out of time, failed; (2) the children were entitled to their respective shares for an indefeasible estate in fee simple, & they could therefore make a good title.—*Re THOMPSON & CURZON* (1885), 29 Ch. D. 177; 52 L. T. 498.

Annotations:—*Generally*, *Mentd.* *Re* Hobson's Settlt., *Webster v. Rickards* (1885), 55 L. J. Ch. 300; *Re Hughes' Trusts*, [1885] W. N. 62; *Re Tucker, Emanuel v. Parfitt* (1885), 54 L. J. Ch. 874.

1172. Property subject to restrictive covenant—Not disclosed.—A trustee in bkpey. contracted to sell bkpt.'s life interest in certain property. No mention was made in the contract of the property being subject to any restrictive covenant, but on the examination of the abstract it appeared that part of the property was subject to a restrictive covenant with regard to building:—*Held*: the restrictive covenant depreciated the value of the property & the non-disclosure of it in the contract was a fatal objection to the title.—*Re EBSWORTH & TIDY'S CONTRACT* (1889), 42 Ch. D. 23; 58 L. J. Ch. 665; 60 L. T. 841; 54 J. P. 199; 37 W. R. 657, C. A.

Annotations:—*Reid.* *Re* Bryant & Cullingford to Barningham (1889), 62 L. T. 53; *Re* Stamford, Spalding & Boston Banking Co. & Knight's Contract, [1900] 1 Ch. 287.

1173. —Affecting material part of property.—*Re* COX & NEVE'S CONTRACT, No. 588, *ante*.

1174. —Breach continued for upwards of twenty years.—By a conveyance dated in 1874, a certain plot of land was conveyed subject to a covenant that no dwelling-house, shop, or other building to be erected on the land should at any time thereafter be used as an inn, tavern, or beer-house. Shortly after the date of the conveyance beer & spirits were sold in one of the houses erected on the land, & continued to be openly sold for upwards of twenty-four years:—*Held*: in an action by a purchaser to rescind a contract for sale of that house on the ground of the existence of this restrictive covenant, it must be presumed from the uninterrupted user of the premises as a beer-house for twenty-four years, there had been a waiver or release of the covenant.—*HEPWORTH v.*

PICKLES, [1900] 1 Ch. 108; 69 L. J. Ch. 55; 81 L. T. 818; 48 W. R. 184; 44 Sol. Jo. 44.

Annotation:—*Reid.* *Greenhalgh v. Brindley*, [1901] 2 Ch. 324.

1175. Title derived from settlement—In favour of purchaser.—*Re* DALE TO ELSDEN (1892), 36 Sol. Jo. 347.

1176. Agreement for sale of freehold—Deposited lease not surrendered—Recovery in ejectment by lessor—Indemnity offered.—Land was leased by the freeholder to B. for twenty-one years from Mar. 1876, the lease containing the usual proviso for re-entry for nonpayment of rent. The lease was subsequently deposited by B. with T. as security for an advance. In Dec. 1877, the freeholder conveyed the land to J. in fee simple subject to the lease. In 1890 an action in ejectment was commenced by J. against B. for non-payment of rent, & B. not appearing judgment was given in favour of J. in Mar. 1890, & he took possession thereunder. The exors. of T., who had died, were not parties to the action & had no notice of it. B. got into pecuniary difficulties, & disappeared without having repaid the advance. In June, 1890, J. conveyed the land to W. in fee simple, when the production of the judgment in ejectment was considered satisfactory as regarded the deposited lease. In Dec. 1892, W. agreed to sell the land to C. in fee simple free from incumbrances. C. required that the lease to B. should be surrendered at W.'s expense, or at all events given up before completion. This W. was unable to accede to, but he offered to agree to indemnify C. against any claim which might be made under the lease:

Held: this was not a reasonable blot on the title to which the ct. ought to give effect, it being a purely theoretical & not a practical blot, & the vendor having offered to give an indemnity, the purchaser's objection must be declared sufficiently answered.—*Re HEYSMAN'S & TWEEDY'S CONTRACT* (1893), 69 L. T. 89, C. A.

1177. Property subject to agreement restricting user.—(1) Pltfs. by an open contract agreed to buy from defts. two houses "subject to right of light with owner of adjoining property being guaranteed." The houses had been recently built by the vendor, & contained no ancient lights. The adjoining house had also been built by the vendor & sold by him in 1897 to D., on which occasion he & D. mutually covenanted not to do anything to prejudice the right of light to the windows of each other's premises:—*Held*: this restrictive stipulation was a defect in the title.

(2) Under part of the premises contracted to be sold ran a drain, into which opened the drains of two adjoining houses:—*Held*: this drain was a sewer, & was vested in the local authority under Public Health Act, 1875 (c. 65), s. 13; Public Health Acts Amendment Act, 1890 (c. 50), s. 19, did not prevent it from vesting; the vendor was therefore unable to convey all that he had contracted to sell; & he had not made a good title.—*PEMSEL & WILSON v. TUCKER*, [1907] 2 Ch. 191; 76 L. J. Ch. 621; 97 L. T. 86; 71 J. P. 547.

1178. Sewer under land sold—Vested in local authority.—*PEMSEL & WILSON v. TUCKER*, No. 1177, *ante*.

SECT. 3.—WHAT TITLE COURT WILL FORCE UPON PURCHASER.

1179. General rule.—A term was created in 1711 for raising portions. There was no evidence

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11791. General rule.—It is only where deft. admits pltf.'s title, or has by his

contract expressly agreed to pay irrespective of title, that a ct. will decree payment by a purchaser without

a good title first having been shown.—*LANDES v. KUSCH* (1915), 30 W. L. R. 444; 7 W. W. R. 1076.—*CAN.*

of the portions being satisfied, but a settlement of the estate took place in 1744, & a recovery was suffered; & there was a covenant that the estate was free from incumbrances. No assignment appeared to have been at any time made of the term. On an objection to the title by a purchaser:—*Held*: a surrender of the term must be presumed; & in matters of presumption the ct. will bind a purchaser where it would give a clear direction to a jury.

The only rule [the ct.] can adopt in cases of presumption seems to be that if the case be such, that sitting before a jury, it would be the duty of a judge to give a clear direction in favour of the fact; thus it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser (*LEACH, V.-C.*).—*EMERY v. GROCOCK* (1821), 6 Madd. 54; 56 E. R. 1010.

Annotations:—*Apld.* *Cooke v. Soltan* (1824), 2 Sim. & St. 154; *Games v. Bonnor* (1884), 54 L. J. Ch. 517; *Re Briggs & Spicer*, [1891] 2 Ch. 127. *Consd.* *Mogridge v. Clapp*, [1892] 3 Ch. 382.

1180. Doubtful title.—There being the opinion of learned men against the title, viz. that the will of testator did pass this trust estate, I will not, nor do I think it reasonable that a ct. of equity should compel the purchaser to accept the purchase (*JEKYLL, M.R.*).—*MARLOW v. SMITH* (1723), 2 P. Wms. 198; 24 E. R. 698.

Annotations:—*Apld.* *Pyrke v. Waddingham* (1852), 10 Hare, 1. *Mentd.* *Braybrooke v. Inskip* (1803), 8 Ves. 417.

1181. —[—]—A man is not obliged to accept a conveyance when the title is doubtful.—*HARTLEY v. PEHALL* (1792), Peake, 178; 170 E. R. 121, N. P.

Annotations:—*Refd.* *Simmons v. Heseltine* (1858), 5 C. B. N. S. 554. *Mentd.* *Keppell v. Bailey* (1834), Coop. temp. Brough, 298.

1182. —[—]—Ct. will not decree a specific performance of a purchase where there is a doubtful title.—*COOPER v. DENNE, DENNE v. COOPER* (1792), 4 Bro. C. C. 80; 1 Ves. 565; 29 E. R. 788.

Annotations:—*Refd.* *Robinson v. Milner* (1842), 1 Hare, 578, n.; *Pyrke v. Waddingham* (1852), 10 Hare, 1.

1183. — **Purchaser not compelled to take a doubtful title.**—*WHEATE v. HALL* (1809), 17 Ves. 80; 34 E. R. 31.

Annotations:—*Refd.* *Brewster v. Angell* (1820), 1 Jac. & W. 625; *Horne v. Barton* (1822), Jac. 437; *Wolley v. Jenkins* (1856), 23 Beav. 53; *Topham v. Portland* (1862), 31 Beav. 325; *Wise v. Piper* (1880), 13 Ch. D. 848.

1184. —[—]—Purchaser not compelled to take a doubtful title.—*PRICE v. STRANGE* (1820), 6 Madd. 159; 56 E. R. 1052.

Annotations:—*Refd.* *Pyrke v. Waddingham* (1852), 10 Hare, 1; *Mullings v. Trinder* (1870), 39 L. J. Ch. 833. *Mentd.* *Palin v. Hills* (1834), 1 My. & K. 470; *Alker v. Barton* (1842), 12 L. J. Ch. 16; *Holloway v. Clarkson* (1843), 2 Hare, 621; *Re Crawford's Trusts* (1854), 2 Drew. 230; *Wing v. Wing* (1876), 34 L. T. 941.

1185. —[—]—L. having a term of ninety-nine years, with a covenant that he may within twenty years purchase the fee, demises to F. for ninety-nine years & a half, at a ground rent, & then acquires the fee. The ground rent was put up for sale described as "a freehold ground rent issuing out of lands on lease, which will expire in Dec. 1922," being the expiration of the ninety-nine years & a half term:—*Held*: the title was too

doubtful, in reference to the remedies which the purchaser would have for enforcing the rent, to be forced on an unwilling purchaser.—*LANGFORD v. SELMES* (1857), 3 K. & J. 220; 3 Jur. N. S. 859; 69 E. R. 1089.

Annotation:—*Mentd.* *Bryant v. Hancock*, [1898] 1 Q. B. 716.

1186. —[—]—The ct. will not enforce specific performance of a contract for sale against a purchaser, where a question of title has to be determined, upon which the ct. is not clearly in favour of the vendor.—*BURNELL v. FIRTH* (1867), 15 W. R. 546.

1187. — **Effect of court holding title good.**—[—]—Upon a late decision of the Ct. of Exchequer that a presumption from non-payment of tithes cannot bar even a lay impropriator, the Lord Chancellor though holding the contrary opinion would not compel a purchaser to take such a title.—*ROSE v. CALLAND* (1800), 5 Ves. 186; 4 Gwill. 1620; 31 E. R. 537, L. C.

Annotations:—*Consd.* *Pyrke v. Waddingham* (1852), 10 Hare, 1. *Refd.* *Oncred v. Hardman* (1801), 5 Ves. 722; *Jenkins v. Hiles* (1802), 6 Ves. 646. *Mentd.* *Berney v. Harvey* (1810), 17 Ves. 119; *Heathcote v. Aldridge* (1816), 1 Madd. 236; *Meade v. Norbury* (1816), 2 Price, 338.

1188. — [—]—*PYRKE v. WADDINGHAM, No. 1099, ante.*

1189. — [—]—It is not so settled that a power to appoint "by deed, or deeds, writing or writings under hand & seal" can now be well exercised by an unsealed will that a purchaser can be forced to take a title depending on that proposition.—*COLLARD v. SAMPSON* (1853), 4 De G. M. & G. 224; 16 Beav. 543; 1 Eq. Rep. 262; 22 L. J. Ch. 729; 21 L. T. O. S. 234; 17 Jur. 641; 43 E. R. 493, L. JJ.

Annotations:—*Consd.* *Mullings v. Trinder* (1870), L. R. 10 Eq. 449. *Mentd.* *West v. Ray* (1851), Kay, 385; *Orange v. Pickford* (1858), 4 Jur. N. S. 649; *Taylor v. Meads* (1865), 4 De G. J. & Sm. 597.

1190. — [—]—The ct. is bound to act upon its own opinion, & to decree specific performance when it considers the title clear.

It has been pressed that the ct. will not force a purchaser to take a doubtful title, but, if in its own opinion the title is clear, I think it is bound to act upon it (*ROMILLY, M.R.*).—*WRIGLEY v. SYKES* (1856), 21 Beav. 337; 25 L. J. Ch. 458; 26 L. T. O. S. 252; 2 Jur. N. S. 78; 4 W. R. 228; 52 E. R. 889.

Annotations:—*Refd.* *Re Whistler* (1887), 35 Ch. D. 561. *Mentd.* *Poad v. Watson* (1856), 6 E. & B. 618.

1191. — [—]—I adopt entirely the view expressed by *TURNER, V.-C.*, with respect to the species of doubt which ought to prevent the ct. from enforcing specific performance in the way he expresses it. Such a case must, I think, come within one of three divisions. First, where there has been a decision adverse to the title or to the principle on which the title depends, which the ct. is of opinion is wrong, of course if the ct. is of opinion that the decision is right, it is simply a bad title, in which case the ct. will not rely upon its own opinion against a decision already pronounced, & will not enforce the title. Another case is where there is a decision in favour of the title, but the ct. is of opinion the decision was not right.

The third division, which I think is the difficult

1179 ii. — [—]—The title which a vendor may force upon a protesting purchaser is & must be either in himself or in some one else from whom he has a legal or equitable right to secure it for the purchaser.—*LANG v. GRAVES (Man.)* [1923] 2 W. W. R. 907.—*CAN.*

1179 iii. — [—]—*Re McLOUGHLIN & McGRATH'S CONTRACT* (1914), 48 I. L. T.

87.—*IR.*

1180 i. *Doubtful title.*—*LAMB v. ALLISON* (1890), 11 N. S. W. Eq. 23. *AUS.*

1180 ii. — [—]—*MALLOCH v. PLUNKETT* (1865), 11 Gr. 439.—*CAN.*

1180 iii. — [—]—*KEEFER v. MCKAY* (1884), 10 P. R. 345.—*CAN.*

1180 iv. — [—]—*Re MORICE & RIBBRIDGE* (1887), 13 O. R. 640.—*CAN.*

n. — *Wife's claim to dower.*—*Re MORRIS & CHERTOFF*, [1925] 2 D. L. R. 1115; 56 O. L. R. 665.—*CAN.*

o. — [—]—*AAUTO v. BLAKE* (Ont.), [1925] 2 D. L. R. 27.—*CAN.*

Sect. 3.—What title court will force upon purchaser.]

one, is where there is a known difficulty in the title. For instance, when I was at the Bar, there was a great question whether a mere contingent remainder could be too remote or not. Suppose there were a title depending on that question alone, or on several questions which were known to be questions discussed among conveyancers, the ct. would say, "I will not decide that question incidentally in enforcing the title upon a purchaser." Those are cases in which, undoubtedly, you could not compel the purchaser to take the title.

Another case is pointed out by TURNER, V.-C., in which it is undoubtedly true that the ct. will not decree specific performance, although I think it comes rather within another rule, where the validity of the title depends upon facts or a fact the exact accuracy of which you have no means of judging. Then, of course, you will not force the title upon anybody. In truth, the vendor has not made out a good title; because, if it depends upon a particular fact, that fact must be proved, & if he does not prove it, he has not made out a good title (ROMILLY, M.R.).—MULLINGS v. TRINDER (1870), L. R. 10 Eq. 449; 39 L. J. Ch.

contingent remainders.]—A purchaser not compelled to take a doubtful title; nor will a case be directed without his consent. The ct. also hesitated upon giving sanction to a title founded on the destruction of contingent remainders by the tenant for life; there being no trustees to support them.—ROAKE v. KIDD (1800), 5 Ves. 647; 31 E. R. 785, L. C.

*Annotations:—*Refd. Willcox v. Bellairs (1827), Turn. & R. 491; Pyrke v. Waddingham (1852), 10 Hare, 1.

1193. — Defect appearing on abstract—Delivered before action brought.]—Purchaser not compelled to take a doubtful title. No objection to a purchaser, that the defect of title appeared on the abstract delivered before he filed his bill.—STAPYLTON v. SCOTT (1809), 16 Ves. 272; 33 E. R. 988, L. C.

1194. — Dependent on facts not well proved.]—The ct. will not compel a purchaser to take a title depending upon matter of fact, if the fact do not admit of satisfactory proof or be not well proved.—SMITH v. DEATH (1820), 5 Madd. 371; 56 E. R. 937.

*Annotations:—*Refd. Pyrke v. Waddingham (1852), 10 Hare, 1. *Mentd.* Barton v. Briscoe (1822), Jac. 603; Roddy v. Fitzgerald (1858), 6 H. L. Cas. 823.

1195. — Dependent on construction of will.]—A purchaser not compelled to take a title depending upon the words of a will, which were too doubtful ever to be settled without litigation.—SHARP v. ADCOCK (1828), 4 Russ. 374; 38 E. R. 846.

*Annotation:—*Refd. Pyrke v. Waddingham (1852), 10 Hare, 1.

1196. — —.]—PYRKE v. WADDINGHAM, No. 1099, *ante*.

1197. — Title derived from person committing act of bankruptcy.]—A purchaser is not bound to accept a doubtful title. Where vendors derived title from a trader who was liable to the bkpt. laws, & who had committed an act of bkpcy. by assigning his estate to his creditors:—*Held*: the purchaser was not bound to accept the title, it not appearing that all the creditors had released, or that some one of them had not the power of suing out a commission.—PORT v. TURNER (1830), 6 Bing. 702; L. & Welsb. 293; 4 Moo. & P. 551; 8 L. J. O. S. C. P. 282; 130 E. R. 1451.

—A trader unable to pay his debts executed a deed whereby he conveyed &

assigned to a trustee for his creditors all his estate & effects, including his freehold dwelling-house & shop where he carried on his business, upon trust to permit him to carry on his business for the purpose of paying off his debts by certain instalments which he thereby covenanted to pay; & upon default in the payment of such instalments the trustee was empowered to enter into possession of the whole of the property & sell the same, & pay the creditors rateably out of the proceeds; & the trader thereby appointed the trustee his attorney for executing every document necessary or expedient for carrying into effect the trusts & provisions of the deed, which was registered under Deeds of Arrangement Act, 1887 (c. 57). Five months after the date of the deed the trader made default in payment of the instalments, & the trustee entered into possession of the property comprised therein, & a month after such entry into possession by the trustee the trader was adjudged bkpt. Two months after the trader's bkpcy., the trustee under the deed sold the trader's house & shop by auction, & the purchaser required the concurrence of the trustee in bkpcy. in the conveyance of the property to him by the trustee under the deed. It was admitted that all the creditors of the trader did not assent to the deed:—*Held*: although the deed was not void under 13 Eliz. c. 5, as there was nothing to show that the trader thereby intended to defeat, hinder, or delay his creditors, yet the purchaser was right in his contention that the concurrence of the trustee in bkpcy. in the conveyance to him was necessary to confer a good title to the property, as otherwise he would be liable to legal proceedings at the instance of such trustee.—*Re* POPPLETON JONES' CONTRACT (1896), 74 L. T. 582; 40 Sol. Jo. 478.

1199. — Easements affecting property.]—SHACKLETON v. SUTCLIFFE, No. 1154, *ante*.

1200. — Sale of leaseholds—Title to reversion uncertain.]—The vendors under an agreement for sale of leaseholds produced the last receipt for the ground rent, signed by agents; but it did not clearly appear on whose behalf it was so signed. On inquiry the title to the reversion was found to be uncertain:—*Held*: the ct. would not compel the purchaser to accept the title, although the vendors offered to indemnify him against six years' ground rent.—PEGLER v. WHITE (1864), 33 Beav. 403; 3 New Rep. 557; 33 L. J. Ch. 569; 10 L. T. 84; 10 Jur. N. S. 330; 12 W. R. 455; 55 E. R. 423.

*Annotation:—*Refd. *Re* Hollis' Hospital Trustees & Hague's Contract, [1899] 2 Ch. 540.

1201. — Trustees selling jointly with others—Possibility of injury by joint sale.]—Where trustees, with power to sell by private contract, joined with others in selling as one estate, & for one sum of money, different properties which could not be clearly distinguished, & the titles to which were, by the conditions of sale, limited to different periods:—*Held*: the title was too doubtful to be forced upon a purchaser, as the trust property might have been injured by the joint sale, & the ct. could not, under such circumstances, apportion the purchase-money.—REDE v. OAKES (1864), 4 De G. J. & Sm. 505; 5 New Rep. 209; 34 L. J. Ch. 145; 11 L. T. 549; 10 Jur. N. S. 1246; 13 W. R. 303; 46 E. R. 1015, L. J.J.; *subsequent proceedings* (1865), 2 De G. J. & Sm. 518, L. J.J.

*Annotations:—*Consd. Dance v. Goldingham (1873), 8 Ch. App. 902; *Re* Cooper & Allen's Contract for Sale to Harlech (1876), 4 Ch. D. 802; Morris v. Debenham (1876), 2 Ch. D. 540. *Refd.* Hiatt v. Hillman (1871), 25 L. T. 55; Barclay v. Messenger (1874), 43 L. J. Ch. 449; Tolson v. Sheard (1877), 5 Ch. D. 19; Dunn v. Flood (1885), 28 Ch. D. 586.

1202. — Property purchased from undischarged bankrupt.—*Testatrix*, who died in Apr. 1890, devised her real estate to her nephews, W. & J., as tenants in common in fee. In Oct. 1890, W. & J. purported to convey this real estate to a land co., who, in May, 1891, entered into a contract for sale thereof to a purchaser. The purchaser before completion discovered, that in 1888 W. had been adjudicated bkpt., & that he was still undischarged. The trustee in W.'s bkpcy. now intervened & claimed to be entitled to a moiety of this real estate:—*Held*: the title was too doubtful to be forced on a purchaser, & on that ground alone the purchaser was entitled to be relieved from his contract.—*Re NEW LAND DEVELOPMENT ASSOCN. & GRAY*, [1892] 2 Ch. 138; 61 L. J. Ch. 495; 66 L. T. 694; 40 W. R. 551; 36 Sol. Jo. 446, C. A.

Annotations:—*Distd. Re Clayton & Barclay's Contract*, [1895] 2 Ch. 212. *Apld. Re Poppleton & Jones' Contract* (1896), 74 L. T. 582. *Refd. Re Allesbury S. E.* (1893), 9 T. L. R. 616; *Re Calcott & Elvin's Contract* (1898), 67 L. J. Ch. 327; *London & County Contracts v. Tallack* (1903), 19 T. L. R. 156. *Mentd. Hunt v. Fripp*, [1898] 1 Ch. 675; *Bird v. Philpott*, [1900] 1 Ch. 822; *Official Receiver v. Cooke*, [1906] 2 Ch. 661; *Re Kent County Gas Light & Coke Co.*, [1909] 2 Ch. 195; *Re Behrend's Trust*, *Surman v. Biddell*, [1911] 1 Ch. 687.

1203. — Doubtful question of law.—*MULLINGS v. TRINDER*, No. 1191, *ante*.

1204. ——*A railway co. on July 12, 1867, conveyed certain superfluous lands, the period for the sale of which under their special Act expired on July 13, 1867, & the conveyance contained a covenant by the purchasers that they would pay the purchase-money on or before July 12, 1869, with interest in the meantime; & by an indenture of even date & made between the same parties, it was declared that until the whole of the purchase-money & interest were paid, the co. should have a lien on the deed of conveyance & the lands therein comprised. Upon a summons under Vendor & Purchaser Act, 1874 (c. 78), raising the question whether Lands Clauses Consolidation Act, 1845 (c. 18), s. 127, had been satisfied:—*Held*: having regard to expressions in the judgments of the Ct. of Appeal in *London & South Western Ry. Co. v. Gomm* (1882), 120 Ch. D. 562, to the effect that when land is sold as superfluous no interest in it can be returned by the co., the question was one of such doubt that it must be left open & not answered in a way which would force the title on a purchaser or prejudice the vendor's title.—*Re THACKWRAY & YOUNG'S CONTRACT* (1888), 40 Ch. D. 34; 58 L. J. Ch. 72; 59 L. T. 815; 37 W. R. 74; 5 T. L. R. 18.*

Annotations:—*Apld. Re Hollis' Hospital Trustees & Hague's Contract*, [1899] 2 Ch. 540. *Refd. Re Allsop & Joy's Contract* (1889), 61 L. T. 213.

1205. — Doubtful question of fact—Whether vendor purchased without notice of defect in title.—*A tenant for life, purporting to act under the powers of Settled Land Act, 1882 (c. 38), granted a building lease of some vacant land at less than the best rent that could reasonably be obtained, the rent having been reduced in consideration of the waiver by the lessee of a claim for damages against the lessor, & the lessee covenanted to lay out a certain sum in building. The lessee neglected to build, & the lease was sold by auction to the vendor at a large price. The vendor agreed to sell at an enhanced price to the purchaser, & the purchaser objected that, having regard to the amount of the price, it must be shown that the rent reserved by the lease was the best that could reasonably be obtained within Settled Land Act, 1882 (c. 38), s. 7 (2). The vendor had no knowledge of the arrangement between the lessor &*

the lessee as to the reduction of the rent, & he insisted that, as purchaser for value without notice, he could make a good title to the purchaser:—Held: assuming that the lease was voidable only & not void, the title was not such as ought to be forced upon the purchaser, since it depended on a doubtful question of fact, namely, whether his predecessor in title, the vendor, purchased without notice of the defect in the title.—*Re HANDMAN & WILCOX'S CONTRACT*, [1902] 1 Ch. 599; 71 L. J. Ch. 263; 86 L. T. 246, C. A.

Annotation:—*Refd. Re Douglas & Powell's Contract*, [1902] 2 Ch. 296.

1206. — Dealings of complicated nature.—*A title depending upon the establishment of facts & dealings of a complicated & ambiguous nature, such as may reasonably be challenged with a practical chance of success, is not one which should be forced upon a purchaser.—Re DOUGLAS & POWELL'S CONTRACT*, [1902] 2 Ch. 296; 71 L. J. Ch. 850.

Annotations:—*Mentd. Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666; *Re Sturt, De Bunsen v. Harding*, [1922] 1 Ch. 416.

1207. — Decision in favour of title—Court of opinion title bad.—*MULLINGS v. TRINDER*, No. 1191, *ante*.

1208. — Purchaser in danger of litigation.—*An estate was settled to the husband & wife successively for life, with remainder to their children as they should appoint, & in default of appointment between such children. The husband & wife encumbered their life interests, & in Aug. the husband & wife, having seven children, appointed the whole estate to the eldest daughter; in Oct. of the same year the husband, wife & daughter mortgaged the property for £8,000. The mtge., under the power of sale in the mtge. deed, sold the property to plff.; & after the title had been approved of, one of the younger children gave notice to plff. not to complete, & that the appointment was a fraud on the marriage settlement, & also cautioning the purchaser not to pay the purchase-money; he did not, however, follow up the notice by any proceeding:—Held*: notwithstanding this a good title was shown, & the purchaser must complete.—*GREEN v. PULSFORD* (1839), 2 Beav. 70; 48 E. R. 1105.

Annotations:—*Apld. Grove v. Bastard* (1851), 1 De G. M. & G. 69. *Refd. Boyse v. Rossborough* (1854), 23 L. J. Ch. 305. *Mentd. Cockcroft v. Sutcliffe* (1856), 27 L. T. O. S. 34; *Carver v. Richards* (1860), 6 Jur. N. S. 410.

1209. — Heir-at-law making adverse claim.—*In 1898 a contract was entered into on behalf of the present trustees of Hollis' Hospital for the sale of certain freehold property belonging to the hospital. The property contracted to be sold formed part of certain property which had been conveyed by H. to trustees upon trusts for the hospital by deeds of lease & release dated May 17 & 18, 1726. The release contained a proviso that if at any time thereafter the premises thereby conveyed or any part thereof, or the rents, issues, & profits of the same or of any part thereof, should be employed or converted to or for any other uses, intents, or purposes than those thereinbefore mentioned, then & from thenceforth all & every the premises thereinbefore conveyed should revert to the right heirs of H. party thereto. The title had been accepted & the draft conveyance approved when a letter was received by the purchaser's solrs. from A., one of the trustees of the hospital, intimating that as the heir-at-law of H. he had not concurred in the sale, & calling their attention to the clause in the release under which if the sale was carried out the property would revert to him. A summons was thereupon taken*

Sect. 3.—What title court will force upon purchaser.
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out by the purchaser for a declaration that a good title to the hereditaments contracted to be sold had not been made:—*Held*: in view of the notice received from A. claiming as heir-at-law of H., & who declined to be bound by the decision, the title was not one which could be forced upon an unwilling purchaser.—*Re HOJLIS' HOSPITAL TRUSTEES & HAGUE'S CONTRACT*, [1899] 2 Ch. 540; 68 L. J. Ch. 675; 81 L. T. 90; 47 W. R. 691; 43 Sol. Jo. 644.

Annotations:—*Mentd. Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337.

1210. —.—.]—At a sale by auction on July 21, 1903, deft. contracted to buy a secured profit rental of £550 *per annum* for £5,500. This profit rental was secured upon two houses in Cheapside, the receipts from tenants amounting to £950, the ground rent being £250, & the rates & taxes on one of the houses being £150. No deduction was made in respect of the other house, of which W. was the tenant, as there was no covenant by the landlord to pay rates & taxes. As a matter of fact the landlord had from 1876 until 1903 paid the rates & taxes on the house let to W. On Sept. 29, 1903, W. commenced an action for rectification of his lease, but the action was dismissed because he had granted an underlease of the term vested in him which amounted to an assignment. W. wrote that he intended to take proceedings to make the underlessee join, & bring a fresh action.

Plff. said that, the action by W. having been heard & dismissed, plff. was entitled to specific performance. For deft. it was said that plff. knew W. said that he was not liable to pay rates & taxes before the sale, & that plff. was not entitled to specific performance:—*Held*: W.'s claim was an honest one, & specific performance could not now be granted, because sufficient time had not elapsed to enable the ct. to say that no fresh action would be brought. The action was ordered to stand over till June 24, & if W. had then taken no steps to obtain rectification, the ct. might then be in a position to treat his claim as shadowy.—*GEORGE v. THOMAS* (1904), 90 L. T. 505; 52 W. R. 416.

1211. Sale by person not absolute owner—Owner offering to make title.—If A. contracts for the purchase of an estate, & is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so, though the owner offers to make the seller a title, yet equity will not force the buyer to take it, for every seller that will have such a bargain executed must be *bonâ fide* a contractor.—*TENDRING v. LONDON* (1731), 2 Eq. Cas. Abr. 680; 22 E. R. 571.

1212. Property formerly subject to incumbrance—Discharge shown by presumption only.—(1) A purchaser is not compellable to accept a title to premises, formerly subject to an incumbrance, the discharge of which is shown only by presumption. A leasehold was sold, subject to a ground rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by any existing deed, but only by the acceptance of a mesne landlord, & presumption: *Held*: the purchaser was not bound to accept the title.

1218 i. Possessory title.—*CLIBBORN v. HORAN*, [1921] 1 L. R. 93; 55 L. T. 49.—*IR.*

p. Property subject to voluntary settlement.—A purchaser will not be

compelled to take a title to land which has, prior to the sale to him, been made the subject of a voluntary settlement by the vendor.—*PURSER v. HALLORAN* (1862), 1 Q. S. C. R. 85.—*AUS.*

(2) Sixty years possession is an unobjectionable title to a fee simple.—*BARNWELL v. HARRIS* (1809), 1 Taunt. 430; 127 E. R. 901.

1213. Title reported good in creditors suit.—A purchaser is not compellable to accept a title reported good by the deputy remembrancer in a creditor's suit, against an objection, that the close in dispute, having a given name, by which it has been long known, is not described by it in the title deeds notwithstanding the vendor has been long in possession of the land as part of the estate conveyed to him by the deeds. Such a title is merely *primâ facie*.—*EYTON v. DICKEN* (1817), 4 Price, 303; 146 E. R. 472.

1214. Title dependent on invalidity of voluntary settlement.—A purchaser is compellable to take a title dependent on the invalidity of a voluntary settlement.—*CURRIE v. NIND* (1836), 1 My. & Cr. 17; 5 L. J. Ch. 169; 40 E. R. 283.

Annotations:—*Fold. Butterfield v. Heath* (1852), 15 Beav. 408. *Refd. Hewison v. Negus* (1853), 16 Beav. 594; *Scott v. Scott* (1854), 23 L. T. O. S. 27; *Clarke v. Wright* (1861), 6 H. & N. 849. *Mentd. Re Foster & Lister* (1877), 6 Ch. D. 87.

1215. —.—.]—A purchaser must take a title though depending upon the invalidity of a voluntary conveyance as against a purchaser for valuable consideration with notice.—*BUTTERFIELD v. HEATH* (1852), 15 Beav. 408; 22 L. J. Ch. 270; 20 L. T. O. S. 242; 51 E. R. 595.

Annotations:—*Consd. Hewison v. Negus* (1853), 16 Beav. 594; *Re Foster & Lister* (1877), 6 Ch. D. 87.

1216. Sale by executor—Executor devisee for life—Direction to pay debts—Power to mortgage.—(1) A general direction that testator's debts should be paid by the exor., coupled with a devise of real estate to such exor. for life, with a power to the exor. to mortgage, does not enable the exor. to give such a title as the ct. will force upon a purchaser.

(2) Where the title to an estate has been pronounced bad by any judge of the ct., the Ct. of Appeal will not, except under very special circumstances, force it upon a purchaser.—*COOK v. DAWSON* (1861), 3 De G. F. & J. 127; 30 L. J. Ch. 359; 4 L. T. 226; 9 W. R. 434; 45 E. R. 826, L. JJ.

Annotations:—*Generally, Mentd. Re Chawner's Will* (1869), L. R. 8 Eq. 569; *Re Bailey, Bailey v. Bailey* (1879), 12 Ch. D. 268.

1217. Title pronounced bad by court of first instance.—*COOK v. DAWSON*, No. 1216, *ante*.

1218. Possessory title.—A vendor at the date of the contract relied on a title under a deed which was subsequently shown to be no title at all. After the date of the contract a twelve years' possessory title under Stat. Limitations accrued. The ct. holding such title sufficiently made out, or admitted by the purchaser, forced it upon the purchaser.

A twelve years' possessory title can be forced on a purchaser.

A vendor is entitled to costs of action, if he showed & offered a good possessory title before action, though it is not proved till afterwards in chambers.—*GAMES v. BONNOR* (1884), 54 L. J. Ch. 517; 33 W. R. 64, C. A.

Annotations:—*Fold. Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1. *Refd. Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391.

1219. —.—.]—Where a vendor contracts to give a title commencing with a certain instrument & it afterwards appears that he cannot give such a title but can give a good possessory title from a

q. Title depending on adverse possession.—*WALKER v. SMITH* (1907), 7 S. R. N. S. W. 400; 24 N. S. W. W. N. 85.—*AUS.*

—.]—The ct. will compel a

later date, the possessory title will be forced upon the purchaser.

An owner relied on a title under a deed which was subsequently shown to be no title at all. After the date of the contract a twelve years' possessory title under Stat. Limitations accrued. The ct., holding such title sufficiently made out, forced it upon the purchaser.—*Re ATKINSON & HORSFELL'S CONTRACT*, [1912] 2 Ch. 1; 81 L. J. Ch. 588; 106 L. T. 548; 56 Sol. Jo. 324, C. A.

Annotation:—*Consd. Re Halles & Hutchinson's Contract*, [1920] 1 Ch. 233.

1220. Property described as "business premises"

—*Covenants restricting carrying on of business.*—At a sale by auction the particulars described the property as "business premises," but on investigating the title it appeared that the lease, under which the premises were held, contained a covenant seriously restricting the free user of them for the purposes of business:—*Held*: the title was not such as the purchaser could be compelled to take, & the contract was rescinded, with liberty to the purchaser to bring an action for the recovery of the deposit & the costs of investigating the title.—*Re DAVIS & CAVEY* (1888), 40 Ch. D. 601; 58 L. J. Ch. 143; 60 L. T. 100; 53 J. P. 407; 37 W. R. 217.

Annotations:—*Consd. Dougherty v. Oates* (1900), 45 Sol. Jo. 119. *Refd. Re Boulton & Cullingford's Contract* (No. 2) (1893), 37 Sol. Jo. 248.

1221. Property subject to restrictive covenants—*Facts showing waiver.*—*Re SUMMERSON, DOWNIE v. SUMMERSON*, [1900] 1 Ch. 112, n.; 69 L. J. Ch. 57, n.; 81 L. T. 819, n.

Annotations:—*Follid. Hepworth v. Pickles*, [1900] 1 Ch. 108. *Refd. Greenhalgh v. Brindley*, [1901] 2 Ch. 324.

1222. Lease containing covenant against assignment—*Without lessor's consent*—*Lessor with holding consent.*—The vendor was the lessee of a public-house. The lease under which the property was held contained a covenant against assigning without the consent of the lessor with the usual qualification as to refusal in the case of a respectable & responsible tenant. The vendor

agreed to sell the property to the purchasers, who were brewers, under an open contract. The lessor refused to give his consent to the assignment stating that the main ground of his objection was that he desired the house to remain a free house. Upon summons taken out by the purchasers asking for a declaration that a good title had not been shown:—*Held*: the title was not one which could be forced upon an unwilling purchaser.—*Re MARSHALL & SALT'S CONTRACT*, [1900] 2 Ch. 202; 69 L. J. Ch. 542; 83 L. T. 147; 48 W. R. 508; 41 Sol. Jo. 129.

SECT. 4.—NOTICE TO PURCHASER.

SUB-SECT. 1.—EFFECT OF NOTICE.

See Law of Property Act, 1925 (c. 20), s. 41 (5), (8).

1223. Notice of defect of title—*Notice after execution but before payment of purchase-money—Purchase avoided.*—If after the execution of a conveyance, but before payment of the consideration money, the purchaser has notice that the vendor has no title to the lands, this is sufficient to avoid the purchase.—*JONES v. STANLEY* (1731), 2 Eq. Cas. Abr. 685; 2 Barn. K. B. 64; 22 B. R. 575.

1224. — *No excuse for non-performance.*—Deflt. has entered into an express contract to deduce a good title to the premises by a specified day & it affords no reason for his not performing that contract that pltf. at the time of the sale was aware of the defect of title by the breach of the covenant to repair (*PARKE, B.*).—*BARNETT v. WHEELER* (1811), 7 M. & W. 364; 10 L. J. Ex. 102; 151 E. R. 806.

Annotations:—*Follid. Re Highett & Bird's Contract*, [1903] 1 Ch. 287. *Distd. Re Taunton & West of England Perpetual Benefit Bldg. Soc. & Roberts' Contract*, [1912] 2 Ch. 381.

1225. — *Notice derived from collateral facts*—*In covenants of lease—Purchaser not compelled to perform contract.*—*DARLINGTON v. HAMILTON*, No. 1130, *ante*.

purchaser to take a title depending upon parol evidence of adverse possession under Stat. Limitations.—*SCOTT v. NIXON* (1843), 3 Dr. & War. 388.—*IR.*

t. *Devise by will*—*Restrictions against incumbering*—*Mortgage by devise*—*Breach of condition.*—*Re CHISHOLM, RE LOT THREE IN THE EIGHT CONFESSION OF THE TOWNSHIP OF MOSA*, 21 C. L. T. 525.—*CAN.*

a. *Land not released from judgments.*—A purchaser is entitled to call for a release from all judgment creditors who have registered their judgments in the county where the lands sold are situate or that the creditors join in the conveyance to the purchaser, although it appears that the purchase-money will be exhausted in discharging prior incumbrances. If the vendor cannot procure such release or concurrence in the conveyance, the ct. will not compel the purchaser specifically to perform the contract.—*SPOHN v. RYCKMAN* (1859), 7 Gr. 388.—*CAN.*

b. — *Re TRUSTS CORPN. OF ONTARIO & MEDLAND* (1892), 22 O. R. 538.—*CAN.*

c. *Prior deed executed by attorney of grantor.*—A prior deed, through which the title comes to the vendor, having been executed by the attorney of grantor, does not render the title invalid, or such as a purchaser will not be bound to accept.—*FARRELL v. MOORE* (1859), 1 Ch. Ch. 139.—*CAN.*

d. *No sufficient proof of execution of conveyance.*—Where there was no

other proof of the execution of a conveyance, which constituted a link in the chain of title, than a memorial purporting to be executed by the grantee in such conveyance, the ct. refused to force the title upon a purchaser.—*WISHART v. COOK* (1868), 15 Gr. 237.—*CAN.*

e. *Incumbrances on title*—*Vendor unable to pay them off at once.*—*BRANDON STEAM LAUNDRY CO. v. HANNA* (1909), 19 Man. L. R. 8.—*CAN.*

f. *Title subject to highway.*—*BERGMAN v. COOK* (Man.) (1912), 21 W. L. R. 833; 5 D. L. R. 233.—*CAN.*

g. *"Reasonably decent probability of litigation."*—As long as acceptance of a title involved a "reasonably decent probability of litigation" it would not be forced upon an unwilling purchaser.—*Re PIGGOTT & KERN* (1913), 24 O. W. R. 863; 4 O. W. N. 1580; 12 D. L. R. 838.—*CAN.*

h. *Conveyance conveying lands described by metes & bounds.*—Where under an agreement of sale the vendor agrees to deliver a clear title & the land is described as lot 1, "according to a plan to be registered":—*Held*: there being no registered plan, the purchaser was bound to accept a conveyance containing a description of the land by metes & bounds.—*FRASER v. COLUMBIA VALLEY LANDS, LTD.* (1914), 20 B. C. R. 508.—*CAN.*

k. *Land for easement sought thereon.*—*ROWLAND v. RANSFORD* (Alta.), [1919] 2 W. W. R. 486.—*CAN.*

l. *Variance in property contracted*

for & tendered deed.]—*MCCALLY v. HAWKINS*, [1924] 2 D. L. R. 412; 57 N. S. R. 68.—*CAN.*

m. *Sale of land as freehold*—*Duty of purchaser to maintain fences & keep drains & watercourses clear.*—*JARKIN v. ROSSE* (LORD) (1846), 10 Ir. Eq. R. 70.—*IR.*

n. *Lease with covenant to spend money on building.*—Trustees for a charity permitted to sell land held under lease, the land being the subject of the trust; & though the lease contained a covenant by them to expend thereon £3,000 in building the landlord's rights were saved; & because of the covenant, the title was not forced on an unwilling purchaser.—*Re CATHOLIC UNIVERSITY* (1865), 18 Ir. Jur. 250.—*IR.*

o. *Title depending on age of woman ceasing to bear children.*—A title, the validity of which depends upon the presumption that a woman of 63 is past child bearing, will be forced upon a purchaser of real estate.—*BROWNE v. WARNOCK* (1880), 7 L. R. Ir. 3.—*IR.*

PART V. SECT. 4, SUB-SECT. 1.

p. *General rule.*—A purchaser with notice is bound to the same extent, & in the same manner, as his vendor.—*DUNBAR v. TREDENNICK* (1813), 2 Ball. & B. 301.—*IR.*

q. *Notice of defect of title Execution against heir—Ancestor's debts.*—Where a debtor dies intestate & his lands are sold under execution against

Sect. 4.—Notice to purchaser: Sub-sects. 1

1226. — Objection on ground of misdescription precluded.]—HENDERSON v. HUDSON, No. 622, ante.

1227. — —.]—A purchaser, who is aware at the time of entering into a contract for the purchase of a lease that the vendor's interest in the property is only under an underlease, is bound by the contract notwithstanding the misdescription.—FLOOD v. PRITCHARD (1879), 40 L. T. 873.

1228. — Possession taken subsequently—Whether amounting to waiver.]—If a contract for the sale of land is silent as to the title which is to be shown by the vendor, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title, but, if the contract expressly provides that a good title shall be shown the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract he had notice of defects in the vendor's title. If the contract contains no stipulation as to possession being taken by the purchaser before completion, & he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver.

A purchaser by making structural alterations after notice of restrictive covenants was held to have waived his right to object to the title on the ground of the restrictions.—*Re GLOAG & MILLER'S CONTRACT* (1883), 23 Ch. D. 320; 52 L. J. Ch. 654; 48 L. T. 629; 31 W. R. 601.

*Annotations:—***Apld.** *Re Wallis & Barnard's Contract*, [1899] 2 Ch. 515. **Refd.** *Ellis v. Rogers* (1885), 29 Ch. D. 661; *Alderdale Estate Co. v. McGlory*, [1917] 1 Ch. 414.

1229. Notice of claim by mortgagee—Purchaser postponed to mortgagee.]—A mtgee. of a leasehold house gave up the indenture of lease to his mtgor., in order that it might be shown to an intending purchaser, who wished to see what the covenants in it were; the mtgor. concealed from the purchaser the fact of the existence of an incumbrance on the property, & produced the lease to him, & left it in his possession; within a week afterwards, the purchaser accepted a conveyance, paid his purchase-money, & took possession of the house without any notice of the existence of the mtgee., but the solr. of the mtgee. deposed that, in an interview which he had had before the completion of the purchase with the solr. of the purchaser, he had informed the latter that a client of his was

to receive a considerable sum out of the purchase-money, & had requested to have notice of the time when the money was to be paid; &, though the solr. of the purchaser denied that any such interview had taken place, before the completion of the purchase, a jury gave a verdict in favour of the statement made on that point by the solr. of the mtgee.—*Held*: the mtgee. was not to be postponed to the purchaser.—*MARTINEZ v. COOPER* (1826), 2 Russ. 198; 38 E. R. 309, L. C.

*Annotations:—***Consd.** *Dowle v. Saunders* (1864), 2 Hem. & M. 242. **Refd.** *Jones v. Jones* (1838), 8 Sim. 633; *Hewitt v. Loosemore* (1851), 9 Hare, 449; *Northern Counties of England Fire Insee. v. Whipp* (1884), 26 Ch. D. 482; *Brocklesby v. Temperance Permanent Bldg. Soc.*, [1895] A. C. 173. **Mentd.** *Gordon v. Horsfall* (1847), 5 Moo. P. C. C. 393; *National Bank of Australasia v. United Hand-in-Hand & Band of Hope Co.* (1879), 4 App. Cas. 391.

1230. Notice of judgment affecting land sold—Purchaser postponed to judgment creditor.]—Where a judgment is entered up against the owner of lands, of which the legal estate is outstanding in a trustee or mtgee., a purchaser who has notice of the judgment will be bound by it, although the creditor may not have taken out execution on his judgment.—*TUNSTALL v. TRAPPES* (1830), 3 Sim. 286; 57 E. R. 1005.

*Annotations:—***Mentd.** *Hart v. Cradock* (1837), 1 Jur. 735; *Neate v. Marlborough* (1838), 3 My. & Cr. 407; *Barnes v. Ræster* (1842), 1 Y. & C. Ch. Cas. 401; *Allin v. Crawshaw* (1851), 9 Hare, 382; *Agraman v. Corbett* (1861), 30 L. J. Ch. 642; *Benham v. Keane* (1861), 3 De G. F. & J. 318; *Doswell v. Reece* (1865), 13 L. T. 156; *Mara v. Browne*, [1895] 2 Ch. 69; *Re Thursby's Settltmt.*, *Grant v. Littledale*, [1910] 2 Ch. 181; *Re Stanley's Settltmt.*, *Maddocks v. Andrews*, [1916] 2 Ch. 50.

1231. Notice of restrictive covenant—Purchase from purchaser for value without notice.]—The purchaser of land from one who has purchased it for value, without notice, either actual or constructive, of a restrictive covenant, is not bound by the covenant, although he himself had notice of it.

The lessee of premises No. 137, High Street, East Ham, carried on therein the business of a pork butcher. The lease contained a covenant by which he covenanted not to carry on therein any noisy or offensive trade other than that of a pork butcher. He was also lessee under a different landlord of premises No. 170, in the same street, upon which he carried on the business of a general butcher. He sold & assigned to pltf. his interest in the last mentioned premises, & the goodwill of his business as a general butcher, covenanting with pltf. (*inter alia*) that he, his exors., administrators & assigns, would not "cut, sell or deal in fresh hind-quarter beef, mutton, veal, lamb, or poultry at or upon the premises No. 137, High Street, East Ham, or in connection with the business of a pork butcher now carried on there by

his heir for the private debt of the heir & the purchaser has notice before his purchase that there are debts of the ancestor outstanding of which the creditors claim payment out of the land seised, such purchaser takes only the beneficial interest of the heir, subject to the payment of the ancestor's debts.—*PECK v. BUCKE* (*circa* 1868), 2 Ch. Ch. 294.—**CAN.**

r. Notice given by agent.]—Although the rule in equity is that a notice to be binding must be given by a person interested in the property & in the course of the treaty for the purchase, still where notice of an incumbrance was given to an intending purchaser by the son, & while acting on behalf of the incumbrancer in endeavouring to effect a loan upon the security of such incumbrance, the purchaser was held bound by such notice.—*MCMANES v. PHILLIPS* (1862), 9 Gr. 814.—**CAN.**

t. Defence of bona fide purchaser—When allowed.]—A purchaser from the heir with notice of the will, but under an erroneous supposition that, according to its true construction, the land was not affected by it, cannot set up, as against claimants under the will, the defence of a purchaser for value without notice.—*SMITH v. BONNISTEEL* (1867), 13 Gr. 29.—**CAN.**

a. — —.]—A sale of land was effected subject to a mtgee. created by a former owner.—*Held*: this circumstance did not preclude the purchaser from setting up the defence of a purchaser for value without notice.—*CAMPION v. FAIRBAIRN* (1869), 15 Gr. 674.—**CAN.**

b. — —.]—Although there is considerable difference of opinion on this point, whether a purchaser for value without notice can protect himself when there is a legal right—that

is, whether the ct. can give relief to such a purchaser, when it is open to the other party to pursue his legal right—yet, when the purchaser is brought into this ct., he may avail himself of his character of a purchaser for valuable consideration without notice, as a defence, whether his title be a legal or an equitable one; & he is entitled to have the bill against him dismissed with costs, although the next hour the party may be able to turn him out of possession.—*BOWEN v. EVANS* (1844), 6 I. Eq. R. 569; 1 Jo. & Lat. 178; *affd.* (1848), 2 H. L. Cas. 257.—**IR.**

c. — —.]—A purchase for a valuable consideration, without notice, is a defence as well against a legal as an equitable title.—*JOYCE v. DE MOLEYNES* (1845), 2 Jo. & Lat. 374.—**IR.**

d. Proof of actual notice—What

him." He afterwards gave up business, & surrendered his lease of No. 137 to the landlord; & a new lease thereof was granted to his son by the landlord, which lease contained a covenant that the lessee would not carry on upon the premises any noisy or offensive trade other than, not "that of a pork butcher," as in the old lease, but, "that of a butcher."

At the time when the landlord accepted the surrender, he had not in fact notice of the restrictive covenant entered into by the father with pltf. as regards No. 137, but the son, when the new lease was granted to him, knew of the existence of that covenant. The son afterwards set up the business of a general butcher on the premises No. 137, High Street:—*Held*: under the circumstances of the case the landlord was not affected with constructive notice of the father's covenant, & consequently could grant to the son a lease free from the restriction of that covenant, & the son therefore could not be restrained at the suit of pltf. from carrying on the business of a general butcher at No. 137.—*WILKES v. SPOONER*, [1911] 2 K. B. 473; 80 L. J. K. B. 1107; 104 L. T. 911; 27 T. L. R. 426; 55 Sol. Jo. 479, C. A.

SUB-SECT. 2.—CONSTRUCTIVE NOTICE.

See, generally, EQUITY, Vol. XX., pp. 316 *et seq.*

See, nov, Law of Property Act, 1925 (c. 20), s. 44 (5) (8).

1232. Notice of instrument notice of contents.]—

Where a purchaser cannot make out his title, but through a deed, which leads to a fact, he will be affected with notice of that fact.—*MERTINS v. JOLLIFFE* (1756), Amb. 311; 27 E. R. 211.

1233. — Recital of deed.]—There is no dispute that the recital of a deed is constructive notice of its contents (*LEACH, V.-C.*).—*PROSSER v. WATTS* (1821), 6 Madd. 59; 56 E. R. 1012.

Annotation:—*Consd.* *Freud v. Buckley* (1870), L. R. 5 Q. B. 213.

1234. — Deed referred to by another.]—

In 1792 J. C. purchased an estate at a sale by auction, but died without having completed the contract. By his will he gave all his real & personal estate to A., his widow, who shortly afterwards married W. S. By deed of 1793 recited the contract by J. C. his death, his will, & A.'s marriage with W. S., who "thereupon became entitled to the beneficial interest in the said purchase," the estate was conveyed to W. S. & L. N. jointly, in fee, in trust as to the estate of L. N. for W. S. By deed of 1817 reciting that by certain good

assurances in the law & the premises stood limited to the use of W. S. & L. N. as to the estate of L. N. in trust for W. S. The property was conveyed by W. S. & L. N. to C., a purchaser for value. On bill filed by A.'s heiress-at-law to recover the estate:—*Held*: as C. was not able to show that W. S. had acquired any other title than that which he took under the deed of 1793, the ct. would not presume that W. S. had in the interval acquired any independent title; & C. was bound by such title as W. S. had & he was therefore affected by notice of A.'s right to the estate, & a reconveyance was decreed on the usual terms.

Wherever you find one deed referred to by another, the person who claims under the deed thus referred to, is bound at his peril to ascertain what all the contents of the deed so referred to are. The case I believe might in point of law be put more strongly in pltf.'s favour; for I take the rule of this ct. to be that every purchaser is presumed to have cognisance of his vendor's title (*WIGRAM, V.-C.*).—*NEESOM v. CLARKSON* (1842), 2 Hare, 163; 12 L. J. Ch. 99; 6 Jur. 1055; 67 E. R. 68; *subsequent proceedings* (1845), 4 Hare, 97.

Annotation:—*Distd.* *Parkinson v. Hanbury* (1867), L. R. 2 H. L. 1.

1235. — Will inaccurately recited—Notice of real contents.]—A will was inaccurately recited in a conveyance:—*Held*: nevertheless purchaser had notice of the real contents of the will.—*HOPE v. LIDDELL, LIDDELL v. NORTON* (1855), 21 Beav. 183; 25 L. J. Ch. 90; 26 L. T. O. S. 305; 2 Jur. N. S. 105; 4 W. R. 145; 52 E. R. 829.

Annotations:—*Consd.* *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan* (1866), 10 Moo. Ind. App. 540. *Refd.* *Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387. *Mentd.* *Re Bellis's Trusts* (1877), 5 Ch. D. 501.

1236. — Notwithstanding representation by vendor.]—A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, & is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title.—*PATMAN v. HARLAND* (1881), 17 Ch. D. 353; 50 L. J. Ch. 642; 44 L. T. 728; 20 W. R. 707.

Annotations:—*Consd.* *Gainsborough v. Watcombe Tertu Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 51 L. J. Ch. 991; *Garnham v. Skipper* (1885), 53 L. T. 940; *English & Scottish Mercantile Investment Trust Co. v. Brunton*, [1892] 2 Q. B. 700. *Apld.* *Mogridge v. Clapp*, [1892] 3 Ch. 382; *Spencer v. Bailey* (1893), 69 L. T. 179. *Consd.* *Hooper v. Bromet* (1903), 89 L. T. 37; *Re Nisbet*

amounts to.]—*WIGLE v. SETTERINGTON* (1872), 19 Gr. 512.—*CAN.*

e. — Registration of deed or will.]—*BELL v. WALKER* (1873), 20 Gr. 558.—*CAN.*

f. — — — — —.]—*Re* (1879), 27 Gr. 199.—*CAN.*

g. — — — — —.]—*FOOT v. McGEORGE* (1885), 12 A. R. 351.—*CAN.*

h. — — — — —.]—*CHAPMAN v. EDWARDS, CLARK & BENSON* (1911), 16 B. C. R. 334.—*CAN.*

k. — — — — —.]—*COOPER v. ANDERSON (Man.)* (1912), 20 W. L. R. 217.—*CAN.*

l. — — — — —.]—*GRADY v. STRANGMAN* (1853), 5 Ir. Jur. 113.—*IR.*

m. — — — — —.]—*Re BURMESTER* (1858), 9 I. Ch. R. 41; *Drury*, *temp. Nap.* 559.—*IR.*

n. — — — — —.]—*Notice of trust.]*—

If the purchaser of an estate for value takes with notice, actual or constructive, of a trust, he is bound by such trust to the same interest & in the same manner as the person from whom he purchased.—*MANCHARJI SORABJI CHULLA v. KONGSEOO* (1869), 6 Bom. O. C. 59.—*IND.*

o. — — — — —.]—*Advertisement.]*—An advertisement is not notice, unless it is brought home to the party.—*NAGLE v. BAYLOR* (1842), 3 Dr. & War. 62.—*IR.*

PART V. SECT. 4, SUB-SECT. 2.

p. General rule.]—A purchaser is not affected with notice by vague rumours or by statements made by a mere stranger; a notice to be binding must proceed from some person interested in the property.—*WILLIAMSON v. BORS* (1900), 21 N. S. W. L. R. (Eq.) 302.—*AUS.*

1232i. Notice of instrument notice of contents.]—*COOLIDGE v. NELSON* (1900), 20 C. L. T. 225; 31 O. R. 646.—*CAN.*

1232 ii. — — —.]—*MACDONALD v. McLEAN* (1914), 30 W. L. R. 242; 7 W. W. R. 997.—*CAN.*

1232 iii. — — —.]—Notice of a document of title is notice of its contents.—*GUTSCHENRITTER v. BALL* (Sask.), [1923] 3 W. R. 619.—*CAN.*

1232 iv. — — —.]—*STEWART v. CONYNGHAM (MARQUIS)* (1849), 1 I. Ch. R. 534.—*IR.*

1232 v. — — —.]—Mere notice of the existence of a lease will not bind a purchaser to the covenants it may contain, if he have not the means of informing himself of their character & effect.—*Re KIDD, Ex p. KIRK* (1830), 17 L. T. O. S. 234.—*IR.*

1232 vi. — — —.]—If a purchaser has notice of a deed, he is bound by all its contents.—*BUCKLEY v. LANAUZE* (1836), L. & G. *temp. Plunk.* 327.—*IR.*

1232 vii. — — —.]—*STEPHENSON v. ROYCE* (1856), 5 I. Ch. R. 401; 9 Ir. Jur. 68.—*IR.*

Sect. 4.—Notice to purchaser: Sub-sect. 2.]

& Pott's Contract, [1906] 1 Ch. 386. **Refd.** L. C. & D. Ry. v. Bull (1882), 47 L. T. 413; Nottingham Patent Brick & Tile Co. v. Butler (1885), 15 Q. B. D. 261; Hall v. Ewin (1887), 57 L. J. Ch. 95; Tritton v. Bankart (1887), 56 L. T. 306; Imray v. Oakshette, [1897] 2 Q. B. 218; Jones v. Lavington, [1903] 1 K. B. 253; Teape v. Douse (1905), 92 L. T. 319; Leschallas v. Woolf, [1908] 1 Ch. 641; Wilkes v. Spooner, [1911] 2 K. B. 473; *Re* Chafer & Randall's Contract, [1916] 2 Ch. 8; Torbay Hotel v. Jenkins, [1927] 2 Ch. 225.

1237. — Original deed lost—Document purporting to be true copy produced—Subsequently proving defective.]—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, & what purported to be a true copy was produced. This copy subsequently proved to be defective.

An action was brought by an adjoining owner to restrain deft. from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a building line. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within 4 ft. of a boundary fence:—**Held:** deft. was affected with notice of the building stipulations, for there was nothing in this case to take it out of the general rule that notice of a deed is notice of its contents.—**HOOPER v. BROMET** (1903), 89 L. T. 37; *on appeal* (1904), 90 L. T. 234, C. A.

See, now, Law of Property Act, 1925 (c. 20), s. 44 (5).

1238. Agreement between lessee & adjoining owner—Premises described as "late residence" of lessee.]—Under an agreement of exchange between A. who held lands under a college lease, & B. the owner of an adjoining estate, B. occupied part of the college lands, & A. had occupied, along with the residue of the leasehold, part of B.'s estate. A. having become bkpt., the college leasehold was sold, & was described in the particulars of sale as "late residence of A."—**Held:** the purchaser was not to be considered as having implied notice of the agreement of exchange, & he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation.—**MILES v. LANGLEY** (1831), 2 Russ. & M. 626; 39 E. R. 533, L. C.

*Annotations:—***Consd.** Jones v. Smith (1841), 1 Hare, 43. **Refd.** Holmes v. Powell (1856), 8 De G. M. & G. 572.

1239. Notice of covenants in lease—Purchase of leaseholds.]—A purchaser of a lease, having, with his attorney, had inspection of it, & the purchaser having taken possession, cannot refuse specific performance, on the ground of a covenant in the lease.

It is the duty of the purchaser of a lease to inform himself what covenants are in it, & if he enters into possession without doing so, he must suffer for his own neglect.—**COSSER v. COLLINGE** (1832), 3 My. & K. 283; 1 L. J. Ch. 130; 40 E. R. 108.

*Annotations:—***Distd.** Hyde v. Warden (1877), 3 Ex. D. 72. **Consd.** Porter v. Drew (1880), 5 C. P. D. 143. **Refd.** Hargraves v. Rothwell (1836), 5 L. J. Ch. 118; Smith v. Capron (1849), 7 Hare, 185; Brunnit v. Morton (1857), 30 L. T. O. S. 98; Reeve v. Berridge (1888), 20 Q. B. D. 523; *Re* White & Smith's Contract, [1896] 1 Ch. 637; Molyneux v. Hawtrey, [1903] 2 K. B. 487; Melzak v. Lilienfeld, [1926] Ch. 480.

1239 i. Notice of covenants in lease—Purchase of leaseholds.]—The possession of the tenant is notice that he has some interest in the land, & a purchaser

having notice of that fact is bound to inquire what that interest is.—**GREENSHIELDS v. BARNHART** (1853), C. R. 2 A. C. 91.—**CAN.**

1240. — — — — —.]—**POPE v. GARLAND**, No. 1118, *ante*.

1241. — — — — —.]—A lease containing a covenant against carrying on offensive trades on the premises was sold by auction, but it was not stated in the conditions of sale that such covenant was contained in the lease. The purchaser refused to complete, & upon a bill for specific performance:—**Held:** a purchaser having notice of a lease was bound by all the covenants contained in the lease, & was bound to complete his contract.—**GROSVENOR v. GREEN** (1858), 28 L. J. Ch. 173; 32 L. T. O. S. 252; 5 Jur. N. S. 117; 7 W. R. 140.

*Annotations:—***Consd.** Flood v. Pritchard (1879), 40 L. T. 873. **Refd.** Hyde v. Warden (1877), 3 Ex. D. 72; *Re* Davis & Cavey (1888), 58 L. J. Ch. 143; *Re* Reeve v. Berridge (1888), 20 Q. B. D. 523; *Re* White & Smith's Contract, [1896] 1 Ch. 637; Molyneux v. Hawtrey (1903), 72 L. J. K. B. 873; Melzak v. Lilienfeld, [1926] Ch. 480.

1242. — — — — —.]—A person who agrees to accept an assignment of an underlease is not to be held to have constructive notice of the terms of the original lease, unless he has had a fair opportunity of ascertaining its terms.—**HYDE v. WARDEN** (1877), 3 Ex. D. 72; 47 L. J. Q. B. 121; 37 L. T. 567; 26 W. R. 201, C. A.

*Annotations:—***Extd.** Reeve v. Berridge (1888), 20 Q. B. D. 523. **Apld.** Dougherty v. Oates (1900), 45 Sol. Jo. 119. **Refd.** Willmott v. Barber (1880), 15 Ch. D. 96; *Re* Davis & Cavey (1888), 58 L. J. Ch. 143; *Bishop v. Taylor & Harris* (1891), 60 L. J. Q. B. 556; *Re* White & Smith's Contract, [1896] 1 Ch. 637; Molyneux v. Hawtrey, [1903] 2 K. B. 487; Melzak v. Lilienfeld, [1926] Ch. 480. **Mentd.** Evans v. Davis (1878), 10 Ch. D. 747; Burford v. Unwin (1885), Cab. & El. 494; Barrow v. Isaacs, [1891] 1 Q. B. 417; Eastern Telegraph Co. v. Dent, [1899] 1 Q. B. 835; Harman v. Ainslie, [1904] 1 K. B. 698; Lewis v. Baker, [1905] 1 Ch. 46.

1243. — — — — — Inspection by purchaser.]—(1) The lease contained a covenant against assignment without the licence of the lessors; the purchaser inspected the lease & an indorsement upon it, from which it appeared that a licence was necessary, but he alleged that he did not observe the covenant & only looked at the term & rent:—**Held:** he had notice of the covenant.

(2) The purchaser requested the vendor to prepare the assignment by indorsement *totidem verbis* with that to himself:—**Held:** the purchaser could not afterwards require the production of the original lessor's title.—**SMITH v. CAPRON** (1849), 7 Hare, 185; 19 L. J. Ch. 322; 14 Jur. 686; 68 E. R. 75.

*Annotations:—**As to* (1) **Consd.** Brumfit v. Morton (1857), 30 L. T. O. S. 98. **Refd.** Hyde v. Warden (1877), 3 Ex. D. 72; *Re* Reeve v. Berridge (1888), 20 Q. B. D. 523; *Re* White & Smith's Contract, [1896] 1 Ch. 637; Molyneux v. Hawtrey (1903), 72 L. J. K. B. 873. *Generally, Refd.* Southern v. Harriman (1864), 10 L. T. 263.

1244. — — — — — Whether notice of collateral facts in covenants.]—**DARLINGTON v. HAMILTON**, No. 1130, *ante*.

1245. — — — — — Onerous & unusual covenants.]—**REEVE v. BERRIDGE**, No. 1064, *ante*.

1246. — — — — —.]—*Re* WHITE & SMITH'S CONTRACT, No. 1065, *ante*.

1247. — — — — —.]—**MOLYNEUX v. HAWTREY**, No. 1071, *ante*.

1248. — — — — — Purchase of freehold subject to lease.]—**POPE v. GARLAND**, No. 1148, *ante*.

1249. — — — — —.]—**DARLINGTON v. HAMILTON**, No. 1130, *ante*.

—**]**—*See* LANDLORD & TENANT, Vol. XXXI., p. 431, Nos. 5763, 5764.

1250. Vendor not in possession of title deeds—Notice of claim of party in possession.]—If the same person is agent both for the vendor &

1239 ii. — — — — —.] **CARROLL v. KEAYS, KEAYS v. CARROLL** (1873), 22 W. R. 243.—**IR.**

purchaser, or is himself vendor & agent for the purchaser, whatever notice he may have will affect the purchaser; & a purchaser taking a conveyance from a vendor, who has not possession of the title deeds, will take it with notice of any claim the party in possession of the title deeds may have.—*DRYDEN v. FROST* (1838), 3 My. & Cr. 670; 8 L. J. Ch. 235; 2 Jur. 1030; 40 E. R. 1084, L. C.

Annotations:—*Consd.* *Hewitt v. Loosemore* (1851), 9 Hare, 449. *Mentd.* *Woods v. Woods* (1840), 12 Jur. 994; *Watson v. Alcock* (1853), 4 De G. M. & G. 242; *Wilkes v. Saunton* (1877), 7 Ch. D. 188; *National Provincial Bank of England v. Games* (1886), 31 Ch. D. 582; *Wales v. Carr*, [1902] 1 Ch. 800.

1251. Notice to agent of purchaser—Notice to purchaser.—*DRYDEN v. FROST*, No. 1250, *ante*.

1252. Notice of easement—Purchaser familiar with property sold.—*SHACKLETON v. SUTCLIFFE*, No. 1154, *ante*.

1253. — Facts putting purchaser on inquiry.—A. sold to B., the owner of the adjoining premises, the right of using two chimneys in A.'s wall. The consideration was paid, & they were used for eleven years, but no grant was executed. C. purchased A.'s house without notice of the right; but there being fourteen chimney pots on the wall & only twelve flues in A.'s house:—*Held*: C. was put on inquiry, he had constructive notice of the right, & was bound by it, & an injunction was granted to restrain him from stopping up the two chimneys.—*HERVEY v. SMITH* (1856), 22 Beav. 299; 52 E. R. 1123.

Annotations:—*Distd.* *Allen v. Seckham* (1879), 11 Ch. D. 790. *Reid.* *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

1254. — — — — ——Disputes having arisen between pltf. & W. whether a window overlooking W.'s land was an ancient light an agreement not under seal was signed by which W. agreed that pltf. should have access of light to the window & pltf. agreed to keep the window opaque & make it open only in such a way that no person could look out of it. W.'s land was afterwards sold to deft. who had no actual notice of the agreement but knew of the existence of the window:—*Held*: the mere fact of there being windows in an adjoining house which overlook a purchased property was not constructive notice of any agreement giving a right of access of light to them.—*ALLEN v. SECKHAM* (1879), 11 Ch. D. 790; 48 L. J. Ch. 611; 41 L. T. 260; 43 J. P. 685; 28 W. R. 26, C. A.

Annotations:—*Reid.* *English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700; *Poulton v. Moore* (1913), 83 L. J. K. B. 875.

1255. Vendor's representations preventing inquiry.—Where the representations of a vendor are calculated to prevent inquiry, the ct. will not hold the purchaser to be affected with constructive notice of facts in reference to which he would otherwise have been put upon inquiry by the mention of a deed in the particulars of sale.—*DRYSDALE v. MACE* (1854), 5 De G. M. & G. 103; 2 Eq. Rep. 386; 23 L. J. Ch. 518; 2 W. R. 341; 43 E. R. 809, L. J.

1256. Absence of receipt in deed—Notice of non-payment—Not of other irregularities.—The absence on a deed of a receipt for the consideration,

though it is notice of its non-payment, is not constructive notice of other irregularities in the transaction.—*GREENSLADE v. DARE* (1855), 20 Beav. 284; 24 L. J. Ch. 490; 1 Jur. N. S. 294; 3 W. R. 220; 52 E. R. 612.

1257. Person in possession of land sold.—To a bill, stating a settlement, under which, after a life estate to A., pltf. was entitled to the estate, & praying the delivery of the title-deeds, deft. pleaded a purchase for valuable consideration, without notice, averring that A. pretended to be seised in fee, & was in possession, but not averring that he had any title prior to, & independent of the settlement:—*Held*: such a plea is a good defence to the bill.—*JACKSON v. ROWE* (1829), 4 Russ. 514; 9 L. J. O. S. Ch. 32; 38 E. R. 899, L. C.

Annotations:—*Reid.* *Nesom v. Clarkson* (1842), 2 Hare, 163; *Jones v. Smith* (1843), 1 Ph. 244; *West v. Reid* (1843), 12 L. J. Ch. 245; *Hewitt v. Loosemore* (1851), 9 Hare, 449; *Phillips v. Phillips* (1862), 31 L. J. Ch. 321; *Wilson v. Hart* (1865), 2 Hem. & M. 551.

1258. — — — — ——When a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, & persons so dealing cannot be heard to deny notice of the title under which the possession is held. Nor is it necessary that such possession should be continually visible or actively asserted. Where therefore the purchasers of mines took possession under the agreement for purchase without any conveyance:—*Held*: a subsequent purchaser of the land without any exception of mines took with notice of the agreement, & was bound specifically to perform it.—*HOLMES v. POWELL* (1856), 8 De G. M. & G. 572; 44 E. R. 510, L. J.

Annotation:—*Reid.* *Cavander v. Bulteel* (1873), 29 L. T. 710.

1259. — Notice of tenant's rights—Notice of lessor's title.—(1) The occupation of land by a tenant affects a purchaser of the land with constructive notice of all that tenant's rights, but not with notice of his lessor's title or rights.

(2) Actual knowledge by the purchaser that the rents of the land are paid by the tenants to some person whose receipt of them is inconsistent with the title of the vendor is constructive notice of that person's rights, but mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all.—*HUNT v. LUCK*, [1902] 1 Ch. 428; 71 L. J. Ch. 239; 86 L. T. 68; 50 W. R. 291; 18 T. L. R. 265; 46 Sol. Jo. 229, C. A.

Annotations:—*As to* (1) *Apld.* *Green v. Rheinberg* (1911), 104 L. T. 149. *Generally, Reid.* *Powell v. Browne* (1907), 97 L. T. 851.

1260. — — — — — Compensations.—*Re DERBY (EARL) & FERGUSSON'S CONTRACT*, No. 1034, *ante*.

1261. Opportunity for inspection of documents—Documents produced.—Production of documents for the purpose of notice is not a sufficient production to fasten a purchaser with notice, unless reasonable opportunity be given for examination.—*BRUMFIT v. MORTON* (1857), 30 L. T. O. S. 98; 3 Jur. N. S. 1198.

1262. — Property sold subject to provisions in deed.—If property is declared to be sold subject to the provisions contained in a deed which is

1257i. Person in possession of land sold.—Possession is constructive notice of the title of the possessor.—*WILSON v. BOYD* (1877), 3 V. L. R. (Eq.) 98.—*AUS.*

1257ii. — — — — ——Possession is not in itself notice.—*Re MATCH v. CLAVIR* (1912), 23 O. W. R. 279; 4 O. W. N. 263; 6 D. L. R. 882.—*CAN.*

1261i. Opportunity for inspection of documents—Documents produced.—

Where in negotiating for a sale of land the vendor gives to the purchaser for his information the vendor's documents of title (in this instance an agreement for sale with respect to one quarter section & the duplicate certificate of title for the other quarter section) & the purchaser has an opportunity of reading them before signing the agreement for sale, he is fixed with knowledge of their contents & of the documents referred to therein

even though he has not in fact read them.—*NIRKA v. KEMILA*, [1927] 2 W. W. R. 556; 21 Sask. L. R. 541.—*CAN.*

1261ii. — — — — ——*BANK OF IRELAND v. BROOKFIELD LINEN CO.* (1884), 15 L. L. R. 37.—*IR.*

q. Of breach of trust—By means of recital in deed.—Where in the recitals of one of the title deeds to land facts were disclosed which point to

Sect. 4.—Notice to purchaser: Sub-sect. 2. Sect. 5: Sub-sects. 1

specially referred to, without mentioning its contents, & which deed can be examined before the sale by the purchaser, he is bound by everything contained in that deed. But if the vendor, instead of referring the purchaser to the deed to ascertain its contents, himself states what the contents are, the purchaser is not bound to examine the deed, but may reasonably trust to the representation of it, contained in the particulars of sale, as being a correct statement of its contents.

Redeemed land tax, amounting to £41 *per annum*, was sold by auction in one lot. The particulars represented £3 14s., part of it, as charged on three houses, but stated that the title consisted of a contract for redemption of the land tax of Mar. 25, 1818. This contract, when produced after the sale, showed that the £3 14s. was not charged on three houses, but consisted of three small sums, each charged separately on one of the houses:—*Held*: the misdescription was fatal; the reference to the contract did not give the purchaser notice of the actual state of the title.—*COX v. COVENTON* (1862), 31 Beav. 378; 7 L. T. 78; 8 Jur. N. S. 1142; 10 W. R. 829; 54 E. R. 1185.

Annotations:—*Apld.* *Dougherty v. Oates* (1900), 45 Sol. Jo. 119. *Refd.* *Turquand v. Rhodes* (1868), 18 L. T. 844.

1263. ———.]—Had *pltf.* a fair opportunity of discovering what provisions the conveyances contained? . . . A man has not a fair opportunity of ascertaining the contents of deed if he comes into the auction room not knowing the deeds exist (*BUCKLEY, J.*).—*DOUGHERTY v. OATES* (1900), 45 Sol. Jo. 119.

1264. ———.]—Where a contract for the sale of freehold land contains a provision that the land is sold subject to the conditions contained in or referred to by a specified deed, & reference to that deed would have disclosed the fact that the land was subject to certain restrictions contained in a second deed, a purchaser, who before executing the contract has not inspected either the first or the second deed, will not be granted relief on the ground that he had no notice, at the time when he entered into the contract, of the restrictions contained in the second deed.—*Re CHILDE & HODGSON'S CONTRACT* (1905), 54 W. R. 234; 50 Sol. Jo. 59.

1265. Statement by vendor—That property subject to same restrictions as adjoining property.—*HONE v. GAKSTATTER*, No. 1068, *ante*.

1266. Purchaser accepting less than forty years' title—Notice disclosed by reasonable inquiries—Under title for full period.—*Re COX & NEVE'S CONTRACT*, No. 588, *ante*.

1267. ———.]—*Re NISBET & POTTS' CONTRACT*, No. 590, *ante*.

SECT. 5.—PROOF AND INVESTIGATION OF TITLE.

SUB-SECT. 1.—IN GENERAL.

1268. When title "shown"—All necessary matters stated in abstract.—*PARR v. LOVEGROVE*, No. 1163, *ante*.

a possible breach of trust having been committed, a purchaser who omits to inquire has constructive notice of such facts as it is reasonable to suppose he would have learnt upon inquiry, but not of such facts as it is possible he might have learnt.—*FLOWER v. OWEN* (1896), 19 N. S. W. Eq. 72; 15 N. S. W. W. N. 23.—**AUS.**

r. ———.]—*LOCHER v. HOWLETT* (1894), 13 N. Z. L. R. 584.—**N.Z.**

t. Knowledge of solicitor—As to liability for taxes.—*MONRO v. RUDD* (1873), 20 Gr. 55.—**CAN.**

s. ———.]—*Knowledge of principal.*—If, in the matter of a purchase, a party employs a *solr.* who has any knowledge of an incumbrance affecting the property, that knowledge is, in law, communicated to the principal, who may, nevertheless, be wholly unconscious of the existence of the incumbrance. It makes no difference

1269. When title "made"—Matters stated in abstract proved.—*PARR v. LOVEGROVE*, No. 1163, *ante*.

1270. Sale of share of leaseholds to co-owner—Proof of lessor's title not necessary.—When *pltf.* & *deft.* claim leasehold under the same instruments, & *deft.* purchases *pltf.*'s share, he cannot object that the lessor's title is not shown.—*PHIPPS v. CHILD* (1857), 3 Drew. 709; 61 E. R. 1074.

1271. Enfranchised copyhold lands—Proof of lord's title not necessary.—*KERR v. PAWSON*, No. 1112, *ante*.

SUB-SECT. 2.—TIME FOR MAKING TITLE.

1272. Time of completion.—When a party sells an estate, or any interest, & at the time has no title, or not such as he sells; if he nevertheless obtains such estate or interest at any time before he is called upon, to complete the purchase, it is sufficient; & if an action is brought, showing that the party had never been called upon, & had at that time a good title, is a sufficient answer to the action.—*THOMSON v. MILES* (1794), 1 Esp. 184; 170 E. R. 322, N. P.

Annotation:—*Mentd.* *Laythorpe v. Bryant* (1835), 1 Hodg. 19.

1273. ———.]—*CORNISH v. ROWLEY* (1800), 1 Selwyn's N. P., 13th ed. 219, N. P.

Annotation:—*Mentd.* *Farquhar v. Farley* (1817), 1 Moore, C. P. 322.

1274. ———.]—I admit . . . that if A. B. undertakes to sell another's estate, it does not signify whether A. B. has any interest, provided he can give the estate at the time the purchaser was to have it. . . . If before the conveyance is to be prepared, a title has been shown by the delivery of the abstract, the doubts of conveyancers, whether it is good or not, amount to nothing, unless it is shown that there is reasonable ground for a *ct.* of equity refusing to perform the contract; & there may be such a ground (*LORD ELDON, C.*).—*BOEHM v. WOOD* (1820), 1 Jac. & W. 419; 37 E. R. 435, L. C.

Annotations:—*Consd.* *Withy v. Cottle* (1823), Turn. & R. 78. *Refd.* *Reed v. Don Pedro North Del Rey Gold Co.* (1863), 2 New Rep. 413; *Tilley v. Thomas* (1867), 3 Ch. App. 61.

1275. — Repudiation by purchaser.—The trustees in Dec. 1889, entered into a contract to sell which was to be completed by Jan. 24, 1890. The purchaser took the objection that during the life of the widow the trustees could not sell. On Jan. 6, the vendors' *solr.* wrote contending that the trust for sale could be accelerated by a surrender of the life estate. On the following day the purchaser's *solr.* wrote repudiating the contract, & asking for a return of the deposit. Nothing more took place till Jan. 29, when the vendor's *solr.* wrote to say that a good title could be made by the concurrence of the beneficiaries which the vendors would procure.—*Held*: the purchaser was entitled to be relieved from his contract, the concurrence of the beneficiaries not being offered till after the time for completion had expired, & long after the repudiation by the purchaser.—

that the *solr.* happens to be himself owner of the property.—*MARJORI-BANKS v. HOVENDEN* (1843), 6 I. Eq. R. 238; *Drury, temp. Sug.* 11.—**IR.**

b. Of reservation of minerals.—*JAEGLER v. FEUERBORN*, [1926] 1 D. L. R. 230; [1926] 1 W. W. R. 80; 20 Sask. L. R. 241.—**CAN.**

c. ———.]—*CROFTS v. STEWART'S TRUSTEES*, [1926] S. C. 891; [1926] S. J. T. 577.—**SCOT.**

Re HEAD'S TRUSTEES & MACDONALD (1890), 45 Ch. D. 310; 59 L. J. Ch. 604; 63 L. T. 21; 38 W. R. 657, C. A.

Annotations :—*Apld.* *Bellamy v. Debenham*, [1891] 1 Ch. 412. *Distd.* *Re Baker & Selmon's Contract*, [1907] 1 Ch. 238. *Consd.* *Brickles v. Snell*, [1916] 2 A. C. 599; *Re Hall & Hutchinson's Contract*, [1920] 1 Ch. 233. *Refd.* *London & Scottish Issue Co. v. Adams* (1893), 9 T. L. R. 396.

1276. Before action to enforce contract.—*WRIGHT v. HOWARD*, No. 900, *ante*.

1277. —.—(1) It being necessary, in order to make a title perfect, that a recovery should be suffered for the purpose of barring an old estate tail vested in a person who was not a trustee for the vendor, the deed making the tenant to the *praecipe* & the warrant for suffering the recovery were executed before the filing of the bill for specific performance, but the recovery was not completed till a few days afterwards:—*Held*: a good title was not shown before the commencement of the suit.

(2) A person, who purchases two lots, is not justified in refusing to perform his contract for the purchase of the second lot, because a good title is not shown to the first lot.—*LEWIN v. GUEST* (1826), 1 Russ. 325; 38 E. R. 126.

1278. — **Right of vendor to costs.**—*GAMES v. BONNOR*, No. 1218, *ante*.

1279. Reasonable time.—*Deft.* was the vendor of certain lots of ground, which were put up to sale by auction on Sept. 18, 1838, under the following amongst other conditions: that the purchaser should pay down a deposit of £10 per cent. in part of the purchase-money, & sign an agreement for payment of the remainder on or before Nov. 28, 1838; that a proper abstract would be delivered within fourteen days from the day of the sale, & a good title deduced at the vendor's expense, having regard to the conditions; that the deeds of conveyance & assignment, including any assignment of attendant terms on the freehold, should be prepared, etc., & left at the office of the vendor's solrs. for execution, on or before Nov. 10, 1838; any objection to the title should be communicated within twenty-one days after the delivery of the abstract, & every objection not taken & so communicated within such period, should be deemed waived, & not to be made, & in that respect time was to be considered as of the essence of the contract. *Pltf.* became the purchaser, & in an action against *deft.* for a breach of the agreement, in not deducing a good title to the premises on or before Nov. 28, on special demurrer to the declaration:—*Held*: as there was no precise time specified for the deducing of a good title, the vendor was allowed by law a reasonable time for so doing; & as the declaration contained no allegation that a reasonable time for deducing such title had elapsed, it was bad.—*SANSOM v. RHODES* (1840), 6 Bing. N. C. 261; 8 Scott, 544; 9 L. J. C. P. 132; 133 E. R. 103.

Annotation :—*Mentd.* *Hannulic v. Goldner* (1843), 11 M. & W. 849.

1280. — **Secondary evidence of lost documents.**—The mere fact that the title deeds to property sold have been lost or mislaid does not release the purchaser from performance of his contract; but he can be compelled to complete if he is furnished in proper time with satisfactory secondary evidence as to the contents of the lost documents, & as to their having been duly executed & properly stamped.

The vendors of certain lands situate in Yorkshire, after an abstract had been prepared & compared by them with the original title deeds, lost or mislaid the deeds, including the deed which by the conditions of sale was to be treated as the root of the title. The date fixed for completion was Nov. 15, 1897.

On Dec. 1, the purchaser's solrs. insisted that if the deeds were not produced & the title found to be satisfactory & the matter completed before the end of the year, the contract must be considered to be at an end. The deposit, however, was not claimed at the end of the year. The vendors' solrs. proposed to supply the purchaser with satisfactory secondary evidence of the deeds. The effect of the correspondence which then took place was, in the opinion of the ct., to give the vendors still further time from the end of 1897 for producing the deeds. On Dec. 20, the vendor's solrs. sent certain statutory declarations which referred to & verified the abstract of the missing deeds of which the abstract was a full & correct copy. The declarations & abstract did not, however, prove the execution of the deeds. On Feb. 5, 1898, the vendors offered an indemnity which was refused. On Feb. 12, the vendors offered some further statutory declarations by the conveying parties to the various deeds to the effect that they executed the same & exhibiting true copies. But the purchaser strenuously resisted completion in the absence of the deeds. On Mar. 10, the vendors took out a summons asking for a declaration that a good title to the property had been shown; & on Apr. 26, the purchaser took out a summons asking for a declaration to the contrary effect & for the return of his deposit:—*Held*: the purchaser had a right to say that, the vendors not having shown a good title within a reasonable time, he was not bound to wait longer & was entitled to be discharged from the contract & to have back his deposit; there was nothing in the correspondence or in the conduct of the purchaser to deprive him of that right; & the evidence adduced by the vendors before the purchaser issued his summons was not such as he could be compelled to treat as satisfactory.—*Re HALIFAX COMMERCIAL BANKING CO., LTD. & WOOD* (1898), 79 L. T. 536; 47 W. R. 194; 15 T. L. R. 106; 43 Sol. Jo. 124, C. A.

1281. Time for delivery of abstract.—*BEDFORD v. FORBES* (1843), 1 Car. & Kir. 33; 2 L. T. O. S. 192, N. P.

1282. Before definite repudiation by purchaser.—A husband gave & bequeathed his real & personal estate to his wife & the vendor upon trust to pay the income to his wife for life & after her decease he directed the whole to be divided amongst his children as his wife should by will direct. The wife survived, & by her will directed her husband's estate to be divided amongst the children so that one child should receive £30 more than the others, but otherwise in equal proportions, & she appointed the vendor her exor. After the wife's death the vendor, who had in fact obtained the verbal consent of the beneficiaries, contracted to sell the real estate as trustee of the husband's will. In her first requisition the purchaser objected that the vendor had no power of sale, declined to accept the title, & asked for the return of her deposit. Her other requisitions dealt with formal points. In reply the vendor

PART V. SECT. 5, SUB-SECT. 2.

1276 i. *Before action to enforce contract.*—*MATTHEWS v. CRAGG* (1876), 38 U. C. R. 319.—*CAN.*

1276 ii. —.—*BODLEY v. MACDONALD* (1901), 20 N. Z. L. R. 371.—*N.Z.*

1279 i. *Reasonable time.*—*COOPER v.*

HORWOOD (1888), 14 V. L. R. 547.—*AUS.*

d. *At hearing of action.*—*UNION BANK v. WALLACE & CRAIB* (Sask.), [1926] 3 D. L. R. 329.—*CAN.*

Sect. 5.—Proof and investigation of title: Sub-sects. 2, 3 & 4, A. & B.]

submitted that there was an implied power of sale for the purpose of the division actually directed, “& if required all the beneficiaries are prepared to concur in the conveyance.” Further correspondence ensued in which the purchaser, though insisting on her first requisition, also dealt with the formal requisitions:—*Held*: there was no definite & clear repudiation of the contract before the complete beneficial title was offered, & the purchaser must be held to her bargain. —*Re HAILES & HUTCHINSON'S CONTRACT*, [1920] 1 Ch. 233; 89 L. J. Ch. 130; 122 L. T. 459; 36 T. L. R. 130; 64 Sol. Jo. 209.

SUB-SECT. 3. —LENGTH OF TITLE REQUIRED.

See, now, Law of Property Act, 1925 (c. 20), s. 44.

1283. Must commence with proper root of title.]

—*Re COX & NEVE'S CONTRACT*, No. 588, *ante*.

1284. Sixty years.]—*BARNWELL v. HARRIS*, No. 1212, *ante*.

1285. —.]—A purchaser is not entitled as a matter of course to a covenant for the production of all documents contained in the abstract of title, which are not delivered to him, but only of those which are necessary to make out a good sixty years' title. —*COOPER v. PEMERY* (1844), 1 Ph. 388; 13 L. J. Ch. 275; 2 L. T. O. S. 437; 8 Jur. 181; 41 E. R. 679, L. C.

1286. Forty years—Effect of recital in deed more than twenty years old.]—*BOLTON v. LONDON SCHOOL BOARD*, No. 1108, *post*.

1287. —. —. —. Where other deeds intervening.] —*Re WALLIS & GROUT'S CONTRACT*, No. 1318, *post*.

1288. —. —. —. What amounts to waiver.]—On an open contract for the sale of freehold property the vendor supplied an abstract showing a title for twelve years, & alleged that the purchasers had notice at the date of the contract of his inability to give an absolute title; he also set up a waiver by the purchasers of their right to a full forty years' title by a letter written by the purchasers. Part of the property was subject to a restrictive covenant not to carry on any trade or business on the premises. When the purchasers made inquiries as to restrictive covenants, they were informed that such covenants did not affect the user of the property for business purposes:—*Held*: if it is shown on the signing of a contract that a forty years' title was not able to be given, the purchasers cannot have it, but in this case the purchasers refused to take a shorter title, & the contract being silent on that point, the purchasers were entitled to their full forty years' title. The whole correspondence showed that the purchasers all along insisted on a forty years' title, & the letter referred to could not be held to be a waiver of itself. The restrictive covenants were perfectly good objections to the title, & notice of them had not been received by the purchasers, who were told there were no such restrictive covenants. —*Re JUDGE & SHERIDAN'S CONTRACT* (1907), 96 L. T. 451.

1289. What is sufficient possessory title—Long uninterrupted possession.]—A good title may be made to an estate, although the origin cannot be

shown by any deed or will; but it must be shown, that there has been such a long uninterrupted possession, enjoyment & dealing with the property, as afford a reasonable presumption that there is an absolute title in fee simple. —*COTTRELL v. WATKINS* (1839), 1 Beav. 361; 3 Jur. 283; 48 E. R. 980.

1290. —. —. —. Sixty years.]—*DOUGLASS v. LONDON & NORTH WESTERN RY. CO.*, No. 1450, *post*.

1291. —. —. —. Forty years.]—*JACOBS v. REVELL*, No. 844, *ante*.

1292. —. —. —. Twelve years.]—*GAMES v. BONNOR*, No. 1218, *ante*.

1293. —. —. —. —.]—*Re ATKINSON & HORSELL'S CONTRACT*, No. 1219, *ante*.

1294. Title depending on disentailing deed—Effect of loss of deed—Title shown by long possession.]—*COUSSMAKER v. SEWELL* (1791), cited in Sugden's Vendors & Purchasers, 14th ed. p. 366.

1295. Purchase under order of court—Safe holding title—Whether for benefit of infant.]—The conveyancing counsel having certified that the title to a proposed purchase of land “though not a good title of sixty years, was a safe holding one,” & the purchase appearing in other respects desirable & for the benefit of an infant, it was sanctioned by the ct. —*Re SHEFFIELD & ROTHERHAM RY. CO.* (1853), 1 Sm. & G. App. IV.; 67 E. R. 1318.

1296. Sale by mortgagees as trustees—Title must be traced from date of settlement—Where mortgagees not original trustees.]—A mtge. of freeholds recited that the sum advanced was paid by the mtgees. out of moneys belonging to them on a joint account. The freeholds were contracted to be sold when the mtge. debt was to be paid off. By a slip it was disclosed that the mtge. money belonged to the mtgees. as trustees, & the trusts of the settlement on which they held it were also disclosed, by which it appeared that they were not the original trustees. On a vendor & purchaser summons:—*Held*: the purchasers were entitled to require from the vendor that he should trace the title of the trustees from the date of the settlement in order that the purchasers might get a good discharge for the payment of the mtge. debt. —*Re BLAIBERG & ABRAHAM'S*, [1899] 2 Ch. 340; 68 L. J. Ch. 578; 81 L. T. 75; 47 W. R. 634; 43 Sol. Jo. 625.

Annotations:—Reffd. Re Arran & Knowlson & Creer's Contract (1912), 81 L. J. Ch. 547; *Re Chafer & Randall's Contract*, [1916] 2 Ch. 8.

1297. Effect of taking short title—Purchaser fixed with constructive notice.]—*Re NISBET & POTTS' CONTRACT*, No. 590, *ante*.

Special conditions as to commencement of title.] —*See* Part IV., Sect. 2, sub-sect. 5, A., *ante*.

SUB-SECT. 4.—ABSTRACT OF TITLE.

A. In General.

1298. Necessity for.]—A purchaser made the following requisition, “Is there to the knowledge of the vendors or their solrs. any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?” —*Held*: neither the vendors nor their solrs. were bound to answer any part of the requisition.

PART V. SECT. 5, SUB-SECT. 4.—A.

a. General rule.]—Showing title is the manifestation on the abstract of all matters essential to a good title. —*LONDON & CANADIAN LOAN & AGENCY CO. v. GRAHAM* (1888), 12 P. R. 651.—*CAN.*

1298 i. Necessity for.]—Abstract of title need not be furnished by vendor unless a demand is made therefor. —*BOYDELL v. HAINES* (1915), 30 W. L. R. 842; 8 W. W. R. 17; 21 D. L. R. 371. *CAN.*

1298 ii. —.]—In the absence of any

express or limited stipulation to the contrary in an agreement respecting the sale of land in British Columbia, which is not held under a certificate of indefeasible title, the purchaser is entitled to the production of a solr's abstract of the vendor's title to the

A vendor is bound to furnish an abstract of title, &, upon the requisition of the purchaser, to verify it or complete it on any point on which it appears defective (*JAMES, L.J.*).—*Re FORD & HILL* (1879), 10 Ch. D. 365; 48 L. J. Ch. 327; 40 L. T. 41; 43 J. P. 334; 27 W. R. 371. C. A.

Annotations.—**Reid**. Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Wilkes v. Spooner, [1911] 2 K. B. 473; *Re* Chafer & Randall's Contract, [1916] 2 Ch. 8.

1299. —.]—*Re* JOHNSON & TUSTIN, No. 1461,
post.

1300. —.]—*Re Pelly & Jacob's Contract*,
No. 964, *ante*.

1301. What is complete abstract—Legal & equitable title shown.]—The abstract is complete, when it appears, that upon certain acts done the legal & equitable estates will be in the purchaser; though long before the title can be completed.—**FRAYBROKE (LORD) v. INSKIP** (1803), 8 Ves. 417; 32 E. R. 416, L. C.

Annotations :—**Consd.** Lewin v. Guest (1826), 1 Russ. 325.
Refd. Cholmondeley v. Clinton (1817), 2 Mer. 171; Bainbridge v. Ashburnton (1836), 2 Y. & C. 441; Pyrrke v. Waddingham (1852), 10 Har. & L. 341.
Menta. Hall v. Knight (1820), 1 Jac. & W. 494; Galliers v. Moss (1820), 9 B. & C. 267; Baring v. Booth (1832), 1 L. J. Ch. 204; Lindse v. Thacker (1841), 12 Sim. 178; Rackham v. Siddall (1848), 16 Sim. 297; Goodman v. Goodman (1859), 28 L. J. Ch. 745; Martin v. Laverton (1870), L. R. 9 Eq. 563; Sidebotham v. Knott (1872), 26 L. T. 700; *Re* Packman & Moss (1875), 1 Ch. D. 214; *Re* Brown & Sibly's Contract (1876), 3 Ch. D. 156; Lysaght v. Edwards (1876), 2 Ch. D. 499; *Re* Bellis's Trusts (1877), 5 Ch. D. 504; *Re* Franklyn's Mortgages, [1888] W. N. 217.

1302. What is "perfect abstract"—Most perfect in vendor's possession at time of delivery.]—MORLEY *v.* COOK, No. 646, *ante*.

1303. What is sufficient abstract—Deficiency as to length of title.]—BLACKBURN v. SMITH, No. 668, *ante*.

1304. — **Effect of waiver of proof of title by purchaser.**—A purchaser is not entitled to be furnished with an abstract of the title beyond the time he has dispensed with the proof of it.

An estate described as land tax redeemed was sold, subject to certain conditions, amongst which was one, that every deed dated more than ten years ago should be conclusive evidence of everything recited or stated therein. In the witnessing part of a deed of conveyance dated eleven years before the sale, & forming part of the title, the consideration money was acknowledged by the then vendor to have been received from the then purchaser "in full for the absolute purchase of the premises, & the fee simple & inheritance thereof in possession, free from land tax & all other incumbrances":—*Held*: a statutory declaration by a prior owner, made some years before the sale, that, to the best of his knowledge & belief, no land tax had ever been paid for or in respect of the land "subsequently to the purchase or redemption thereof, in or about the year 1799," was not sufficient to satisfy a purchaser, as it left it doubtful whether the land tax ever was redeemed so as to free the land from liability either to the Crown or to a purchaser under Land Tax Redemption Act, 1802 (c. 116).—*POPPLETON v. BUCHANAN*.

interest in the land which he has agreed to sell, according to the rule introduced into that province with the general body of the law of England.—**NEWBERRY v. LANGAN** (1912), 23 W. L. R. 93; 3 W. W. R. 426; 47 S. C. R. 114; 8 D. L. R. 815.—**CAN.**

1. What is complete abstract—
Necessity to abstract registered deeds.]
Re BOUSTEAD & WARWICK (1886), 12
O. R. 488.—**CAN.**

Abstract with indorsed receipts for con-

sideration appearing.—The indorsed receipts for consideration money should appear in a perfect abstract, at all events as to deeds executed before Registry Act.—*McMANUS v. LITTLE* (1871), 3 Ch. Ch. 263.—**CAN.**

h. Period of commencement of abstract must not be unnecessarily remote.—It is a mischievous practice to commence abstracts of title from periods unnecessarily remote.—BLUNDEN v. DESERT (1838), 6 Ir. L. Rec. N. S. 324.—**IR.**

BUCHANAN v. POPPLETON (1858), 4 C. B. N. S. 20; 27 L. J. C. P. 210; 31 L. T. O. S. 83; 22 J. P. 546; 4 Jur. N. S. 414; 6 W. R. 372; 140 E. R. 986.

1305. — **Proof of Insufficiency—Onus on purchaser.**—WARD *v.* GRIMES (OR GHIMES), No. 670, *ante*.

1306. Contents of abstract—Statement of un-executed deeds as executed Improper.]—BEDFORD v. FORBES, No. 1149, ante.

1307. What constitutes delivery of abstract—Delivery of deeds for perusal.]—An allegation that A. delivered an abstract of his title to B., is not satisfied by proof, that A. handed two deeds, which formed the whole of his title to B., & that B., having read the deeds, returned them to A.—*HORNE v. WINGFIELD* (1841), 3 Man. & G. 33; 3 Scott, N. R. 340; 10 L. J. C. P. 295; 133 E. R. 1046.

1308. Right of purchaser to object—Suspicion not sufficient.—Mere suspicion, upon opinions in the abstract, etc., will not support an objection by a purchaser. —**MCQUEEN v. FARQUHAR**
11 Ves. 167; 32 E. R. 1168, L. C.

Annotations:—Apid. Green c. Pulsford (1839), 2 Beav. 70.
Reid. Hall v. Montague (1830), 8 L. J. Q. S. Ch. 167;
 Butcher v. Jackson (1845), 14 Sim. 444; Warde v. Dixon
 (1858), 28 L. J. Ch. 315; *Re* Huish's Charity (1870), L. R.
 10 Eq. 5. **Mentd.** Wright v. Wakeford (1811), 17 Ves. 451;
 A.-G. v. Hamilton (1816), 1 Madd. 214; Moodie v. Reid
 (1816), 1 Madd. 516; Hougham v. Sandys (1827), 2 Sim.
 95; Allen v. Bradshaw (1835), 1 Curt. 110; Campbell v.
 Home (1842), 1 Y. & C. Ch. Cas. 661; Burdett v. Spillsbury
 (1843), 10 Cl. & Fin. 340; Warren v. Postlethwaite (1845),
 2 Coll. 108; Doe d. Knight v. Spencer (1848), 2 Eveh.
 752; Vincent v. Sodor & Man (Bp.) (1849), 8 C. B. 905;
 Brassey v. Chalmers (1852), 16 Beav. 223; Donville v.
 Lamb (1853), 1 L. R. 246; Baker v. Bradley (1855),
 2 L. R. 45. **Wclcy.** Morantson (1855), 2 Ch. & S.
 143; Bradshaw v. Euse (1856), 25 L. J. Ch. 13; Cock-
 croft v. Sutcliffe (1856), 25 L. J. Ch. 313; *Re* Rickett's
 Trust (1860), 2 L. T. 320; *Re* Frith & Osborne (1876), 3
 Ch. D. 618; Henty v. Wrey (1882), 21 Ch. D. 332; Ross
 v. Tyser Line, The 'Celtic King' (1894), 10 T. L. R. 222;
 Cloutie v. Storey, [1911] 1 Ch. 18.

Special stipulations in contract.]—*See* Part IV., Sect. 2, sub-sect. 6, *ante*.

B. What must be Abstracted.

1309. Whether all documents relating to property.]—Right of the purchaser to the production & to an abstract of all the documents relating to the property in the vendor's possession, whether a good title is made without them or not.—*SPARROW v. HILTON* (1852), 1 W. R. 87.

1310. All documents forming link in title.]—
(1) Every document that forms a link in the vendor's title ought to be abstracted in chief.

(2) Conveyancing Act, 1881 (c. 41), s. 3 (6), presupposes a proper abstract, & does not apply to a document in the chain of title.

(3) In an abstract of title to leaseholds, an assignment appeared only by way of recital in another document:—*Held*: an abstract of the recited assignment must be delivered at the vendor's expense.

The deed which is recited in the subsequent deed ought, beyond all question, to have been abstracted in chief, & not to have been merely left to depend upon a recital in another deed that

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J. Whether old abstract.—Where under the contract the vendor is to deliver an abstract, but is not to be required to abstract any deed or evidence of title not in his possession, he need not abstract an old abstract showing the title of a former owner, nor attested copies of deeds purporting to be conveyances in the chain of title.—*HELY v. SCOTT* (1872), 11 N. S. W. S. C. R. (L.) 272.—**AUS.**

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was abstracted (NORTH, J.).—*Re* STAMFORD, SPALDING & BOSTON BANKING CO. & KNIGHT'S CONTRACT, [1900] 1 Ch. 287; 69 L. J. Ch. 127; 81 L. T. 708; *sub nom.* STAMFORD, SPALDING & BOSTON BANKING CO. *v.* KNIGHT, 48 W. R. 244; 44 Sol. Jo. 101.

1311. Every material part of documents.]—An abstract of title ought to set out every part of the documents abstracted which may affect the judgment of the purchaser, & the purchaser is entitled to consider that no part of the documents which is not so set out has any bearing upon the title.—*BURNABY v. EQUITABLE REVERSIONARY INTEREST SOCIETY* (1885), 28 Ch. D. 416; 54 L. J. Ch. 466; 52 L. T. 350; 33 W. R. 639.

Annotations:—Mentd. Re Hewett, *Hewett v. Hallett* (1893), 63 L. J. Ch. 182; *Re* Hodson, *Williams v. Knight*, [1894] Ch. 421; *Viditz v. O'Hagan* (1899), 68 L. J. Ch. 553.

1312. Deeds prior to commencement of title.]—*PARR v. LOVEGROVE*, No. 1163, *ante*.

—**Where special stipulations.]**—*See* Part IV., Sect. 2, sub-sect. 6, B., *ante*.

1313. Satisfied equitable charge.]—An extrix. being also a devisee in trust to sell, & to divide the clear proceeds between herself & two others, with power to give receipts, married, & with the concurrence of her husband, sold the estate:—*Held*: she & her husband were capable of making a good title to the purchaser, notwithstanding there were judgment debts registered against her husband, & still unsatisfied.

A satisfied equitable charge should be communicated to the purchaser, though it may not be necessary that it should appear upon the abstract.—*DRUMMOND v. TRACY* (1860), *John*. 608; 29 L. J. Ch. 304; 1 L. T. 364; 6 Jur. N. S. 369; 8 W. R. 207; 70 E. R. 562.

Annotation:—Consd. Re Solomon & Davey (1875), 10 Ch. D. 366, n.

1314. Conveyance & reconveyance.]—The abstract is wrong; that I take as established by the authorities; it should have contained the conveyance & the reconveyance (*BRAMWELL, B.*).—*GRAY v. FOWLER* (1871), L. R. 8 Exch. 249; 42 L. J. Ex. 161; 29 L. T. 297; *on appeal* (1873), L. R. 8 Exch. p. 275, Ex. Ch.

1315. Mortgage—Where question of priority doubtful.]—A legatee of a reversionary interest under a will, which had been paid into ct. in an administration suit, presented a petition for liquidation in Mar. 1873, & a trustee was appointed. In July he assigned his interest in the legacy to J., who obtained a stop order on the fund in ct. In Nov. 1876, he assigned his interest to E., without notice of the liquidation, who also obtained a stop order on the fund. Afterwards the trustee in liquidation obtained a stop order. Pltfs. purchased the interest of the trustee in liquidation & of J., & contracted to sell the legacy to deft. Deft. required E.'s mtge. to be abstracted as an incumbrance on the estate:—*Held*: the question of the priority of E.'s incumbrance was too doubtful to justify the vendor in omitting it from the abstract.—*PALMER v. LOCKE* (1881), 18 Ch. D. 381; 51 L. J. Ch. 124; 45 L. T. 229; 30 W. R. 419, C. A.

Annotations:—Refd. Re Jakeman's Trusts (1883), 23 Ch. D. 344; *Burnaby & Equitable Reversionary Interest Soc.* (1885), 54 L. J. Ch. 466; *Mercer v. Vans Colina* (1897), 67 L. J. Q. B. 424. *Mentd. Re* Allsop & Joy's Contract (1889), 61 L. T. 213; *Re* Stone's Estate (1893), 9 T. L. R. 346.

1316. Equitable title.]—*Re* BALEN & SHEPHERD'S CONTRACT, No. 1412, *post*.

C. Sufficiency of Recitals in Later Deeds.

1317. General rule—Insufficient.]—*Re* STAMFORD, SPALDING & BOSTON BANKING CO. & KNIGHT'S CONTRACT, No. 1310, *ante*.

1318. ——— Though recital twenty years old.]—A vendor's title to a freehold house comprised the following deeds:—(a) a conveyance on sale in Aug. 1877; (b) a first mtge. in May, 1878; (c) a second mtge. in June, 1878; (d) a release of the second mtge. in May, 1882; (e) a conveyance on sale of the house in June, 1882, by the mtgor. & first mtgee. to the vendor's immediate predecessor in title with an acknowledgment of the right to production of the prior deeds which included other property. This conveyance recited that by the first mtge. the house & other property were "granted unto & to the use of the mtgee., his heirs & assigns," by way of mtge. "as therein mentioned." The vendor having sold by open contract in 1906, relied on this recital & declined to furnish any title prior to the conveyance of June, 1882. The purchaser, while insisting on her right to a forty years' title, offered to begin with the conveyance of Aug. 1877:—*Held*: the purchaser was entitled to a title beginning with the conveyance of Aug. 1877.

I can see nothing in Vendor & Purchaser Act, 1874 (c. 78), s. 2, to relieve the vendor from the duty of abstracting the title prior to the twenty years old deed, or to relieve her from the obligation of furnishing a forty years' title under Vendor & Purchaser Act, 1874 (c. 78), s. 1 (*SWINFEN EADY, J.*).—*Re* WALLIS & GROUT'S CONTRACT, [1906] 2 Ch. 206; 75 L. J. Ch. 519; 94 L. T. 814; 51 W. R. 534; 22 T. L. R. 540.

1319. When recital sufficient—Sale of trust property.]—In 1840 property was mortgaged to W. in fee, there being nothing in the mtge. deed to show that he was not the beneficial owner of the mtge. money. He died in 1842, having by his will devised & bequeathed his real & personal estate to three trustees, of whom his wife was one, on trusts for the benefit of his wife & children, & having appointed the same three persons exors. He also devised & bequeathed his trust & mtge. estates to the same three persons, subject to the trusts & equities affecting the same respectively. The widow alone proved the will, & alone acted as trustee. The other two trustees disclaimed the trusts. In 1854 the widow obtained a decree absolute foreclosing the mtge. In 1865, she, by a deed indorsed on the mtge. deed, conveyed the property, without receiving any pecuniary consideration for it, to K., C., & B., in fee, as joint tenants at law & in equity. The conveyance contained a recital that testator held the mtge. money on an account under which K., C., & B., were then solely entitled thereto as was thereby acknowledged, whereby the widow, as trustee under testator's will, was trustee only of the property for K., C., & B., & they had requested her to convey it to them. On a subsequent sale of the property by persons who had purchased it from K., C., & B., the purchasers required evidence of the truth of the recital in the deed of 1865 that K., C., & B., were entitled to the mtge. money, & assuming that testator was a trustee of the mtge. money, the purchasers required the vendors to show that the property sold was comprised in the trust; that K., C., & B., were duly appointed to succeed testator in the trust; & that they had an effectual power of sale & of giving a receipt for the purchase-money:—*Held*: it would be contrary to the practice of the ct. to go behind a recital evidently framed for the purpose of keeping

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bill to enforce specific performance, & produced an affidavit showing that both the trustees had seen the draft of the deed before its execution, & were acquainted with & had consented to its contents:—*Held*: the due execution of the power had been sufficiently shown, & the purchaser must accept the title.

H., the purchaser, also objected that the vendor did not hand over three of the title deeds, nor offer to covenant to produce them, but the ct. held that, as in this case the deeds in question were only collateral to the title, & as the purchaser had inspected the three deeds, & had been furnished with attested copies of two of them, & had had an undertaking that an attested copy of the third should be produced, he must complete the purchase.—*OFFEN v. HARMAN* (1859), 1 De G. F. & J. 253; 29 L. J. Ch. 307; 1 L. T. 315; 6 Jur. N. S. 487; 8 W. R. 129; 45 E. R. 355, L. J.

1328. —[The reversion of an estate having been put up to sale by auction describing it as leased with a covenant on the part of the tenant to repair, & the purchaser objecting to the title because no counterpart of the lease was in the possession of the vendors, it being stated to be in the hands of a party under a partition of the estate made some time before, the ct. thought that such counterpart ought to be deposited for the benefit of all parties, before it could compel the purchaser to take.—*SHORE v. COLLETT* (1815), Coop. G. 234; 35 E. R. 542, L. C.]

1329. — **Deeds relating to other lands of vendor—Lands charged with rentcharge.**—(1) If there be a settlement of a rentcharge upon an adult female before marriage, in lieu of dower, a purchaser from the husband of other lands than those charged is not entitled to look into the husband's title deeds to see whether he had a good title to the lands out of which the rentcharge was granted.

(2) It is no objection to a title that two fee farm rents, created by letters patent by James I., are not shown to have been extinguished, it being proved that no claim had been made by the Crown of the rents from the year 1706, & no proof of any previous claim.

(3) No objection to a title that an assignment of a term was executed by one exor. only, though the deed was prepared as an assignment by two exors.; one exor. being competent to assign.—*SIMPSON v. GUTTERIDGE* (1816), 1 Madd. 609; 56 E. R. 224.

Annotations:—As to (1) *Refd.* Dyke v. Rendall (1852), 2 De G. M. & G. 209. As to (3) *Refd.* *Ex p.* Holdsworth (1841), 1 Mont. D. & De G. 475; *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

1330. — **Will—Title derived as heir under void will.**—Where the title to an estate was derived from a person who entered as heir under the impression that his ancestor's will was void, a purchaser was not compelled to complete his contract without production of the will or evidence of its contents.—*STEVENS v. GUPPY* (1825), 2 Sim. & St. 439; 57 E. R. 414.

1331. — **Deed creating mortgage term—Recited in deed dated sixty years back—Term presumed surrendered.**—Where a deed, dated sixty years back, contains a recital of the creation of a mtge. term, & a subsequent assignment of it,

in trust to attend the inheritance, & the term is not subsequently noticed in the title, it will be presumed to have been surrendered; & it is no objection to the title, that the vendor cannot produce the deed creating the term, nor the assignment of it.—*TOWNSEND v. CHAMPERNOWN* (1827), 1 Y. & J. 538; 148 E. R. 784.

1332. — **Deed earlier than those on abstract—When in vendor's possession.**—*PARR v. LOVE-GROVE*, No. 1163, *ante*.

1333. **Right of vendor to compel production—Deeds in possession of third party.**—*BARCLAY v. RAINE*, No. 1324, *ante*.

1334. **Effect of agreement not to require abstract.**—A purchaser, who agrees not to require an abstract of title, has nevertheless a right to inspect the deeds which constitute the vendor's title.—*HARDING v.* — (1826), 4 L. J. O. S. Ch. 213.

1335. **Duty of purchaser to require production of title deeds—Sale of copyhold.**—*WHITBREAD v. JORDAN*, No. 1366, *post*.

—[See, also, *EQUITY*, Vol. XX., pp. 322, 323, Nos. 681–685.]

Special conditions as to abstract.—See Part IV., Sect. 2, sub-sect. 6, *ante*.

Duty of vendor to verify abstract.—See Sub-sect. 8, A., *post*.

Duty of purchaser to require production.—See Sub-sect. 7, A., *post*.

Presumption as to examination.—See Sub-sect. 7, A., *post*.

Title deeds of mortgaged property.—See *MORTGAGE*, Vol. XXXV., pp. 413–416, Nos. 1525–1560.

Acknowledgement by vendor of right to production or covenant to produce—Inability of vendor to furnish.—See Law of Property Act, 1925 (c. 20), s. 45 (7).

B. Sale of Leaseholds.

See Law of Property Act, 1925 (c. 20), s. 44 (2)–(5).

1336. **Vendor bound to produce lease—Where root of title—Though more than sixty years old.**—Upon a sale of leasehold property without any condition protecting the vendor against the production of deeds, the vendor is bound to produce the lease which is the root of his title, although the lease is more than sixty years old.—*FREND v. BUCKLEY* (1870), L. R. 5 Q. B. 213; 10 B. & S. 973; 39 L. J. Q. B. 90; 22 L. T. 170; 18 W. R. 680, Ex. Ch.

Annotation:—*Consd.* *Williams v. Spargo*, [1893] W. N. 100.

1337. —[Under a contract to sell & assign a term of years derived out of a leasehold interest in land, or to grant a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended assign or lessee has the right to call for the lease under which the intended assignor or lessor holds.—*GOSLING v. WOOLF*, [1893] 1 Q. B. 39; 68 L. T. 89; 41 W. R. 106; 5 R. 81.]

Annotation:—*Refd.* *Baynes v. Lloyd*, [1895] 1 Q. B. 820.

1338. **Whether vendor bound to produce lessor's title.**—*Qu.*: whether, without express stipulation, a person, seised under a contract with a lessee for years to purchase the term, can insist upon a production of the lessor's title, & whether the lessee can compel such production.—*WHITE*

the production of a particular document, stated in the abstract to be lost, & the purchaser adopt that opinion, & deal with the seller upon

that view, he will not be permitted to repudiate the opinion of his counsel.—*ALEXANDER v. CROSBY* (1844), 1 Jo. & Lat. 666.—*IR.*

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1338.1. **Whether vendor bound to produce lessor's title.**—*LAHEY v. BELL* (1843), 6 L. Eq. R. 122.—*IR.*

v. FOIJAMBE (1805), 11 Ves. 337; 32 E. R. 1118, L. C.

Annotations:—**Consd.** *Deverell v. Bolton* (1812), 18 Ves. 505; *Fane v. Spencer* (1815), 2 Madd. 438; *Temple v. Brown* (1815), 6 Taunt. 60. **Distd.** *Purvis v. Tayer* (1821), 9 Price, 488. **Consd.** *Shepherd v. Keatley* (1834), 4 Tyr. 571; *Souter v. Drake* (1834), 5 B. & Ad. 992. **Refd.** *Vancouver v. Bliss* (1805), 11 Ves. 458; *Fildes v. Hooker* (1817), 2 Mer. 424; *Ogilvie v. Foijambe* (1817), 3 Mer. 53; *Spratt v. Jeffery* (1829), 5 Man. & Ry. K. B. 188.

1339. —[—]—Exception to the master's report in favour of the title of the vendor of a bishop's lease, on the ground of the non-production of the bishop's title, overruled.—*FANE v. SPENCER* (1815), 2 Madd. 438; 56 E. R. 396.

1340. —[—]—On a bill by vendor for specific performance of an agreement to take a lease for twenty-one years, at rack rent; the master having reported in favour of the title shown by the abstract, & an exception being taken to the report; the question was, whether where the agreement is silent, the vendor of a leasehold interest is not bound to produce the title of his lessor? The exception was allowed. Whether the interest contracted for be freehold or leasehold, for a long term of years, or a short lease at rack rent, the party who comes for a specific performance should be prepared to show, that he is able to give what he seeks to compel the other to take.—*FILDES v. HOOKER* (1817), 2 Mer. 424; 35 E. R. 1002; *subsequent proceedings* (1818), 3 Madd. 193.

Annotations:—**Consd.** *Souter v. Drake* (1834), 5 B. & Ad. 992. **Refd.** *Portman v. Mill* (1831), 1 Russ. & M. 696; *Lucas v. James* (1849), 7 Hare, 410; *Stranks v. St. John* (1867), L. R. 2 C. P. 376.

1341. —[—]—In action by vendee against vendor of a lease, for the deposit:—*Held*: the vendor is not bound to produce his lessor's title without an express stipulation to that effect.—*GEORGE v. PRITCHARD* (1826), Ry. & M. 417; 171 E. R. 1069, N. P.

Annotations:—**Overd.** *Souter v. Drake* (1834), 5 B. & Ad. 992. **Refd.** *Hall v. Betty* (1842), 4 Man. & G. 410.

1342. —[—]—*SOUTER v. DRAKE*, No. 1085, *ante*.

1343. —[—]—*SMITH v. CAPRON*, No. 1243, *ante*. **Duty to make title.**—See Sect. 2, *ante*.

C. Unstamped Documents.

See Stamp Act, 1891 (c. 39), s. 117.

1344. Right of purchaser to insist on stamping—Sale of property subject to tenancy agreement—Agreement not stamped.—Contract to sell a freehold ground rent of £20, arising from a wharf "subject to an agreement for a lease for a term" of years. The agreement mentioned was unstamped. On a bill for specific performance by the purchaser:—*Held*: the agreement was part of the subject of the contract, & the vendor was bound to perfect it by having it properly stamped.—*SMITH v. WYLEY* (1852), 16 Jur. 1136.

1345. —[—]—An agreement for the sale of freehold property provided that the property was sold subject to all tenancies, & also for apportionment of outgoing. Upon investigation of the title the purchaser discovered that an agreement with a yearly tenant of part of the property was unstamped, & required the vendor to stamp it before completion of the purchase. The vendor refused, & commenced proceedings for specific performance against the purchaser:—*Held*: the purchaser was entitled to have the agreement stamped at the vendor's expense.—*COLEMAN v. COLEMAN* (1898), 79 L. T. 66.

1346. Mortgage deed.—A ten shilling deed stamp on a mtge. deed is insufficient; therefore a purchaser is entitled, on a contract for sale with a

mtgor., to require the mtge. deed, where so stamped, to be stamped before completion to the full *ad valorem* duty at the vendor's expense, notwithstanding that the mtgee. may have consented to join in the conveyance.—*WHITING TO LOOMES* (1881), 17 Ch. D. 10; 50 L. J. Ch. 463; 44 L. T. 721; 29 W. R. 435, C. A.

Annotations:—**Distd.** *Ex p. Birbeck Freehold Land Soc.* (1883), 24 Ch. D. 119. **Apld.** *Maynard v. Consolidated Kent Collieries Corp.*, [1903] 2 K. B. 121.

1347. Deed unnecessary for protection of title—Concurrence of parties to unstamped deed.—A purchaser is not entitled to have an unstamped title deed stamped at the vendor's expense where the deed is not necessary for the protection of the purchaser's title. Where the unstamped deed was a conveyance of the legal estate, & the vendors offered to procure the concurrence in the conveyance to the purchaser of the conveying parties to the unstamped deed:—*Held*: the purchasers could not require the deed to be stamped at the vendor's expense.—*Ex p. BIRCKBECK FREEHOLD LAND SOCIETY* (1883), 24 Ch. D. 119; *sub nom. Re BIRCKBECK FREEHOLD LAND SOCIETY*, 52 L. J. Ch. 777; 19 L. T. 265; 31 W. R. 710.

D. Expenses of Obtaining, Producing and Inspecting.

See Sub-sect. 10, C., *post*.

SUB-SECT. 6.—REQUISITIONS ON TITLE.

1348. Delivery of new abstract—Further requisitions may be made.—If exceptions taken to the report of a good title are overruled, other objections to the title cannot be made; but if exceptions are allowed, & a new abstract of title is delivered, further objections may be brought in.—*BROOKE v.* — (1819), 4 Madd. 212; 56 E. R. 684.

1349. Subjects of requisitions.—Objections to title mean such objections as can only be properly the subject of adjudication upon the investigation of the title; & such are cases where the dispute is as to the application of the conditions of sale, the propriety or validity of the conditions themselves not being questioned.—*WOOD v. MACHU* (1846), 5 Hare, 158; 16 L. J. Ch. 21; 8 L. T. O. S. 210; 10 Jur. 1001; 67 E. R. 868.

1350. Whether vendor bound to answer—Requisition as to dower.—Upon a proper requisition as to dower, the purchaser has a right to know, if the vendor is in a condition to inform him thereof, the actual state of the title; & is not bound to rest satisfied by being told that, if the liability to dower does exist, he may protect himself by means of a term of years.—*MAJOR v. WARD* (1848), 12 Jur. 473; *previous proceedings* (1847), 5 Hare, 598.

1351. Inquiry as to Incumbrances.—*Re SOLOMON & DAVEY* (1875), 10 Ch. D. 366, n.; 40 L. T. 41, n.; *sub nom. SOLOMON v. DAVEY*, 48 L. J. Ch. 327, n.

Annotation:—**Overd.** *Re Ford & Hill* (1879), 48 L. J. Ch. 327.

1352. —[—]—*Re FORD & HILL*, No. 1298, *ante*.

1353. —[—]—All that could be suggested by counsel in argument was an inquiry whether the mtges. were subject to any incumbrances. It is now settled that a vendor is not bound to answer such a general inquiry (*STIRLING, L.J.*).—*TAYLOR v. LONDON & COUNTY BANKING CO., LONDON & COUNTY BANKING CO. v. NIXON*, [1901] 2 Ch. 231;

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70 L. J. Ch. 477; 84 L. T. 397; 49 W. R. 451, C. A.

Annotations.—*Reid*, Walker v. Linom, [1907] 2 Ch. 104. *Mentd.* *Re* Pidcock, Penny v. Pidcock (1907), 51 Sol. Jo. 514; *Re* Cozens, Green v. Brisley, [1913] 2 Ch. 478; Radcliffe v. Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557.

—Inquiry as to payment of debts of testator—Vendor selling as executor.]—See EXECUTORS, Vol. XXIV., p. 585, Nos. 6187, 6188.

1354. Time for compliance with requisitions—Reasonable time allowed.]—When a requisition is made by a purchaser, the vendor must be allowed a reasonable time to comply with it. Thus, a requisition was made at the end of June, which involved the necessity of instituting a suit & obtaining a decree. On Aug. 1, the vendors consented to comply with the requisition, & they obtained a decree in Michaelmas term following; but on Aug. 9 the purchaser gave notice to rescind the contract:—*Held*: it was ineffectual.—MICHOLLS v. CORBETT (1865), 34 Beav. 376; 55 E. R. 680; *on appeal*, 3 De G. J. & Sm. 18, L. J. J.

1355. Sufficiency of answer to requisition.]—Upon an open contract for the sale of a lease of a house the vendor, in answer to a requisition by the purchaser as to the performance of repairing covenants in the lease, produced a receipt of rent down to a year previously, but could not produce the last receipt, the lessor having refused to receive his rent on the ground of alleged breaches of covenant. The lessor had commenced an action of ejectment on the same ground against the vendor, but the action had been stayed on account of pltf. having failed to comply with an order for delivery of particulars of claim. The vendor deposed that to the best of his knowledge & belief the whole of the covenants in the lease had been duly performed, & proved the execution of various specific repairs, & the purchaser, though he had had an opportunity given him of inspecting the premises, offered no evidence to show that anything was wanting to the complete performance of the covenants:—*Held*: notwithstanding the failure to produce the receipt for rent, there was such *prima facie* evidence of the performance of the covenants as to constitute a sufficient answer to the requisition in that behalf.—RINGER TO THOMPSON (1881), 51 L. J. Ch. 42; 45 L. T. 580.

1356. —.]—Where leasehold land is registered under the Land Transfer Acts, after a mtge. by sub-demise for the term less one day has been created, & not registered, the mtgee. selling under the statutory power of sale is not the vendor of registered land within Land Transfer Act, 1897 (c. 65), s. 16 (2), & the purchaser is not entitled to require him either to be registered as proprietor of the land or of a charge giving a power of sale

over the land, or to procure a transfer from the registered proprietor to the purchaser.

Land held under a lease of ninety-nine years was sub-demised, by way of mtge., for the residue of the term less the last day. The mtge. contained no express power of sale, but a provision that on a sale by the mtgee. under the statutory power the mtgor. should stand possessed of the last day in trust for the purchaser. Subsequently a purchaser from the mtgor. was registered under Land Transfer Act, 1897 (c. 65), as the first proprietor, with possessory title. The mtge., having been transferred, the transferee's exor. contracted under the statutory power of sale to sell. To a requisition by the purchaser that the vendor must get himself put on the register as the registered proprietor, the vendor replied that he would not, as he was not selling a registered title:—*Held*: the requisition had been sufficiently answered.—*Re* VOSS & SAUNDERS' CONTRACT, [1911] 1 Ch. 42; 80 L. J. Ch. 33; 103 L. T. 493; 55 Sol. Jo. 12.

Time for delivery—Under special stipulations in contract.]—See Part IV., Sect. 2, sub-sect. 7, A., ante.

SUB-SECT. 7.—SEARCHES AND INQUIRIES.

A. In General.

Duty of purchaser to investigate title.]—See EQUITY, Vol. XX., pp. 321, 322, Nos. 669–678.

1357. Whether purchaser bound to search—Land register.]—(1) A purchaser of lands, in a register county, is not bound to search the register.

(2) Search of the register up to a particular date, will not operate as notice of incumbrances registered at an earlier date.

(3) Search of a register, admitted or proved generally, fixes a party with notice of all the contents of the register.—HODGSON v. DEAN (1825), 2 Sim. & St. 221; 3 L. J. O. S. Ch. 95; 57 E. R. 330.

Annotations.—*As to* (1) *Reid*, Manks v. Whiteley, [1912] 1 Ch. 735. *As to* (3) *Reid*, Procter v. Cooper (1855), 3 Eq. Rep. 364. *Generally, Mentd.* Castellan v. Blumenthal (1841), 12 Sim. 47; West v. Reid (1843), 12 L. J. Ch. 245.

1358. —Register of judgments.]—An estate was mortgaged to A., & afterwards to deft.: pltf. subsequently obtained a registered judgment against the mtgor. Deft. then purchased the equity of redemption, without searching for judgments. On a bill to charge the equity of redemption with the judgment:—*Held*: it was not incumbent on a purchaser to search for judgments.—LANE v. JACKSON (1855), 20 Beav. 535; 52 E. R. 710.

1359. Effect of search—Land register—How far party fixed with notice.]—HODGSON v. DEAN, No. 1357, ante.

1360. Duty of purchaser to inquire—Property in occupation of tenant—Copyhold land—Custom of

PART V. SECT. 5, SUB-SECT. 6.

1355i. Sufficiency of answer to requisition.]—Re DELANY & DERGAN'S CONTRACT, [1905] 1 I. R. 602.—IR.

p. Conditions precedent to grant—Duty to inquire whether conditions have been performed.]—The purchaser of land the title to which has been derived by the vendor from a municipal corp'n. is bound to inquire whether the conditions precedent to the grant to the vendor have been performed.—COSSITT v. CUSACK (1903), 40 N. S. R. 446.—CAN.

q. Requisition requiring vesting order to be registered.]—Re FURLONG & BOGAN'S CONTRACT (1893), 31 L. R. Ir. 191.—IR.

r. Grant of administration insufficiently stamped.]—TYKRELL v. IMPERIAL TOBACCO CO., LTD., [1926] 1 I. R. 285.—IR.

PART V. SECT. 5, SUB-SECT. 7.—A.

1357i. Whether purchaser bound to search—Land register.]—The purchaser must satisfy himself by the usual searches as to entries in the general register & executions affecting the lands.—*Re* TAYLOR & MARTYN (1907), 9 O. W. R. 666; 14 O. L. R. 132.—CAN.

1357ii. —.]—A purchaser of land at a sale under proceedings upon a mtge. in default is not bound to search for liens or mtges. against goods

which under the law have become part of the realty sold. In the absence of express notice he has a right to assume that everything affixed to the realty passes with it.—BERLIN INTERIOR HARDWOOD CO., LTD. v. COLONIAL INVESTMENT & LOAN CO., [1918] 1 W. W. R. 378; 11 Sask. L. R. 46.—CAN.

1357iii. —.]—A party obtaining a conveyance of land by deed, referring to a former deed of assignment, which had been registered:—*Held*: bound to consult the registry to ascertain if his subsequent conveyance is not barred by the trusts or provisions in the prior deed.—AYLMOUR v. AYLMOUR (1849), 13 L. T. O. S. 265.—IR.

manor.]—(1) Equity will not compel a purchaser to take an equitable lease instead of a legal one; but where a person contracts for a lease, for a term certain, of copyhold premises, knowing the property to be of copyhold tenure, he is bound to inquire whether the custom of the manor warrants a lease for the term agreed to be granted; & exercising acts of ownership without such inquiry, will prevent his waiving the contract, because the lease for the whole term cannot be granted.

(2) *Semble*: a purchaser of a property under lease is not bound to make any inquiries beyond the tenant in possession, though he should merely be an underlessee, & would not be affected by notice of the titles of intermediate lessees.—*HANBURY v. LITCHFIELD* (1833), 2 My. & K. 629; 3 L. J. Ch. 49; 39 E. R. 184.

Annotations:—*Generally*, *Refd.* *Jones v. Smith* (1841), 1 Harc. 43; *Wilson v. Williams* (1857), 3 Jur. N. S. 810.

1361. ——— *To whom rents paid.*—*HUNT v. LUCK*, No. 1259, *ante*.

1362. ——— *As to rentcharge—Duty to call for receipt.*—Where a purchaser buys land out of which a rentcharge is represented to issue, it is his duty to call for & see the form of receipt given for the same; & if it turn out not to be a rentcharge, but a tenant's rent, the purchaser must take the consequences of his negligence.—*A.-G. v. STEPHENS* (1855), 1 K. & J. 724; 3 Eq. Rep. 1072; 24 L. J. Ch. 694; 25 L. T. O. S. 316; 19 J. P. 642; 1 Jur. N. S. 1039; 69 E. R. 651; *sub nom.* *A.-G. v. LYNE STEPHENS*, 3 W. R. 649; *on appeal*, 6 De G. M. & G. 111, L. C.

Annotations:—*Mentd.* *Brown v. Wales* (1872), L. R. 15 Eq. 142; *Searle v. Cooke* (1890), 43 Ch. D. 519.

1363. ——— *As to vendor's title.*—Upon a sale of real property it is for the purchaser to ascertain what the title of the vendor is, & to satisfy himself that he has a good title (*ERLE, C.J.*).—*THACKERAY v. WOOD* (1865), 6 B. & S. 766; 6 New Rep. 305; 34 L. J. Q. B. 226; 13 W. R. 996; 122 E. R. 1376, Ex. Ch.

1364. ——— *As to unregistered instruments.*—A purchaser or mtgee. is not bound to make any inquiries with a view to the discovery of registered instruments, though he may be bound by actual knowledge of such instruments.—*LEE v. CLUTTON* (1876), 46 L. J. Ch. 48; 35 L. T. 84; 24 W. R. 942, C. A.

1365. ——— *As to nature & origin of trust—Recital that owner seised as trustee.*—*Re CHAFER & RANDALL'S CONTRACT*, No. 1320, *ante*.

— *Sale by executor.*—*See EXECUTORS*, Vol. XXIV., pp. 583–585, Nos. 6169–6188.

1366. *Sale of copyholds—Search of court rolls.*—An equitable mtgce. may be created of copyholds, by the mere deposit of the copy of ct. roll. It is therefore not sufficient for the protection of a purchaser or mtgee. of copyholds, that he should search the ct. rolls for incumbrances; he ought to require the vendor or mtgor. to produce an abstract of his title & the copy of his admission to the copyhold premises; & if the latter document is not forthcoming, its non-production must be reasonably accounted for.

Where the creditor of a publican in London took from the latter a legal mtgce. of copyhold premises as a security for an antecedent debt, & at the time of taking this security, knew that the publican was indebted to his brewers, & likewise was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mtgce.:—*Held*: the creditor had such notice of

the transactions between his debtor & the brewers, as would have put a prudent man on further inquiry; & having omitted to make such further inquiry, the equitable security of the brewers had priority over his legal security.—*WHITBREAD v. JORDAN* (1835), 1 Y. & C. Ex. 303; 4 L. J. Ex. Eq. 38; 160 E. R. 123.

Annotations:—*Consd.* *Jones v. Smith* (1843), 1 Ph. 244. *Refd.* *Re Mount Morgan (West) Gold Mine, Ex p. West* (1887), 56 L. T. 622.

1367. *Presumption as to examination of title deeds.*—A purchaser must be presumed to have examined every instrument forming a link, directly or by inference, in the title of the property he purchases; but he cannot be presumed to have examined instruments not directly or presumptively connected with the title only, because they may by possibility affect it.—*WEST v. REID* (1843), 2 Hare, 219; 12 L. J. Ch. 245; 7 Jur. 147; 67 E. R. 104.

Annotations:—*Refd.* *Lloyd's Banking Co. v. Jones* (1885), 29 Ch. D. 221. *Mentd.* *Drysdale v. Piggott* (1856), 22 Beav. 238; *Saunders v. Dunnman* (1878), 7 Ch. D. 825; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Faleck v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234.

1368. *Effect of bona fide inquiries—Assignment of lease—Prior equitable charge.*—Where an assignee of a lease, upon the occasion of the assignment, made *bona fide* inquiries for the deeds, & a reasonable excuse was given for their not being produced, he was held to be entitled to the benefit of the assignment, free from a previous equitable charge which had been made by the assignor by deposit of the deeds.—*ESPIN v. PEMBERTON* (1859), 3 De G. & J. 547; 4 Drew. 333; 28 L. J. Ch. 311; 32 L. T. O. S. 345; 5 Jur. N. S. 157; 7 W. R. 221; 44 E. R. 1380, L. C.

Annotations:—*Foll.* *Brown v. Stedman* (1896), 44 W. R. 458. *Refd.* *Manners v. Mew* (1885), 29 Ch. D. 725. *Mentd.* *Eastham v. Wilkinson* (1859), 33 L. T. O. S. 234; *Austin v. Tawney* (1867), 15 W. R. 463; *Bradley v. Itches* (1878), 9 Ch. D. 189; *Cave v. Cave* (1880), 15 Ch. D. 639; *Davis v. Hutchings* (1907), 96 L. T. 293.

1369. *Inspection—Physical inspection of property not included.*—The inspection referred to in Conveyancing Act, 1882 (c. 39), s. 3 (1), (2), does not extend to a personal examination of the property.

I do not accede to the suggestion that the inspections referred to in Conveyancing Act, 1882 (c. 39), s. 3 (1), (2), extend to a physical examination of the property being dealt with (*EVE, J.*).—*SLACK v. HANCOCK* (1912), 107 L. T. 14.

Sufficiency of inquiry.—*See EQUITY*, Vol. XX., p. 322, Nos. 679, 680.

B. Judgments and Orders.

See Law of Property Act, 1925 (c. 20), s. 195; *Land Charges Act*, 1925 (c. 22), ss. 1, 6, 17.

1370. *Period of search—Five years.*—Purchasers, mtgees., & creditors are bound to search the register only for five years, & judgments not re-registered within that period are void as against them.—*BEAVAN v. OXFORD (EARL)* (1855), 6 De G. M. & G. 492; 26 L. T. O. S. 114; 1 Jur. N. S. 1121; 4 W. R. 112; 43 E. R. 1325, L. C. & L. JJ.

Annotations:—*Apprvd. & Apld.* *Shaw v. Neale* (1858), 6 H. L. Cas. 581. *Apld.* *Re Kensington, Bacon v. Lord* (1885), 29 Ch. D. 527. *Refd.* *Simpson v. Morley* (1855), 26 L. T. O. S. 135; *Benham v. Keane* (1861), 1 John. & H. 685; *Punchard v. Tomkins* (1882), 31 W. R. 286; *Re Leavesley*, [1891] 2 Ch. 1. *Mentd.* *Neve v. Flood* (1864), 10 Jur. N. S. 607; *Pickering v. Ilfracombe Ry.* (1868), L. R. 3 C. P. 235; *Itobinson v. Nesbitt* (1868), L. R. 3 C. P. 284.

1364.1. *Duty of purchaser to inquire—As to unregistered instruments.*—*HUDSON'S BAY Co. v. KEARNS & ROWLING* (1896), 4 B. C. R. 536.—*CAN.*

1. ——— *Property in occupation of tenant.*—*CLEMENTS v. CONROY*, [1911] 2 I. R. 500, 517.—*IR.*

Sect. 5.—Proof and investigation of title: Sub-sect. 7, B., C. & D.; sub-sect. 8, A.]

1371. ———.]—Under Judgments Act, 1830 (c. 11), if A. has a judgment registered under Judgments Act, 1838 (c. 110), such registration will protect him against all who become mtgees. or purchasers during the currency of the five years & such protection will continue as to them under a re-registration even though he should have omitted to re-register within five years; but as to persons becoming mtgees. or purchasers between the period when his first registration ceased & when his re-registration began he will not be protected but they will have priority over him.—**SHAW v. NEALE** (1858), 6 H. L. Cas. 581; 27 L. J. Ch. 444; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 6 W. R. 635; 10 E. R. 1422, H. L.; *revg.* (1855), 20 Beav. 157.

*Annotations:—***Refd.** Beavan v. Oxford (1855), 6 De G. M. & G. 492; **Hopkinson v. Rolt** (1861), 9 H. L. Cas. 514; **Menzies v. Lightfoot** (1871), L. R. 11 Eq. 459. **Mentd.** **Turner v. Lettis** (1855), 20 Beav. 185; **North v. Stewart** (1890), 15 App. Cas. 452; **Briscoe v. Briscoe**, [1892] 3 Ch. 543; **Re Knight, Knight v. Gardner**, [1892] 2 Ch. 368; **Meguerditchian v. Lightbound**, [1917] 2 K. B. 298.

1372. ———.]—A search for five years in the Common Pleas Registry is sufficient in every case, although it may have to be made in the names of several successive vendors.—**BENHAM v. KEANE** (1861), 1 John. & H. 685; 31 L. J. Ch. 129; 5 L. T. 265; 7 Jur. N. S. 1096; 9 W. R. 765; 70 E. R. 919; *on appeal*, 3 De G. F. & J. 318, L. J.

*Annotations:—***Mentd.** **Neve v. Flood** (1864), 33 Beav. 666; **Rolland v. Hart** (1871), 6 Ch. App. 678; **Re Wyatt, White v. Elms**, [1892] 1 Ch. 188; **Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon**, [1901] 2 Ch. 231.

Registration.—*See, generally*, EXECUTION, Vol. XXI., pp. 567–571, Nos. 1423–1452.

Effect of judgments & orders on land. *See* JUDGMENTS, Vol. XXX., pp. 157–160, Nos. 285–309.

C. *Lis pendens*.

1373. Foundation of doctrine.—The doctrine as to the effect of *lis pendens* on the title of an alienee is not founded on any principles of eqts. of equity with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the ct. in a suit should be binding, not only on the litigant parties, but on those who derive title from them *pendente lite*, whether with notice of the suit or not.

A person who, without notice of a suit, purchases from one of defts. property which is the subject of it, is not in consequence of the pendency of the suit affected by an equitable title of another deft., which appears on the face of the proceedings, but of which he has no notice & to which it is not necessary for any of the purposes of the suit to give effect.

F. the heir at law of E. filed a bill against J. & S. to impeach two agreements, one of which was for the sale of a life-estate by J. to E., & by the other of which E. had agreed to sell to S. the entire fee-simple, which accordingly was conveyed to S. by J. & E. After the institution of the suit S. mortgaged to B. & G. The bill was dismissed as to the first agreement, but the second was set

aside & a decree made for a reconveyance by S. to F. on the terms of F. making certain payments to S. It was afterwards decided in another suit on the state of facts which appeared in the first suit, that J. was entitled to a lien on the estate as against F. & S. for moneys payable under the first agreement:—**Held**: B. & G. not having when they took their mtge. any notice of the first suit, or of the circumstances on which J. B.'s claim was founded, were not affected on the ground of the pendency of the first suit by the claim of J.; though, owing to the pendency of that suit, they were entitled as against F. to no more than S. was entitled to.

The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a ct. of equity as to implied or constructive notice. It is, as I think, a doctrine common to the cts. both of law & of equity, & rests, as I apprehend, upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail (**TURNER, L.J.**).—**BELLAMY v. SABINE** (1857), 1 De G. & J. 566; 26 L. J. Ch. 797; 30 L. T. O. S. 68; 3 Jur. N. S. 943; 44 E. R. 842, L. C. & L. J.

*Annotations:—***Consd.** **Wigram v. Buckley**, [1894] 3 Ch. 483.

Refd. **Tyler v. Thomas** (1858), 25 Beav. 47; **Plant v. Pearman** (1872), 41 L. J. Q. B. 169; **Price v. Price** (1887), 35 Ch. D. 297; **Huntly v. Gaskell**, [1905] 2 Ch. 656; **Faiyaz Husain Khan v. Munsifi Prag Narain** (1907), 23 T. L. R. 405. **Mentd.** **Lorraine v. Lorraine & Murphy**, [1912] P. 222; **Jagger v. Jagger**, [1926] P. 93.

1374. What is *lis pendens*—Decree not carried into effect.—After a decree has been pronounced for an account, & a reference made to see what proportion of an incumbrance two estates shall respectively bear, & the master has made his report, which has been confirmed, & nothing remains but to carry the decree into effect, such a state of things is not to be considered as *lis pendens*; & a purchaser not bound to notice it as such.—**KINSMAN v. KINSMAN** (1831), 1 Russ. & M. 617; 9 L. J. O. S. Ch. 276; 39 E. R. 236, L. C.

1375. — Creditor's action for administration.—Where debts are charged upon testator's real estate by his will or as judgment debts under the old law an action by a creditor for the administration of the real & personal estate is a *lis pendens* which, when registered, gives plff. priority over a purchaser or mtgee. from any deft. entitled to real estate under the will except where deft. is in such a position that the purchaser or mtgee. has a right to suppose he is selling or mortgaging for the purpose of paying testator's debts.—**PRICE v. PRICE** (1887), 35 Ch. D. 297; 56 L. J. Ch. 530; 56 L. T. 842; 35 W. R. 386; 3 T. L. R. 453.

*Annotations:—***Refd.** **Wigram v. Buckley**, [1894] 3 Ch. 483.

Mentd. **Edgar v. Plomley**, [1900] A. C. 431.

1376. Application of doctrine—To purchase from defendant—Purchaser not affected by equitable title of co-defendant.—**BELLAMY v. SABINE**, No. 1373, *ante*.

1377. Effect of registration—No charge or lien created.—**BULL v. HUTCHENS**, No. 1037, *ante*.

1378. Memorandum of registration—What particulars entered.—Judgments Act, 1839 (c. 11), s. 7, requires that the memorandum for registration of a *lis pendens* shall contain, amongst other

PART V. SECT. 5, SUB-SECT. 7.—C.

1377i. Effect of registration—No charge or lien created.—The registration of a certificate of *lis pendens* is not an incumbrance within R. S. C., c. 119, s. 15. It did not create any lien or charge upon the lands against which it was registered.—**MOLESONS BANK v. EAGER** (1905), 6 O. W. R. 93, 180; 10 O. L. R. 452.—**CAN.**

a. Vacation of registration—Mode of discharging.—**GRAHAM v. CHALMERS** (1866), 2 Ch. Ch. 53.—**CAN.**

b. Right of purchaser to object—*Lis pendens* registered at time of commencement of vendor's action—Vendor reselling to purchaser.—A purchaser of land cannot object because his vendor's title had, at the commencement of the vendor's action against him but since

removed, a *lis pendens* registered against it, where the vendors had got the land from the purchaser & agreed to sell him what they got from him.—**ENGLISH & ENGLISH v. NESTMAN (Sask.)**, [1923] 1 W. W. R. 801.—**CAN.**

c. What is *lis pendens*—Whether cloud upon title.—A *lis pendens* registered against real estate is a cloud upon the title & as such a purchaser

e. Possession under agreement to purchase—*Adverse grant from Crown*.—Where a party entered into possession of land under agreement to purchase from one representing himself as owner under an allotment of ancient date:—*Held*: his title was good as against a grantee holding under grant

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1390. — Reconveyance.]—Reconveyances of the legal estate presumed under obscure circumstances, after a great lapse of time; though the possession not originally adverse, but under a trust.—*HILLARY v. WALLER* (1806), 12 Ves. 239; 33 E. R. 92, 1. C.

Annotations:—*Mentd.* R. v. Upton Gray (1830), 10 B. & C. 807; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140.

1391. — —.]—A reconveyance of a mtge. made in 1745 but not afterwards mentioned in the title deeds ought to be presumed where no demand of either principal or interest has been made for several years & the mtgee. deeds have been long in the possession of the owner & his ancestor.—*COOKE v. SOLTAU* (1824), 2 Sim. & St. 151; 2 L. J. O. S. Ch. 30; 57 E. R. 304.

1392. — Surrender of lease.]—*EMERY v. GROCOCK*, No. 1179, *ante*.

1393. — That ancestor took as purchaser—Vendor making title as heir.]—A vendor making title as heir is not bound to produce affirmative evidence in his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase.—*DORLING v. CLAYDON* (1863), 1 Hem. & M. 402; 71 E. R. 175.

1394. Vendor claiming through will—Purchaser not entitled to proof of will—Against heir-at-law.]—*BELLAMY v. LIVERSIDGE* (1786), Sugden's Vendors & Purchasers, 14th ed. p. 439.

Annotation:—*Refd.* *Boyse v. Rossborough* (1854), 23 L. J. Ch. 305.

1395. Vendor claiming by purchase from son—Purchaser entitled to evidence of fairness of transaction.]—The father, vendor, claimed the estate by purchase from his son; the purchaser is entitled to evidence of the fairness of the transaction.—*BOSWELL v. MENDHAM* (1822), 6 Madd. 373; 56 E. R. 1134.

1396. Vendor claiming as heir—Effect of judgment against purchaser as tenant.]—(1) If B. claiming as co-heir with C. establish his right by a verdict against T., the actual tenant under C., & afterwards contracts to sell his moiety to T. the verdict is not conclusive as to the title upon T. as purchaser, but T. may still insist on an objection, which says, that neither B. nor C. is proved to be entitled to the premises as heir.

(2) A vendor is bound to use all reasonable diligence to make a good title; nor will the ct., without the consent of the purchaser, excuse the vendor from making a good title, on the terms of discharging the purchaser from his contract.—

HAWKINS v. SHEWEN (1823), 1 L. J. O. S. Ch. 148.

1397. Vendor claiming through descent recited in deeds—Must produce extrinsic evidence of recitals or possession.]—A conveyance to a purchaser in 1793, from persons residing in Bermuda, of lands then in their possession, & to which, subject to an outstanding but satisfied mtge. term, they claimed title under an entail created in 1732, through a descent recited in the deeds, a subsequent assignment of the mtge. term from the mtgee. to the purchaser, & uninterrupted enjoyment under his conveyance, will not enable him to make a good title; if unsupported by extrinsic evidence of the pedigree recited in the deeds, or of possession, prior to 1793, conformable to that pedigree.—*FORT v. CLARKE* (1826), 1 Russ. 601; 38 E. R. 231.

1398. Title depending on surrender of lease—Necessity for proof of vendor's title to lease surrendered.]—On the sale of leaseholds for lives, held under a lease granted in 1815, by an eleemosynary corp., it appeared that the lease stated that it was granted in consideration of the surrender of a former lease granted to two persons in 1769, & which was also stated to be then legally vested in the grantee of the lease of 1815:—*Held*: the vendors were not only bound to produce the lease of 1769, but also to show that that lease, at the time of the surrender, absolutely belonged to the grantee of the lease of 1815.—*HODGKINSON v. COOPER* (1846), 9 Beav. 304; 15 L. J. Ch. 160; 6 L. T. O. S. 451; 10 Jur. 39; 50 E. R. 361.

1399. Vendor claiming through co-heiresses—Presumption of death of child unmarried.]—*HEMMING v. SPIERS* (1847), 15 Sim. 550; 9 L. T. O. S. 194; 11 Jur. 294; 60 E. R. 732.

1400. Title depending on particular fact—Fact must be proved.]—*MULLINGS v. TRINDER*, No. 1191, *ante*.

1401. Quality of evidence required—Whether such as would be admissible in ejectment action.]—I do not entirely assent to the proposition that a vendor is in every case bound to supply evidence which would be admissible in an action for ejectment (*PARKER, J.*).—*HALKETT v. DUDLEY (EARL)*, [1907] 1 Ch. 590; 76 L. J. Ch. 330; 96 L. T. 539; 51 Sol. Jo. 290.

Annotations:—*Refd.* *Berners v. Fleming*, [1925] 1 Ch. 264. *Mentd.* *Banfield v. Plead* (1911), 55 Sol. Jo. 649; *Procter v. Pugh*, [1921] 2 Ch. 256.

On sale of copyholds.]—*See* *COPYHOLDS*, Vol. XIII., pp. 111, 112, Nos. 1414–1424.

B. Proof of Particular Matters.

See, generally, *EVIDENCE*, Vol. XXII., pp. 19 *et seq.*

1402. Acknowledgment of married woman—Necessity for proof of certificate filed.]—Where a

from the Crown, dated four years after his entry, & setting out fact of allotment having been made to individual of same name as the person from whom deft. purchased.—*MILLER v. LANTY* (1840), 1 N. S. R. (1 Thom.) 161.—*CAN.*

i. Possession—By descent.]—Possession by descent is possession under colour of title.—*SMYTH v. McDONALD* (1863), 5 N. S. R. (1 Old.) 274.—*CAN.*

g. —.]—*ROBERTSON v. DALEY* (1886), 11 O. R. 352.—*CAN.*

h. Registered title—One deed unregistered.]—*KITCHEN v. MURRAY* (1865), 16 C. P. 69.—*CAN.*

k. Warrant or licence for sale.]—Where it is necessary to prove title under a deed given upon a sale of land for taxes, the production of the warrant directing the sale, issued by the

treasurer to the sheriff, is sufficient evidence of the taxes having been in arrear for the periods therein mentioned.—*CLARK v. BUCHANAN* (1878), 25 Gr. 559.—*CAN.*

l. —.]—An administrator's deed duly proved & registered under 3 Vict. c. 61, s. 56, reciting all the facts required by the statute, & having the affidavit of the administrator indorsed thereon that the premises mentioned in the deed had been duly advertised & sold according to law, is not sufficient proof of title in one claiming thereunder without proof of the licence to sell.—*JOHNSON v. CALNAN* (1907), 3 E. L. R. 65; 38 N. B. R. 52.—*CAN.*

m. Vesting order—Reasons for making must be shown.]—A vesting order made in a chancery suit, vesting all the estate of O., including the land in question in pltf., was sufficient proof

of pltf.'s title without showing why it was made.—*GORDON v. MCPHAIL* (1872), 32 U. C. R. 480.—*CAN.*

n. Instrument void on its face—Cloud on title.]—The rule is, that instruments void upon the face of them will not be ordered to be removed as forming a cloud upon the title.—*HURD v. BILLINTON* (1857), 6 Gr. 145.—*CAN.*

o. Necessity to show lives in existence—At time of contract.]—Under a contract to make out a good title to a lease for lives renewable for ever, the vendor must show who are the lives in existence at the time of the contract.—*ANDERSON v. HIGGINS* (1884), 1 Jo. & Lat. 718.—*IR.*

PART V. SECT. 5, SUB-SECT. 8.—B.

p. Sufficiency of proof of title—Verbal declarations.]—The verbal

deed acknowledged by a married woman, under Fines & Recoveries Act, 1833 (c. 74), forms an essential part of a title, a good title is not made out to a purchaser by the mere production of the deed, with an indorsement thereon of an acknowledgment before a judge; proof must also be given of a certificate of such acknowledgment filed of record in the Common Pleas, pursuant to Fines & Recoveries Act, 1833 (c. 74), s. 85.—*JOLLY v. HANDCOCK* (1852), 7 Exch. 820; 22 L. J. Ex. 38; 19 L. T. O. S. 170; 16 Jur. 550; 155 E. R. 1182.

Annotations:—*Reid*, *Bankes v. Ollerton* (1854), 10 Exch. 168; *Re A Married Woman* (1867), 36 L. J. C. P. 233.

1403. ——— **Effect of omission to file.**—B., a married woman, joined in selling land in 1844. The necessary certificate of acknowledgment & affidavit of verification were signed & sworn, but not filed, as required by Fines & Recoveries Act, 1833 (c. 74), & rules thereunder. A successor of the purchaser having resold in 1875, the defect in title was discovered, & the intending purchaser declined to complete unless it should be remedied. B. had died in 1857:—*Held*: the certificate & affidavit might be filed *nunc pro tunc*.—*Re BLAIR, Ex p. WARING* (1875), 32 L. T. 731.

See, now, Law of Property Act, 1925 (c. 20), s. 167.

Admittance to copyholds.—*See* COPYHOLDS, Vol. XIII., p. 139, Nos. 1755–1759.

1404. Agreement for lease—Draft signed by lessee not sufficient—Though coupled with possession.—A vendor stipulated that he would show title under an agreement for a lease. It appeared that there was no agreement signed by the lessor & lessee, but a draft or paper, signed only by the lessee, & which document came out of the lessee's possession, was produced. He, the lessee & vendor, alleged that he had taken possession under this alleged agreement:—*Held*: this was not sufficient. The purchaser could not be compelled to take an equitable title under the alleged agreement, coupled with possession, but was entitled to strict evidence that such an agreement had been entered into.—*HOUGHTON v. BANKART* (1861), 5 L. T. 307.

1405. Default by mortgagor—Declaration of

declaration of the grantee of land that he has sold to a person under whom deft. claims, is not sufficient to show title out of the grantee.—*DOR d. THOMPSON v. TODD* (1851), 7 N. B. R. (2 All.) 261.—*CAN.*

q. ———]—Where pltf. proved that he had leased to B., & that after he had left deft. went in; that deft. offered to purchase at the valuation of a person named, & after the commencement of this action offered \$800 for the place:—*Held*: sufficient evidence to go to the jury, without further proof of pltf.'s title.—*PENNINGTON v. BROWNLEE* (1868), 28 U. C. R. 189.—*CAN.*

r. Lessor's title.—Where deft., in his notice of title, claimed as purchaser through M., & pltf., in proving his title, put in a lease from M. to himself:—*Held*: it was unnecessary for pltf. to show M.'s title.—*BRANDON v. CRAWTHORNE* (1860), 19 U. C. R. 368.—*CAN.*

t. Deed from company.—Under 27 & 28 Vict. c. 100, a deed from the co., dated Feb. 17, 1835, in the form given by the Imperial Act, 9 Geo. 4, c. 51, & under the seal of the attorneys of the co., was held proved by its mere production, & sufficient to pass the fee.—*FELL v. SOUTH* (1864), 24 U. C. R. 196.—*CAN.*

u. Execution of deeds.—On the investigation of title between vendor

& vendee, under the ordinary jurisdiction of the ct., it is not usually necessary to prove the execution of deeds produced.—*BRADY v. WALLS* (1871) 17 Gr. 699.—*CAN.*

b. Proof of filing of bill of specific performance.—In ejectment:—*Held*: it was no admission of the title of the party through whom deft. claimed, that the party through whom pltf. derived title had, long after his title by possession had matured, filed a bill in chancery against the former for specific performance of an agreement for sale of the land in question to him.—*MULHOLLAND v. CONKLIN* (1872), 22 C. P. 372.—*CAN.*

c. Proof that taxes were due.—Where in order to sustain a party's case it is necessary to prove title under a sheriff's deed for taxes, he must show that an actual sale did take place, & that at the time of the sale under which he claims there were some taxes due, notwithstanding the time limited by 32 Vict. c. 36, s. 155, for questioning the deed has elapsed.—*PROUDFOOT v. AUSTIN* (1874), 21 Gr. 566.—*CAN.*

d. Certificate of municipal treasurer.—*Re MORTON & YORK COUNTY* (1884), 7 O. R. 59.—*CAN.*

e. Proof of creation of corporation.—Where title is set up under a deed from a foreign corp., there must be proof

mortgagee alone not sufficient.—*HOBSON v. BELL, GLYNN v. BELL*, No. 667, *ante*.

Entries in manor court rolls.—*See* COPYHOLDS, Vol. XIII., pp. 39, 40, Nos. 448–466.

Marriage.—*See* HUSBAND & WIFE, Vol. XXVII., pp. 71–73, Nos. 559–579; EVIDENCE, Vol. XXII., pp. 337, 338, Nos. 3379–3388.

1406. Payment of succession duty—Sufficiency of certificate from Inland Revenue.—Where trustees for sale under a will, who had entered into a contract with a purchaser, & paid legacy duty on the amount of the purchase-money, afterwards vested the estate in the person to whom, subject to the trust, the land was devised, whereby he became the proper party to convey, *semble*: succession duty, & not legacy duty, ought to have been paid:—*Held*: a certificate from the Inland Revenue Office that the duty was paid, discharged the land, & the purchaser could require no further evidence on the subject.—*HOWE (EARL) v. LICHFIELD (EARL)* (1867), 2 Ch. App. 155; 36 L. J. Ch. 313; 16 L. T. 436; 15 W. R. 323, L. C.

Power of attorney.—*See* AGENCY, Vol. I., pp. 385, 386, Nos. 897–900.

Redemption of land tax.—*See* LAND TAX, Vol. XXX., pp. 309, 310, Nos. 97–101.

Registers.—*See* EVIDENCE, Vol. XXII., pp. 334–347, Nos. 3320–3513.

Surrender of copyholds.—*See* COPYHOLDS, Vol. XIII., pp. 132, 133, Nos. 1652–1659.

Testamentary instrument.—*See* WILLS.

C. Recitals as Evidence.

See Law of Property Act, 1925 (c. 20), s. 15 (6).

1407. Whether evidence of seisin—Recital in deed more than sixty years old.—*PARR v. LOVINGROVE*, No. 1163, *ante*.

1408. ——— **Recital in deed more than twenty years old.**—(1) A contract for sale of a house provided that the purchaser should be entitled to immediate possession upon depositing the purchase-money, but the purchaser was not to be considered as accepting the vendor's title:—*Held*: this clause had the same operation as Lands Clauses Act, 1845 (c. 18), s. 85, & the purchaser was entitled upon depositing the purchase-money, not only to take possession, but to pull

of the creation of the corp., in the country in which it professes to have been incorporated.—*YOUNG v. MILNE* (1857), 28 N. B. R. 186.—*CAN.*

1. Nature of proof required.—It appeared that the vendor, although by the contract he had limited himself to certain proofs, had elected to make out a title perfect both as to abstract & verification, in order that he might compel the purchaser to accept it:—*Held*: the purchaser was entitled to have the title made out as strictly & completely as if the vendor had not in any way guarded himself by the terms of the contract.—*McINTOSH v. ROGERS* (1888), 12 P. R. 389.—*CAN.*

g. Probate of will.—It is not necessary in order to establish the title of a devisee of land that the will containing the devise shall be admitted to probate by a surrogate ct.—*Re HOLWEY & ADAMS*, [1926] 2 D. L. R. 960; 58 D. L. R. 507.—*CAN.*

h. Poor rate.—In all cases purchasers are entitled to have proof that the poor rate is paid up.—*ANON.* (1850), 15 L. T. O. S. 27.—*IR.*

PART V. SECT. 5, SUB-SECT. 8.—C.

k. Whether evidence of facts recited—Recital in deeds more than twenty years old.—*GUNN v. TURNER* (1907), 8 O. W. R. 799; 13 O. L. R. 158.—*CAN.*

Sect. 5.—Proof and investigation of title: Sub-sect. 8, C.; sub-sect. 9, A & B. (a).]

down the house, that being the object for which the purchase was effected.

(2) Under Vendor & Purchaser Act, 1874 (c. 78), s. 2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee simple, is sufficient evidence of that fact, & no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; & in such cases a forty years' title is not required. —*BOLTON v. LONDON SCHOOL BOARD* (1878), 7 Ch. D. 766; 47 L. J. Ch. 461; 38 L. T. 277; 42 J. P. 647; 26 W. R. 549.

Annotations:—As to (2) Dtd. & Distd. Re Wallis & Grout's Contract, [1906] 2 Ch. 206. Generally, Mentd. Wimbledon L. B. v. Croydon R. S. A. (1886), 55 L. T. 106; Boyce v. Gill (1891), 64 L. T. 824.

1409. ———.]—Re WALLIS & GROUT'S CONTRACT, No. 1318, ante.

1410. Whether evidence of facts recited—Recitals in deeds less than twenty years old.]—Where the vendor of land in India is bound by his contract to deduce "a marketable title free from all reasonable doubts," & where there is no evidence of its being customary for Indian conveyancers to provide in contracts of sale that recitals in deeds dated less than twenty years before the contract should be sufficient to satisfy a purchaser as to the truth of the facts recited, the purchaser is not bound to accept such recitals, as sufficient proof of the facts recited. —*SIRINIVASDAS BAVRI v. MEHERBAI* (1916), 33 T. L. R. 106, P. C.

1411. Whether evidence of power of sale—Recital not shown to be inaccurate.]—Re MARSH & GRANVILLE (EARL), No. 1056, ante.

1412. Not proof of equitable title—Recital in voluntary conveyance by administratrix—As against heir-at-law.]—The principle compelling a purchaser to accept as correct a recital in a conveyance forming part of the vendor's title that the grantee has become entitled in equity to the property being conveyed rests upon the grantor being the person who on the face of the abstract was the legal & beneficial owner of the property so that the recital operated as an admission binding on him.

When therefore an abstract of title traced the absolute legal & beneficial interest in the property being sold into C. & after his death his administratrix purported voluntarily to convey the property to G. by a deed containing a recital that A., a predecessor in title of the vendor, had become entitled in equity to the property:—*Held*: (1) the purchaser was entitled to go behind the recital & require it to be shown how A. had become entitled in equity, for the administratrix could not by her admission bind C.'s heir-at-law, on whom, upon the face of the abstract, the beneficial interest in the property had devolved; (2) the absence from the abstract of any record of how A. had become entitled in equity did not constitute a defect in title but merely a gap in the abstract, & the purchaser was not entitled to rescind the contract without giving the vendor a reasonable time to supply a complete abstract of title. —*Re BALEN & SHEPHERD'S CONTRACT, [1924] 2 Ch. 365; 94 L. J. Ch. 97; 132 L. T. 606; 40 T. L. R. 766; 68 Sol. Jo. 791.*

SUB-SECT. 9.—ACCEPTANCE OF TITLE BY PURCHASER.

A. In General.

1413. Acceptance induced by misrepresentations—Not binding on purchaser.]—Consent to accept a title given under the influence of representations made on the part of the vendor, which turn out to be inaccurate, will not bind a purchaser.

If a purchaser, entitled by his agreement to possession, exercises acts of ownership, under the persuasion that the title is perfect, & that nothing will intervene to prevent the completion of the agreement, he is not thereby precluded from having a reference on the question of title, as to objections not appearing on any abstract delivered to him prior to the exercise of the acts of ownership. —*JOHNS v. CLAUGHTON* (1824), 2 L. J. O. S. Ch 113.

1414. Acceptance subject to single objection—Whether waiver of right to object generally.]—Upon a bill filed by the vendor for the specific performance of a contract, it appeared that deft., in the course of correspondence between the solrs. & upon a case stated on his part for the opinion of counsel expressed himself willing to accept the title if a particular objection then referred to were removed. That objection not being removed, the bill was filed, & the ct. ruled that the reference to the master as to the title must be in general terms, & not confined to the particular objection. —*LESTURGEON v. MARTIN* (1834), 3 My. & K. 255; 40 E. R. 97.

1415. Acceptance by joint purchaser—Not binding on co-purchaser.]—A bill was filed for the specific performance of a contract, by one of two joint purchasers, against the other purchaser & the vendor. An objection taken by deft., the vendor, on the ground of multifariousness, & that pltf. could not support his bill, unless the joint purchaser joined him as a co-pltf. therein, was overruled. *Scmble*: the acceptance of a title by a joint purchaser, is no answer to the right of the other purchaser to have a good title proved. —*MACKRETH v. DUNN* (1841), 10 L. J. Ch. 367, L. C.

1416. Right to object after acceptance—Sale of leaseholds—Restriction not included in lease—Subsequent attempted enforcement.]—Leaseholds were sold under the ct., described as "a bonded sugar refinery," & the lease was referred to, which contained no such restriction.

The abstract showed a prior agreement for the lease of the premises to be used "for refining sugar in bond." The purchaser accepted the title, paid his purchase-money into ct., & was let into possession. The lessors afterwards instituted a suit to rectify the lease, by introducing the restriction. The ct. refused to compel the final completion of the purchase, or part with the purchase-money, until the result of the suit was known. —*BENTLEY v. CRAVEN* (1853), 17 Beav. 204; 21 L. T. O. S. 215; 1 W. R. 401; 51 E. R. 1011.

B. What Amounts to Acceptance.

(a) In General.

1417. No objection to abstract—Possession taken.]—Specific performance decreed against a purchaser, without a reference as to the title; upon possession, & no objection made to the

PART V. SECT. 5, SUB-SECT. 9.—A.

1. Right of purchaser to object to conveyance—Although title accepted.]—Notwithstanding that a decree declares that deft. "has accepted the title of pltf.," deft. has a right to object to a conveyance by pltf. alone if it appear that the legal estate is partly out of

him. —*RAE v. GEDDES* (1871), 3 Ch. 404.—CAN.

m. Whether bar to claim for compensation for damage.]—CONNOLLY v. KEATING (No. 2), [1903] 1 I. R. 356.—IR.

n. Necessity of tendering clear title—Waiver of by refusal to pay.]—The

necessity of tendering a purchaser of land a clear certificate of title is waived by the purchaser's statement to the vendor, on payment being demanded, that he does not intend to pay. —*GOOSE LAKE GRAIN & LUMBER CO., LTD. v. WILSON, [1918] 2 W. W. R. 1018; 11 Sask. L. R. 274; 42 D. L. R. 776.—CAN.*

abstract.—**FLEETWOOD v. GREEN** (1809), 15 Ves. 594; 33 E. R. 879.

Annotations.—**Consd.** *Margarvine of Anspach v. Noel* (1816), 1 Madd. 310. **Distd.** *Burroughs v. Oakley* (1819), 3 Swan. 159.

1418. —.—.]—Specific performance decreed against a purchaser, without a reference as to the title; upon possession, a correspondence & no objection to the title till two years after abstract delivered.—**ANSPACH (MARGRAVINE) v. NOEL** (1816), 1 Madd. 310; 56 E. R. 114.

Annotations.—**Distd.** *Burroughs v. Oakley* (1819), 3 Swan. 159. **Appl.** *Sibbald v. Lowrie* (1853), 2 Eq. Rep. 485. **Consd.** *Bown v. Stenson* (1857), 24 Beav. 631. **Refd.** *Osborne v. Harvey* (1841), 11 L. J. Ch. 42; *Corless v. Sparling* (1873), 21 W. R. 876.

1419. Conditional approval by purchasers' counsel.—**DEVERELL v. BOLTON**, No. 1459, *post*.

1420. Continuation of negotiations—Whether waiver of objection—When objection insisted upon.—Specific performance of a purchase agreement refused, no good title being made to a part of the estate, which, though very small in proportion to the whole of the purchase, was essential to its enjoyment; & deft. who was let into possession being afterwards turned out by pltf.

A man by going on to treat does not waive an objection he is continually insisting upon (**PLUMER, V.-C.**).—**KNATCHBULL v. GRUEBER** (1815), 1 Madd. 153; 56 E. R. 58; *affd.* (1817), 3 Mer. 124, L. C.

Annotations.—**Consd.** *Casamajor v. Storde* (1834), 2 My. & K. 706. **Distd.** *Croome v. Lediard* (1834), 2 My. & K. 251; *Colby v. Gadsden* (1865), 34 Beav. 416. **Consd.** *Re Arnold, Arnold v. Arnold* (1880), 14 Ch. D. 270; *Lee v. Rayson*, [1917] 1 Ch. 613. **Refd.** *Bowyer v. Bright* (1824), *M'Cle.* 479; *Jacobs v. Revell*, [1900] 2 Ch. 858.

1421. Preparation of conveyance.—A purchaser was held entitled to an investigation of the vendor's title, notwithstanding possession taken, acts of ownership incident to possession, & preparation of a conveyance.

The preparation of the conveyance in this case is an important fact, as amounting to evidence that the parties had arrived at a stage of proceeding subsequent to the question of title, & must be supposed, therefore, to have removed or abandoned all objections. But I cannot satisfy myself that that fact alone, in the circumstances of this case, is sufficient to exclude the common equity (**PLUMER, M.R.**).—**BURROUGHS v. OAKLEY** (1819), 3 Swan. 159; 36 E. R. 815.

Annotations.—**Consd.** *St. Paul v. Birmingham, Wolverhampton & Stour Valley Ry.* (1853), 17 Jur. 1176. **Apprvd.** *Simpson v. Sadd* (1854), 4 De G. M. & G. 665. **Consd.** *Bown v. Stenson* (1857), 24 Beav. 631. **Refd.** *Blacklow v. Laws* (1842), 2 Hare, 40; *Corless v. Sparling* (1873), 21 W. R. 876.

1422. Failure to require production of landlord's title—After receipt of original lease.—**CLIVE v. BEAUMONT**, No. 27, *ante*.

1423. Inspection & approval of original lease.—**SMITH v. CAPRON**, No. 1243, *ante*.

PART V. SECT. 5, SUB-SECT. 9.— B. (a).

o. Delay.—An abstract of title & the title deeds having been sent to a purchaser in Nov. 1869, at his own request, for the purposes of examination & advice, he retained the same for a considerable time, intimated no objection to the title, & in correspondence with the vendor's solrs. implied that he was content with the title; but in June, 1870, he claimed the right of investigating it afresh.—**Held**: by the lapse of time & the letters which he had written he had impliedly accepted the title.—**RAE v. GEDDES** (1871), 18 Gr. 217; 3 Ch. Ch. 404.—**CAN.**

p. Purchaser entitled to possession on accepting title—Undisturbed possession.—In a contract for the sale of land it was of such "that the pur-

chaser should be entitled to possession of the land after payment of the deposit, & upon the acceptance in writing of the title to such land." The purchaser accepted the title of the vendor, but it was discovered that a third person was in adverse possession of the land.—**Held**: the acceptance of title did not relieve the vendor from his obligation to give possession & the purchaser under such a contract was entitled to demand to be put in undisturbed possession.—**ISAACS v. MCGUIRE** (1888), 14 V. L. R. 815.—**AUS.**

q. Willingness to accept title—If hearing of action.—**CUTRAH v. RAPELJE** (1851), 2 Gr. 342.—**CAN.**

r. What amounts to acceptance—Giving mortgage.—Writing a letter apologetical for non-payment, accepting a release of dower from a person whose title is identical, or giving a mtge. to

1424. Comparing abstract with deeds.—**PEGG v. WISDEN**, No. 666, *ante*.

1425. Failure to demand abstract.—By an agreement dated in Aug. 1849, A. agreed to sell to B., & B. agreed to purchase an estate subject to a mtge. created by A.; & B. agreed to indemnify A. against the mtge. debt. It was stipulated that immediate possession should be taken by B., & that A. should deliver an abstract within a month. By a subsequent agreement, B. agreed to pay for an abstract when required by him. B. took possession of the property, & kept it for two years, during which time he did not require an abstract of title. B. having suffered the interest on the mtge. money to get into arrear, A. had to pay some interest to the mtgees., & the mtgees. had entered into possession of the property. In a suit instituted by A. for specific performance of the agreement, with an indemnity against the mtge. debt to be given by B.:—**Held**: under the circumstances, B. must be held to have accepted the title, & to have waived all right to investigate it.—**SIBBALD v. LOWRIE** (1853), 2 Eq. Rep. 485; 23 L. J. Ch. 593; 22 L. T. O. S. 155; 18 Jur. 141; 2 W. R. 89.

1426. —.—.]—J. S. entered into a negotiation with pltf. for the purchase & transfer to him of pltf.'s business & property, & on Jan. 26, 1857, the terms of the agreement were, by a son of J. S., reduced into writing, in the form of a letter from pltf. to J. S. By that letter pltf. agreed to the terms proposed as to certain houses & rents, & agreed to give up to J. S. all deeds, etc., which he might require to carry on, & that might be necessary for him to take to, the whole of his business as a common brewer, & to sign & hand over all the necessary leases, etc., that might enable J. S. to have & possess the whole & sole control over the freehold, leasehold & copyhold property of which pltf. was possessed or interested in, or about to become interested in, save the right of sale of his freehold property. Pltf. was to use his best endeavours to secure to J. S. the whole of his trade, on the understanding that J. S. paid him the further sum of £100, or such sum as should make up the deficiency between the two sums of £800 & £900, the latter being the amount which pltf. considered his brewhouse, etc., & brewing utensils to be worth. If the brewhouse, etc., & utensils should not fetch £900, & if the brewhouse, etc., should not be sold within six months, J. S. agreed to pay interest at 4 per cent., on the sum of £550, being the value of that property without the utensils. The document contained (*inter alia*) a stipulation empowering J. S. to receive the rents; & at the foot of it W. S. S., a son of J. S., & on his behalf, signed his name, agreeing to the terms, but it was not signed by pltf., nor did it contain his

secure the payment of the purchase-money, are circumstances indicating the approval of the title.—**MCDONALD v. GARRETT** (1860), 8 Gr. 290.—**CAN.**

t. Taking conveyance or vesting order.—A purchaser by taking a conveyance or vesting order waives all objections to the title.—**BULL v. HARPER** (1873), 6 P. R. 36.—**CAN.**

a. Defect discovered after conveyance—Effect of.—**DINSMORE v. SHACKELTON** (1876), 26 C. P. 604.—**CAN.**

b. Waiver of right to object—Clear proof necessary.—It requires clear proof to establish waiver by a purchaser of the right to object to the title.—**DARBY v. MACGREGOR** (1907), *M. C. C.* 47.—**CAN.**

c. —.—.]—Where an owner of land subject to a reservation of coal

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name. A duplicate copy was, however, signed by him & given to J. S., who subsequently took possession of some part of the property comprised in the agreement, including the brewery, & received the rents of other parts of the property, & was introduced to pltf.'s customers, etc. J. S. also took possession of some of the utensils & casks, & others were sold, both by him & pltf. on J. S.'s behalf. J. S. died in Feb. 1858, having bequeathed all his estate to deff., who refused to complete the purchase of the brewhouse & utensils. But, on bill for specific performance:—*Held*: (1) according to the true construction of the agreement, deff. was the purchaser of the brewhouse & utensils at the price of £900; she, upon £550, part thereof, must pay interest at 4 per cent., from the end of six months from July 26, 1857; & she must account for & pay £350, for the utensils, without interest to the date of the decree; & ordered a general account to be taken; (2) the right to an investigation of the title of the brewery had been waived by the purchaser.

Then as to the question of title, I think that is a case to which, by the acts & conduct of the purchaser, the right to an investigation of the title is entirely waived. There has been possession; there has been no question raised about the title—no abstract called for, & nothing, in short, done (STUART, V.-C.).—*DELLER v. SIMONDS* (1859), 34 L. T. O. S. 43; 5 Jur. N. S. 999.

1427. Payment of purchase-money—Into court—Sale by order of court.]—*M'CULLOCH v. GREGORY*, No. 696, *ante*.

1428. No question raised as to title.]—*DELLER v. SIMONDS*, No. 1426, *ante*.

1429. Delay.]—Circumstances of delay considered not to amount to a waiver of requisitions on title.—*COOCH v. WALDEN* (1877), 46 L. J. Ch. 639.

1430. Effect of constructive notice.]—I therefore think that there was no actual notice in fact, & not sufficient constructive notice, so that whatever might have been the position had deff. really known what had gone before, when he signed the contract or when he sent the draft conveyance, there cannot be said to be any waiver of the objection to title (ALVERSTONE, C.J.).—*WEALDSTONE URBAN DISTRICT COUNCIL v. EVERSHED* (1905), 69 J. P. 258; 3 L. G. R. 722, D. C. *Annotation*:—*Mentd.* Friern Barnet U. C. v. Adams, [1927] 2 Ch. 25.

sells it under an agreement for sale without reserving the coal in the description of the land or in the covenant for title, the purchaser may, by his conduct at the time of the agreement or by his subsequent conduct be found to have waived any right to object to the vendor's title.—*BURKE v. POPOFF* (Sask.), [1923] 2 W. W. R. 618.—*CAN.*

d. Title in wife's name.]—*BEECH v. MULINS* (1916), 33 W. L. R. 721; 9 W. W. R. 1168.—*CAN.*

e. Previous acts of purchaser.]—Pltf. cannot, after proceeding before the master on a reference as to title, rely on previous acts of the purchaser, as binding him to his purchase notwithstanding a report of bad title.—*HARWOOD v. BLAND* (1842), Fl. & K. 540.—*IR.*

PART V. SECT. 5, SUB-SECT. 9.—B. (b).

1. Whether waiver of objections to title—Making alterations in buildings.]—The purchaser of real estate, on which was a grist mill, took possession,

& while in occupation made several alterations in the property; took the mill-gearing & machinery from the premises, & removed the partitions in the mill, intending to convert it into a planing factory. The expense of restoring the property as it was when he took possession was variously estimated at from \$100 to £500.—*Held*: the purchaser had waived his right to call for a good title.—*COMMERCIAL BANK v. MCCONNELL* (1859), 7 Gr. 323.—*CAN.*

g. —Erection of buildings.]—*DENISON v. FULLER* (1864), 10 Gr. 498.—*CAN.*

h. —.—Where a contract for sale of building lots provided for immediate possession, & for the payment of the purchase-money in eight annual instalments:—*Held*: the erection of two workshops on the lots by the vendees, was no waiver of their right to examine the title; nor was the division when another time of another lot said to depend on the same title.—*DARBY v.*

Waiver of objection to length of title.]—*See* No. 1288, *ante*.

Where particular conditions of sale.]—*See* Part IV., Sect. 2, sub-sect. 5, *ante*.

(b) Acts of Ownership.

1431. Whether waiver of objections to title.]—*BURROUGHS v. OAKLEY*, No. 1421, *ante*.

1432. —Acts committed since discovery of objection.]—Purchaser in possession under an agreement, having exercised acts of ownership, but objecting to the title, ordered to pay in the purchase-money. Slighter acts of ownership sufficient, where they have been committed since the discovery of an objection to title.—*DIXON v. ASTLEY* (1816), 1 Mer. 133; 19 Ves. 564; 35 E. R. 625, L. C.

Annotations:—*Distd.* *Bonner v. Johnston* (1816), 1 Mer. 366. *Apld.* *Pope v. G. E. Ry.* (1866), L. R. 3 Eq. 171. *Refd.* *Blackburn v. Stace* (1821), 6 Madd. 69.

1433. —Acts prompted by misrepresentations.]—*JOHNS v. CLAUGHTON*, No. 1413, *ante*.

1434. —Possession taken under contract—Subject to good title being made.]—*FRASER v. BENNETT* (1837), 1 Jur. 473.

1435. —Granting lease.]—Looking at all the facts, I can arrive at no other conclusion than that resp. intended to waive all objections, & did accept the title. The lease he made to A. is the main circumstance on which I rely (ERSKINE, J.).

The purchaser very properly contends, that he has a right to a perfect title, & to an investigation into it, before he is ordered to complete his purchase. But circumstances may have happened to debar him of that right. The bare fact of taking possession has over & over again been held not to be a waiver of objections to title (SIR G. ROSE).—*Re BARRINGTON, Ex p. SIDEBOTHAM* (1835), 4 Deac. & Ch. 693; 2 Mont. & A. 146; 4 L. J. Bey. 27; Ct. of R.

1436. —Dealing with property.]—Where a purchaser deals with the property contracted to be purchased, he waives his right to object to the title.—*HAYDON v. BELL* (1838), 1 Beav. 337; 2 Jur. 1008; 48 E. R. 970.

1437. —Making structural alterations.]—*Re GLOAG & MILLER'S CONTRACT*, No. 1228, *ante*.

(c) Taking Possession.

1438. Whether amounting to waiver of objections to title.]—The purchaser might have said he would not have anything to do with the estate, until he got a conveyance. But that is not the course he

GREENLESS (1865), 11 Gr. 351.—*CAN.*
k. —Purchaser mending leak in mill gate.]—*CLARKE v. MCKAY* (1872), 32 U. C. R. 583.—*CAN.*

l. —Repairs & improvements.]—The purchaser waives any objection to the title of the vendor if he takes possession of the property & exercises acts of ownership by making repairs & improvements.—*WALLACE v. HESSLEIN* (N. S.) (1898), 29 S. C. R. 171.—*CAN.*

m. —.—A purchaser of land who takes possession & exercises acts of ownership by ploughing the land & making improvements waives any objection to the title of the vendor.—*ROGERSON & MOSS v. COSH* (1917), 24 B. C. R. 367; 37 D. L. R. 694.—*CAN.*

n. —Land ploughed by purchaser.]—*WISELY v. MCGRUER & KERR* (1909), 28 N. Z. L. R. 481.—*N.Z.*

PART V. SECT. 5, SUB-SECT. 9.—B. (c).

1439 i. Whether amounting to waiver of objections to title.]—Possession & user of the premises do not deprive

took. He enters into possession; an act, that generally amounts to a waiver ever of objections to title. He proceeds upon the supposition, that the contract will be executed; & therefore agrees, that from that day he will treat it as if it was executed. The act of taking possession is an implied agreement to pay interest; for so absurd an agreement, as that the purchaser is to receive the rents & profits, to which he has no legal title, & the vendor is not to have interest, as he has no legal title to the money, can never be implied (GRANT, M.R.).—FLUDYER v. COCKER (1805), 12 Ves. 25; 33 E. R. 10.

Annotations:—**Reid**. Ballard v. Shutt (1880), 15 Ch. D. 122. **Mentd.** Swift v. Board of Trade, [1925] A. C. 520.

1439. —.]—BURROUGHS v. OAKLEY, No. 1421, *ante*.

1440. —.]—If a purchaser after the delivery of the abstract, on the face of which, part of the estate appears to be subject to a right of sporting, not mentioned in the particulars of sale, enters into possession, he waives that objection.—BURNELL v. BROWN (1820), 1 Jac. & W. 168; 37 E. R. 339.

Annotations:—**Consd.** Edwards-Wood v. Marjoribanks (1860), 7 H. L. Cas. 807. **Reid**. Smithson v. Powell, Powell v. Smithson (1852), 20 L. T. O. S. 105; *Re* Gloag & Miller's Contract (1883), 48 L. T. 629.

1441. —.]—*Primâ facie* taking possession, after an abstract has been delivered, & not in pursuance of any provision in the contract, is a waiver of the objections appearing on the abstract, & it lies on the purchaser to rebut that presumption.

A purchaser had taken possession, by his tenant & not under the contract, after an abstract had been delivered, & he had made no objection to the title till long after, when a suit was threatened, & he had promised payment of part of the purchase-money:—**Held**: (1) by his conduct & on the correspondence, he had waived all objections to the title arising upon that abstract; (2) he had not waived any objection not arising on the abstract.—BOWN v. STENSON (1857), 24 Beav. 631; 53 E. R. 501.

1442. —.]—**Not conclusive**.—*Re* BARRINGTON, *Ex p.* SIDEBOTHAM, No. 1435, *ante*.

1443. —.]—**No objection made to abstract**.—FLEETWOOD v. GREEN, No. 1417, *ante*.

1444. —.]—**Possession taken under contract—Possession continued without objection**.—A purchaser, who under the agreement took possession in 1814, admitted by his answer, that in that year an abstract of title was delivered to him, & approved by his counsel:—**Held**: he had a right to a reference of the title to the master, though he has all along continued in possession, & never taken any objection to the title.—BOXHALL v. JACKSON (1825), 2 L. J. O. S. Ch. 100.

1445. —.]—**Subject to title being made**.—A purchaser, by taking possession of property & acting as the owner of it, does not waive objection to the title, when the contract, under which such

possession is taken, proceeds on the supposition that he is to have possession, & provides, at the same time, that a title shall be made to the property.—STEVENS v. GUPPY (1828), 3 Russ. 171; 6 L. J. O. S. Ch. 164; 38 E. R. 540, L. C.

1446. —.]—*Re* GLOAG & MILLER'S CONTRACT, No. 1228, *ante*.

1447. —.]—**No abstract called for**.—SIBBALD v. LOWRIE, No. 1425, *ante*.

1448. —.]—*Re* DELLER v. SIMONDS, No. 1426, *ante*.

1449. —.]—**Before delivery of abstract**.—The mere fact of taking possession does not, either in the case of vendor & purchaser, or in that of lessor & lessee, operate as a waiver of the purchaser's or lessee's right to call for the vendor's or lessor's title, though an intention to waive the right is less probable in the former than in the latter instance.—SIMPSON v. SADD (1854), 4 De G. M. & G. 665; 3 Eq. Rep. 263; 24 L. J. Ch. 562; 24 L. T. O. S. 205; 1 Jur. N. S. 457; 3 W. R. 118; 43 E. R. 668, L. C.

1450. —.]—In 1820, D. & W. being partners, & W. having contracted for the purchase of certain premises, it was agreed that they should be holden as partnership property. In 1823 the partnership was dissolved. No conveyance was ever made to W., there was no deed of partnership & no deed of dissolution. By the terms of the dissolution D. took to the premises & received the rents without let or question from W. until W.'s decease in 1845. In 1847, D. being still in possession, contracted to sell to the N. W. ry. co., it being agreed that D. should give in one month such abstract as the co. should require, & no further; possession to be given to the co. immediately, & the purchase to be completed on that day; interest to be paid on the purchase-money till payment. The co. were immediately let into, & had ever since continued in, possession. In 1852 & 1853 the co. demanded an abstract; pltf. replied that his title was merely possessory. In 1853 the exor. of W. applied to the co. to know what was done with the purchase-money:—**Held**: D. had impliedly undertaken to give a sixty years' possessory title, & the co. had not waived their right to that length of years.—DOUGLASS v. LONDON & NORTH WESTERN RY. CO. (1857), 3 K. & J. 173; 3 Jur. N. S. 181; 69 E. R. 1069.

Annotations:—**Consd.** *Ex p.* Winder (1877), 6 Ch. D. 696. **Reid**. *Re* Metropolitan Street Improvement Act, 1877, *Ex p.* Chamberlain (1880), 14 Ch. D. 323; Wells v. Chelmsford L. B. of Health (1880), 15 Ch. D. 108.

1451. —.]—**Sale by order of court—Taking possession without order of court**.—A purchaser under the decree of the ct. is never let into possession till he has approved the title.

A purchaser under a decree, who takes possession without the order of the ct. by an arrangement with the solr. in the suit, accepts the title.—WILDEN v. ANDREWS (1820), 4 L. J. O. S. Ch. 208.

the vendee of his right to have a good title shown.—CROOKS v. GLENN (1860), 8 Gr. 239.—**CAN.**

1438 ii. —.]—The mere taking possession by a purchaser is not necessarily a waiver of the right to an inquiry as to title.—MITCHELTREE v. IRWIN (1867), 13 Gr. 537.—**CAN.**

1438 iii. —.]—PATTERSON v. IRWIN (1870), 21 C. P. 132.—**CAN.**

1438 iv. —.]—A purchaser who enters into possession of the land purchased, even though he does so by leave of the parties to the suit, is deemed to have accepted the title unless the sanction of the ct. has been obtained to his entering into possession without

waiving his right to call for a good title.—PATTERSON v. ROBB (1873), 6 P. R. 114.—**CAN.**

1438 v. —.]—CURRIE v. RAPID CITY FARMERS' ELEVATOR CO. (1898), 12 Man. L. R. 105.—**CAN.**

1438 vi. —.]—McNIVEN v. PROOTT (1914), 31 O. L. R. 365; 19 D. L. R. 846.—**CAN.**

1438 vii. —.]—A purchaser, who, knowing the state of the title at the time of entering into an agreement to purchase, goes into possession, subdivides the property, & enters into an agreement for the sale of an interest in it, thereby waives all objections to

title.—BOYDELL v. HAINES (1915), 30 W. L. R. 842; 8 W. W. R. 17; 21 D. L. R. 371.—**CAN.**

1438 viii. —.]—Where a purchaser of land not knowing of defects in the vendor's title takes possession with the vendor's consent, such taking of possession is not a waiver of the purchaser's right to call for a good title in the vendor.—WHITNEY v. BELDER (Alta.), [1919] 3 W. W. R. 627; 49 D. L. R. 153.—**CAN.**

o. Thirteen years' possession.—DUNCAN'S LESSEE, GILLIS v. CAMPBELL (1853), James, 48.—**CAN.**

p. Waiver of acceptance by vendor delivering abstract.—Acceptance of

Sect. 5.—Proof and investigation of title: Sub-sect. 9, B. (c); sub-sect. 10, A., B. & C.]

1452. — Long possession—Vexatious objections made.]—Purchaser after long possession & vexatious objections to complete the purchase, held to have waived his right to an investigation of the title.—*HALL v. LAVER* (1838), 3 Y. & C. Ex. 191; 160 E. R. 669.

Annotation:—Distd. Corless v. Sparling (1873), 21 W. R. 876.

1453. — No objection made.]—Where a purchaser who had been in possession for some years made no objection to the title, a specific performance was decreed, & the money ordered to be brought into ct.—*EVERSFIELD v. TROUP* (1847), 9 L. T. O. S. 349.

1454. — —.]—I think, having been so long in possession, viz. near twenty-six years since his requisitions on the abstract were sent in, & being clearly in possession under the contract, & not as tenant in continuation of his holding prior to 1829, as evinced by the payment of so large a portion of the purchase-money, & paying no rent, & making alterations, G. [the purchaser] must be considered to have accepted the title (*WOOD, V.-C.*).—*WALLIS v. WOODYEAR* (1855), 2 Jur. N. S. 179.

1455. — Possession taken with vendor's permission—Pending answer to requisition—Possession delivered up on discovery of misrepresentation.]—Taking possession by a purchaser does not, in all cases, amount to a waiver of a requisition which has not been answered, & therefore, where a purchaser took possession with leave of the vendor pending an answer to a requisition as to the tenure of the property, & the purchaser discovered *aliunde* after taking possession that the description of the property was not correct, & gave up possession immediately insisting on his right to rescind:—*Held*: he was not precluded from rescinding by such taking possession.—*TURQUAND v. RHODES* (1868), 37 L. J. Ch. 830; 18 L. T. 844; 16 W. R. 1074.

1456. Rebuttal of presumption of waiver—Burden of proof—Lies on purchaser.]—*BOWN v. STENSON*, No. 1141, *ante*.

abstract delivered is imperfect, he pays the costs of the suit up to the time of the defects being supplied.

If he sell with a confused title, he must be at the expense of clearing it (*PLUMER, M.R.*).—*WILSON v. ALLEN* (1820), 1 Jac. & W. 611; 37 E. R. 501.

Annotations:—Apld. Flood v. Pritchard (1879), 40 L. T. 873. *Refd. McNicoll v. Kay* (1856), 28 L. T. O. S. 20; *Minton v. Kirwood* (1868), 3 Ch. App. 614. *Mentd. Cooper v. Norfolk Ry.* (1849), 3 Exch. 546; *Ecl. Comrs. v. L. & S. W. Ry.* (1854), 2 C. L. R. 1796.

1459. Liability of purchaser to repay—Expenses incurred before objection.]—Contract for the sale of an existing & a reversionary lease not specifically performed without a production of the title of the lessors. The objection not waived by a premature conditional approbation of the title by the purchaser's counsel; but the expense incurred in making out the title, before this objection was taken, repaid.

It is too much to say, that, where an abstract is laid before counsel, who approves the title, his approbation is to be taken, as against the person consulting him, as a waiver of all reasonable objections (*LORD ELDON, C.*).—*DEVERELL v. BOLTON* (*LORD*) (1812), 18 Ves. 505; 34 E. R. 409, L. C.

Annotations:—Refd. Fildes v. Hooker (1817), 2 Mer. 424; *Spratt v. Jeffery* (1829), 5 Man. & Ry. K. B. 188. *Mentd. Ogilvie v. Foljanibe* (1817), 3 Mer. 53; *Souter v. Drake* (1834), 5 B. & Ad. 992.

1460. Sale by tenant in tail—Costs of special case—Liability of testator's residuary estate.]—Testator devised real & personal estate to his son, J., his heirs, exors. & administrators, his will being that his son should not have power to sell the estates & lands, but that they should go to his son's lawful issue absolutely, & if he should not have any issue him surviving, then over:—*Held*: the son was tenant in tail of the estates, & the costs of a special case rendered necessary by the objections raised by a purchaser of part of the estates must be paid out of testator's residuary estate.—*MARSHALL v. CRIME* (1860), 28 Beav. 375; 29 L. J. Ch. 592; 6 Jur. N. S. 390; 8 W. R. 385; 54 E. R. 410.

B. Expenses of Abstract.

See Law of Property Act, 1925 (c. 20), s. 45 (1), (5).

1461. General rule—Expenses borne by vendor.]—

A vendor is bound at his own expense to produce to the purchaser a proper abstract of title, either for the statutory period of forty years, or for such other period as may be agreed upon, & Conveyancing & Law of Property Act, 1881 (c. 41), s. 3 (6), is not intended to interfere with the performance by the vendor of that duty, but proceeds on the assumption that the vendor has produced such an abstract.

title by the act of the purchaser in going into possession, was held to be waived by the vendor's solrs., delivering the abstract of title, & answering some of the requisitions.—*ALDWELL v. ALDWELL* (1874), 6 P. R. 183.—*CAN.*

PART V. SECT. 5, SUB-SECT. 10.—A.

*q. Costs of co-defendant—Removal of deed from registry as cloud upon title.]—**SUTHERLAND v. YOUNG* (1884), 1 Man. L. R. 94.—*CAN.*

*r. Costs of getting in title.]—**McMANUS v. EDMONTON PUBLIC SCHOOL BOARD* (Alta.) (1912), 22 W. L. R. 120; 6 D. L. R. 370; 2 W. W. R. 1054.—*CAN.*

*t. Investigation of title.]—*A purchaser under the decree of the ct. took several objections to the title, in some of which he failed, & succeeded in

others:—*Held*: he was entitled to the costs properly & necessarily incurred by him in investigating the title, after deducting thereout the costs occasioned by the objections in which he failed.—*BROWN v. LYNCH* (1841), 4 L. Eq. R. 59.—*IR.*

*a. —.]—*A purchaser discharged upon a resale under an order opening the biddings, is not entitled against ptfr. as his solicitor to the costs which he may have incurred in investigating the title, there not having been any reference to the master.—*SULLIVAN v. BAYLY* (1842), Fl. & K. 460.—*IR.*

*b. Counsel's opinion.]—*A purchaser discharged by reason of bad title, is entitled to the cost of counsel's opinion on the title, & of the preparation of the case for counsel.—*BARTON v. DOWNES* (*LORD*) (1842), Fl. & K. 633.—*IR.*

*c. Costs of surrender of trust term—Falls on vendor.]—*Upon the sale of an estate, if there be an outstanding trust term, the vendor must (if so required) have such term surrendered at his own expense.—*KEATINGE v. KEATINGE* (1843), 6 L. Eq. R. 43.—*IR.*

PART V. SECT. 5, SUB-SECT. 10.—B.

1461 i. General rule—Expenses borne by vendor.]—Vendor must produce at his own expense all deeds & other evidences of title which are in his possession.—*GIBSON v. LEES* (1913), 13 S. R. N. S. W. 519; 30 N. S. W. W. N. 150.—*AUS.*

1461 ii. —.]—The general rule in England is, that where an abstract of title has been demanded, & the vendor only makes out a good title after bill filed by him, he will be ordered to pay the costs of the suit; but where the

On an open contract the vendor must bear the expense of procuring & making an abstract of any deed forming part of the forty years' title, although such deed be not in his possession.

The word "abstract" in Conveyancing & Law of Property Act, 1881 (c. 41), s. 3 (6), is to be distinguished from the "abstract" of title to which the purchaser is entitled; & a purchaser cannot be said to "require an abstract of a particular deed," merely because he requires an abstract of title for the prescribed length of time, which involves the abstracting of that deed.—*RE JOHNSON & TUSTIN* (1885), 30 Ch. D. 42; 54 L. J. Ch. 889; 53 L. T. 281; 33 W. R. 737; 1 T. L. R. 579. (C. A.)

Annotations:—*Aplid.* *Re* Moody & Yates' Contract (1885), 30 Ch. D. 328. *Distd.* *Re* Smart & Ollivant & Seadon's Contract, [1896] 2 Ch. 328. *Fold.* *Re* Stamford, Spalding & Bosto, Banking Co. & Wright & Co. (1891), 1 Ch. D. 287. *Distd.* *Re* Wright & Thompson's Contract, [1920] 1 Ch. 191. *Refd.* *Re* Glenton & Saunders to Haden (1885), 53 L. T. 431; *Re* Duthy & Jesson's Contract, [1898] 1 Ch. 419.

1462. ———.]—*Re* STAMFORD, SPALDING & BOSTON BANKING CO. & KNIGHT'S CONTRACT, No. 1310, *ante*.

1463. Deeds not in vendor's possession.]—*Re*
JOHNSON & TUSTIN, No. 1461, *ante*.

C. Expenses of Obtaining, Producing, and Inspecting Documents.

See Law of Property Act, 1925 (c. 20), s. 45 (4), (8).

1464. General rule—Expenses borne by purchaser.]—Unless the contract for sale contains provisions inconsistent with Conveyancing Act, 1881 (c. 41), s. 3 (6), the expense of searching for all documents not in the vendor's possession & required by the purchaser for the purpose of verifying the abstract, not excepting even the deed, *e.g.* an underlease, which is the root of the vendor's title, must be borne by the purchaser.—*Re* STUART & OLIVANT & SEADON'S CONTRACT, [1896] 2 Ch. 328; 65 L. J. Ch. 576; 74 L. T. 450; 44 W. R. 610; 12 T. L. R. 382; 40 Sol. Jo. 497, C. A.

1465. — — — — **Deeds in possession of vendor's mortgagee.**—A vendor agreed to sell to a purchaser a certain house " & the inheritance thereof in fee simple in possession, free from incumbrances," except certain restrictive covenants; & the contract provided that the vendor, & "all other necessary parties if any," should make & execute to the purchaser a proper assurance, & that "such assurance, & every other act & thing required by the purchaser for perfecting or completing the vendor's title or otherwise," should be "prepared, obtained, made, & done at the expense of the purchaser." When the abstract of title was delivered, it appeared that the property was subject to a mtge. effected by the vendor. A summons was taken out by the vendor, under Vendor & Purchaser Act, 1874 (c. 78), claiming that the expenses of the production & inspection required by the purchaser for the verification of the abstract, of the deeds & documents in the abstract referred to, which were in the possession of the vendor's

question really in issue between the vendor & purchaser was one other than of title & was decided against the purchaser, the ct. gave the vendor the costs of the suit although a good title had not been shown until after bill filed, no abstract having been demanded previously. —HAGGART v. QUACKENBUSH (1868), 14 Gr. 701. —CAN.

1481 iii. — —.] — When pltf. neglects to make out title to a purchaser, he will be allowed to make it out himself, & deduct the expense from
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mtgee., should be borne by the purchaser, pursuant to Conveyancing Act, 1881 (c. 41), s. 3 (6); & that the expenses of the concurrence of the vendor's mtgee. in the conveyance to the purchaser should be borne by the purchaser, pursuant to the terms of the contract:—*Held*: (1) under Conveyancing Act, 1881 (c. 41), s. 3 (6), the costs in question were expressly thrown upon the purchaser; there was nothing in the terms of the contract to bring the case within the exception contained in sub-sect. 9 of the same sect.; & the costs of obtaining the concurrence of the mtgee. were clearly within the terms of the contract.—*Re WILLETT & ARGENTI* (1889), 60 L. T. 735; 5 T. L. R. 476.

Annotation :—**Distd.** *Re Sander & Walford's Contract* (1900),
83 L. T. 316.

1466. ——— **Production of will not in vendor's possession.]—***Re* EBSWORTH & TIDY'S CONTRACT, No. 1323, *ante*.

1467. Where expenses borne by vendor—Extra costs of inspection—Deeds produced in different parts of country.]—Where title deeds are in the hands of persons residing in different parts of the country, the vendor must bear the expense of the purchaser sending a clerk to compare the abstract with the deeds.—*HUGHES v. WYNNE* (1836), 8 Sim. 85; 59 E. R. 34; *affd.* (1837), 1 Jur. 720, L. C.

1468. — Cost of surveyor's certificate—Sale of leaseholds.]—The certificate of the lessor's surveyor that the house has been finished to his satisfaction is not a "certificate" or "evidence" within Conveyancing Act, 1881 (c. 41), s. 3 (6), the expense of obtaining which must be borne by the purchaser, but it is a part of the title itself.—*Re MOODY & YATES' CONTRACT* (1885), 30 Ch. D. 344; 54 L. J. Ch. 886; 53 L. T. 845; 33 W. R. 785; 1 T. L. R. 650. C. A.

Annotations.—**Distd.** *Re Stuart & Olivant & Seadon's Contract*, [1896] 2 Ch. 328; *Re Wright & Thompson's Contract*, [1920] 1 Ch. 191.

1469. — Cost of obtaining title deeds to be handed over on completion—Though not referred to on abstract.]—On an open contract the vendor must bear the expense of obtaining title deeds required by the purchaser to be handed over on completion, although such title deeds are not in vendor's possession, & are not referred to in the abstract.—*Re DUTHY & JESSON'S CONTRACT*, [1898] 1 Ch. 419; 67 L. J. Ch. 218; 78 L. T. 223; 46 W. R. 300; 42 Sol. Jo. 269.

1470. Cost of statutory declarations—As to payment of interest on mortgage.]—In 1818 certain freehold property was mortgaged by the then owner, the form of the mtge. being a conveyance of the fee simple to trustees upon trust, at any time after the expiration of six months from the date named for repayment of the principal, to sell the property, & discharge the debt, etc., out of the proceeds & to pay the residue to the mtgor., his exors., administrators, or assigns. The deed contained a proviso for redemption, & also provisions making the receipt of the trustees, their heirs or assigns, a sufficient discharge to a purchaser of the property, & exonerating any purchaser from seeing to the application of the

his purchase-money.—**HARDING v. MID-
DLETON** (1823), 1 Hog. 80.—**IR.**

PART V. SECT. 5. SUB-SECT. 10.—C.

d. Evidence required to be obtained at purchaser's expense — Proof of identity of person named in deed.]—*Re MATHER & PAYNE'S CONTRACT*, [1905] V. L. R. 453.—AUS.

c. — *Costs of obtaining certified copies— Falls on purchaser in Bombay.*
—SHAMSUDIN TAJBHAI v. DAHYABHAI
MAGANLAL (1923). I. L. R. 48 Bom.

368.—IND.

1. What expenses borne by vendor—Costs of mortgagee producing certificate of title.]-DONALDSON v. GRAY, [1920] V. L. R. 379.—AUS.

g. — *Whether costs of registry searches.*] — LANGFORD (LADY) v. MAHONY (1845), 3 Jo. & Lat. 97.—IR.

h. ———.]—Where freehold or chattel real property is offered for sale under conditions which do not provide for the expense of registry searches, the vendor is bound, not-

Sect. 5.—Proof and investigation of title: Sub-sect. 10, C. Part VI. Sect. 1: Sub-sect. 1, A. & B. (a).]

purchase-money, & rendering unnecessary the concurrence of the mtgor., or his heirs, in any conveyance under the trust for sale. The deed, however, did not contain any provision exonerating a purchaser from inquiring whether default had been made in payment of principal or interest nor as to whether anything was owing on the security. The mtgor. died in 1839, having by his will devised the property comprised in the mtge. to several of his children in succession, as tenants for life, with remainders over. The last surviving tenant for life died in 1887, & shortly afterwards, A. & B., in whom the mtge. had become vested by transfer, there having previously been several mesne transfers, contracted to sell the property. The vendors sold as mtgees., in pursuance of the trust contained in the mtge. The purchasers having raised an objection to the validity of the title, a summons was taken out, under the Vendor & Purchaser Act, 1874 (c. 76), by the vendors, asking for a declaration that a good title had been shown:—*Held*: (1) without the concurrence of all the persons at present entitled to the equity of redemption, it was necessary, in order to enable the vendors to make a good title to the property, that they should, by obtaining statutory declarations, furnish evidence of the subsistence of the mtge. from the death of the mtgor. down to the date of the sale; (2) as to the costs of the

proceedings, according to the ordinary practice, the costs of the statutory declarations furnished by the vendors would, under Conveyancing Act, 1881 (c. 41), s. 3 (6), be payable by the purchasers, the conditions of sale being silent as to such expenses, while the costs of the summons would be payable by the vendors; (3) in the present case the proper order would be that the vendors' expenses in procuring & furnishing the purchasers with the evidence of payment of the interest on the mtge. should be considered as part of the vendors' costs of the summons, & no costs of the summons should be given to either side.—*Re EDWARDS & RUDKIN TO GREEN* (1888), 58 L. T. 789.

1471. — Where abstract complete.—Where vendor's title to sell depends on a fact, *e.g.* that they became mtgees. in possession before Courts (Emergency Powers) Act, 1914 (c. 78), & that fact though omitted in the abstract is stated in the answers to requisitions, the abstract is rendered complete & the expense of a statutory declaration made by the vendor or any other person in proof of the fact must be borne by the purchaser under Conveyancing Act, 1881 (c. 41), s. 3 (6).—*Re WRIGHT & THOMPSON'S CONTRACT*, [1920] 1 Ch. 191; 89 L. J. (Ch. 66; 122 L. T. 92; 36 T. L. R. 37; 64 Sol. Jo. 52.

Costs as between solicitor & client.—*See SOLICITORS.*

Costs of conveyance on compulsory purchase.—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 234-236, Nos. 1240-1265.

Part VI.—Position of Parties Pending Completion.

SECT. 1.—RIGHTS AND LIABILITIES WITH RESPECT TO THE PROPERTY.

SUB-SECT. 1.—EFFECT OF CONTRACT ON OWNERSHIP.

A. Vendor.

1472. Vendor as trustee for purchaser.—*DAIRE v. BEVERSHAM* (1661), Nels. 76; 21 E. R. 793; *sub nom. DAVIES v. BEVERSHAM*, Freem. Ch. 157; 3 Rep. Ch. 4; 1 Cas. in Ch. 39.

Annotations:—*Reid*, *Wainwright v. Elwell* (1816), 1 Madd. 627; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Matthew v. Osborne* (1853), 13 C. B. 919.

1473. ——The vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser, & the vendee, [is] as to the money, a trustee for the vendor (LORD HARDWICKE, C.).—*GREEN v. SMITH* (1738), 1 Atk. 572; *West temp. Hard*. 561; 26 E. R. 360, L. C.

Annotations:—*Reid*, *Broome v. Monck* (1805), 10 Ves. 597; *Toft v. Stephenson* (1848), 7 Harc. 1. *Mentl. Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31.

1474. ——*CAPEL v. GIRDLER*, No. 1495, *post*.

1475. ——*WILSON v. CLAPHAM*, No. 1533, *post*.

1476. ——*HOLROYD v. MARSHALL*, No. 1500, *post*.

1477. ——*HADLEY v. LONDON BANK OF SCOTLAND, LTD.*, No. 1496, *post*.

withstanding Conveyancing & Law of Property Act, 1881, s. 3 (6), to furnish such searches at his own expense.—*Re MURRAY & HEGARTY'S CONTRACT* (1885), 15 L. R. Ir. 510.—*IR.*

k. — Whether proof of heirship.—*Re CONLON & FAULKNER'S CONTRACT*, [1916] 1 I. R. 241.—*IR.*

PART VI. SECT. 1, SUB-SECT. 1.—A.

1472i. Vendor as trustee for purchaser.—The statement that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold, subject to a lien for the purchase money, is only true if, & so

far as a ct. of equity would, under all the circumstances of the case, grant specific performance of the contract.—*MILLER v. HOWARD* (1914), 30 W. L. R. 112; 7 W. W. R. 627, P. C.—*CAN.*

1472ii. ——*Re ROGERS*, [1921] N. Z. L. R. 245.—*N.Z.*

1 Ch. 472. **Mentd.** *Castellain v. Preston* (1883), 52 L. J. Q. B. 366; *I. R. Comrs. v. Angus, Same v. Lewis* (1889), 23 Q. B. D. 579; *Ecc. Comrs. for England v. Royal Exchange Assee. Corp.* (1895), 11 T. L. R. 476; *Re Elementary Education Acts, 1870 & 1873*, [1909] 1 Ch. 55; *Mason v. Fulham Corp.* (1910), 102 L. T. 188; *Sinnot v. Bowden*, [1912] 2 Ch. 414.

See, now, Law of Property Act, 1925 (c. 20), s. 47.

1482. ———.]—**LOCKHARTS v. ROSEN (BERNARD)** & Co., No. 1635, *post*.

1483. ——— **Extent of trusteeship.**]—An estate which testator had contracted to sell, held to pass by a devise of all his real & personal estate to trustees, in trust to sell.

The contract to sell is a disposition of the estate, & by it the vendor parts with his right & dominion over it. It is in equity no longer his. He is considered constructively to be a trustee of the estate for the purchaser, & the latter as a trustee of the purchase-money for him. . . . The vendor, therefore, is not a mere trustee: he is in progress towards it, & finally becomes such when the money is paid, & when he is bound to convey. In the meantime . . . he retains for certain purposes his old dominion over the estate (PLUMER, M.R.).—*WALL v. BRIGHT* (1820), 1 Jac. & W. 494; 37 E. R. 456.

Annotations:—**Consd.** *Trotter v. Watson* (1869), L. R. 4 C. P. 434. **Expld.** *Shaw v. Foster* (1872), L. R. 5 H. L. 321. **Consd.** *Lysaght v. Edwards* (1876), 2 Ch. D. 499. **Refd.** *Dowson v. Solomon* (1859), 1 Drew. & Sm. 1; *Ridout v. Fowler*, [1904] 1 Ch. 658.

1484. ———.]—**SHAW v. FOSTER**, No. 1497, *post*.

1485. ———.]—**LYSAGHT v. EDWARDS**, No. 1518, *post*.

1486. ———.]—**EGMONT (EARL) v. SMITH, SMITH v. EGMONT (EARL)**, No. 1539, *post*.

1487. ———.]—**BOLTON PARTNERS v. LAMBERT**, No. 1538, *post*.

1488. ———.]—Where completion of a purchase is delayed without any fault on the part of the purchaser, & the vendor remains in possession & receives rents after the date fixed by the contract for completion, the vendor is not at liberty, as against the purchaser, to retain out of the rents so received arrears of rent accrued due at the date of the contract or subsequently before the date fixed for completion.

He [the vendor] is a trustee in a modified sense (KEKEWICH, J.).—**PLEWS v. SAMUEL**, [1904] 1 Ch. 464; 73 L. J. Ch. 279; 90 L. T. 533; 52 W. R. 410; 48 Sol. Jo. 276.

1489. ——— **Effect of charge given to third party.**]—**SHAW v. FOSTER**, No. 1497, *post*.

1490. ——— **With right of indemnity.**]—**BOLTON PARTNERS v. LAMBERT**, No. 1538, *post*.

1491. ——— **Conditional on performance of contract.**]—In June, 1901, the purchaser, under a contract for the sale of land, which was to be completed on Sept. 29, paid a deposit & was let into possession. The purchaser did not complete at the time appointed, & litigation ensued between him & the vendor. In Aug. 1902, a judgment creditor of the purchaser obtained an order appointing himself, upon giving security, receiver of the rents, etc., receivable in respect of the purchaser's interest in the land under the contract for sale. Notice of this order was at once served on the vendor, & the order was registered under Land Charges Registration & Searches Act, 1888 (c. 51), & Land Charges Act, 1900 (c. 26), but the creditor did not perfect his security as receiver until May, 1903. Meanwhile, in Jan. 1903, the litigation between the purchaser & the vendor was compromised, a consent order being made for the rescission of the contract of sale & the

delivery up of possession of the property by the purchaser on payment of £110 to him by the vendor. In May, 1903, the judgment creditor commenced an action against the vendor claiming a declaration that by virtue of the receivership order he was entitled to a lien or charge on the property for securing payment of the judgment debt & costs, with interest, & claiming also payment of the judgment debt & costs by debt.:—**Held:** (1) the £110 was not paid to the purchaser as the price of any interest which he had in the land, but on the basis that he had no interest, & only for the purpose of getting him out of possession; (2) the judgment creditor had no claim against the vendor, & the action must be dismissed.—**RIDOUT v. FOWLER**, [1904] 2 Ch. 93; 73 L. J. Ch. 579; 91 L. T. 509; 53 W. R. 42; 48 Sol. Jo. 571, C. A.

B. Purchaser.

(a) In General.

1492. **Whether purchaser becomes equitable owner.**]—**DAIRE v. BEVERSHAM** (1661), Nels. 76; 21 E. R. 793; *sub nom.* **DAVIES v. BEVERSHAM**, *Freem. Ch.* 157; 3 Rep. Ch. 4; 1 Cas. in Ch. 39.

Annotations:—**Refd.** *Wainwright v. Elwell* (1816), 1 Madd 627; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Matthew v. Osborne* (1853), 13 C. B. 919.

1493. ———.]—One articles to buy certain lands, he thereby becomes seised thereof in equity; but where A. devised all his real & personal estate & afterwards article to purchase lands, & then died, the heir-at-law was held to be entitled to this estate, as not passing by the will; *secus* had the articles for the purchase been before the will, for then the estate would have passed.—**LANGFORD v. PITT** (1731), 2 P. Wms. 629; 24 E. R. 800.

Annotation:—**Mentd.** *Sabbarton v. Sabbarton* (1738), *Lee temp. Hard.* 413.

1494. ———.]—**R. v. SNOW** (1794), cited in 6 Price, at p. 465; 146 E. R. 868.

Annotation:—**Consd.** *Casberd v. A.-G.* (1819), 6 Price, 411.

1495. ———.]—An estate contracted for will pass by a subsequent devise of all lands; the deviser being equitable owner under the contract.

The vendor is trustee for him [testator]. If he had by his will afterwards disposed of all his lands, this estate would have passed by that will (GRANT, M.R.).—**CAPEL v. GIRDLER** (1804), 9 Ves. 509; 32 E. R. 700.

1496. ———.]—On a bill filed for specific performance of an alleged contract for sale of premises by debts. to pltf., debts. contended that they never entered into the contract alleged. Upon the evidence before the ct. upon a motion for an injunction to restrain debts. from selling the property except to pltf., their lordships, even assuming that pltf. would succeed in his suit, were governed by the consideration that the inconvenience of granting the injunction would be far greater than that of withholding it; & therefore dissolved the injunction which had been granted.

So long as the contract is an undisputed contract the whole of the property is in equity transferred from the vendor to the purchaser; the vendor then becomes a trustee for the purchaser & the trustee cannot be permitted to deal with the legal estate so as to inconvenience the purchaser. . . . In a case where there is an undisputed & clear contract, there the ct. will undoubtedly interfere in restraining the vendor from transferring the legal estate to a third person (TURNER, L.J.).—**HADLEY v. LONDON BANK OF SCOTLAND, LTD.** (1865), 3 De G. J. & Sm. 63; 12 L. T. 747; 11 Jur. N. S. 554; 13 W. R. 978; 46 E. R. 502, L. J. **Annotations:**—**Apld.** *Lysaght v. Edwards* (1876), 2 Ch. D. 499. **Refd.** *Johnston v. Boyes* (1898), 14 T. L. R. 475.

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 1, B. (a).]

1497. —[F. entered into a contract with P. to sell him some leasehold property. P. paid part of the purchase-money, & obtained from F. a lease of the premises for a short term of years, in favour of a nominee of P. P. had dealings with bankers, to whom he became much indebted. Being called on to give the bankers some security, he handed to them the title deeds of a freehold estate, which he charged with the debt, & at the same time he deposited with them his contract for the purchase of the leasehold property. He accompanied this deposit with a written memorandum in which he agreed to make to the bankers "a valid assignment of my contract with F. for the purchase of" the leasehold premises, "by way of mtge. for further securing," etc. The bankers, by their solrs., some time afterwards gave to F. notice, in the above words, of this agreement, & the solr.'s letter called it "a charge by P. on his purchase." F. acknowledged the receipt of this notice. He heard nothing more of the matter. P. did not complete his purchase at the stipulated time, but did so afterwards, & then F., according to the terms of the original contract, executed to him a conveyance of the leasehold premises, without any notice being taken in the conveyance of the claims of the bankers:—*Held*: the rule of equity, that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, did not apply to this case, & F. was in no way liable to the bankers.

There cannot be the slightest doubt of the relation subsisting in the eye of a ct. of equity between the vendor & purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a ct. of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal & substantial interest in the property, a right to protect that interest, & an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee & *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor & trustee to protect his own interest as vendor of the property (LORD CAIRNS).

P., the purchaser, being the real & beneficial owner . . . there cannot be any doubt of the rights of P. with regard to the property of which he had thus become beneficial owner. He had a right to devise it; he had a right to alienate it, he had a right to charge it (LORD CAIRNS).

The moment that a contract for sale & purchase is entered into & the relation of vendor & vendee is constituted, the vendor becomes a constructive trustee for the vendee. It is but a constructive trust (LORD HATHERLEY, C.).—*SHAW v. FOSTER* (1872), L. R. 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907, H. L.

Annotations:—*Apld.* *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *Bodington v. Atlee* (1887), 35 Ch. D. 317; *Re Stucleys, Stucleys v. Kekewich*, [1906] 1 Ch. 67. *Refd.* *Cave v. Mackenzie* (1877), 46 L. J. Ch. 564; *Egmont v. Smith, Smith v. Egmont* (1877), 6 Ch. D. 469; *London & County Banking Co. v. Ratcliffe* (1881), 6 App. Cas. 722; *Re Thackwray & Young's Contract* (1888), 40 Ch. D. 34; *Rafferty v. Schofield*, [1897] 1 Ch. 937; *Ridout v. Fowler* [1904] 1 Ch. 658; *Golden Bread Co. v. Hommings*, [1922] 1 Ch. 162. *Mentd.* *Glyn Mills Currie v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Levy v. Stogdon*, [1898] 68 L. J. Ch. 19; *United Realization Co. v. I. R. Comrs.*, [1899] 1 Q. B. 361.

1498. —[*LYSAGHT v. EDWARDS*, No. 1518, *post*.

1499. —[*Only as against vendor.*—This rule [that by a contract of purchase the purchaser becomes in equity the owner of the property] applies only as between the parties to the contract, & cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property (LORD COTTENHAM, C.).—*TASKER v. SMALL* (1837), as reported in 3 My. & Cr. 63; 7 L. J. Ch. 19; 40 E. R. 848.

Annotations:—*Apld.* *Bird v. G. E. Ry.* (1865), 19 C. B. N. S. 268; *De Houghton v. Money* (1866), 2 Ch. App. 164. *Consd.* *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165. *Apld.* *Lumley v. Timms* (1873), 28 L. T. 157. *Refd.* *West Mid. Ry. v. Nixon* (1863), 1 Hem. & M. 177; *Aberaman Ironworks v. Wickens* (1868), 4 Ch. App. 101; *I. R. Comrs. v. Angus, Same v. Lewis* (1889), 23 Q. B. D. 579; *Richards v. Pryse*, [1927] 2 K. B. 76. *Mentd.* *Roberts v. Marchant* (1843), 13 L. J. Ch. 56; *Cutts v. Thodey* (1844), 2 L. T. O. S. 474; *Neithorpe v. Holgate* (1844), 1 Coll. 203.

1500. —[*Contract must be capable of specific performance.*—In equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, & the vendor becomes a trustee for the vendee. This rule applies to personal property, as well as to real estate.—*HOLROYD v. MARSHALL* (1862), 10 H. L. Cas. 191; 33 L. J. Ch. 193; 7 L. T. 172; 9 Jur. N. S. 213; 11 W. R. 171; 11 E. R. 999, H. L.

Annotations:—*Consd.* *Joseph v. Lyons* (1884), 15 Q. B. D. 280; *Morris v. Delobel-Filpo*, [1892] 2 Ch. 352; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *Re Wait*, [1927] 1 Ch. 606. *Refd.* *Belding v. Read* (1865), 3 H. & C. 955; *Trotter v. Watson* (1869), 1 Hop. & Colt. 216; *Fothergill v. Rowland* (1873), 43 L. J. Ch. 252; *Leatham v. Amor* (1878), 47 L. J. Q. B. 581; *Lazarus v. Andrade* (1880), 5 C. P. D. 318; *Re D'Epincull, Tadman v. D'Epincull* (1882), 20 Ch. D. 758; *Clements v. Matthews* (1883), 11 Q. B. D. 808; *Harding v. Harding* (1886), 17 Q. B. D. 442; *Ross v. Army & Navy Hotel Co.* (1886), 34 Ch. D. 43; *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Hilton v. Tucker* (1888), 57 L. J. Ch. 973; *Talbly v. Official Receiver* (1888), 13 App. Cas. 523; *Ward, Lock v. Long*, [1906] 2 Ch. 550; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1. *Mentd.* *Iteev v. Whitmore, Martin v. Whitmore* (1863), 4 De G. J. & Sm. 3; *Re Barker, Ex p. Gorely* (1864), 5 New Rep. 22; *Dean v. Byrnes* (1864), 3 Moo. P. C. N. S. 92; *Langton, etc. v. Waring, etc.* (1865), 18 C. B. N. S. 315; *Brown v. Bateman* (1867), L. R. 2 C. P. 272; *Re Marine Mansion Co.* (1867), L. R. 4 Eq. 601; *Tobb v. Hodge* (1869), 38 L. J. C. P. 217; *Thompson v. Cohen* (1872), L. K. 7; *Q. B. 527*; *Re Cook, Ex p. Izard* (1874), 30 L. T. 7; *Anon.*, [1875] W. N. 203; *Greenbirt v. Smece* (1876), 35 L. T. 168; *Re Banford, Ex p. Games* (1879), 12 Ch. D. 314; *Baghott v. Norman* (1880), 41 L. T. 787; *Collyer v. Isaacs* (1881), 19 Ch. D. 342; *Re Jones, Ex p. Nichols* (1883), 22 Ch. D. 782; *Reeves v. Barlow* (1884), 12 Q. B. D. 436; *Walker v. Bradford Old Bank* (1884), 12 Q. B. D. 511; *Thomas v. Kelly* (1888), 13 App. Cas. 506; *Re Turcan* (1888), 58 L. J. Ch. 101; *Re Pyle Works* (1890), 44 Ch. D. 534; *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292; *Church v. Sage, Froy, Claimant* (1892), 67 L. T. 800; *Administrator General of Jamaica v. Lascelles, De Mercado*, [1894] A. C. 135; *Re Dallas*, [1904] 2 Ch. 385; *Re Kels, Ex p. Clough* (1904), 91 L. T. 592; *National Provincial & Union Bank of England v. Charnley*, [1924] 1 K. B. 431.

1501. —[—If the vendor is not in a position to obtain a decree for specific performance, whether by reason of some defect in title or by reason of some collateral misrepresentation, the purchaser never was, in the view of the ct., owner in equity of the property. So, too, if by reason of delay, or other circumstances the ct. declines to grant to the purchaser specific performance the purchaser is not treated as being in equity owner of the property (COZENS-HARDY, J.).—*CORNWALL v. HENSON*, [1899] 2 Ch. 710; 68 L. J. Ch. 749; 81

L. T. 113; 48 W. R. 42; 15 T. L. R. 544; *on appeal*, [1900] 2 Ch. 298, C. A.

Annotation.—*Reid*. Von Freedon v. Hull & Turner (1906), 75 L. J. K. B. 359.

1502. — Contract for immediate sale.—When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract (LORD WESTBURY, C.).—*ROSE v. WATSON* (1864), 10 H. L. Cas. 672; 3 New Rep. 673; 33 L. J. Ch. 385; 10 L. T. 106; 10 Jur. N. S. 297; 12 W. R. 585; 11 E. R. 1187, H. L.

Annotations.—*Apld.* Torrance v. Bolton (1872), 41 L. J. Ch. 643; Lysaght v. Edwards (1876), 2 Ch. D. 499. *Consd.* Levy v. Stogdon, [1898] 1 Ch. 478; *Re* Stucley, Stucley v. Kekewich, [1906] 1 Ch. 67. *Refd.* Aberaman Iron Works v. Wickens (1868), 4 Ch. App. 101; Shaw v. Foster (1872), L. R. 5 H. L. 321; Beddington v. Atlee (1887), 35 Ch. D. 317; Cornwall v. Henson, [1899] 2 Ch. 710; Dodson v. Downey, [1901] 2 Ch. 620; Whitbread v. Watt, [1901] 1 Ch. 835; Ridout v. Fowler, [1904] 1 Ch. 658; *Re* Wai [1927] 1 Ch. 606. *Mentd.* McCreight v. Foster (1870), (Ch. App. 604; Mycock v. Beatson (1879), 13 Ch. D. 384; Fleming v. Loo (1901), 70 L. J. Ch. 805.

1503. — Purchaser let into possession—Right of vendor to protect own interests.—Upon the execution of the contract, & the purchaser being let into possession, he became the owner in equity of the land, subject to payment of the purchase-money in accordance with the contract, & subject to the paramount right of the vendors to protect their own interests as vendors of the property (BYRNE, J.).—*ECCLESIASTICAL COMRS. v. PINNEY*, [1899] 2 Ch. 729; 69 L. J. Ch. 139; 81 L. T. 536; *on appeal*, [1900] 2 Ch. 736, C. A.

1504. — Effect of special stipulation in contract.—*HALFORD v. CLARK* (1915), 50 L. Jo. 68.

1505. Purchaser as tenant at will—Where let into possession.—One who is in possession under an agreement to purchase, is a tenant at will.—*DOE d. MELLERSH v. REDMAN* (1829), 8 L. J. O. S. K. B. 154.

1506. — — — — ——A party who has been let into possession of land on a contract of sale which has not been completed, is a tenant at will to the vendor.—*BALL v. CULLIMORE* (1835), 2 Cr. M. & R. 120; 1 Gale, 96; 5 Tyr. 753; 4 L. J. Ex. 137; 150 E. R. 51.

Annotation.—*Refd.* Hogan v. Hand (1861), 14 Moo. P. C. C. 310.

1507. Trustee of money for vendor.—*GREEN v. SMITH*, No. 1473, *ante*.

1508. — Not for third person.—From the time of the agreement for a purchase of an estate,

the vendee is a trustee as to the money for the vendor. But this rule is confined merely to the vendor & vendee, & will not extend to a third person.—*POLLEXFEN v. MOORE* (1745), 3 Atk. 272; 26 E. R. 959.

Annotations.—*Dbtd.* Mackreth v. Symmons (1808), 15 Ves. 329; Selby v. Selby (1828), 4 Russ. 336. *Consd.* Wythe v. Henniker (1833), 2 My. & K. 635; Sproule v. Prior (1836), 8 Sim. 189. Lord Hardwicke decided *Pollexfen v. Moore* in 1745. If the report in *Atkins* is right, he did express an opinion that the equity of the unpaid vendor would not extend to a third person; but it is clear . . . from the registrar's book, that he did not so decide (*SHADWELL, V.-C.*). *Refd.* Fawell v. Heells (1773), Amb. 724. *Mentd.* Blackburn v. Grogson (1785), 1 Bro. C. C. 420; Austen v. Halsey (1801), 6 Ves. 475.

1509. — — — — ——*WALL v. BRIGHT*, No. 1483, *ante*.

1510. Price payable by instalments—Default of payment—Forfeiture—Vendor not compellable to convey.—In an agreement for the sale of leasehold premises to be paid for by instalments it is stipulated that in default of payment of the instalments at specified times, the former instalments shall be forfeited, & the vendor shall not be compellable to convey. The forfeiture, enures to destroy every right which the vendee took under the agreement, but does not affect any right of possession which he had before. No previous right being proved. *Semble*: the party after forfeiture is a mere tenant by sufferance.—*DOE d. MOORE v. LAWDER* (1816), 1 Stark. 308.

Annotation.—*Apld.* Doe d. Rogers v. Pullen (1836), 2 N. C. 749.

Tenancy at sufferance.—

DOE d. MOORE v. LAWDER, No. 1510, *ante*.

1512. Right to injunction against vendor—In relation to user of property.—A contract having been entered into for the purchase of land, it is not competent to the purchaser, before the title has been accepted, to obtain an injunction restraining the vendor from using or continuing to use the external wall of the building, the subject of the contract, as a party-wall, or from encroaching on the land, or from building so as to obstruct the light or air coming to the premises contracted to be purchased.—*HEATH v. MAYDEW* (1864), 11 L. T. 473; 13 W. R. 199.

1513. Right to enforce equities attaching to property—Against third parties.—A purchaser cannot, before completing his contract, enforce any equities attaching to the property against persons not parties to the contract.

Where a purchaser filed a bill for specific performance, & added as defendants persons claiming under

session & part payment.—A purchaser holding a receipt for an instalment & having actual possession, may maintain trespass against all strangers, though not against the Crown.—*GLOVER v. WALKER* (1856), 5 C. P. 478.—*CAN.*

m. — Where entry by purchaser before action & after delivery of deed.—*GIBSON v. CLINKWORTH* (1917), 51 N. S. R. 341.—*CAN.*

n. Purchaser as beneficial owner.—*BAIN v. PEEFIELD* (1916), 33 W. L. R. 681; 9 W. W. R. 1163.—*CAN.*

o. Right of purchaser to fixtures—What amounts to fixture—Intention of permanent affixing.—*HAMILTON v. LINDSAY & LINDSAY*, [1923] 1 W. W. R. 1243; 16 Sask. L. R. 510.—*CAN.*

p. Purchaser acquires no greater rights than vendor.—*LONG v. LOCKHART*, *CONNALLY v. LOCKHART* (Ont.), [1927] 2 D. L. R. 776.—*CAN.*

q. Purchaser erecting building not amounting to fixture—Right to remove.—A building put by a vendee of land in possession, under a contract to purchase, resting upon a foundation in some parts let into the soil, & connected to the foundation by mortar, is a fixture belonging to the owner of the

PART VI. SECT. 1, SUB-SECT. 1.— B. (a)

1505 i. Purchaser as tenant at will—Where let into possession.—A person let into possession of land by the owner under an agreement to purchase has only the estate of a tenant at will, unless there is some agreement respecting the occupation of the land before the sale is completed.—*DOE d. CLIFF v. CONNAWAY* (1838), 2 N. B. R. (Ber.) 382.—*CAN.*

1505 ii. — — — — ——Where a person enters into possession of land under an agreement to purchase, he is tenant at will to the seller, & at the seller's death his heir-at-law can maintain ejectment against him without any notice to quit or demand of possession.—*DOE d. KEMP v. GARNER* (1844), 1 U. C. R. 39.—*CAN.*

1505 iii. — — — — ——A person taking possession of land under an agreement to purchase, which specified no time for the continuance of the possession in the event of the purchase not being completed, becomes a tenant at will; & such tenancy must be terminated by some act of the parties, before he can be ejected on noncompletion of the purchase.—*DOE d. CROOKSHANK v.*

DENNY (1854), 8 N. B. R. (3 All.) 50.—*CAN.*

1505 iv. — — — — ——Deft. had been let into possession under a contract to purchase, payable by instalments, with a stipulation for forfeiture if payment were not made on a particular day, & the vendor had subsequent to such day received payment on account:—*Held*: deft. was tenant at will, & not by sufferance, & that a demand of possession was necessary.—*LUNDY v. DOVEY* (1857), 7 C. P. 38.—*CAN.*

1505 v. — — — — ——Where a purchaser enters into possession of lands under a contract of sale without more, a tenancy at will is thereby created which is determined by the rescission of the contract.—*STEWART BROTHERS FARM LAND CO. v. SCHRAEDER* (1915), 8 W. W. R. 761; 8 Sask. L. R. 172.—*CAN.*

1505 vi. — — — — ——When a purchaser enters under a contract of sale, the tenancy at will arising therefrom is determined by a rescission of the contract, without any demand of possession.—*MARKEY v. COOTE* (1876), 1 R. 10 C. L. 149.—*IR.*

1. Right to maintain trespass against strangers—Where actual pos-

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 1, B. (a) & (b); sub-sect. 2, A. & B.]

a previous agreement what the bill sought to impeach:—*Held*: the bill could not be sustained.

—*DE HOUGHTON v. MONEY* (1866), 2 Ch. App. 164; 15 L. T. 403; 15 W. R. 214, L. J.

1514. — Delivery up of voluntary instrument for cancellation.—A purchaser for value of an interest in land cannot require a voluntary deed or agreement affecting the estate to be delivered up to him to be cancelled.—*DE HOUGHTON v. MONEY* (1865), L. R. 1 Eq. 154; 35 Beav. 98; 13 L. T. 447; 14 W. R. 159; 55 E. R. 832.

Right to devise, alienate or charge.—*See* Sect. 2, sub-sect. 1, A., *post*.

(b) Relation to Third Parties.

Notice.—*See* EQUITY, Vol. XX., pp. 310–333; Part V., Sect. 4, *ante*.

— Right of mortgagee to take after notice of purchase.—*See* MORTGAGE, Vol. XXXV., p. 438, No. 1782.

Priorities.—Purchaser for value without notice.—*See* EQUITY, Vol. XX., pp. 296–300, Nos. 509–547.

— Purchaser with notice.—*See* EQUITY, Vol. XX., pp. 300–304, Nos. 548–580.

— Of mortgages.—*See* MORTGAGE, Vol. XXXV., pp. 441–487.

Searches & inquiries.—*See* Part V., Sect. 5, sub-sect. 7, *ante*.

SUB-SECT. 2.—POSSESSION.

A. In General.

1515. When right to possession accrues to purchaser.—From time of payment of purchase-money.—*ACLAND v. CUMING*, No. 1612, *post*.

1516. — Where special agreement.—Agreement for the sale of a lease, “with possession on Dec. 1, the rent to commence at Christmas.” Possession was not given until Jan. 31, through the default of the vendor:—*Held*: the purchaser was entitled to compensation, & an inquiry was directed.—*GEDYE v. MONTROSE (DUKE)* (1858), 26 Beav. 45; 53 E. R. 813.

1517. Implied agreement by vendor to give possession within reasonable time.—When a person employs a house agent to sell the lease of a house of which he is in occupation, & nothing is said about going out of possession, there is an implied promise to do so within a reasonable time.—*NOSOTTI v. AUERBACH* (1899), 15 T. L. R. 140, C. A.

1518. Possession of vendor as security for purchase-money.—The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, & the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a

charge or lien on the estate for the security of that purchase-money, & a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee, that is, a person without beneficial interest, & a mtgee. who is not, in equity, any more than a vendor, the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz. possession of the estate & a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mtgee. has a right to foreclose, that is to say, he has a right to say to the mtgor., “Either pay me within a limited time, or you lose your estate,” & in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a ct. of equity; he has a right to say to the purchaser, “Either pay me the purchase-money, or lose the estate.” Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the ct. of equity, or now by a judgment of the High Ct. of Justice; & if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the ct. & the vendor becomes again the owner of the estate (*JESSEL, M.R.*).—*LYSAGHT v. EDWARDS* (1876), 2 Ch. D. 499; 45 L. J. Ch. 554; 34 L. T. 787; 24 W. R. 778.

Annotations.—*Consd. Plews v. Samuel*, [1904] 1 Ch. 464. *Appld. Allen v. L. R. Comrs.*, [1914] 1 K. B. 327. *Refd. Re Colling* (1886), 32 Ch. D. 333; *Re Thomas, Thomas v. Howell* (1886), 34 Ch. D. 166; *Leppington v. Freeman* (1891), 65 L. T. 145; *Rodger v. Harrison*, [1893] 1 Q. B. 161; *Dale v. Hatfield Chase Corp.*, [1922] 2 K. B. 282. *Mentd. St. Thomas' Hospital v. Richardson* (1909), 101 L. T. 771; *Re Marlay, Rutland v. Bury*, [1915] 2 Ch. 264.

Compulsory purchase.—Entry on land by promoters.—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 212–223.

B. Possession Taken before Payment of Purchase-Money.

1519. Order for delivery up or payment of purchase-money into court.—The co. have taken possession as purchasers, & the whole question is, whether they have or not accepted the title. The ordinary course is to direct, either that the purchase-money be paid into ct., or that the possession be given up. The vendor by filing this bill has elected his ct.; & in a case of specific performance he can require nothing more than that the purchase-money should be secured (*LORD COTTENHAM, C.*).—*HYDE v. GREAT WESTERN RY. CO.* (1839), 1 Ry. & Can. Cas. 277, L. C.

1520. ——The ordinary rule is where possession has been taken by a purchaser, & he is in possession, not to permit him to retain possession

soil, & when wrongfully severed it becomes a chattel; & debts, the vendee of the land & others, who had at first removed it into the highway, & afterwards took it away, were held liable in trespass for taking the goods of plff., the owner of the soil.—*GASCO v. MARSHALL* (1850), 7 U. C. R. 193.—CAN.

PART VI. SECT. 1, SUB-SECT. 2.—A.

1515i. When right to possession accrues to purchaser.—From time of payment of purchase-money.—*DOR d. HENDERSON v. WESTOVER* (1846), 1 E. & A. 465.—CAN.

r. — On execution of contract.—In the absence of an agreement to the contrary the vendor of immovable

property is bound to deliver up possession immediately after execution of the sale deed.—*SRI RAM v. KIDARI PARSHAD CHHEDI LAL* (1925), 1 L. R. 6 Lah. 308.—IND.

t. Whether purchaser bound to ke on execution of agreement.—Where king possession imprudent.—Although a purchaser after the execution of the agreement for sale is entitled to enter into possession of the property, which is the subject of the agreement, he is not bound, & will not be compelled, to enter into possession where it might or would not be prudent for him to do so.—*LOBEL v. WILLIAMS* (1915), 30 W. L. R. 352; 7 W. W. R. 1042; 25 Man. L. R. 161.—CAN.

a. Vendor continuing in possession

after conveyance.—Right to demand of possession.—The mere fact of a vendor continuing in possession of land after conveying it, without more being shown, does not entitle him to a demand of possession.—*DOE d. RICHARDSON v. DAFOE* (1847), 4 U. C. R. 484.—CAN.

PART VI. SECT. 1, SUB-SECT. 2.—B.

1519i. Order for delivery up or payment of purchase-money into court.—*WEIST v. SMITH (Sask.)*, [1927] 1 D. L. R. 448; [1927] 1 W. W. R. 280.—CAN.

b. Purchaser in possession under bond by vendor to convey.—Right of purchaser to notice or demand of possession.—When a minor gives a bond to convey, & he or his heir afterwards brings

& at the same time to keep back the purchase-money (SHADWELL, V.-C.).—TOMLINSON v. MANCHESTER & BIRMINGHAM RY. CO. (1840), 2 Ry. & Can. Cas. 104.

1521. — [Possession without knowledge of vendor.]—Purchaser taking possession without the consent or privity of the vendor, ordered on motion, before answer, to pay the purchase-money into ct.—BLACKBURN v. STACE (1821), 6 Madd. 69; 56 E. R. 1016.

1522. — [Notwithstanding objections to title.]—Purchaser, having taken possession, but objecting to the title, required either to pay in the purchase-money, or deliver up possession.—CLARKE v. WILSON (1808), 15 Ves. 317; 33 E. R. 774, L. C.

Annotations:—*Distd.* Clarke v. Elliott (1816), 1 Madd. 606; Pope v. G. E. Ry. (1866), L. R. 3 Eq. 171. *Consd.* Greenwood v. Turner, [1891] 2 Ch. 144.

1523. — [—]—Vendee in possession, objecting to title, must pay in purchase-money, or give up possession.—SMITH v. LLOYD (1815), 1 Madd. 83; 56 E. R. 33.

1524. — [—]—Vendee in possession, objecting to title, ordered to pay purchase-money into ct., though possession not admitted by the answer, & only shown by affidavit.—BOOTHBY v. WALKER (1815), 1 Madd. 197; 56 E. R. 73.

1525. — [—]—A vendor permitting the vendee to take possession, before the completion of the title, without any stipulation as to purchase-money, cannot on motion have the purchase-money paid into ct.—CLARKE v. ELLIOTT (1816), 1 Madd. 606; 56 E. R. 223; *revsd.*, see 14 L. T. p. 53, L. C.

Annotation:—*N.F.* Lilley v. Allen (1866), 14 L. T. 52.

1526. — [—]—LILLEY v. ALLEN, No. 1657, *post*.

1527. — [—]—WOOD v. EDWARDS, [1876] W. N. 15.

ejectment against the assignee of the obligee, deft. is entitled to a demand of possession. But where deft. went to the heir & offered to pay him the money due on the bond, & to take a deed from him as heir, it was held that by such conduct he had waived his right to a demand.—DOE d. LEMOINE v. VANCOTT (1837), 5 O. S. 486.—CAN.

c. — [—]—Pltf. sold to deft., & gave a bond for a deed, receiving deft.'s bond for the purchase money. Nothing was said about possession in either instrument. Deft. having made default in payment, after having been for some time in possession:—*Held*: pltf. could eject without either notice or demand.—ROBINSON v. SMITH (1859), 17 U. C. R. 218.—CAN.

d. — [—]—STRINGHAM v. AMMERMAN (1857), 14 U. C. R. 548.—CAN.

e. — [Possession of purchaser to continue until conveyance.—Right to continue in possession on failure of vendor to make title.]—A. gave a bond to convey within a specified time certain promises to B. & put B. in possession, which possession, by the terms of the writing obligatory, B. was entitled to hold until A. conveyed to him, & he took B.'s notes for the purchase money, but was never in a position to convey. B. refused to pay his notes or to give up possession:—*Held*: being in possession under the bond, he was entitled to hold it, & his right was not dependent on payment of the notes.—FULTON v. BURRILL (1859), 9 C. P. 101.—CAN.

f. Purchaser in possession under agreement to pay by instalments.—Right to demand for possession on default.]—DOE d. GREENWOOD v. TURNER, [1891] 2 Ch. 144.

g. — [—]—Where deft. entered under an agreement to purchase, & that he should enjoy until

default in payment:—*Held*: on default he might be ejected without notice or demand.—DOE d. SHERIFF v. MCGILL-VERAY (1841), 6 O. S. 234.—CAN.

h. — [Possession of tenant of purchaser.—Right of vendor to eject tenant without demand on default of purchaser.]—A. contracted to sell to B. for a sum to be paid by instalments, & deft. went in under B., upon some understanding not explained. Default was made in the payments to A.:—*Held*: A. could eject deft. without notice or demand.—DOE d. PHILLIPOTS v. CROUCH (1849), 5 U. C. R. 453.—CAN.

k. — [Right of entry of vendor on default.]—Where a purchaser is in possession of land either under a written contract of sale, or with the assent of the vendor, the purchase money being payable by instalments, the vendor's right of entry does not first accrue until default occurs in payment of an instalment.—IRVINE v. MACAULAY, McLELLAN v. MACAULAY (1896), 28 O. R. 92; 24 A. R. 446.—CAN.

l. — [—]—READ v. RICHARDSON (1906), 4 W. L. R. 123, 124.—CAN.

m. — [—]—A purchaser who has gone into possession under an agreement for the sale & purchase of land giving him the right to possession until default in payment of an instalment of the purchase money, may be dispossessed on such default, a lessee from the purchaser may also be dispossessed, & the owner is entitled to damages for the refusal of the lessee to give up possession.—FIDELITY TRUST CO. v. HALL, [1918] 2 W. W. R. 439; 11 Sask. L. R. 177; 40 D. L. R. 752.—CAN.

n. — [Right of vendor to recover instalments as rent.]—BUBBSH v. POLASHKEK (Sask.), [1923] 4 D. L. R. 1042; [1923] 3 W. W. R. 1086.—CAN.

1528. — [Unexpected difficulty in title.]—Though generally a purchaser cannot be called on for his money, until he has a title, yet, where he is let into possession upon a mutual confidence of a speedy title, & the difficulty is a mutual surprise, he cannot, without express contract, retain the possession, withholding the money.—GIBSON v. CLARKE (1813), 1 Ves. & B. 500; 35 E. R. 195, L. C.; *subsequent proceedings*, 2 Ves. & B. 103, L. C.

Annotations:—*Consd.* Mole v. Smith (1820), 1 Jac. & W. 665; Greenwood v. Turner, [1891] 2 Ch. 144.

1529. — [Special agreement by vendor to make good title.]—In an agreement for the purchase of an estate, the purchaser stipulated to pay the residue of the purchase-money on a day specified, "upon the vendor's making a good title, or, otherwise, if such title should not be then completed, upon his executing a bond to complete such title, & to convey the estate as soon as the same could be completed"; the vendor is bound to show a good title; & till a good title is shown, the purchaser, though he had entered into possession, is not bound to pay the purchase-money.—CLARKE v. FAUX (1827), 3 Russ. 320; 6 L. J. O. S. Ch. 17; 38 E. R. 596, L. C.

1530. — [Possession without prejudice to objections to title.]—A purchaser under the ct. will not be allowed to take possession "without prejudice to objections to the title," even upon payment of his purchase-money into ct.—HUTTON v. MANSELL (1840), 2 Beav. 260; 48 E. R. 1180.

1531. — [—]—A purchaser who takes possession, although for the benefit of the vendor, & expressly without prejudice to any objection he may afterwards make to the title, will be ordered to pay the purchase-money into ct. if he admits the contract.—FOWLER v. WARD (1812), 6 Jur. 547.

o. Possession retained by vendor under condition to restore on certain event.]—A. is let into possession by B., upon an agreement to purchase, with the understanding that he is to remain until default. A. afterwards, though not in default, lets B. into possession, on the express condition that B. is to restore to him, A. the possession in a certain event. This event happens, but B. retains the possession:—*Held*: A., being entitled to the possession, could maintain ejectment against B., though he had the legal title.—DOE d. BARKER v. CROSBY (1850), 7 U. C. R. 202.—CAN.

p. Restraint of waste or removing timber by purchaser on default of payment.]—A purchaser, having entered into possession under his contract & failed to meet his payments, was restrained from committing waste, or removing timber already cut down.—FAIRRIER v. KERR (1851), 2 Gr. 668.—CAN.

q. Action of ejectment by vendor to compel payment of purchase-money.—Restraint of proceedings on proof of bad title.]—WINTERS v. SUTTON (1865), 12 Gr. 113.—CAN.

r. Conveyance of other property as part of consideration.—Loss of right to possession by conveyance by purchaser making completion impossible.]—SMITH v. KILPATRICK (N.B.) (1913), 12 E. L. R. 557.—CAN.

t. Necessity for judicial proceedings to terminate possession.]—When an agreement for sale gives the purchaser the right of possession he, although in default under the agreement, is entitled to remain in possession until the final order of the ct. terminating the agreement, if no order for possession has been made in the order nisi.—SMITH v. BEITZ, [1921] 1 W. W. R. 278; 56 D. L. R. 507; 11 Sask. L. R. 47.—CAN.

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 2, B.; sub-sect. 3, A. & B.]

1532. — *Contract admitted.*—*FOWLER v. WARD*, No. 1531, *ante*.

SUB-SECT. 3.—MAINTENANCE OF THE PROPERTY.

A. In General.

Position of vendor—Trustee for purchaser.]—*See Sect. 1, sub-sect. 1, A., ante.*

1533. — *Duty to take care of property—Consistent with prudent ownership.]—*The title appearing on the abstract not being satisfactory, & the purchaser for that reason not having taken possession, the vendor to account for the rents received, or which without his wilful default might have been received. Specific performance decreed without costs, the abstract delivered not containing a satisfactory title.

Consider the situation of the purchaser: the objections to the title not being removed, it would not be safe for him to enter into possession, as that would be a waiver of the objections. . . .

. . . The care of the estate must of necessity be left to the vendor; he becomes a trustee for the purchaser, & what hardship is there in expecting him to take the same care of it as he would if it were his own? He must take the measures that are adopted by every prudent landlord. If ultimately the estate is determined to continue his own, he retains the rents; if not, he hands them over to the vendee (*PLUMER, M.R.*).—*WILSON v. CLAPHAM* (1819), 1 Jac. & W. 36; 37 E. R. 289.

1534. — *—.*—(1) Where there is a binding contract for the sale of land, the vendor has a right to retain possession until the purchase-money has been paid & the conveyance accepted; but if he exercise this right he becomes a trustee for the purchaser, & will be liable to him for neglecting to keep the property in a proper state of repair & cultivation.

(2) A dispute arose between the trustees for a deceased vendor & a purchaser, the purchaser claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill & obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land whilst the purchase-money remained unpaid, & in the meantime the rest of the land was allowed to lie waste:—*Held*: the purchaser must be allowed to set off against the interest payable by him the amount of rent which might have been received & the amount of deterioration.—*PHILLIPS v. SILVESTER* (1872), 8 Ch. App. 173; 42 L. J. Ch. 225; 27 L. T. 840; 21 W. R. 179. L. C.

Annotations:—As to (1) Apd. Royal Bristol Permanent Bldg. Soc. v. Bomash (1887), 35 Ch. D. 390; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Clarke v. Ramuz*, [1891] 2 Q. B. 456. *Consd. Leppington v. Freeman* (1891), 65 L. T. 145; *Newman v. Maxwell* (1899), 80 L. T. 681; *Plews v. Samuel*, [1904] 1 Ch. 464.

1535. — *—.*—*ROYAL BRISTOL PERMANENT BUILDING SOCIETY v. BOMASH*, No. 1562, *post*.

1536. — *—.*—Where a vendor under a contract for sale of land keeps possession until completion & payment of the purchase-money, he is in the position of a trustee for the purchaser, & bound as such to take reasonable care to preserve the property.

While a vendor so remained in possession, a trespasser without his authority or knowledge removed large quantities of surface soil from the property. A conveyance of the land was subse-

quently executed, & completion took place, neither party being then aware of the removal of soil:—*Held*: notwithstanding the conveyance, the purchaser could maintain an action against the vendor for a breach of trust in taking no care to prevent such removal of the soil.—*CLARKE v. RAMUZ*, [1891] 2 Q. B. 456; 60 L. J. Q. B. 679; 65 L. T. 657; 56 J. P. 5; 7 T. L. R. 626, C. A.

Annotations:—Consd. Leppington v. Freeman (1891), 66 L. T. 357. *Distd. Greswolde-Williams v. Barneby* (1900), 83 L. T. 708. *Reid. Re Wilson & Stephen's Contract* (1894), 43 W. R. 23.

1537. — *—.*—By a building agreement deft. agreed to erect certain buildings, & carry out certain works, on pltf.'s land within a specified time, & "forthwith to proceed" with & complete the works, when a lease for ninety-nine years was to be granted; the agreement provided that if deft. did not perform the several stipulations therein contained, pltf. might by notice in writing determine the agreement & re-enter; it also contained an option to deft. to purchase the freehold. Pltf. being dissatisfied with the slow progress made by deft., gave him notice to determine the agreement; but deft. having previously given notice to pltf. of his intention to exercise the option to purchase, declined to give up possession. On an action by pltf. to restrain deft. from trespassing on or interfering with pltf.'s possession of the land:—*Held*: (1) on the evidence, deft. had made default in not "forthwith proceeding" to carry out the stipulations of the agreement; but as there was no condition precedent that deft. should not have committed any breach of the conditions contained in the building agreement, the option to purchase was well exercised, & a binding contract was thereby made for the sale & purchase of the property: (2) the determination of the leasing part of the building agreement by the notice given to deft. for breach of its conditions, did not destroy or affect the contract for sale created by the exercise of the option to purchase; & pltf.'s action must therefore be dismissed.

(3) The rights & position of a purchaser in the interval between the commencement of the contract & the completion of the purchase discussed.

As between vendor & purchaser of a property which at the date of the contract is in occupation of a tenant, the purchaser is generally speaking entitled to have the property preserved pending completion in its existing state, & the vendor would not only not be entitled as against the purchaser's desire to determine the tenancy, but if he did determine it he would be liable to the purchaser for any loss thereby accruing (*ROMER, J.*).—*RAFFETY v. SCHOFIELD*, [1897] 1 Ch. 937; 66 L. J. Ch. 448; 76 L. T. 648; 45 W. R. 460.

Annotation:—As to (1) Reid. Sherwood v. Tucker, [1924] 2 Ch. 440.

1538. — *—.*—The co. were bound as vendors, to maintain the property for the benefit of L., their purchaser. . . . They are bound to maintain the premises on the footing that they are trustees of the property, though not in the fullest sense, for the purchaser; & as they are trustees with that obligation to maintain, it seems to me that, where they have had to pay money out of their own pocket which is entirely unremunerative to them, they have a claim against the purchaser in respect of money so expended (*KEKEWICH, J.*).—*BOLTON PARTNERS v. LAMBERT* (1888), 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; *on appeal* (1889), 41 Ch. D. p. 302, C. A.

Annotations:—Mentd. Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs (1890), 44 Ch. D. 616; *Metropolitan Asylums Board Managers v. Kingham* (1890), 6 T. L. R. 217; *Re Portuguese Consolidated Copper Mines, Ex p. Badman, Ex p. Bosanquet* (1890), 45 Ch. D. 16; *Dibbins*

n. Dibbins, [1896] 2 Ch. 348; *Re Hemp, Yarn & Cordage Co., Hindley's Case* (1896), 74 L. T. 627; *Cook v. Williams* (1897), 13 T. L. R. 481; *Re Tiedemann & Ledermann*, [1899] 2 Q. B. 66; *Fleming v. Bank of New Zealand*, [1900] A. C. 577; *Re Gloucester Municipal Petn.*, 1900, *Ford v. Newth*, [1901] 1 K. B. 683; *Reynolds v. Atherton* (1921), 125 L. T. 690.

1539. — Rights & liabilities in respect of existing tenancies—Duty to keep property let.—When the vendor of a farm subject to a yearly tenancy finds that, without default on the part either of himself or the purchaser, the purchase cannot be completed on the appointed day, & that the tenancy will determine before actual completion, it is his duty as trustee for the purchaser, whether the tenancy be determined in the ordinary course by landlord or tenant or on a notice to quit given by the vendor at the request & for the convenience of the purchaser, to relet the farm on a yearly tenancy, so as to prevent it going out of cultivation, unless he obtains an indemnity from the purchaser against all risk arising from its remaining unlet.

He [the vendor] is certainly a trustee for the purchaser, a trustee, no doubt, with peculiar duties & liabilities, for it is a fallacy to suppose that every trustee has the same duties & liabilities; but he is a trustee (*JESSEL, M.R.*).—*EGMONT (EARL) v. SMITH, SMITH v. EGMONT (EARL)* (1877), 6 Ch. D. 469; 46 L. J. Ch. 356.

Annotations:—Apld. *Royal Bristol Permanent Bldg. Soc. v. Bomash* (1887), 35 Ch. D. 390; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295. *Consd.* *Clarke v. Ramuz*, [1891] 2 Q. B. 456; *Leppington v. Freeman* (1891), 65 L. T. 115. *Mentd.* *Re Read*, [1894] 3 Ch. 238; *Re London School Board & Foster* (1902), 87 L. T. 700.

1540. — Right to determine.—*RAFFETY v. SCHOFIELD*, No. 1537, *ante*.

1541. — Liability for improper determination.—*RAFFETY v. SCHOFIELD*, No. 1537, *ante*.

—*See LANDLORD & TENANT*, Vol. XXX., p. 474, Nos. 1370–1372.

1542. — Sale of business—Liability where business carried on by vendor.—*DAKIN v. COPE*, No. 1631, *post*.

1543. ——Where by reason of the deliberate default of the purchaser a contract for the sale of premises, together with the goodwill of the business being carried on thereon, is not completed on the date fixed for completion, the vendor is entitled, apart from any express provision in the contract to that effect, to carry on the business at the risk of the purchaser & to be indemnified by him in respect of losses so incurred, provided that he informs the purchaser promptly of what he is doing & that the business is being carried on at a loss.—*GOLDEN BREAD CO. v. HEMMINGS*, [1922] 1 Ch. 162; 91 L. J. Ch. 228; 120 L. T. 594; 66 Sol. Jo. 124.

B. Repairs and Improvements.

1544. Where contract obtained unfairly—Allowance to purchaser—On cancelling contract & accounting for profits.—There may be a degree of unfairness in obtaining articles for the purchase

of an estate, for which this ct. will not set them aside; but will refuse its aid to carry them into execution, & if the party who obtained such articles has been in possession, & made lasting improvements, he shall be allowed for them on consenting to deliver up the articles & account for the profits; otherwise, if he goes to law, & fails there.—*SAVAGE v. TAYLOR* (1736), *Cas. temp. Talb.* 234; 25 E. R. 753, L. C.

Annotation:—Refd. *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77.

1545. Claim in respect of improvements effected—Form of order for inquiry.—A vendor who has to account to the purchaser for rents & profits from the time fixed for completion is not, unless a special case be made, liable to account for sums which he might have received but for his wilful default, nor entitled to an inquiry as to repairs or lasting improvements.

In fixing occupation rent to be paid by a vendor in such circumstances, it is not according to the course of the ct., to insert in the decree a provision respecting income tax, any just allowance, in that respect, being comprehended in the general & usual words.—*SHERWIN v. SHAKESPEAR* (1854), 5 De G. M. & G. 517; 2 Eq. Rep. 957; 23 L. J. Ch. 898; 24 L. T. O. S. 45; 18 Jur. 813; 2 W. R. 668; 43 E. R. 970, L. J.

Annotations:—Apld. *Regents Canal Co. v. Ware* (1857), 23 Beav. 575; *Mct. Ry. v. Defries* (1877), 2 Q. B. D. 189.

Refd. *Vickers v. Hand* (1859), 26 Beav. 630; *Palmerston v. Turner* (1861), 33 Beav. 524; *Herbert v. Salisbury & Yeovil Ry.* (1866), L. R. 2 Eq. 221; *Williams v. Glenton* (1866), 1 Ch. App. 200; *Re Riley to Streatfield* (1866), 56 L. T. 48; *Re London Corp'n. & Tubbs' Contract*, [1894] 2 Ch. 524; *Bennett v. Stone*, [1903] 1 Ch. 509. *Mentd.* *Re Phillips, Ex p. Kiveton Coal Co.* (1872), 7 Ch. App. 730.

1546. Repairing covenant—Incident to reversion—Right of purchaser to benefit of.—A dwelling-house was put up for auction on Mar. 2, 1887.

The particulars announced the sale as “with possession” & stated that the purchaser could take the late tenant's fixtures at a valuation if he desired. The conditions provided that the purchase should be completed on Mar. 25. There was no mention, except as above, in the particulars & conditions of any tenancy. B. purchased the house at the auction. It was in evidence that the auctioneer stated at the auction that the house was not in good decorative repair. It appeared from the abstract delivered to the purchaser that the house had been let upon a lease, which had been determined by notice expiring on Mar. 25, 1887, & which contained covenants by the lessee to keep & deliver up the premises in good repair. On Jan. 20, 1887, a receiving order in bkpy. had been made against the lessee, & an arrangement had afterwards been come to giving the vendor power to take immediate possession. The vendor had carried in a proof in the lessee's bkpy. for damages for breach of the repairing covenants. The purchaser delivered a requisition claiming to be entitled to any sum recovered by the vendor from the lessee in respect of his breach of covenant to repair:—*Held*: the

purchaser having in the meantime gone into possession of & improved the property, afterwards applied to be relieved from the purchase, & to have the improvements paid for out of the estate, alleging his inability to carry out the bargain. The ct. relieved him from the purchase but refused to make him any allowance in consideration of his improvements, or return to him the money he had paid.—*Re YAGGIE* (1858), 1 Ch. Ch. 52.—*CAN.*

c. — *Improvements made in good faith*—The rule that a party in

PART VI. SECT. 1, SUB-SECT. 3.—A.

15391. Position of vendor—Rights & liabilities in respect of existing tenancies—Duty to keep property let.—Unpaid vendors of a property, consisting of houses let in rooms to weekly tenants, who are in a position of qualified trusteeship for a purchaser, are bound, so far as they reasonably can, to keep the premises properly tenanted so long as they remain in their possession.

2.—IR.

Liability for removal of fixtures by stranger between sale & com-

pletion.—A vendor of real estate is not liable for the removal by a third party of fixtures from the premises sold, between the time of sale & the date fixed for delivery of possession.—*SMITH v. HAYLES* (1877), 3 V. L. R. 237.—*AUS.*

PART VI. SECT. 1, SUB-SECT. 3.—B.

b. *Claim in respect of improvements effected—By purchaser withdrawing from purchase.*—A person contracted to purchase lands of persons not capable of selling without the authority of the ct., which was subse-

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 3, B., C. & D. (a) & (b).]

purchaser had contracted for the purchase of the possession of the house as it stood, & could not be entitled to the claim for damages for breach of the covenant to repair, because that claim was incident to the reversion of the lease, which he had not purchased.—*Re EDIE & BROWN'S CONTRACT* (1888), 58 L. T. 307; 4 T. L. R. 260.

Annotation:—Apprvd. Re Lyne-Stephens & Scott-Miller's Contract, [1920] 1 Ch. 472.

1547. —[—]—On July 8, 1919, the purchaser bought a freehold house at a sale by auction from the vendor. In the particulars of sale it was stated that the property was "let on lease expiring Sept. 29, 1919, at a rent of £500 per annum, & to be sold with possession on completion of the purchase." The conditions of sale, condition 3, provided that the purchase should be completed on Sept. 29, 1919. Condition 4 was as follows: "Possession or receipt of the rents & profits will be retained, & all outgoing discharged by the vendor up to Sept. 29 next, & as from that day the outgoing, including any rates made but not demanded till after that day, shall be discharged by, & possession shall belong to the purchaser, & the outgoing shall, if necessary, be apportioned for the purpose of this condition, but the purchaser shall not be let into actual possession of the property until the completion of the purchase." At the date of the contract the property was in a bad state of repair, & the lessee was bound under his lease to make good the repairs. In the interval between the contract & completion, namely, about Aug. 28, 1919, the amount payable by the lessee was arranged between the vendor & lessee at £2,000 & that amount was paid into a joint account, the rights of the vendor & purchaser thereto being reserved. The purchase was completed in the afternoon of Sept. 29, 1919. On a summons taken out by the purchaser under Vendor & Purchaser Act, 1874 (c. 78), asking for a declaration that he was entitled to moneys payable at or at any time after the date of the contract of July 8, 1919, by the lessee of the property sold, as compensation for breaches of the repairing or other covenants by the lessee:—*Held*: what was sold was not the house subject to & with the benefit of the lease which was existing at the date of the contract, but the house with possession, altogether apart from & independent of the lease, the obligations & rights under which were only a matter between the vendor & the lessee, & the purchaser was therefore not entitled to the sums paid by the lessee as compensation for his breaches of covenant.—*Re LYNE-STEPHENS & SCOTT-MILLER'S CONTRACT*, [1920] 1 Ch. 472; 123 L. T. 8; 36 T. L. R. 307; 64 Sol. Jo. 341; *sub nom. Re STEPHENS & SCOTT-MILLER'S CONTRACT*, 89 L. J. Ch. 287, C. A.

1548. *Cost of compliance with dangerous structure notice—Vendor under covenant to repair.*—A purchaser on July 1, 1901, entered into an open contract with a vendor for the purchase of a leasehold house, the lease of which contained a covenant by the lessee to keep in good repair. At the date of the contract the purchaser was aware that

the lease contained such a covenant, he was also aware from previous inspection that the house was, as the vendor in fact admitted, in bad repair, & on that account the vendor agreed to accept a reduced price. The ct. held that Nov. 6 was the date fixing the rights & liabilities of the parties under the contract. On Sept. 27, the vendor was served with a "dangerous structure" notice from the London County Council under London Building Acts, 1894 & 1898, requiring him to pull down or render secure a part of the house. The notice not being complied with, a police ct. order was made on Nov. 1 requiring him to do the repairs within fourteen days from service of the order, but he was not served with it till Nov. 9. On Oct. 24 the vendor paid the Michaelmas rent due under his lease, & he produced the receipt for it to the purchaser.

Upon a summons taken out by the vendor under the Vendor & Purchaser Act, 1874 (c. 78), for a declaration that he had made a good title & that the expenses of complying with the police ct. order should be borne by the purchaser:—*Held*: apart from the question as to the date at which the requirements of the "dangerous structure" notice & the subsequent police ct. order had ripened into an obligation, as to which the ct. expressed no opinion, the purchaser had proved a breach of the vendor's covenant to repair, & therefore Conveyancing Act, 1881 (c. 41), s. 3 (4), which requires a purchaser of leaseholds, on production of the receipt for the last payment due for rent, to assume, "unless the contrary appear," that all the covenants of the lease have been performed, did not apply, since the contrary did appear; & the vendor's obligation to make a good title was not removed by the knowledge of the purchaser at the date of the contract that the title was bad by reason of the breach of covenant; & accordingly the expense of complying with the police ct. order must be borne by the vendor.—*Re HIGGETT & BIRD'S CONTRACT*, [1903] 1 Ch. 287; 72 L. J. Ch. 220; 87 L. T. 697; 51 W. R. 227; 47 Sol. Jo. 204, C. A.

Annotations:—Expld. Re Allen & Driscoll's Contract, [1904] 2 Ch. 226. *Distd. Re Taunton & West of England Perpetual Benefit Bldg. Soc. & Roberts' Contract*, [1912] 2 Ch. 381.

C. Accretion in Value.

1549. *Right of purchaser to benefit.*—Sale of an estate for a certain sum of money, & an annuity for life. The agreement being fair, a ct. of equity will decree a specific performance, although the party die before any payment of the annuity.—*MORTIMER v. CAPPER* (1782), 1 Bro. C. C. 156; 28 E. R. 1051, L. C.

Annotations:—Apld. Kenney v. Wexham (1822), 6 Madd. 355. *Refd. Pritchard v. Ovey* (1820), 1 Jac. & W. 396; *Davies v. Cooper* (1840), 5 My. & Cr. 270; *Bover v. Cooper* (1843), 2 Hare, 408; *Counter v. Macpherson* (1845), 5 Moo. P. C. C. 83; *Strickland v. Turner* (1852), 7 Exch. 208; *Coles v. Bristowe* (1868), L. R. 6 Eq. 149.

1550. —[—]—*HARFORD v. PURRIER*, No. 1570,

D. Liability for Loss or Damage.

(a) In General.

1551. *Liability of purchaser.*—A. articulated on behalf of B. to purchase four houses in Jamaica,

good faith making improvements on property which he has purchased will not be disturbed in his possession, even if the title prove bad, without payment, for his improvements, will be enforced actively in this et., as well where the purchaser is pft., as where he is deft.; & that although no action has been brought to dispossess him.—*GUMMERSON v. BANTING* (1871), 18

Gr. 516.—CAN.

d. — *Where vendor unable to make good title.*—In the absence of fraud on the part of the vendor, or other special circumstances, if a purchaser takes possession under the contract, & the vendor is unable to make a good title, the purchaser is not entitled to be repaid the amount expended by him in improvements.—

RANKIN v. STERLING (1902), 22 C. L. T. 230; 3 O. L. R. 646; 1 O. W. R. 243.—CAN.

PART VI. SECT. 1, SUB-SECT. 3.—D. (a).

1551. *Liability of purchaser.*—In equity, an estate agreed to be purchased is considered the estate of the purchaser from the time of the contract, &

& to pay £800 for the same. The houses were soon afterwards swallowed up by an earthquake, & A. had no assets of B. yet decreed to pay the purchase-money.—*CASS v. RUDELE* (1693), 2 Vern. 280; 1 Eq. Cas. Abr. 25, pl. 8; 23 E. R. 781, H. L.

Annotation:—*Mentd.* *Burton v. Langham* (1848), 5 C. B. 92.

1552. — **Dropping of life on sale of lease for lives.**—*WHITE v. NUTTS* (1702), 1 P. Wms. 61; 24 E. R. 294.

1553. — **In possession only as trespasser.**—*Injunction against cutting timber in the case of trespass: viz. by a person, having got possession under articles to purchase.*—*CROCKFORD v. ALEXANDER* (1808), 15 Ves. 138; 33 E. R. 707, L. C.

Annotation:—*Refd.* *Lowndes v. Bettle* (1864), 3 New Rep. 409.

1554. — **Loss of tenants.**—*HARFORD v. PURRIER*, No. 1570, *post*.

1555. — ————*DOTESIO v. BISS*, No. 2229, *post*.

1556. — **Acts of waste.**—Acts of ownership, amounting to waste, by alteration & conversion of property, sufficient to induce the ct. to order payment of purchase-money into ct., upon the ground that a vendor has a lien on the estate for the amount, & might have filed his bill to restrain the purchaser in possession from committing such acts of ownership. Though the bill contained no charge of such acts having been committed, the order was made on affidavit supplying the fact; deft. not having answered, nor being in contempt, nor under any order for time.—*CUTLER v. SIMONS* (1816), 2 Mer. 103; 35 E. R. 880, L. C.

Annotations:—*Folld.* *Bramley v. Teal* (1818), 3 Madd. 219. *Consd.* *Lewis v. James* (1886), 32 Ch. D. 326. *Refd.* *Osborne v. Harvey* (1841), 1 Y. & C. Ch. Cas. 116; *Greenwood v. Turner*, [1891] 2 Ch. 144.

1557. — **Premises becoming dangerous structure.**—A purchaser from the ct. is in equity the owner from the order confirming the report, & any deterioration of the property arising from accident or by fire, without the default of the vendor, falls upon the purchaser.

If, between the contract & conveyance, a loss arises by accident, which brings with it legal obligation, which must be immediately satisfied, the expense incurred by the vendors is payable by the purchaser.

After the confirmation of the report a part of the premises fell down & damaged the neighbouring property, the owner of which threatened to bring an action, & the remainder was ruinous & dangerous to the public. The vendor having reinstated & repaired the premises, the ct. held that the purchaser was bound to indemnify him, & on petition ordered a reference to ascertain the expenses properly incurred.—*ROBERTSON v. SKELTON* (1849), 12 Beav. 260; 19 L. J. Ch. 140; 14 L. T. O. S. 542; 50 E. R. 1061; *sub nom.* *SKELTON v. ROBERTSON*, 14 Jur. 323.

Annotation:—*Refd.* *Paramore v. Greenslade* (1853), 1 Sm. & G. 341.

1558. — **Damage repaired by vendor—In-**

if after the contract the value be lessened, with no fault on either side, the purchaser must sustain the loss.—*MAUVAIS v. TERVO* (1915), 32 W. L. R. 811; 9 W. W. R. 434; 25 D. L. R. 192; 22 B. C. R. 207.—*CAN.*

1551*h.* — *J.*—A purchaser must suffer the loss by deterioration of the land purchased from the time of a valid agreement for sale, so long as the land remains in *esse*.—*FAGAN v. CAN-TERBURY WASTE LANDS BOARD* (1882), 1 N. Z. L. R. 242 (S. C.).—*N.Z.*

e. Liability of vendor—In posses-

demnification.—*ROBERTSON v. SKELTON*, No. 1557, *ante*.

1559. **Liability of vendor—In possession with consent of vendee—Demolition increasing selling value of property.**—(1) In estimating damages, the nature of the property & position of the parties is to be considered.

(2) Damages in the nature of an occupation rent will not be given in respect of an unfinished house.

(3) Before paying the purchase-money for a piece of land, & after having expended a large sum in building upon it, the purchaser became insolvent, & entered into an agreement with the vendor for the rescission of the contract, & the vendor resumed possession of the property; but before he did so the purchaser committed an act of bkpcy. by absconding. Amongst the buildings erected by the purchaser were some stables on a vast scale, & quite unsuited to the kind of house that any prudent man would build on the property. The vendor on resuming possession pulled down these stables. The purchaser's assignees in bkpcy. filed a bill against the vendor for specific performance of the original contract for sale, & by the vendor's consent a decree was made for specific performance, & an inquiry was directed as to the damages sustained by plffs. by reason of certain acts of defts. complained of in the bill:—*Held*: as the demolition of the stables did not diminish the selling value of the property, deft. was not liable to pay damages in respect of such demolition.—*KREHL v. PARK* (1874), 31 L. T. 325; 22 W. R. 477, L. J.

1560. **Measure of damages—Matters to be considered.**—*KREHL v. PARK*, No. 1559, *ante*.

1561. **Damages in nature of occupation rent—No advantage from occupancy.**—*KREHL v. PARK*, No. 1559, *ante*.

(b) Deterioration.

1562. **Duty of vendor to prevent deterioration.**—Two houses stated in the particulars to have been "recently in the possession of F.," were put up by plffs., mtgees. from F., for sale by auction, & were bought by deft. A day was fixed for completion of the purchase, when rents or possession were to belong to the purchaser. At that day F. was still in possession, & remained so until he was turned out by the sheriff, more than a month after. The purchaser had agreed to let the houses to a tenant as from a day five days later than the day fixed for completion, but the tenant, finding that he could not have immediate possession, had refused to take the houses, which had remained unoccupied, & had also been damaged by the removal of some fixtures & otherwise. The vendors brought an action for specific performance simply. Deft. counterclaimed for specific performance with compensation:—*Held*: (1) the purchaser was entitled to damages in the nature of compensation for loss of a tenant, & the damages would be the amount of rent lost; (2) the purchaser was entitled to damages for the deterioration of the property.

sion pending completion.—The right of a purchaser to claim compensation for damage to or deterioration of land owing to an omission or neglect of duty on the part of a vendor remaining in possession pending completion of the contract for its sale, exists independently of express stipulation & irrespective of whether it is recoverable at law or not.—*POGGIOLI v. KING* (1921), 21 S. R. N. S. W. 667; 38 N. S. W. W. N. 179.—*AUS.*

ties in possession.—A vendor who contracts for the sale of property of which he has not taken possession is accountable to the purchaser for dilapidations by the parties in possession before the vendor takes the possession from them. A vendor in possession is, generally speaking, responsible for dilapidations that take place before he shows a good title, where the dilapidations are such as a prudent owner or his tenants might have prevented.—*FISKEN v. WRIDE* (1865), 11 Gr. 245.—*CAN.*

1. — *For dilapidations of par-*

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 3, D. (b) & (c), & E.]

(3) A vendor having property under his control in his possession which he has contracted to sell, is bound to keep it in a reasonable state of repair, so that the purchaser may take the thing which he contracted to buy, unless there are some special circumstances which alter that obligation. . . . I regard the vendors in this case as trustees for the purchaser—from the date of the contract (KEKEWICH, J.).—**ROYAL BRISTOL PERMANENT BUILDING SOCIETY v. BOMASH** (1887), 35 Ch. D. 390; 56 L. J. Ch. 840; 57 L. T. 179.

Annotations:—As to (1) Distd. Re Wilsons & Stevens' Contract, [1894] 3 Ch. 546. Rejd. Jones v. Gardiner, [1902] 1 Ch. 191. As to (3) Rejd. Clarke v. Ramuz, [1891] 2 Q. B. 456.

1563. — Removal of surface soil.]—CLARKE v. RAMUZ, No. 1536, ante.

1564. Compensation allowed to purchaser.]—The completion of a contract being delayed for three years by difficulties in the title, the vendor held accountable for a deterioration of the land during that period.—**FOSTER v. DEACON** (1818), 3 Madd. 394; 56 E. R. 550.

Annotation:—Rejd. Royal Bristol Permanent Bldg. Soc. v. Bomash (1887), 35 Ch. D. 390.

1565. — Deduction from purchase-money.]—The amount of deterioration of an estate pending a suit for specific performance, having been ascertained by an issue, the purchaser was allowed it out of his purchase-money, which he had paid into ct. under an order, with interest from the time when he paid in his money.—**FERGUSON v. TADMAN** (1827), 1 Sim. 530; 57 E. R. 676.

1566. — Delay in completion of purchase.]—**HOGGART v. SCOTT, No. 2158, post.**

1567. — —.]—Deterioration of the estate arising from delay in completing the purchase is not ground for rescinding the contract but may be the subject of allowance to the purchase.—**LORD v. STEPHENS** (1835), 1 Y. & C. Ex. 222; 160 E. R. 90.

1568. — — Default of vendor.]—(1) When the completion of a purchase is delayed through the default of the vendor in possession, & the property has diminished in value or has been deteriorated by permissive waste, the purchaser is entitled to compensation.

(2) Vendor held accountable for the rents, but not entitled to any interest on the purchase-money, the purchase not having been completed through the default of the vendor, & the purchase-money having, after notice to the vendor, been lying idle.—**REGENT'S CANAL CO. v. WARE** (1857), 23 Beav. 575; 26 L. J. Ch. 566; 29 L. T. O. S. 274; 3 Jur. N. S. 921; 5 W. R. 617; 53 E. R. 226.

Annotations:—As to (1) Rejd. Clarke v. Ramuz (1891), 60 L. J. Q. B. 679. Generally, Mentd. Mason v. Stokes Bay Ry. & Pier Co. (1862), 1 New Rep. 84; Harding v. Met. Ry. (1872), 7 Ch. App. 154; Re Pigott & G. W. Ry. (1881), 18 Ch. D. 146; Re Cary-Elwes' Contract, [1906] 2 Ch. 143.

1569. — — Allowance of rent.]—**PHILLIPS v. SILVESTER, No. 1534, ante.**

1570. When loss falls on purchaser—Act of purchaser.]—(1) A vendee, before a conveyance, having agreed with a tenant, that if he had a conveyance by a given time, the tenant should quit at that period, & the tenant misconstruing the agreement, quitted before a conveyance was made, so that the land was untenanted & de-

teriorated, the loss held to fall upon the vendee, it being occasioned by his agreement with the tenant.

If after the contract the estate be improved in the interval, or if the value be lessened by the failure of tenants, or otherwise, & no fault on either side, the vendee has the benefit, or sustains the loss. If there is a loss by fire after the contract, & before the completion of it, if neither party is in fault, the loss falls upon the vendee (**PLUMER, V.-C.**).

(2) Vendor not making a title when bill filed pays the costs up to the report of a good title.—**HARFORD v. PURRIER** (1816), 1 Madd. 532; 56 E. R. 195.

Annotation:—As to (1) Rejd. Raffety v. Schofield, [1897] 1 Ch. 937.

1571. — — Completion delayed.]—The completion of a contract having been delayed for thirteen years, the property became deteriorated by dilapidations:—**Held**: under the circumstances the loss must fall on the purchaser, as the state of the title was such, that he ought to have completed his purchase & taken possession.

In Aug. 1828, pltf. agreed to sell a property to deft. The contract was to be completed on Oct. 9 following, & the purchaser was to be entitled to possession up to that time, & if the purchase should not be then completed, the purchaser was to pay interest at 5 per cent. from that day until full payment. The abstract having been delivered, all parties seemed to agree that a good title was not shown; & in Nov. 1828, the time for completion was enlarged to Feb. 21, 1829, when the purchase-money was to be paid without interest, & deft. let into possession; & if pltf. should fail to make a good title, the deposit was to be returned, with interest at 4 per cent. from Oct. 9. Deft. refused to complete, & in 1829 brought an action for his deposit, & pltf. filed his bill for specific performance. Deft. had not taken possession, & great dilapidation had occurred. It was decided that a good title had been shown in Aug., 1828. A decree was made against deft. with costs; & it was determined that A. should sustain the loss by dilapidation, & should pay interest at 4 per cent. only on his purchase-money from the time of filing the bill.—**MINCHIN v. NANCE** (1841), 4 Beav. 332; 49 E. R. 367.

1572. Deterioration not ground for rescission.]—**LORD v. STEPHENS, No. 1567, ante.**

1573. —.]—A railway co. had taken possession of houses under an agreement with the vendors, but had so acted with the property after they had taken possession that it became much deteriorated in value. The ct. ordered the payment of the purchase-money into ct. without allowing the co. the alternative of giving back possession.—**POPE v. GREAT EASTERN RY. CO.** (1866), L. R. 3 Eq. 171; 36 L. J. Ch. 60; 15 L. T. 239; 12 W. R. 192.

Annotations:—Consd. Lewis v. James (1886), 32 Ch. D. 326. Rejd. Greenwood v. Turner, [1891] 2 Ch. 144.

(c) Fire.

1574. Whether loss borne by purchaser.]—If 1 article to buy an house, & the house is burnt down before the day of payment, I am not bound to pay the money.—**STENT v. BAILIS** (1724), 2 P. Wms. 217; 24 E. R. 705, L. C.

Annotations:—Expld. Bacon v. Simpson (1837), Murp. & H. 309. Mentd. Thompson v. Barclay (1831), 9 L. J. O. S. Ch. 215.

PART VI. SECT. 1, SUB-SECT. 3.—D. (c).

1574i. Whether loss borne by purchaser.]—A purchaser of a sale under

decree signed the usual contract to purchase, & paid the deposit. The next day the buildings on the property were burned down:—**Held**: the loss would not fall on the purchaser, as the

interest contracted for did not vest in him till the report on sale was confirmed.—**STEPHENSON v. BAIN** (1880), 8 P. R. 258.—**CAN.**

1575. —.]—The declaration stated that pltf. was lawfully possessed of a certain dwelling-house & premises, etc., & also of certain furniture, tenant's fixtures, etc., then being on the said premises, for the residue of a term of six years; & that pltf. agreed to sell & assign the said lease, with the outbuildings & premises; at a certain sum; & all the household furniture, etc.; then on the said premises at a fair valuation; & that possession should be given to deft. on or before a certain day. It then averred, that from the time of making the agreement, pltf. was ready & willing to transfer the household furniture, etc. This averment was traversed. It appeared that upon the day upon which the agreement was entered into, the house together with the furniture was destroyed:—*Held*: on this issue pltf. could not recover.—*BACON v. SIMPSON* (1837), 3 M. & W. 78; *Murph. & H.* 309; 7 L. J. Ex. 34; 150 E. R. 1064.

Annotations:—*Mentd.* Gwynne v. Davy (1840), 1 Man. & G. 857; *Tharpe v. Stallwood* (1843), 7 J. P. 400.

1576. —.]—(1) Contract for the sale of houses; which from defects in the title could not be completed on the day. The treaty however proceeded upon a proposal to waive the objections upon certain terms. The houses being burnt before a conveyance, the purchaser is bound, if he accepted the title; & the circumstance, that the vendor suffered the insurance to expire at the day, on which the contract was originally to have been completed, without notice, makes no difference. A reference to the master was therefore directed to inquire, whether the proposal was accepted, or acquiesced in, on behalf of the purchaser.

(2) If the party by the contract has become in equity the owner of the premises, they are his to all intents & purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; & they would descend to his heir (*LORD ELDON, C.*).—*PAINE v. MELLER* (1801), 6 Ves. 349; 31 E. R. 1088, L. C.

Annotations:—*As to* (1) *Distd.* Wyvill v. Exeter (Bp.) (1811), 1 Price, 294, n. *Consd.* Harford v. Purrier (1816), 1 Madd. 532. *Distd.* Bryant v. Busk (1827), 4 Russ. 1; *Counter v. Macpherson* (1845), 5 Moo. P. C. C. 83. *Apld.* Rayner v. Preston (1881), 18 Ch. D. 1. *Refd.* Coles v. Bristowe (1868), L. R. 6 Eq. 149; *Cory v. Patton* (1872), L. R. 7 Q. B. 304. *As to* (2) *Apld.* Mead v. Davison (1835), 3 Ad. & El. 303. *Consd.* Dowson v. Solomon (1859), 1 Drew. & Sm. 1. *Distd.* Trotter v. Watson (1869), L. R. 4 C. P. 434. *Generally, Mentd.* Sutherland v. Pratt (1843), 11 M. & W. 296.

1577. —.]—A purchase before the master is not complete before confirmation of the report. Therefore a loss by fire after the report, but before confirmation, falls upon the vendor; & the circumstance that the sale had been delayed by the purchaser having opened the biddings, was not attended to.—*Ex p. MINOR* (1805), 11 Ves. 559; 32 E. R. 1205, L. C.

Annotations:—*Apld.* Twigg v. Fifield (1807), 13 Ves. 517. *Distd.* Anson v. Towgood (1820), 1 Jac. & W. 637. *Refd.* Millican v. Vanderplank (1853), 11 Hare, 136; *Re Clayton, Smith v. The Co.*, [1920] 1 Ch. 257.

1578. —.]—*ACLAND v. CUMING*, No. 1612, *post*.

1579. —.]—*HARFORD v. PURRIER*, No. 1570, *ante*.

1580. —.]—*ROBERTSON v. SKELTON*, No. 1557, *ante*.

Insurance & insurance money.]—See Sub-sect. 3, E., *post*.

E. Insurance and Insurance Money.

See, now, Law of Property Act, 1925 (c. 20), s. 47.

Assignability of fire insurance policy.]—See INSURANCE, Vol. XXIX., pp. 307–308, Nos. 2541–2550.

1581. Duty of vendor to keep insured—Beyond day of completion—Completion delayed.]—PAINE v. MELLER, No. 1576, *ante*.

1582. — — — — **Property subject to covenant to insure.]—**The vendors of an interest in a freehold house, subject to a covenant to insure it against fire, contracted for the sale of the house to a purchaser within a given time. The contract was not completed by the specified time. There was no default on the part of the purchaser, but the vendors did not keep up the insurance after the time at which the contract should have been completed:—*Held*: the purchaser ought to be discharged from his contract.—*PALMER v. GOREN* (1856), 25 L. J. Ch. 841; 4 W. R. 688.

1583. — — — — **Leasehold property was sold by auction on June 8, 1858, with a condition for completion on July 20, following. The title was accepted by the purchaser on July 16, but owing to disputes as to the value of the fixtures the meeting for completion did not take place till Aug. 26. The purchaser then discovered that the vendors had renewed the insurance, which expired on June 24, for one month only, so that the property became uninsured on July 24, & thereupon became forfeited to the lessors. On Sept. 7, the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, & obtained a waiver of the forfeiture from the lessors, & the purchaser refusing to complete, they filed a bill for specific performance:—Held: although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the ct. would not decree specific performance, & the bill was dismissed, but without costs.**

(2) That up to July 20, the day fixed for the completion of the contract, it was their [the vendors] duty to keep up the insurance, & not only to do so, but to do it at their own expense, I have no doubt, for by the express terms of the contract, the vendors were to clear all outgoing up to that day. But the question is, was it their duty to do so after the day fixed for the completion of the purchase? Now to try this question, let me suppose that the purchaser knew, as he did know, that by the terms of the lease the estate was liable to forfeiture if the insurance dropped. . . . Upon the dry question by whom the expenses of renewing the insurance after July 20 ought to have been borne, I am of opinion that it ought to have been borne by the purchaser (*KINDERSLEY V.-C.*).—*DOWSON v. SOLOMON* (1859), 1 Drew. & Sm. 1; 29 L. J. Ch. 129; 1 L. T. 246; 6 Jur. N. S. 33; 8 W. R. 123; 62 E. R. 278.

Annotation:—*As to* (2) *Apld.* Newman v. Maxwell (1899), 80 L. T. 681.

1584. — **No date fixed for completion.]—**This case raised an important point in the law of vendor & purchaser, as to whether, in a contract between a lessor & his lessee for the lessor to purchase the lessee's interest, no time being fixed for completion, the lessee is bound to keep up the insurance of the

PART VI. SECT. 1, SUB-SECT. 3.—E.

g. Failure of vendor to keep insured—Property subject to covenant by purchaser to insure—Vendor undertaking insurance.]—Where, although a purchaser under an agreement for

sale of a lot of land & building thereon covenants to insure for the benefit of the vendor, the latter waives performance thereof by undertaking to look after the insurance himself but fails to keep the policy in good stand-

ing & the building is burned, he, the vendor, & also his assignee, will be chargeable in an action to recover the amount unpaid under the agreement with what would have been received for insurance had the policy been

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 3, E.; sub-sect. 4, A.]

property after the contract. It is purely a question of the contract contained in that lease binding the lessee to insure all the buildings standing on the land or to be erected thereon, & I have not a scrap of evidence as to what the nature of all those buildings was. Then again, unfortunately, the insurance policy does not in any way help me. As a matter of fact it expired on Mar. 25, 1898, & could not even be sued on. I confess that my present impression is that this structure was a building, but if that question were an essential one for me to decide I should have to request further evidence on that point to be placed before me. Assuming, then, that this was a building, the second question arises whether the *pltf.* could sue on that covenant. Here the purchaser is suing in equity to enforce the covenant. There has been no breach of this covenant to insure, except so far as the amount is concerned. No time was fixed for the completion of the contract, & the period had not arrived when the vendor could say that the policy, so far as he was concerned, had lapsed, & the liability to insure was shifted on to the purchaser. I think that in this respect the present case is covered by the decision of *KINDERSELEY, V.-C.*, in *Dowson v. Solomon*, No. 1583, *ante* (*KEKEWICH, J.*).—*NEWMAN v. MAXWELL* (1899), 80 L. T. 681; 43 Sol. Jo. 477.

1585. Failure of vendor to keep insured—Property subject to covenant to insure—Whether purchaser discharged from contract.]—PALMER v. GOREN, No. 1582, *ante*.

1586. —————.]—*DOWSON v. SOLOMON*, No. 1583, *ante*.

1587. Liability of purchaser for insurance—After date of completion.]—DOWSON v. SOLOMON, No. 1583, *ante*.

1588. Right to insurance money—None acquired by fact of purchase—In absence of agreement.]—A purchaser of property insured against fire does not by the mere fact of purchase acquire a right to the insurance moneys.

A contract was entered into with a trustee for sale for the purchase of a house which was insured against fire in the trustee's name, after which, & before completion of the purchase, the house was burnt down. The insurance co. paid the insurance money to the trustee, who, without the concurrence of his *cestuis que trust*, allowed the purchaser to deduct the amount from the purchase-money upon completion of the sale. The trustee having become *bkpt.*, & a bill having been filed by the *cestuis que trust* against the purchaser:—*Held*: in the absence of any provision in the contract the purchaser was not entitled to the benefit of the money received from the insurance co., & the *cestuis que trust* were entitled to a lien upon the property for the amount deducted, as being unpaid purchase-money.—*POOLE v. ADAMS* (1864), 4 New Rep. 9; 33 L. J. Ch. 639; 10 L. T. 287; 28 J. P. 295; 12 W. R. 683.

Annotations:—*Apld.* *Rayner v. Preston* (1881), 18 Ch. D. 1. *Refd.* *Sinnott v. Bowden*, [1912] 2 Ch. 414.

1589. —————.]—*RAYNER v. PRESTON*, No. 1481, *ante*.

1590. —————.]—*ECCLESIASTICAL COMRS. FOR ENGLAND v. ROYAL EXCHANGE ASSURANCE CORPN.* (1895), 11 T. L. R. 476; 39 Sol. Jo. 623.

1591. — *Right of vendor—Purchaser intending to demolish buildings.]—*Certain insured premises

& buildings were required by the Metropolitan Board of Works for the construction of a new street, under the compulsory powers of their Act. The price had been fixed by an arbitrator, & the purchase though not completed was in course of completion, when the premises were destroyed by fire. The policy was still in force:—*Held*: *pltf.*, as unpaid vendor, was entitled to recover the full value of the premises; although the buildings were only required by the purchasers in order that they might be pulled down.—*COLLINGRIDGE v. ROYAL EXCHANGE ASSURANCE CORPN.* (1877), 3 Q. B. D. 173; 47 L. J. Q. B. 32; 37 L. T. 525; 42 J. P. 118; 26 W. R. 112, D. C.

Annotations:—*Consd.* *Rayner v. Preston* (1881), 18 Ch. D. 1. *Distd.* *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Ecc.* *Comrs. for England v. Royal Exchange Assce. Corpn.* (1895), 11 T. L. R. 476.

1592. ————— *In addition to purchase-money—Option for purchase of lease.]—*The lease of a mill gave the lessees an option to purchase before a fixed day. The lessor covenanted to insure; it was provided that in case of loss not exceeding £4,000, the insurance moneys should be expended in rebuilding, but that if damage by fire occurred over £4,000 in amount, the lease should determine. A fire occurred before the fixed day:—*Held*: the option continued till that day; but in the case of exercise of the option, the amount of insurance money received was not to be deducted from the purchase-money.—*EDWARDS v. WEST* (1878), 7 Ch. D. 858; 47 L. J. Ch. 463; 38 L. T. 481; 26 W. R. 507.

Annotations:—*Consd.* *Re Adams & Kensington Vestry* (1884), 27 Ch. D. 394. *Distd.* *Re Isaacs, Isaacs v. Reginald*, [1894] 3 Ch. 506. *Refd.* *Re Dyson, Challinor v. Sykes*, [1910] 1 Ch. 750.

1593. ————— *Refund of insurance money to insurers.]—RAYNER v. PRESTON*, No. 1481, *ante*.

1594. —————.]—A vendor contracted with a purchaser for the sale, at a specified sum, of a house, which had been insured by the vendor with an insurance co. against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, & the vendor received the insurance money from the co. The purchase was afterwards completed, & the purchase-money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor:—*Held*: in an action by the co. against the vendor, the co. were entitled to recover a sum equal to the insurance money from the vendor for their own benefit.—*CASTELLAIN v. PRESTON* (1883), 11 Q. B. D. 380; 52 L. J. Q. B. 386; 49 L. T. 29; 31 W. R. 557, C. A.

Annotations:—*Apld.* *Law Fire Assce. v. Oakley* (1888), 4 T. L. R. 309. *Distd.* *Gaussen v. Whatman* (1905), 93 L. T. 101. *Refd.* *West of England Fire Insce. v. Isaacs*, [1896] 2 Q. B. 377; *Re Denton's Estate, Licones Insce. Corpn. & Guarantee Fund v. Denton* (1904), 52 W. R. 484; *Assicurazioni Generali de Trieste v. Empress Assce. Corpn.*, [1907] 2 K. B. 814; *Reliance Marine Insce. v. Duder*, [1913] 1 K. B. 265; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insce. Co.'s Case*, [1914] 2 Ch. 617; *British Dominions General Insce. v. Duder*, [1915] 2 K. B. 394; *Matthey v. Curling*, [1922] 2 A. C. 180. *Mentd.* *Sea Insce. v. Hadden* (1884), 13 Q. B. D. 706; *Grover & Grover v. Mathews*, [1910] 2 K. B. 401; *Thames & Mersey Marine Insce. v. British & Chilian S.S. Co.*, [1915] 2 K. B. 214; *Wilson Shipping Co. v. British & Foreign Insce.*, [1920] 2 K. B. 25; *Edwards v. Motor Union Insce.*, [1922] 2 K. B. 249.

Application of moneys to re-instatement.]—See INSURANCE, Vol. XXIX., pp. 340–343, Nos. 2745–2766.

properly maintained.—*MONTREUIL v. TREMBLAY* (Sask.), [1925] 2 W. W. R. 644.—*CAN.*

h. Right to insurance money—Right of vendor—Payment of purchase-money by instalments—Damage to prop-

erty before all instalments paid.]—SCOTT v. CRINNAN (1918), 43 O. L. R. 430.—*CAN.*

SUB-SECT. 4.—RENTS AND PROFITS.

A. In General.

1595. Right of purchaser to rents & profits.]—On a bill by a purchaser for specific performance of a contract for the sale of an estate, a vendor who, during fifteen years, had retained possession of the whole estate, & of one-third of the purchase-money, was, under the circumstances, charged with interest on one-third of the rents & profits.

The usual course is, that the purchaser shall receive the rents, & pay 4 per cent. interest on the purchase-money (PLUMER, V.-C.).—BURTON v. TODD (1818), 1 Swan. 255; 36 E. R. 380.

Annotation.—**Apld.** Donovan v. Fricke (1821), Jac. 165.

1596. —[.]—Contract for purchase of lands, 100 acres arable, 700 acres pasture; the purchaser's entry to commence at Whitsunday, 1807, & that he is to have right "to the crop & year 1807" & disposition, assigning "the rent for crop & year 1807." The farm at the time of the sale in possession of a tenant at a rent payable one half at Candlemas, the other half at Lammas, in each year:—**Held:** the seller, not the purchaser, was entitled to the rent payable by the tenant at these two terms in 1807.—SHEPPARD v. WATHERSTON (1817), 5 Dow. 278; 3 E. R. 1328, II. L.

1597. — **From when good title shown.]**—The decree must be against him [the vendor] for an account of the rents accrued due & received by his stewards since the time, at which the title was to be made (LORD ELDON, C.).—M'NAMARA v. WILLIAMS (1801), 6 Ves. 143; 31 E. R. 982, I. C. *Annotations.*—**Distd.** Wilson v. Clapham (1819), 1 Jac. & W. 9. **Mentd.** A.-G. v. Chesterfield (1854), 18 Beav. 596.

1598. — —[.]—(1) In conditions of sale a time was fixed for the delivery of the abstract, & also for the payment of the purchase-money, or for interest to run if the money were not paid at that time "from whatever cause the delay might have arisen." The vendor did not deliver the abstract at the time stipulated:—**Held:** the purchaser was only liable to pay interest from the time a good title was shown.

(2) In this case the purchaser, finding that the vendor had failed to deliver an abstract, set apart his purchase-money, & gave notice to the vendor:—**Held:** the purchaser did this in his own wrong, the conduct of the vendor having rendered it unnecessary for him to pay the purchase-money until a good title was shown.

(3) If the abstract did show a good title, then, according to the rule of the ct. the property would belong to the purchaser from the time at which the contract ought to be completed, & the money would be the money of the vendors, & therefore the one would be entitled to the fruits of the property, & the other to the fruits of the money. Such is the ordinary rule, & such would be its practical effect in all cases where there merely is a time fixed for the performance of the contract, & nothing specific is said as to the time from which interest is to run (LORD COTTENHAM, C.).

(4) Where nothing appears to occasion the delay, the rule no doubt is that if the purchaser who on the face of the contract is under the necessity of paying on a certain day, sets apart his money & gives notice that it is ready, interest

stops from that time, provided it be shown he made no interest of it; but if the purchaser refuses to pay interest because the delay is occasioned by the vendor, & the case is made out, no question can arise about intermediate interest, because it does not begin to run till the vendor has put himself right (LORD COTTENHAM, C.).—DE VISME v. DE VISME (1849), 1 Mac. & G. 336; 1 II. & Tw. 408; 19 L. J. Ch. 52; 14 L. T. O. S. 169; 13 Jur. 1037; 41 E. R. 1295, L. C.

Annotations.—**As to** (1) **Apld.** Robertson v. Skelton (1850), 12 Beav. 363. **Distd.** Rowley v. Adams (1850), 12 Beav. 476; Wallis v. Sarel (1852), 21 L. J. Ch. 717; Sherwin v. Shakspear (1854), 5 De G. M. & G. 517; *Er p.* Durham (Dean & Chapter), Tewart v. Lawson (1856), 3 Sm. & G. 307. **N.F.** Vickers v. Hand (1859), 26 Beav. 630. **Distd.** Herbert v. Salisbury & Yeovil Ry. (1866), L. R. 2 Eq. 221. **As to** (3) **Apld.** Monro v. Taylor (1850), 8 Hare, 51. **Refd.** Crosse v. Lawrence, Crosse v. Keene (1852), 16 Jur. 142. **As to** (4) **Expld.** Dyson v. Hornby (1851), 4 De G. & Sm. 481. **Distd.** Stocks v. Holdsworth (1854), 2 W. R. 450. **Consd.** *Re* Riley to Streetfield (1886), 34 Ch. D. 386. **N.F.** *Re* London Corp'n. & Tubbs' Contract, [1894] 2 Ch. 524. **Refd.** Palmerston v. Turner (1864), 4 New Rep. 46. *Generally, Refd.* Lewis v. South Wales Ry. (1852), 10 Hare, 113.

1599. — **From date of completion.]**—ACLAND v. CUMING, No. 1612, *post*.

1600. — **Completion delayed through default of vendor.]**—REGENT'S CANAL CO. v. WARE, No. 1568, *ante*.

1601. — **Time extended by agreement.]**—In May pltf. agreed to purchase an estate, including hay & growing crops, for £9,000. The purchase was to be completed in June, when pltf. was to be let into possession, & if not then completed, pltf. was to pay interest on the purchase-money. By subsequent agreement, Nov. was substituted for June. The contract was not completed until the following Feb., & in the meantime the vendors had sold the hay & used the garden produce:—**Held:** under the altered contract, pltf. was not entitled to this hay or produce.—WEBSTER v. DONALDSON (1865), 34 Beav. 451; 12 L. T. 69; 11 Jur. N. S. 404; 13 W. R. 515; 55 E. R. 710.

1602. — **Completion delayed through no fault of purchaser—Retention by vendor of arrears accrued due before completion.]**—PLEWS v. SAMUEL, No. 1488, *ante*.

1603. — **From quarter day preceding completion.]**—The rule of the ct. in the purchase of a fee simple estate is to give the profits from the quarter day preceding the payment of the purchase-money (LORD ELDON, C.).—ANSON v. TOWGOOD (1820), 1 Jac. & W. 637; 37 E. R. 511, I. C.

Annotations.—**Refd.** Millican v. Vanderplank (1853), 11 Hare, 136; *Re* Clayton, Smith v. Clayton, [1920] 1 Ch. 257.

1604. — **From date of possession—As agreed in conditions of sale.]**—By conditions of sale, the purchase-money was to be paid in May, & if not paid, from any cause whatever, interest was to be paid till the purchase was completed, & the purchaser to be let into possession from the quarter-day next preceding the day of payment. Payment was made in Dec.:—**Held:** the purchaser paying interest from May was entitled to the rents from Mar. 25.—NICHOLSON v. NICHOLSON (1835), 5 L. J. Ch. 51.

1605. — **From order of reference to master.]**—Where a reference had been directed to inquire whether an offer for the purchase of leaseholds was

PART VI. SECT. 1, SUB-SECT. 4.—A.

k. Right of purchaser to rents & profits—From date of completion—Right to proportionate part—Where rent paid in advance.]—LISCOMBE v. GROSS (1876), 6 P. R. 271.—CAN.

1. — — — — —.]—DUBLIN

CORPN. v. BARRY, [1897] 1 I. R. 65.—IR.

m. — — — — —.]—Pltf., on May 29, 1902, contracted in writing with deft. for the sale to deft. of certain land, a portion of which was at the time under lease to a tenant whose term commenced on May 1, 1902, &

was then unexpired. Pltf. claimed an apportionment of the rent between May 1 & June 24, when the deed was delivered:—**Held:** the Act respecting the apportionment of rent, R. S. N. S. c. 150, s. 2, did not apply as between vendor & purchaser, & the written contract containing no reservation of

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beneficial, & ought to be accepted, & the master reported in favour of the purchase:—*Held*: the purchasers were entitled to the rents from the date of the order of reference.—*CHEETHAM v. STURTEVANT* (1849), 3 De G. & Sm. 468; 64 E. R. 565.

1606. Vendor charged with interest on rents & profits—Where in possession for long period.]—*BURTON v. TODD*, No. 1595, *ante*.

1607. Right of parties where contract goes off.]—*WILSON v. CLAPHAM*, No. 1533, *ante*.

1608. —.]—On a bill by a vendor for specific performance, where the purchaser had, in 1814, entered into possession under the agreement, & pending the suit, continued in possession until 1823, *plff.*, in consequence of a defect in the title, failing in his attempt to compel the performance of the contract, the *ct.* refused to decree, under the prayer for general relief, an account of rents & profits against the purchaser, though he had stated by his answer that he was willing to pay a fair rent.—*WILLIAMS v. SHAW* (1825), 3 Russ. 178, *n.*; 3 L. J. O. S. Ch. 157; 38 E. R. 545.

1609. Deduction from purchase-money—Order for payment of purchase-money into court—Whether deduction made part of order.]—An order was made in an administration action directing the freehold property of testator to be put up for sale by auction. The conditions of sale provided that each purchaser should pay the balance of his purchase-money, after deducting the amount paid as deposit, into *ct.* to the credit of the action, on or before July 21, 1885, or, in default should be charged interest at the rate of 5 per cent. *per annum* until payment of the purchase-money; & that upon such payment the purchaser should be entitled to possession, or to the rents & profits, as from July 21, 1885. The purchaser of one of the lots having refused to comply with this condition, a summons was taken out, upon which an order was made that, on or before Apr. 7, 1886, or subsequently within seven days after service of the order, the purchaser should lodge in *ct.* the balance of the purchase-money, after deducting the deposit, with interest thereon from July 21, 1885. The purchaser then asked that after the direction for the payment of the money less the deposit, there should be inserted in the order the words "less the rents & profits of the premises from July 21, 1885." He contended that there ought to be no difference made between a completion of a purchase, where the property was being sold under the direction of the *ct.* & when it was being sold outside the *ct.* in the usual way, the course then adopted invariably being to allow the rents & profits to be set off against the interest, the balance being either paid or received by the purchaser:—*Held*: the practice in circumstances like the present was not to allow the addition of the words referred to; & therefore, the application must be refused.—*Re SMITH, DAY v. BONAINI* (1886), 55 L. T. 329, C. A.

1610. What included in rents & profits—Underwood.]—A fall of underwood which must be cut by the person in possession at the regular season, is no more than gathering a crop of corn or hay.

In the absence of proof that the fall was improper or contrary to custom, it is only an annual crop which a tenant for life would enjoy as one of the ordinary fruits incident to the possession, & of which it could not be intended that the party in possession was not to have the benefit (*GRANT, M.R.*).—*BURROUGHS v. OAKLEY* (1819), 3 Swan. 159; 36 E. R. 815.

Annotations:—*Mentd.* *Blacklow v. Laws* (1842), 2 Hare, 40. *St. Paul v. Birmingham, Wolverhampton & Stour Valley Ry.* (1853), 17 Jur. 1176; *Simpson v. Sadd* (1854), 4 De G. M. & G. 665; *Bown v. Stenson* (1857), 24 Beav. 631; *Corless v. Sparling* (1873), 21 W. R. 876.

1611. — Quarry on property purchased—Money payable under lease thereof.]—By an agreement, dated Nov. 30, 1887, M. agreed to sell certain land to F. Part of the purchase-money was to be paid on the signing of the agreement, & the purchase was to be completed on May 1, 1888. It was provided that if the purchase was not completed on that date that the vendor should receive the "rents & profits" of the premises until completion in lieu of interest on the balance of the purchase-money. There was a stone quarry on the land which had been worked for several years under a lease. Part of the purchase-money was paid on the signing of the agreement, but the remainder was not paid on the date fixed for completion:—*Held*: "rents & profits" included whatever was payable under the lease of the quarry, & the vendor was entitled to such amounts from the date of the agreement to the date of the completion of the purchase.—*LEPPINGTON v. FREEMAN* (1891), 66 L. T. 357; 40 W. R. 348, C. A.

Sale of mines or minerals.]—*See MINES*, Vol. XXXIV., p. 633, Nos. 307-309.

Fines on sale of manor.]—*See COPYHOLDS*, Vol. XIII., p. 93, Nos. 1158-1160.

Death of vendor before completion.]—*See EQUITY*, Vol. XX., pp. 377, 452, Nos. 1142a, 1142b, 1768a.

B. Nature of Vendor's Liability.

1612. Whether on footing of wilful default.]—When purchase-money is agreed to be paid, & a conveyance made at a given time, & disputes arise as to the title, & the purchaser proposes to the vendee to lay out the purchase-money in Exchequer bills till it is wanted, but the vendor returns no answer, & the money is laid out in Exchequer bills, the vendee is at the risk, & is entitled to the benefit of such purchase-money, with 4 per cent. interest. When a purchase is completed the vendee is entitled to the rents & profits of the estate till possession is given, & the vendor to his purchase-money, with interest; & if, by the neglect of the vendor, no rents & profits have been received, he will be liable for what he might have received unless the purchaser has taken possession.

With respect to possession, there is no change in the notion of equity until the purchase-money is paid. The vendor has a clear right to possession until the purchase-money is paid; if the purchaser enters before he has paid his purchase-money, he is a trespasser. *Quoad* possession, the estate belongs to the vendor, it is not the estate of the vendee for the purpose of possession; for though in many cases the purchaser is responsible, as if

rent, the purchaser was entitled to the whole rent.—*MILLER v. NICHOLIS* (1892), 23 C. L. T. 176.—*CAN.*

n. — *From date of possession.]—**CAMPION v. JACKSON*, [1919] N. Z. L. R. 209.—*N.Z.*

o. — *From payment of purchase-money.]—**PRENDERGAST v. EYRE* (1826),

4 Ir. L. Rec. N. S. 149; L. & G. *temp.* Plunk. 180.—*IR.*

p. — *—.]—**MONTGOMERY v. COSSLETT* (1836), 2 Jo. Ex. Ir. 174.—*IR.*

q. — *—.]—**SCOTT v. ROTHE* (1838), 1 I. Eq. R. 105.—*IR.*

r. — *—.]—**REDFERN & DICKIE v. CALLOW & ST. JOHN* (1843), Bluet, 263.—*I. of M.*

t. *Liability of vendor—On entry into possession on default of purchaser.]—**WEISS v. RHODES* (Sask.) (1911), 18 W. L. R. 194.—*CAN.*

there be a fire. . . . Still, as to possession, the right is in the vendor till the purchase-money is paid (PLUMER, V.-C.).—*ACLAND v. CUMING* (1816), 2 Madd. 28; 56 E. R. 245.

Annotations :—*Reid*. *Wilson v. Clapham* (1819), 1 Jac. & W. 36. *Reid*. *Burroughes v. Browne* (1852), 9 Hare, 609.

1613. —.]—The account of rents given against a purchaser for value, who, after being in possession, is evicted by a party having a better title, ought not to extend to such rents, as, without his default or neglect, might have been received, if no special case of fraud is made against him. The decree for such an account ought to contain a direction for just allowances.

The question, then, is, whether it is consistent with the practice, that the decree should charge deft. with the rents & profits which might have been received without his default or neglect. The introduction of these words at once struck me as unusual; & I have ascertained on inquiry that no precedent for it can be found, this being neither the case of a mtgee. in possession nor of a trustee against whom a special breach of trust is charged (LORD COTTENHAM, C.).—*HOWELL v. HOWELL* (1837), 2 My. & Cr. 478; 1 Jur. 492; 40 E. R. 722, L. C.

1614. —.]—Houses described in the particulars as in the respective occupations of specified undertenants, & as let to Messrs. J. "at the very low rent of £50 *per annum*, who have received notice to quit" at a day past, but with a subsequent written permission to occupy on the same terms as before until the tenements are sold, were contracted to be sold subject to a condition that the purchaser should be entitled to the rents from a specified day. On completion after that date the purchaser claimed to be allowed a rent at the rate of £150 a year, the sum which the undertenants paid the tenant, on the ground that, in allowing the tenant to continue in possession at the rent of £50 a year after the date of the contract for sale, the vendors were guilty of wilful default. On a claim by the vendors to enforce specific performance :—*Held* : the purchaser not having required the vendors to turn the tenant out, they were not guilty of wilful default in allowing him to remain at the lesser rent; & specific performance was decreed, pltf. accounting only for the lesser rent.—*CROSSE v. BEAUFORT (DUKE)* (1851), 5 De G. & Sm. 7; 64 E. R. 994.

1615. —.]—*SHERWIN v. SHAKESPEAR*, No. 1545, ante.

1616. —.]—*PHILLIPS v. SILVESTER*, No. 1534, ante.

C. Occupation Rent.

(a) As Against Vendor.

1617. Execution delayed through suit pending.—The reasonable course which I shall adopt, unless precedents can be produced against it, is, that for the time, elapsed before the execution of the agreement in consequence of the pendency of the suit, interest shall be paid by the purchaser; & a rent shall be set upon the premises in respect of the possession of the vendor (GRANT, M.R.).—*DYER v. HARGRAVE, HARGRAVE v. DYER* (1805), 10 Ves. 505; 32 E. R. 941.

Annotations :—*Reid*. *Knatchbull v. Grueber* (1817), 3 Mer. 124; *Jennings v. Broughton* (1854), 5 De G. M. & G. 126; *Aberaman Ironworks v. Wickens* (1868), L. R. 5 Eq. 486; *Re Fawcett & Holmes' Contract* (1889), 42 Ch. D. 150.

1618. Sub-purchaser kept out of possession.—Where an owner of an estate contracts to sell to another, who thereupon sells a part of the property so contracted for by auction to a third person & he, the sub-vendee, gets possession & the original vendor afterwards refuses to perform his contract which occasions a suit in equity, pending which the original vendor obtains possession from the sub-vendee on a demand to be restored to it, it being rumoured that the original purchaser had failed in the suit instituted for specific performance, if, in fact, pltf. should ultimately succeed in that suit, & the estate is in consequence conveyed to the purchaser under a decree of the ct., the sub-vendee may maintain use & occupation against the original vendor, for all the time during which he held the possession so obtained from the second purchaser.—*HULL v. VAUGHAN* (1818), 6 Price, 157; 146 E. R. 771.

Annotation :—*Reid*. *Winterbottom v. Ingham* (1845), 7 Q. B. 611.

1619. Completion delayed through default of purchaser.—*DAKIN v. COPE*, No. 1634, post.

1620. —.]—In July, 1867, pltf. sold to a railway co. a house in which he was carrying on the business of a victualler, the terms being that the purchase-money was to be paid on Mar. 25, 1869, or at such earlier time as the co. should choose, possession to be given on payment, they paying 5 per cent. interest in the meantime; & pltf. was to be their tenant at a given rent, the tenancy not to be determined before Mar. 25, 1869, unless the co., after three months' notice, paid the money sooner, but to be determinable on Mar. 25, 1869, by a week's notice. The interest & rent were paid up to Mar. 25, 1869. Pltf. gave due notice to determine the tenancy on that day; but the co. not having the purchase-money ready, he refused to give up possession, & in Apr. filed a bill for specific performance. On Nov. 18, 1869, a decree for specific performance, with a declaration that the title had been accepted, & an order for payment of the purchase-money, with interest from Mar. 25, 1869, was made; & an inquiry was added, whether, having regard to the circumstances & conduct of the parties, the co. were entitled to any & what allowance in respect of pltf.'s occupation of the premises after Mar. 25, 1869 :—*Held* : the co. were not entitled to any allowance by way of occupation rent.

It is the ordinary rule as between vendor & purchaser, that after the time fixed for completion the vendor is entitled to interest, & the purchaser to the rents & profits (JAMES, L.J.).—*LEGGOTT v. METROPOLITAN RY. CO.* (1870), 5 Ch. App. 716; 35 J. P. 135; 18 W. R. 1060, L. J.

Annotation :—*Reid*. *Met. Ry. v. Defries* (1877), 2 Q. B. D. 387.

1621. Occupation by one joint owner.—Deft. & another person conveyed to pltf. an undivided moiety of several houses, of which they were seized as devisees in trust. Of one of those houses deft. had long before been in possession, & continued to occupy it after the conveyance :—*Held* : such occupation did not of itself entitle pltf. to sue him for use & occupation.—*Tew v. JONES* (1844), 13 M. & W. 12; 14 L. J. Ex. 94; 153 E. R. 5.

1622. Condition in agreement for sale.—Admission by demurrer as to amount of rent.—Claim that by an agreement, for the purchase by pltf. of property belonging to defts., the purchase was

PART VI. SECT. 1, SUB-SECT. 4.— C. (a).

a. Delay in completion of title.—Assessment of rent.—Necessity for proof of vendor's occupation.—Where there
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had been considerable delay in completing the title to property, & the purchaser paid the purchase money into court without prejudice, it was held improper, in charging the vendors with the rents during the interval, to

direct the master, in fixing the amounts, to have regard to what the purchaser might have rented the premises for, or to charge the vendors with an occupation rent, without evidence of such occupation, or with deterioration

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 4, C. (a) & (b); sub-sect. 5.] to be completed on Sept. 29, 1869, from which time plffs. were to receive all rents & profits & to pay interest on the purchase-money until the completion of the purchase. That the purchase was not completed until Mar. 13, 1876, & that plffs. had duly paid the interest. That defts. had remained in possession, but had paid no rent. That plffs. claimed rent for use & occupation at the rate of £150 *per annum* as a fair value. Defts. demurred:—*Held*: under the agreement a fair rent must be paid by defts. for the time they remained in possession, & by demurring they had admitted £150 a year to be a fair rent.—*METROPOLITAN RY. CO. v. DEFRIES* (1877), 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841, C. A.

1623. *From when good title shown.*—(1) A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality, & may be a defence to an action for specific performance; but in order to avail himself of that defence he must repudiate the contract as soon as he finds that the vendor cannot make a good title.

Now I think it is reasonably clear on the authorities quoted to me that, before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require, may, except possibly in the case of trifling matters which the ct. would at the vendor's instance treat as matters of compensation or abatement of purchase-money, repudiate his contract, & that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial (*PARKER, J.*).

(2) After a decree for specific performance has been made the purchaser cannot repudiate the contract without the leave of the ct.

(3) Where an order is made for specific performance, interest on purchase-money is payable from the time when the master certifies that a good title is first shown, not from the time when such a title is first shown as would enable the purchaser safely to take possession.

(4) I think there ought to be an occupation rent as far as at any rate this lady has continued, after the date fixed by the master's certificate as the date when title was first shown, in possession in the same way as she was before (*PARKER, J.*).—*HALKETT v. DUDLEY* (EARL), [1907] 1 Ch. 590; 76 L. J. Ch. 330; 96 L. T. 539; 51 Sol. Jo. 290.

Annotations:—As to (1) Apld. Berners v. Fleming, [1925] 1 Ch. 264. Refd. Procter v. Pugh, [1921] 2 Ch. 256. Generally, Refd. Bantfield v. Picard (1911), 55 Sol. Jo. 649.

(b) As against Purchaser.

1624. *Title not completed.*—On a motion by a vendor against a vendee in possession, for a reference to set an occupation rent, the title not being completed, an order was accordingly made,

& damage to the property, except such as occurred through the act or default of the vendors.—*DUDLEY v. BERCZY* (1869), 2 Ch. Ch. 364.—*CAN.*

PART VI. SECT. 1, SUB-SECT. 4.—C. (b).

b. *When contract goes off—Want of title—Vendor bound to prove express or implied contract to pay rent.*—*RE CRAWFORD v. SENEY* (1888), 17 O. R. 74.—*CAN.*

c. *Liability of assignees of purchaser—Continuing in possession after rescission by vendor for default of pur-*

chaser.—*WATERS v. CURRIE* (Alta.), [1919] 3 W. W. R. 525.—*CAN.*

d. *Possession under invalid contract.*—Although a parol contract for the sale of lands be void under Stat. Frauds, s. 4, yet it may be used to rebut an implied contract to pay a quantum valeat for the use & occupation of the premises, deft. having been let into possession in pursuance of the parol contract.—*CORRINGAN v. WOODS* (1867), 15 W. R. 318.—*IR.*

e. *Contract still subsisting.*—Where a purchaser is in possession of a property under a contract of sale &

& that interest, at 5 per cent. upon the deposit, should, under the circumstances, be deducted out of such rent.—*SMITH v. JACKSON* (1816), 1 Madd. 618; 56 E. R. 227.

1625. *When contract goes off—Want of title—Purchase-money paid on entry.*—If a purchaser take possession of premises under a contract of sale, which, on account of a defect in the vendor's title, fails to be completed, the vendor cannot afterwards recover rent for the period of the purchaser's possession, upon an implied contract for use & occupation. At least he cannot, if the purchaser had paid the whole purchase-money when he entered, & the vendor had kept it during the purchaser's possession.—*KIRTLAND v. POUNSETT* (1809), 2 Taunt. 145; 127 E. R. 1032.

Annotations:—Distd. Hull v. Vaughan (1818), 6 Price, 157; *Howard v. Shaw* (1841), 8 M. & W. 118. *Consd. Winterbottom v. Ingham* (1845), 7 Q. B. 611. *Refd. Rumball v. Wright* (1824), 1 C. & P. 589.

1626. — *Occupation beneficial to vendee.*—Where the vendee of an estate sold by auction has been suffered to enter upon & hold the premises while the title was under investigation, & the contract has afterwards been determined for want of title, the vendor cannot, on these grounds only, recover for use & occupation, although a jury find that the occupation has been beneficial.—*WINTERBOTTOM v. INGHAM* (1845), 7 Q. B. 611; 14 L. J. Q. B. 298; 5 L. T. O. S. 328; 10 Jur. 4; 115 E. R. 620.

Annotation:—Mentd. Selby v. Browne (1845), 14 L. J. Q. B. 307.

1627. — *Without default of vendor.*—*HALL v. VAUGHAN* (1819), 1 C. & P. 591, n.; *Peake*, 254, n.; 171 E. R. 1330.

Annotation:—Refd. Rumball v. Wright (1824), 1 C. & P. 589.

1628. — *Period of occupation after failure of contract.*—Where a party is let into possession of land under a contract of purchase, which afterwards goes off, he is liable to an action for use & occupation at the suit of the vendor, for the period which he continues in possession after the contract went off.—*HOWARD v. SHAW* (1841), 8 M. & W. 118; 10 L. J. Ex. 334; 151 E. R. 973.

Annotations:—Refd. Doe d. Stanway v. Rock (1842), 4 Man. & G. 30; *Winterbottom v. Ingham* (1845), 7 Q. B. 611; *Crouch v. Tregonning* (1872), L. R. 7 Exch. 88. *Mentd. Ward v. Clarke* (1844), 9 J. P. 442; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508.

SUB-SECT. 5.—OUTGOINGS.

See, also, Part IV., Sect. 2, sub-sect. 10, F., ante.

1629. *Liability of vendor—Outgoings not disclosed at time of contract.*—*HOWLAND v. NORRIS*, No. 1667, *post*.

1630. — *Until good title shown—In absence of special agreement.*—In the absence of any express stipulation, the expenses & outgoings of property sold must be borne by the vendors, down to the time when the purchaser could prudently take possession, i.e. down to the time when a good title was shown.

purchase which is still in force, he is not liable to a claim for use & occupation of the property for the period during which he has been in possession as purchaser.—*CHAMBERS v. SIMPSON*, [1921] N. Z. L. R. 553.—*N.Z.*

PART VI. SECT. 1, SUB-SECT. 5.

1. *Liability of vendor—Until good title shown—Annual tax due after title shown—Liability of vendor for proportionate part.*—*HARRISON v. JOSEPH* (1880), 8 P. R. 293.—*CAN.*

g. — *Up to time of sale.*—*Re*

The validity of a leasehold title depended on the lessor's assent to the assignment. The assent was not given until after suit by vendor:—*Held*: the vendor must bear the rent, rates, taxes & outgoings, down to the date of the assent, & on the other hand, the purchaser must pay interest from that time.

At what time could the purchaser, acting prudently, have taken possession of the premises sold? Up to that time the expenses & outgoings must be borne by the vendor, & from that time they fall upon the purchaser. Although this is not universally true, yet usually this inquiry is answered, by considering at what time a good title was first shown, it being commonly clear that no purchaser can prudently take possession of what he has contracted to buy, until he is satisfied that he will be able to retain possession of it, or, in other words, until a good title is shown (*ROMILLY, M.R.*).—*CARRODUS v. SHARP* (1855), 20 Beav. 56; 52 E. R. 523.

Annotation:—*Refd.* *Barsht v. Tagg*, [1900] 1 Ch. 231.

1631. — — — — —.]—Conditions of sale of leasehold houses provided that the purchase should be completed on Aug. 11, 1898, & that "a purchaser paying his purchase-money is, as from that day, to be let into possession or receipt of rents & profits, & up to that date all rents, rates, taxes & outgoings are, if necessary, to be apportioned, & such apportioned rent shall be paid on completion by each purchaser to the vendor. If, from any cause whatever, other than wilful default on the part of the vendor, the completion of the purchase is delayed beyond the before-mentioned day, the remainder of the purchase-money is to bear interest at the rate of 6 per cent. *per annum* from that day to the day of actual payment thereof, or, at the option of the vendor, he may receive the rents & profits up to the day of the actual completion of the purchase. The property shall, as from the day of sale, be at the sole risk of the purchaser, & the vendor shall not incur any liability by reason of its then or subsequently becoming or remaining untenanted, uninsured or deteriorated." Through default of *pltf.*, who had purchased one of the lots, his purchase was not completed on Aug. 11, although the title had then been accepted, & *deft.*, the vendor, remained in possession. In Nov. 1898, notices were served on *deft.* as "owner" by the vestry under Public Health (London) Act, 1891 (c. 70), to abate nuisances on the property, & the cost of making the abatement, about £24, was paid by *deft.* In Feb. 1899, *pltf.* was ready to complete, & offered to pay interest at 6 per cent. on the balance of the purchase-money from Aug. 11 on receiving the rents & profits from that date & in that case to repay the £24, but he insisted that if *deft.* retained the rents & profits he ought to bear the cost of the abatement:—*Held*: the £24 being an outgoing which from the time when a good title was shown must clearly be borne by the purchaser in the absence of express stipulation, *pltf.* would as from Aug. 11 have been entitled to the

rents & profits & liable to pay the £24 if the conditions had not given the vendor the option to keep the rents & profits in lieu of interest, but that there was nothing to relieve *pltf.* from the obligation to pay the outgoings, & that he could only obtain specific performance on paying the £24 & the balance of his purchase-money.

I think it is settled law that, in the absence of any stipulation on the subject, the vendor must bear all expenses & outgoings of property sold down to the time when a good title was first shown, so that the purchaser could prudently take possession, & also pay interest on his unpaid purchase-money from that time & as from that time all such expenses & outgoings must be borne by the purchaser (*COZENS-HARDY, J.*).—*BARSH v. TAGG*, [1900] 1 Ch. 231; 69 L. J. Ch. 91; 81 L. T. 777; 48 W. R. 220; 16 T. L. R. 100; 44 Sol. Jo. 133.

Annotations:—*Refd.* *Re Waterhouse's Contract* (1900), 44 Sol. Jo. 645; *Re Highett & Bird's Contract*, [1902] 2 Ch. 214.

1632. — — — — —.]—It is not disputed that in the absence of any stipulation on the subject, the vendor must bear all expenses & outgoings of the property sold down to the time when a good title was first shown, so that the purchaser could safely take possession, & as from that time all such expenses & outgoings must be borne by the purchaser (*SWINFEN EADY, J.*).—*Re HIGHETT & BIRD'S CONTRACT*, [1902] 2 Ch. 214; 71 L. J. Ch. 508; 87 L. T. 159; 50 W. R. 424; 46 Sol. Jo. 380; *on appeal*, [1903] 1 Ch. 287, C. A.

Annotations:—*Refd.* *Re Allen & Driscoll's Contract*, [1904] 2 Ch. 226; *Re Taunton & West of England Perpetual Benefit Bldg. Soc. & Roberts' Contract*, [1912] 2 Ch. 381.

1633. — — — — —.]—Until assent of lessor—Sale of leaseholds.]—*CARRODUS v. SHARP*, No. 1630, *ante*.

1634. Liability of purchaser—Completion delayed through purchaser's default.—By an agreement entered into with exors. for the purchase of a leasehold public-house, & the goodwill & licences connected with it, the household furniture, stock-in-trade, & other effects upon the premises, were to be taken by the purchaser at a valuation, & possession was to be delivered up to him on Sept. 29, 1821; the valuation was made, but, on Sept. 29, the purchaser, alleging that there was a defect in the title to the leasehold, refused to perform his contract: the exors. filed a bill for specific performance, but in the meantime remained in possession of the house, & carried on the business:—*Held*: (1) though the exors. were entitled to a decree for specific performance, & though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since Sept. 1821; (2) he could not be compelled to take that portion of the stock-in-trade on the premises at the time of the decree, which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business; (3) the purchaser ought to be charged with rent, taxes, & other outgoings, paid

WILSON & HOUSTON (1891), 20 O. R. 532.—*CAN.*

h. Liability of purchaser—Stipulations in agreement—Payment of taxes from date of agreement—Whether local improvement rates for work done before contract included.—A contract for the sale of land provided for the payment of the purchase money in quarterly instalments; when half was paid the vendor was to convey & give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract. In an action to recover

instalments under the contract: *Held*: local improvement rates imposed by municipal bye-laws after the work having been done before, the date of the contract, were incumbances to be discharged by the vendor, but rates imposed & work done after the contract were not so.—*ARMSTRONG v. AUGER* (1891), 21 O. R. 98.—*CAN.*

k. — In possession under agreement to pay by instalments.—A purchaser under an agreement for sale by instalments, who is entitled to & does go into possession, is bound to pay the

taxes & other outgoings in respect of the land:—*Held*: the document in question operated as an agreement for sale & not a lease.—*CARMANGAY v. SNYDER & CARMAN* (1915), 8 W. W. R. 567.—*CAN.*

l. Right of purchaser to deduct for arrears of taxes.—*Held*: where a municipality claimed taxes to be in arrear upon certain lands, & the owner relied in answer to their claim upon a certificate furnished him that there were not arrears of taxes, that a purchaser was justified in deducting from

Sect. 1.—Rights and liabilities with respect to the property: Sub-sects. 5 & 6, A. (a).]

by the exors. since Sept. 1821. & with interest on the sums so paid by them; (1) the purchaser was not entitled to any occupation rent, or other allowance for the use of the house & furniture by the exors. during the period that elapsed after Sept. 29, 1821.—*DAKIN v. COPE* (1827), 2 Russ. 170; 38 E. R. 299.

Annotations:—As to (1) *Distd. Golden Bread Co. v. Hemmings*, [1922] 1 Ch. 162. *Generally, Rejd. Darbey v. Whitaker* (1857), 29 L. T. O. S. 351; *Day v. Lubke* (1868), L. R. 5 Eq. 336. *Mentd. Bowser v. Colby* (1842), 11 L. J. Ch. 132.

1635. —Stipulations in agreement—Indemnification of vendors.]—Upon the sale of premises, held under a lease by which the consent of the landlord was necessary to an assignment, & which were in a bad state of repair, the purchasers agreed to purchase at a low price "subject to the consent of the superior landlord & to the premises being taken in their present condition." The purchasers were aware of the state of the premises. No notice to repair had been given by the landlord at the time of the contract, but, upon the vendors applying for a licence to assign, the landlord served a schedule of dilapidations with a notice to repair, & refused to grant the licence until the repairs were done. The purchasers refused to do the repairs, & they were executed by the vendors at a cost of £225. The purchasers claimed that on the principle of *Re Highett & Bird's Contract*, No. 1548, *ante*, the vendors were bound to do the repairs, which were necessary for them to make a good title, notwithstanding the purchasers' knowledge of the state of repair:—*Held*: (1) although the contract was an open one, the vendors were bound to show a good title; (2) under the provision as to the purchasers taking the property "in its present condition," the vendors were from the date of the contract trustees for the purchasers of the property in its existing condition; (3) the purchasers were liable to indemnify them against all moneys they spent upon the property, & the vendors were entitled to an order for specific performance on the footing that the purchasers paid them the £225, & the arrears of rent, rates & taxes in addition to the purchase-money.—*LOCKHARTS v. ROSEN (BERNARD) & Co.*, [1922] 1 Ch. 433; 91 L. J. Ch. 321; 127 L. T. 18; 66 Sol. Jo. 350.

1636. —Improvement rentcharge imposed after contract of sale.]—An improvement rentcharge imposed on land within the improvement area under London County Council (Improvements) Act, 1899 (c. cclxvi), s. 61, is not an effective charge on the land until after a resolution of the Council approving the assessment notwithstanding that the improvement itself has been completed at an earlier date. If, therefore, the land is contracted to be sold free from incumbrances after the completion of the improvement but before the date of such resolution, the purchaser is not entitled to a conveyance of the land free from the improvement rentcharge.—*Re FARRER & GILBERT'S CON-*

TRACT, [1914] 1 Ch. 125; 83 L. J. Ch. 177; 110 L. T. 23; 58 Sol. Jo. 98, C. A.

1637. Succession duty.]—Where land subject to leases is sold in fee simple free from incumbrances & without provision as to succession duty, duty which will become payable in respect of the increased value of the property on the determination of the leases, & of which payment has been postponed under Succession Duty Act, 1853 (c. 51), & so must be borne by the vendor.—*Re KIDD & GIBBON'S CONTRACT*, [1893] 1 Ch. 695; 62 L. J. Ch. 436; 68 L. T. 647; 41 W. R. 507; 3 R. 268.

Annotation:—*Folld. Re Weston & Thomas' Contract* (1907), 96 L. T. 324.

1638. Paving expenses.]—The expenses of paving a new street apportioned under Metropolis Management Amendment Act, 1862 (c. 41), s. 77, are not a charge upon the property in respect of which they are payable, & therefore if the owner sells the property while the expenses are unpaid & conveys as beneficial owner & the purchaser is compelled to pay such expenses, the purchaser cannot recover the amount so paid from the vendor under the implied covenant against incumbrances contained in the conveyance by virtue of Conveyancing & Law of Property Act, 1881 (c. 41), s. 7 (1) (A).—*EGG v. BLAYNEY* (1888), 21 Q. B. D. 107; 57 L. J. Q. B. 460; 59 L. T. 65; 52 J. P. 517; 36 W. R. 893, D. C.

1639. ——The expenses incurred by a local authority for paving & other works executed under Public Health Act, 1875 (c. 55), s. 150, first become within Public Health Act, 1875 (c. 55), s. 257, "a charge on the premises in respect of which they were incurred" as from the date of the completion of the works.

Then as a last point it is said that these expenses were an "outgoing" which the vendors were bound to pay, because there was an inchoate liability from the moment of the service of the notice to do these paving works. In my opinion there was no liability, inchoate or otherwise, until the local authority had completed the works (*VAUGHAN WILLIAMS, L.J.*).—*Re ALLEN & DRISCOLL'S CONTRACT*, [1904] 2 Ch. 226; 73 L. J. Ch. 614; 91 L. T. 676; 68 J. P. 469; 52 W. R. 680; 20 T. L. R. 605; 48 Sol. Jo. 587; 2 L. G. R. 959, C. A.

Annotations:—*Rejd. Re Taunton & West of England Perpetual Benefit Bldg. Soc. & Roberts' Contract*, [1912] 2 Ch. 381. *Mentd. East Ham U. C. v. Aylett*, [1905] 2 K. B. 22.

1640. Special expense rate.]—A special expenses rate levied for the purposes of sewerage is like a poor rate, an outgoing for which the occupier, & not the owner, of a property is liable. When, therefore, land is sold which proves to be subject to such a rate, it is not incumbent upon the vendor to compensate the purchaser for its existence, & the purchaser cannot refuse to complete the contract.—*CALDER'S YEAST CO. v. STOCKDALE* (1926), 96 L. J. Ch. 357; 136 L. T. 458; 91 J. P. 57; *sub nom. CALVER'S YEAST CO. v. STOCKDALE*, 25 L. G. R. 354, C. A.

the purchase price sufficient to meet the alleged claim of the municipality.—*PHILLIPS v. MONTEITH MUNICIPALITY* (1913), 24 O. W. R. 743; 4 O. W. N. 1420; 11 D. L. R. 779.—*CAN.*

m. —Until final order for sale or foreclosure in action for specific performance.—*ALWAY v. SPOONER (Alta.)*, [1923] 4 D. L. R. 872; [1923] 3 W. W. R. 1009.—*CAN.*

n. Purchaser defaulting in payment of taxes—Vendor buying in at tax sale—No right to sue for purchase money unless willing to convey.]—*BRODER v.*

LUINK, McRADU, [1921] 1 W. W. R. 288; 56 D. L. R. 478; 14 Sask. L. R. 54.—*CAN.*

o. Unearned increment tax.]—Under Unearned Increment Tax Act, 1922, s. 6, a purchaser under an agreement for the sale of land who on registration of the transfer to him pays the increment tax chargeable thereon is entitled, in the absence of an agreement to the contrary between him & his vendor, to recover from such vendor such portion, if any, of the tax as is attributable to any increase in the value

of the land prior to the date of the agreement for sale to him. If the vendor is not the registered owner, the right of the purchaser to recover such portion of the tax is not affected by a provision in the agreement for sale between such vendor as purchaser & his vendor which protects the latter from being called on to reimburse the purchaser from him for the tax which such purchaser may be required to pay on registration of the transfer.—*DAHM v. STINN*, [1925] 1 W. W. R. 755; 21 Alta. L. R. 88.—*CAN.*

SUB-SECT. 6.—INTEREST.

A. Liability for Interest.

(a) In General.

Where stipulation for payment of interest.]—See Part IV., Sect. 2, sub-sect. 10, C., *ante*.

1641. Purchase of reversion—Expectant on lives—Effect of dropping of lives.]—A reversion expectant on an estate for life is decreed to be sold, B. is confirmed the best purchaser, & the order made absolute Jan. 1, 1724. On the — day of Jan. 1726, B. is ordered to bring his money into the bank; the life drops; if the life had dropped the next day after the report of B.'s being the best purchaser made absolute, the purchase must have stood; & as from that time the life was wearing, so from that time the purchaser ought to pay interest.—*Ex p. MANNING* (1727), 2 P. Wms. 410; 24 E. R. 791.

1642. — — — — —.]—The advantage a purchaser receives from the wearing out of lives has never been considered as a reason by this ct. for his paying interest for the purchase-money.—*BLOUNT v. BLOUNT* (1748), 3 Atk. 636; 26 E. R. 1166, L. C.

Annotation:—Dtd. Champernowne v. Brooke (1835), 9 Bli. N. S. 199.

1643. — — — — —.]—A., in Dec. 1812, agreed to become the purchaser of a reversionary estate; B., the vendor, agreed, on or before May 1, then next, to make out a good title. A. was to be entitled to the rents & profits of all & singular the messuages, etc., from May 1 then next, or from such time as the purchase should be completed. A. had at the time of making the agreement paid part of the purchase-money, & he promised, for the considerations aforesaid, that he would, on May 1, pay the remainder as & for the absolute purchase, etc. A. further agreed to pay all & every such sum & sums of money for the increased value of the messuages, etc., by or in consequence of the deaths of any persons for whose life or lives any of the messuages were theretofore granted. The purchase was not completed for a very considerable period. The vendor filed his bill for a specific performance. The ct. made a decree, referring it to the master to inquire when the vendor could make a good title, & how much the value of the estate had been increased by the deaths of the persons on whose lives any portions of it were holden:—*Held*: this decree was correct, & the contract did not give the vendor a right to demand payment for the increased value of the estate from the wearing as well as the dropping of lives.

There is nothing said in terms as to the interest on the rest of the purchase-money, but it necessarily follows, from the reservation of the rents to the vendor, that the purchaser was not to be called on to pay interest upon the purchase-money (*LORD COTTENHAM, C.*).—*BROOKE v. CHAMPERNOWNE* (1837), 4 Cl. & Fin. 589; 7 E. R. 95, H. L.; *previous proceedings, sub nom. CHAMPERNOWNE v. BROOKE* (1835), 9 Bli. N. S. 199, H. L.

Annotation:—Apld. Richards v. Pryse, [1927] 2 K. B. 76.

1644. — — — — —.]—After term—Part of term elapsing

before completion.]—A purchaser of a future interest, after a term, shall not pay interest or an increased price for a part of the term elapsing before the purchase is completed, unless the delay be by his fault.—*GROWSOCK v. SMITH* (1797), 3 Anst. 877; 145 E. R. 1068.

— From when interest payable.]—See Nos. 1688, 1689, *post*.

1645. Purchaser delaying payment.]—Interest against a purchaser for delaying payment.—*CHILD v. ABINGDON (LORD)* (1790), 1 Ves. 94; 30 E. R. 246, L. C.

1646. — — — — —.]—Unnecessary delay.]—A purchaser, complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder, & obtained an injunction restraining the vendor from suing him for the purchase-money, part of which was afterwards ordered to be paid into ct. to abide the event of the suit. The bill was dismissed:—*Held*: the vendor was entitled to the residue of the purchase-money, & the interest upon it, to the time of payment, although the purchase-money in ct. had not been laid out, & no interest therefore had accrued thereon.—*HUMPHRIES v. HORNE* (1844), 3 Hare, 276; 67 E. R. 386.

1647. Interest on deposit—Insupportable objection to title.]—Purchaser not to pay interest on the deposit, even where he has rendered a suit necessary by refusing to perform the contract on the ground of an objection to the title, which could not be supported.—*BRIDGES v. ROBINSON* (1811), 3 Mer. 694; 36 E. R. 266.

1648. Vendor in receipt of rents & profits.]—*BROOKE v. CHAMPERNOWNE*, No. 1613, *ante*.

1649. Purchaser in receipt of rents & profits.]—*LEGGOTT v. METROPOLITAN RY. CO.*, No. 1620, *ante*.

1650. — — — — —.]—Or enjoyment of property.]—Defl. co. was the owner of a canal, & plffs. were the owners of the mines under the canal & the adjacent land. Under the provisions of a private Act passed in 1892, when the workings of a mine owner in the position of plffs. approached within a prescribed distance of the canal he was to give a two months' notice to the co. of his intention to proceed with the work, & within the two months was not to continue working within the prescribed distance. If the co. considered that the further working was likely to damage the canal & was willing to purchase & make compensation for the seam, it could give a counter-notice to that effect, & then the seam was not to be wrought or gotten, but was to be purchased & paid for by the co., the amount, if not agreed upon, being settled by arbn.

The mine owner's notice having been given, the co.'s counter-notice was given on Nov. 19, 1892. An arbitrator was appointed in Nov. 1897, & it was subsequently agreed that all questions between the parties should be left to the arbitrator & that his decision should be accepted without dispute, except that on the question of interest on the amount found due for purchase-money & compensation either party might obtain the decision of a ct. of law.

—*HILL v. KIRWAN* (1826), 1 Hog. 357.
—IR.

r. Whether purchaser liable personally—Where vendor limited to rights against the land.]—Where an agreement for the sale of lands provides that the seller is not to be liable for a personal action for the purchase money but that the vendor is "to look to the lands & all other rights & remedies to realise the purchase money & all of his rights," & also provides that all over-due interest shall be treated as purchase

PART VI. SECT. 1, SUB-SECT. 6.—
A. (a).

p. Purchaser delaying payment—Without objection to title.]—When a purchaser neglects to pay in his purchase money & no objection is made to the title, the ct. will order him within a limited time to pay in the amount with interest; or in default direct a resale of the property; & that the purchaser pay costs of motion & deficiency, if any, on such resale.—

CROOKS v. CROOKS (1851), 4 Gr. 376.—
CAN.

q. Interest on deposit—Until date of full payment.]—When a purchaser lodges his promissory note for his deposit of one-quarter of his purchase money, he must pay interest on the amount when he completes his purchase. The purchaser's deposit of one-quarter of his purchase money does not bear interest for him until the remaining three-quarters are lodged.

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 6, A. (a), (b) & (c).]

The arbitrator awarded £16,565 for purchase-money & compensation, on the footing of pl'tfs.' seam having been purchased on Nov. 19, 1892, & that interest at 4 per cent. on the amount should be calculated from the date of payment:—*Held*: when the co. gave its notice to the mine owners, the latter were by force of the statute prevented from enjoying the minerals in their way, namely, by working them, & the co. thenceforth obtained the enjoyment in its way, namely, by way of support, & became liable to pay the purchase-money; from that time the mine owners had been deprived of their property, & the co. had enjoyed both that & the purchase-money, & on the principle laid down in *Birch v. Joy*, No. 1656, *post*, with reference to ordinary vendors & purchasers, the mine owners were entitled to the interest as awarded.

When such a state of things arises between a vendor & purchaser as that the latter has become entitled in equity to the thing purchased & to the receipt of the rents, if there be such, or to the enjoyment, if there can be enjoyment, of the thing purchased, there arises in equity a correlative right in the vendor to have interest on his purchase-money if remaining unpaid (BUCKLEY, J.).—*FLETCHER v. LANCASHIRE & YORKSHIRE RY. Co.*, [1902] 1 Ch. 901; 71 L. J. Ch. 590; 66 J. P. 631; 50 W. R. 423; 18 T. L. R. 417.

Annotations:—*Consd.* *Re Richard & G. W. Ry.*, [1905] 1 K. B. 68. *Reid.* *Swift v. Board of Trade*, [1925] A. C. 520.

1651. Mutual exchange of lands—Liability of both parties.]—GREENOCK HARBOUR TRUSTEES v. GLASGOW & SOUTH-WESTERN RY. Co., [1909] S. C. (H. L.) 49.

Deduction from income tax.]—See INCOME TAX, Vol. XXVIII, p. 64, Nos. 329–334.

(b) Express Stipulation in Contract.

See Part IV., Sect. 2, sub-sect. 10, C., *ante*.

(c) Where Purchaser in Possession.

1652. Purchaser taking possession liable to interest.]—Advertisement of an estate for sale by auction described it all as freehold, though a small part was held at will. After execution of articles a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, purchaser took possession forcibly; but proceeded in the treaty afterwards, till he finally refused to agree to the purchase. On bill of vendor purchase-money decreed to be paid with 4 per cent. from the time it ought; but inquiry directed as to what ought to have been the compensation at that time for the part not freehold; that, with the outgoing to be deducted.—*CALCRAFT v. ROEBUCK* (1790), 1 Ves. 221; 30 E. R. 311, L. C.

1653. —.]—POWELL v. MARTYR, No. 1668, *post*.

money, overdue interest cannot be recovered by personal action against the purchaser.—*PARKER v. TRUSTEE Co. of WINNIPEG* (Man.), [1918] 2 W. W. R. 264.—*CAN.*

1. Agreement to pay interest before default.—Liability for interest after default.]—Where a purchaser agrees to pay interest on the purchase money before default, the ct. has power to allow interest after default when it seems fair & equitable to do so, at such rate & at such time as it may think right.—*WALKER v. CARD* (Alta.) (1915), 30 W. L. R. 402; 7 W. W. R. 1145.—*CAN.*

PART VI. SECT. 1, SUB-SECT. 6.—A. (c).

1652 i. Purchaser taking possession liable to interest.]—ANDERSON v. PHINNEY (1905), 38 N. S. R. 393.—*CAN.*

1652 ii. —.]—MULHOLLAND v. MORRIS (1909), 14 O. W. R. 1112; 1 O. W. N. 214; 20 O. L. R. 27.—*CAN.*

1652 iii. —.]—COLLINS v. WILSON (Sask.), [1922] 3 W. W. R. 1086.—*CAN.*

1652 iv. —.]—TORONTO CORPN. v. TORONTO RY. Co., [1926] 3 D. L. R. 629; 59 O. L. R. 73.—*CAN.*

1654. —.]—TOWNLEY v. BEDWELL (1808), 14 Ves. 591; 33 E. R. 648, L. C.

Annotations:—*Reid.* *Drant v. Vause* (1842), 11 L. J. Ch. 170; *Emuss v. Smith* (1848), 2 De G. & Sm. 722; *Collingwood v. Row* (1857), 26 L. J. Ch. 649; *Weeding v. Weeding* (1861), 1 John. & H. 424; *Lord v. Colvin* (1867), L. R. 3 Eq. 737; *Edwards v. West* (1878), 7 Ch. D. 858; *Re Isaacs, Isaacs v. Reginald*, [1894] 3 Ch. 506; *Re Dyson, Challinor v. Sykes*, [1910] 1 Ch. 750; *Re Marlay, Rutland v. Bury*, [1915] 2 Ch. 264. *Mentd.* *Re Walker's Estate* (1853), 1 Eq. Rep. 247.

1655. —.]—Under an Inclosure Act, an allotment had been made to the improprator, in lieu of tithes; & by the Act, the tithes were to cease on the allotment being made; but the Act did not authorise the sale of allotments before the execution of the award. In the interim, the improprator agreed to sell his allotment for £700, to be paid on Mar. 25, then next, on a good & valid title being made & executed. The award was not made until several years after the agreement; but the purchaser had been all along in possession of the allotment. The ct. ordered him to pay 4 per cent. interest on his purchase-money from Mar. 25 next after the date of agreement, although a good title could not be made until the award was executed.—*A.-G. v. CHRIST CHURCH, OXFORD* (DEAN), *Ex p. MADDOX* (1842), 13 Sim. 214; 12 L. J. Ch. 28; 6 Jur. 1007; 60 E. R. 83.

Annotation:—*Consd.* *Ballard v. Shutt* (1880), 15 Ch. D. 122.

1656. —.]—It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase-money, & that the purchase-money being retained by him will carry interest to be paid by him to the seller.

B., in Mar. 1812, contracted for the purchase of an estate from C., for £90,000. The estate was very much incumbered, & C. was to make a title free from all incumbrances, except one mtge. of £12,000. B., on being put into possession of part of the estates, was to pay £16,000 on June 24, 1812, " & a further sum of £4,000 at Michaelmas next, on C. putting B. into the actual possession of the remainder, free from all incumbrances, except the mtge. for £12,000; the further sum of £25,000 in Mar. 1813; £16,500 in Mar. 1816; & £16,500 in Mar. 1818." B. was to grant C. a mtge. of all the estates for securing these three sums at the respective time, aforesaid, "with legal interest from Michaelmas next." The £20,000 thus agreed to be paid in two sums within the first year not having been paid by B., nor any of the incumbrances cleared off by C., a new agreement was entered into in Oct. 1812. B. was forthwith to advance £10,000 to pay off certain incumbrances, he was to be let into immediate possession, to be entitled to the rents & profits "from Michaelmas last," & to be at liberty to cut timber, etc. The conveyances were to be executed as soon as existing difficulties could be removed, & every possible exertion was to be made to that end. It was further agreed, that "the interest of the remainder of the purchase-money shall not commence till Lady Day next, in case the title shall be perfected, & the conveyances & other assurances

1652 v. —.]—BERESFORD v. CLARKE, [1908] 2 I. R. 317.—*IR.*

u. — From time of possession.]—Where a purchaser takes possession before conveyance, he is liable to interest from the time of taking possession, & the liability is not limited to six years.—*GREAT WESTERN RY. Co. v. JONES* (1867), 13 Gr. 355.—*CAN.*

a. — Liability where interest exceeds rents & profits.]—Where there is no stipulation as to interest, the general rule of the court is, that the purchasers when he completes his contract after the time mentioned in the particular, of sale, shall be considered as in

executed at that time, & if not, then to commence on the execution of such assurances." B. was let into possession, but the business was not completed. In a suit by B. for specific performance, an account was directed:—*Held*: under the clause in the second agreement, exempting "the remainder of the purchase-money" from the payment of interest, the sum remaining unpaid of the £20,000, & the three sums constituting the £58,000, must be taken to come under that description; the exemption of a purchaser in possession of the estate from liability to interest on the purchase-money, though permissible if the agreement had been speedily executed, would not be enforced by any ct. of equity where that state of things continued for many years; the second contract must be taken to have failed by circumstances, & the first contract must be decreed to be executed so far as it had remained unexecuted; & the House ordered the accounts to be settled on these principles.—*BIRCH v. JOY* (1852), 3 H. L. Cas. 565; 10 E. R. 222. H. L.; *varying*, S. C. *sub nom.* *JOY v. BIRCH*, *BIRCH v. JOY*, *STURGIS v. BIRCH* (1848), 12 L. T. O. S. 365, L. C.

Annotations:—*Apld.* *Rhys v. Dare Valley Ry.* (1874), L. R. 19 Eq. 93. *Consd.* *Bullard v. Shutt* (1880), 15 Ch. D. 122; *Leppington v. Freeman* (1891), 65 L. T. 145. *Apld.* *Fletcher v. L. & Y. Ry.*, [1902] 1 Ch. 901. *Consd.* *Re Richard & G. W. Ry.*, [1905] 1 K. B. 68. *Refd.* *Secretary of State in Council of India v. British Empire Mutual Life Assce.* (1892), 67 L. T. 434; *Bennett v. Stone*, [1903] 1 Ch. 509; *Swift v. Board of Trade*, [1925] A. C. 520.

1657. —.]—The ct., on motion in a bill for specific performance, ordered the purchaser, who had been let into possession previously to signing the contract, to pay the purchase-money, with interest from the day fixed by the contract for such payment, into ct.—*LILLEY v. ALLEN* (1860), 14 L. T. 52; 12 Jur. N. S. 181.

1658. —.]—Where a purchaser of real estate fails to complete his contract by payment of the balance of his purchase-money by the stipulated day, but, being in possession on that day, retains possession thereafter without paying interest or rent, the ct. will not, on a motion by the vendor in an action for specific performance, order him to pay the balance of purchase-money into ct. without giving him the option either of retiring from possession on a certain day or of paying the balance into ct. on that day, with interest from the day fixed by the contract for completion, even though the purchaser is in possession under the contract & has made no objection to the vendor's title; but that option will not be given if the purchaser has done anything to prejudice the value of the property as a security for the balance.—*GREENWOOD v. TURNER*, [1891] 2 Ch. 144; 60 L. J. Ch. 351; 64 L. T. 261; 39 W. R. 315.

Annotations:—*Foll.* *Re Cassano & Mackay's Contract* (1919), 64 Sol. Jo. 259. *Refd.* *Cook v. Andrews* (1896), 66 L. J. Ch. 137.

1659. —.]—Where title has been accepted & the purchaser has gone into possession before completion, & has failed to complete, & the vendor has commenced proceedings for specific performance, the vendor can obtain on motion an order directing the purchaser to lodge the balance of the purchase-money in ct., together with the interest under the contract from the date fixed for completion within four days, or in default to deliver up possession to the vendor, & in that event to lodge in ct. the interest due under the contract.—*Re CASSANO & MACKAY'S CONTRACT* (1919), 64 Sol. Jo. 259.

1660. — *By implied agreement.*—A purchaser, taking possession without a conveyance, was compelled to pay interest; though the money was to be paid at a particular day on the execution of the conveyance.

The act of taking possession is an implied agreement to pay interest: for so absurd an agreement, as that the purchaser is to receive the rents & profits, to which he has no legal title, & the vendor is not to have interest, as he has no legal title to the money, can never be implied (*GRANT, M.R.*).—*FLUDYER v. COCKER* (1805), 12 Ves. 25; 33 E. R. 10.

Annotations:—*Consd.* *Ballard v. Shutt* (1880), 15 Ch. D. 122. *Refd.* *Swift v. Board of Trade*, [1925] A. C. 520.

1661. — *Without prejudice to claim for compensation—Undue delay by vendor.*—On a sale under the ct. in June, 1839, it was provided by the conditions, that the abstract should be delivered in the twenty-one days, that the purchaser should be entitled to the rents from Oct. & pay his purchase-money in Nov. & if "from any cause whatever" it should not be paid at that time, he should pay interest at 5 per cent. The vendors were unable to deliver the abstract within the time, & there was great delay & difficulty, on their part, in making out their title, which was not complete till 1845. The purchaser had entered into possession. On a motion made in 1845 to pay the purchase-money & interest into ct., the ct. held that it could not relieve the purchaser from payment of interest but made the order without prejudice to any application for compensation.—*GREENWOOD v. CHURCHILL* (1845), 8 Beav. 413; 14 L. J. Ch. 143; 4 L. T. O. S. 471; 9 Jur. 196; 50 E. R. 162.

Annotation:—*Consd.* *De Visme v. De Visme* (1849), 1 Mac. & G. 336.

1662. — *Possession without prejudice to question of title.*—A purchaser under an agreement entered into possession & into receipt of the rents & profits of certain messuages & premises in the year 1827, without prejudice as to any question of title. After the delivery of the abstract, the purchaser took objections to the title, & by reason of a party necessary to the conveyance being a minor, the conveyance was postponed. The purchaser remained in possession down to the time of filing the bill, performing certain acts of ownership, & still offering objections to the title. Upon motion of the vendor in a suit for specific performance:—*Held*: deft. ought to pay the purchase-money into ct. with interest, at the usual rate of 4 per cent.—*ADAMS v. HEATHCOTE* (1846), 7 L. T. O. S. 317; 10 Jur. 301.

1663. — *Unless rent given up.*—A purchase was to be completed on a given day, when the purchaser was to have possession, & it was provided, "that if, from any cause whatever," the purchase-money should not be then paid, the purchaser should pay interest. A delay of six months occurred from the default of the vendor in not furnishing proper abstracts:—*Held*: the purchaser must pay interest, unless he gave up the rent, during that period.—*COWPE v. BAKEWELL* (1851), 13 Beav. 421; 51 E. R. 162.

1664. — *On instalments of purchase-money.*—Order on a purchaser, before conveyance, to pay into ct. instalments due, & interest according to the contract, the subject being a coal mine; & the purchaser in possession, & working it.—*BUCK v. LODGE* (1812), 18 Ves. 450; 34 E. R. 387.

possession from that time, & thence pay interest on his purchase money, taking the rents & profits. If, however, such interest is much

more in amount than the rents & profits, & it is clearly made out that the delay in completing the contract was occasioned by the vendor, then the

court gives the vendor no interest, but leaves him in possession of the interim rents & profits.—*BANK OF MONTREAL v. FOX* (1875), 6 P. R. 217.—*CAN.*

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 6, A. (c) & (d), & B. (a).]

1665. — Mortgage purchaser—Pro tanto set-off of purchase-money against mortgage debt—Interest on balance.—An estate was mortgaged in 1841 for £2,000 with interest at 5 per cent. In 1842 the mtgor. died & in the same year the devisees of the equity of redemption sold by auction the mtged. premises together with other lands of the mtgor.'s for £2,700 to the mtgee. The usual deposit was paid at the time of the sale, & by the conditions of sale 4 per cent. was payable on the balance of the purchase-money. The mtgee. entered into possession in 1842 & remained in such possession until her death in 1847 when her devisees entered into possession. Upon a claim filed by the devisees of the mtgor. against the devisees & exors. of the mtgee. for specific performance of the contract to purchase eleven years after the sale, no demand having been made during that period either for the payment of the residue of the purchase-money into ct., or for interest on the mtge. :—*Held*: in the circumstances a set-off *pro tanto* was to be inferred at the date when possession was taken by the mtgee. & from that period, interest at 4 per cent. only was payable upon the balance of the purchase-money.—*WALLIS v. BASTARD* (1853), 4 De G. M. & G. 251; 2 Eq. Rep. 508; 22 L. T. O. S. 162; 17 Jur. 1107; 2 W. R. 47; 43 E. R. 503, L. C. & L. J.

1666. What amounts to possession—Acts of ownership—Putting up notice board.—A purchaser who before completion of the purchase exercises acts of ownership over the land agreed to be purchased must pay interest on the purchase-money pending delay in the completion of the contract, although the delay be caused by the vendor & the land is untenanted, so that he receives no rents nor profits from it.—*BALLARD v. SHUTT* (1880), 15 Ch. D. 122; 49 L. J. Ch. 618; 43 L. T. 173; 29 W. R. 73.

(d) *Fund Appropriated to Purchase-Money.*

1667. Purchaser allowed interest.—A contract having been made for sale of an estate it afterwards appeared that there were several outgoing from the estate, which were not disclosed at the time of the contract; yet these being matters which lie in compensation the contract shall be carried into execution, with an allowance only to the purchaser for these particulars which diminish the value. The agreement not being completed within the time specified, the purchaser shall be allowed interest for such time as the purchase-money shall appear to have been kept dead, for the special purpose of completing the contract.—*HOWLAND v. NORRIS* (1784), 1 Cox, Eq. Cas. 59; 29 E. R. 1062, L. C.

1668. Liability of purchaser for interest—On giving notice that fund appropriated.—To excuse a purchaser from paying interest during the delay in clearing difficulties as to the title, it is not sufficient, that the money was appropriated & unproductive; but the vendor must have notice of that.

The rule is perfectly clear, & perfectly reasonable: that if a purchaser is let into possession & perception of the rents & profits, he shall pay interest for his purchase-money (*GRANT, M.R.*).—*POWELL v. MARTYR* (1803), 8 Ves. 146; 32 E. R. 309.

PART VI. SECT. 1, SUB-SECT. 6.—
A. (d).

b. *Liability of purchaser for interest—Unless notice given to vendor of appropriation of fund.*—*Re GOR-*

RIDGE (1923), 19 Tas. L. R. 1.—*AUS.*

c. *Sufficiency of appropriation—Separate banking account.*—To save interest by appropriation of the purchase money on a sale of land, the

1669. — — — — —.]—Effect of a deposit by vendee, with notice to vendor; to stop, or determine the rate of interest; not as a tender & appropriation, transferring the risk as to the principal. Therefore, upon an investment in stock by the vendee, the title not being ready, & the vendor having notice, but returning no answer, the advantage by a rise, as the loss by a fall, is the vendee's.—*ROBERTS v. MASSEY* (1807), 13 Ves. 561; 33 E. R. 404.

Annotations:—*Apld.* *Acland v. Cuming* (1816), 2 Madd. 28. *Refd.* *Humphries v. Horne* (1844), 3 Hare, 276; *St. Paul v. Birmingham, Wolverhampton & Stour Valley Ry.* (1853), 11 Hare, 305.

1670. — — — — —.]—Delay caused by vendor.—*DE VISME v. DE VISME*, No. 1598, *ante*.

1671. — — — — —.]—The rule that, where a vendor fails to complete at the time agreed upon, the purchaser, by providing himself with the money, & giving notice that it is lying idle, may free himself from payment of subsequent interest, is settled by well established authorities.—*DYSON v. HORNBY* (1851), 4 De G. & Sm. 481; 64 E. R. 922.

1672. — — — — —.]—REGENT'S CANAL CO. v. WARE, No. 1568, *ante*.

1673. — — — — —.]—Where the delay in the completion of a purchase by the stipulated day arises from the default of the vendor, & the purchaser gives notice to the vendor that he has deposited his purchase-money at a bank to a separate account, the purchaser is relieved, as from the receipt of such notice, by the vendor from payment of interest on his purchase-money, notwithstanding that he has been in possession or receipt of the rents under the contract, & notwithstanding a condition that he shall pay interest if from any cause whatever the purchase is not completed on the day named.—*Re GOLDS' & NORTON'S CONTRACT* (1885), 52 L. T. 321; 33 W. R. 333; 1 T. L. R. 204.

Annotation:—*N.F. Re Riley to Streatfield* (1886), 34 Ch. D. 386.

1674. — — — — —.]—An agreement dated Sept. 26, 1898, for the sale of land provided that, if from any cause whatever, other than wilful default on the part of the vendors, the completion of the purchase should be delayed beyond Jan. 2, 1899, the purchase-money should bear interest at 5 per cent. *per annum*. The title having been accepted, a dispute arose about the form of the conveyance, & the purchase was not completed on the day fixed. On June 12, 1899, the vendors threatened in effect that, if the purchaser did not within ten days assent to the form of conveyance which they proposed, they would cancel the contract & forfeit the deposit. On June 22, 1899, the purchaser commenced an action for specific performance of the contract. At the trial on Feb. 2, 1900, the judge held that the purchaser was in the right as to the form of the conveyance, & gave judgment for specific performance, with costs up to the date of the judgment. The judgment directed that interest, if any, should be computed on the balance of the purchase-money from Jan. 2, 1899, & that an account should be taken of the rents & profits of the land received by defts. since Jan. 2, 1899; & it was ordered that what should be coming on the account of rents & profits should be deducted from the amount of the purchase-money & interest when computed. On a motion by pltf. to vary the master's certificate,

money should be separated from the purchaser's general bank account, & notice of the appropriation must be given to the vendor.

—*GREAT WESTERN RY. CO. v. JONES* (1867), 13 Gr. 355.—*CAN.*

the judge held that there had been no "wilful default" by the vendors, & that, even if there had been, the delay in completion was due, not to the default, but to the inability of the purchaser to find the money to complete the purchase, & consequently that the purchaser must pay interest on the balance of the purchase-money from Jan. 2, 1899, down to completion:—*Held*: either there had been no wilful default by the vendors, or, if there had been, the delay in completion was not due to the default, & the decision as to payment of interest was right.

There may, however, be conduct on the part of the vendor, or of the purchaser, which suffices to relieve the purchaser wholly or in part from the liability to pay interest. A familiar example is where the purchaser, complaining of delay, informs the vendor that the purchase-money is lying idle on deposit at a bank, & that he will object to pay anything beyond the bank interest (*COZENS-HARDY, L.J.*).—*BENNETT v. STONE*, [1903] 1 Ch. 509; 72 L. J. Ch. 240; 88 L. T. 35; 51 W. R. 338; 47 Sol. Jo. 278, C. A.

Annotation:—*Consd. Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648.

1675. — *Interest received on purchase-money.*]

—*ACLAND v. CUMING*, No. 1612, *ante*.

1676. — — — — —.]—*DE VISME v. DE VISME*, No. 1598, *ante*.

1677. — — — — —.]—*DYSON v. HORNBY* (1851), 4 De G. & Sm. 481; 64 E. R. 922.

1678. *Sufficiency of appropriation—Bank balance equal to purchase-money—Except for four days.*—Where the purchaser, upon entering into possession, paid the amount of his purchase-money to his banker, & gave notice that he was ready to invest it in such manner as the vendor should require; but no answer was returned to that notice, & the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase-money, except for four days, when it was a little less:—*Held*: the purchaser not liable for interest on the difference between his average balance during the period in question & during the three preceding years.—*WINTER v. BLADES* (1825), 2 Sim. & St. 393; 4 L. J. O. S. Ch. 81; 57 E. R. 396.

Annotation:—*Distd. Kershaw v. Kershaw* (1869), L. R. 9 Eq. 56.

1679. — *Separate banking account—Original deposit not equal to necessary sum.*—A purchaser contracted to buy certain real estate for £38,500, & was by the terms of the contract liable to pay interest at 5 per cent. up to the time of payment. Completion being delayed, he transferred £38,000 to a separate account at his banker's, & gave notice that he would not pay any further interest. The vendor denied the sufficiency of the notice, & the purchaser afterwards finding that he had not paid in the whole amount of the purchase-money, paid in the remaining £500 with interest thereon:—*Held*: he was not liable to pay interest from the date when he transferred the £38,000 to a separate account, notwithstanding that the amount so transferred was less than the amount of the purchase-money.—*KERSHAW v. KERSHAW* (1869), L. R. 9 Eq. 56; 21 L. T. 651; 18 W. R. 477.

Annotations:—*Distd. Re Riley to Streetfield* (1886), 34 Ch. D. 386. *Refd. Re Golds' & Norton's Contract* (1885), 52 L. T. 321.

PART VI. SECT. 1, SUB-SECT. 6.— B. (a).

1680i. *From time good title shown—Enabling a purchaser safely to take possession.*—A purchaser becomes liable to pay interest when no time is fixed by the contract, from the time

when he could prudently take possession, & in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made.—*LAIRD v. PATON* (1884), 7 O. R. 137.—*CAN.*

B. From what Time Payable.

(a) In General.

1680. *From time good title shown—Enabling purchaser safely to take possession.*—A purchaser under a decree for sale having accepted, & on a report of an objection to the title, for which compensation was ordered, returned, possession, must pay interest on the purchase-money, from the time at which he took, or at which a title was shown under which he might have safely taken, possession, & is entitled to an allowance for prior, not for subsequent, deterioration of the estate.

With regard to possession, the purchaser was not to take possession till he had paid the purchase-money, & that condition of payment could not be performed unless prior to the time appointed for giving possession, the vendor could show a title under which the purchaser would be safe in taking possession & paying his purchase-money. The case therefore requires, that it should be ascertained when a good title could be made, for without that, the purchaser was not bound to take possession. That might raise another question: whether, by taking possession, which he was not bound to take, he waived objections to the contract. If he ultimately obtains a title, he must be considered, by relation, as in possession, under that title, from the time at which he took possession, & from that time must be understood to say, that if he could hereafter have a title made to him, he was to be considered as in possession, & must receive the rents & profits, & account for interest on the purchase-money (*LORD ELDON, C.*).—*BINKS v. ROKEYBY* (1818), 2 Swan. 222; 36 E. R. 600, L. C.

Annotations:—*Refd. Bowyer v. Bright* (1824), M'Cle. 479; *Smith v. Tolcher* (1828), 4 Russ. 302.

1681. — — — — —.]—A purchaser is liable to pay interest on his purchase-money from the time when he could prudently take possession; but held, that he could not prudently take possession at the time a good title was shown, if he had no assurance that a person having a charge on the property would join in the conveyance.—*WELLS v. MAXWELL* (No. 2) (1863), 32 Beav. 550; 55 E. R. 216; *varied*, 32 Beav. p. 553, L. JJ.

Annotation:—*Refd. Re Young & Harston's Contract* (1885), 52 L. T. 571.

1682. — — — — —.]—Where the vendor has shown his title the purchaser pays interest from the time at which he might prudently have taken possession . . . that is, the time when a good title is shown (*JESSEL, M.R.*).—*Re PIGOTT & GREAT WESTERN RY. CO.* (1881), 18 Ch. D. 146; 50 L. J. Ch. 679; 44 L. T. 792; 29 W. R. 727.

Annotations:—*Apld. Re Shaw & Birmingham Corpn.* (1884), 27 Ch. D. 614; *Re Spencer-Bell & L. & S. W. & Met. Rys.* (1885), 1 T. L. R. 435; *Re Keeble & Stillwell's Fletton Brick Co.* (1898), 78 L. T. 383. *Consd. Re Cary-Elwes' Contract*, [1906] 2 Ch. 143. *Refd. Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142. *Mentd. Swift v. Board of Trade*, [1925] A. C. 520.

1683. — — — — —.]—Where a contract for the purchase of land names no time for completion interest is payable upon the purchase-money from the time when a good title is shown & at which the purchaser may prudently take possession.—*Re SPENCER-BELL TO LONDON & SOUTH WESTERN RY. CO. & METROPOLITAN DISTRICT RY. CO.* (1885), 33 W. R. 771; 1 T. L. R. 435.

1680 ii. — — — — —.]—*Re McLEAN & WALKER* (1890), 19 O. R. 161.—*CAN.*

d. *Purchase of reversion—From date of report of good title.*—*HUTCHINSON v. CATHCART* (1839), Jo. & Car. 260.—*IR.*

Sect. 1.—Rights and liabilities with respect to the property: Sub-sect. 3, B. (a) & (b), & C.; sub-sect. 7. Sect. 2: Sub-sect. 1, A. & B. (a) i.]

1684. ———.]—In May, 1897, B. contracted to sell to K. certain lands, the purchase to be completed on Oct. 11, & failing completion on that date, interest to be paid by the purchaser at 5 per cent. on the balance of purchase-money then due. In June, 1897, K. contracted to sell the same premises to S., subject "to the same terms as to title, etc.," as in the original contract. S. eventually refused to complete until Jan. On a summons by K. asking for a declaration that Oct. 11 was, by reference to the original contract, the time fixed for completion, & that debt. might be ordered to pay interest from that date:—*Held*: a clause of this kind which might possibly involve serious liability on the purchaser could not be read into the agreement of June, 1897, & the contract was therefore an open one. But that, as interest was payable from the time when the purchaser could prudently have taken possession & the abstract was delivered on Oct. 22 interest should run from Nov. 1, 1897.

The contract is left an open one, which does contain no express stipulations as to the date of completion. What is the rule which applies to such a case? That is stated in the judgment of JESSEL, M.R., in *Re Pigott & Great Western Ry. Co.*, No. 1682, *ante*, where he says this: "Where the vendor has shown his title, the purchaser pays interest from the time at which he might prudently have taken possession, supposing it to have been offered to him—that is the time when a good title is shown." What time is this in the present case? Giving him the utmost benefit for the purpose of verifying the abstract delivered on Oct. 22, I think he ought to pay interest from Nov. 1 at 4 per cent. (STIRLING, J.).—*Re KEEBLE & STILLWELL'S FLETON BRICK CO.* (1898), 78 L. T. 383.

1685. ———.]—*BARSH v. TAGG*, No. 1631, *ante*.

1686. ———.]—*Certificate by master—In action for specific performance.*—*HALKETT v. DUDLEY (EARL)*, No. 1623, *ante*.

1687. On what payable—*Not increased value of timber.*—A purchaser will be charged with interest on his purchase-money, only from the time when, with reasonable diligence on his part, the conveyance might have been completed. Though a purchaser has the benefit of the increased value of ornamental timber, by reason of its growth during the years that have intervened between his agreement, & the time from which he is considered as in possession of the land, he will not in respect of that benefit be charged with interest on any part of the purchase-money.—*BOEHM v. WOOD* (1823), 1 L. J. O. S. Ch. 234.

1688. Purchase of reversion—*From time of purchase.*—A purchaser of a reversion ordered to pay interest on his purchase-money from the time of the purchase.—*TREFUSIS v. CLINTON (LORD)* (1828), 2 Sim. 359; 57 E. R. 823.

1689. ———.]—*Time appointed for completion.*—Upon the sale of a reversion, interest is payable from the time appointed for completion.—*BAILEY v. COLLETT* (1854), 18 Beav. 179; 23 L. J. Ch. 230; 22 L. T. O. S. 313; 2 W. R. 216; 52 E. R. 71.

(b) *Where Time Fixed for Completion.*

1690. *Whether from date fixed for completion.*—*ACLAND v. CUMING*, No. 1612, *ante*.

1691. ———.]—*Purchaser considered as in possession.*—Where there is no stipulation as to interest, the general rule of the ct. is that the purchaser, when he completes his contract after the time mentioned in the particular of sale, shall be considered as in possession from that time, & shall from thence pay interest at 4 per cent., taking the rents & profits (LEACH, V.-C.).—*ESDAILE v. STEPHENSON* (1822), 1 Sim. & St. 122; 57 E. R. 49. *Annotations*:—*Apprvd.* Jones v. Mudd (1827), 4 Russ. 118. *Consd.* De Visme v. De Visme (1849), 1 Mac. & G. 336. *Refd.* Portman v. Mill (1839), 3 Jur. 356; Catling v. G. N. Ry. (1869), 21 L. T. 17.

1692. ———.]—*Effect of delay by vendor.*—As to payment of the purchase-money, it is a general, but not an universal rule, that when a specific performance is decreed the vendor is entitled to his purchase-money, with 4 per cent. interest from the time when the money was contracted to be paid, & the purchaser is entitled to the rents & profits from the time when possession was to be delivered. Sir William Grant seems to have considered the rule as universal; but I have held, that where the vendor has improperly delayed the execution of the contract, & refused to give possession, he ought not to be benefited by the delay he has occasioned (LEACH, V.-C.).—*PATON v. ROGERS* (1822), 6 Madd. 256; 56 E. R. 1088. *Annotation*:—*Refd.* De Visme v. De Visme (1849), 1 Mac. & G. 336.

1693. ———.]—The purchaser of a reversion under a decree for sale had, by one of the conditions of sale, stipulated to pay the purchase-money by a certain day. The vendors did not deliver an abstract of their title until after the day named for payment of the purchase-money:—*Held*: notwithstanding the non-delivery of the abstract, the vendors were entitled to interest from that day.—*LEWIS v. TUCKER* (1841), 5 Jur. 1105.

1694. ———.]—*Effect of delay by purchaser.*—The contract was to be completed on Dec 25 & the result of the judgment is that it ought to have been so completed. The purchaser having retained his money, must pay interest after the rate usually allowed by the ct. from the time at which the money ought to have been handed over to the vendor (LORD TRURO, C.).—*GROVE v. BASTARD* (1851), 1 De G. M. & G. 69; 42 E. R. 478, L. C.; *previous proceedings* (1848), 2 Ph. 619, L. C.

Annotations:—*Refd.* Glass v. Richardson (1852), 9 Hare, 698; M'Culloch v. Gregory (1856), 3 K. & J. 12. *Mentd.* Boyse v. Rossborough (1854), 3 De G. M. & G. 817; Langdale v. Briggs (1856), 8 De G. M. & G. 391.

1695. ———.]—*Purchaser not in possession.*—A purchaser, who has not been in possession, is bound to pay interest on the purchase-money, & take the rents & profits, only from the time when a good title was first shown, & not from the time fixed by the agreement for the completion of the purchase.—*JONES v. MUDD* (1827), 4 Russ. 118; 6 L. J. O. S. Ch. 26; 38 E. R. 749, L. C.

Annotations:—*Consd.* Portman v. Mill (1839), 3 Jur. 356. *Refd.* Champenowne v. Brooke (1835), 3 Cl. & Fin. 4; De Visme v. De Visme (1849), 1 Mac. & G. 336.

1696. ———.]—*Action for specific performance—Certificate by master.*—(1) Where, on a reference as to title in a suit for specific performance, *pltf.*, the vendor, showed a good title in the opinion of

PART VI. SECT. 1, SUB-SECT. 6.—
B. (b).

16921. *Whether from date fixed for completion—Effect of delay by vendor.*—*DICKSON (FRASER'S TRUSTEE) v. MUNRO*

(1855), 17 Dunl. (Ct. of Sess.) 524; 27 Sc. Jur. 223.—*SCOT.*

e. ———.]—*Action for specific performance.*—On a decree for specific performance of a contract to purchase

lands the general rule is, that the purchase money carries interest from the day when the contract ought to have been performed.—*ENRAGHT v. FITZGERALD* (1839), 2 I. Eq. R. 87.—*IR.*

the master from the time of producing before him certain evidence, the existence of which was well known to deft., but it had formed no subject of dispute between him & the vendor:—*Held*: interest on the purchase-money ought to be allowed from the time fixed by the contract for completion, & not merely from the time of the good title actually shown.

(2) The vendor of leaseholds, held under an ecclesiastical corpn. previously to his contract for sale was in treaty with the lessors for a renewal of the lease, & continued such treaty after the contract:—*Held*: this did not throw upon him the obligation of procuring such renewal for the benefit of the purchaser.—*MONRO v. TAYLOR* (1852), 3 Mac. & G. 713; 21 L. J. Ch. 525; 19 L. T. O. S. 97; 42 E. R. 434, L. C.

Annotation:—*Generally, Refd.* *Abbott v. Calton* (1853), 22 L. J. Ch. 936.

1697. — Delay not attributable to purchaser.]—Where an agreement for sale provides for completion on a stated day, that circumstance alone does not in this ct. give the vendor interest from that time, when delay in completion is not attributable to the default of the purchaser.—*CATLING v. GREAT NORTHERN RY. CO.* (1869), 21 L. T. 769; 18 W. R. 121, L. C. & L. J.
Annotation:—*Refd.* *Rhys v. Dare Valley Ry.* (1874), 23 W. R. 23.

C. On Compulsory Purchase.

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 231, 232, 275, Nos. 1203–1215, 2022, 2023.

SUB-SECT. 7.—LIEN.

Purchaser's lien.]—See LIEN, Vol. XXXII., pp. 268–273, Nos. 492–551.

—Extinguishment.]—See LIEN, Vol. XXXII., p. 262, No. 772.

Vendor's lien.]—See LIEN, Vol. XXXII., pp. 275–288, Nos. 552–658.

—Extinguishment.]—See LIEN, Vol. XXXII., pp. 296–299, Nos. 710–745.

—Compulsory purchase of land.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 230, 231, Nos. 1177–1202.

PART VI. SECT. 2, SUB-SECT. 1.—A.

1. Liability of purchaser where sub-sale approved by vendor—Novation—Loss by vendor of remedy on bond of sub-purchaser by own default.]—HOLMES v. SPENCER (1833), 3 O. S. 161.—*CAN.*

g. Right of sub-purchaser against original vendor—Where sub-sale without consent of vendor contrary to agreement—Right of sub-purchaser to set aside subsequent sale by original vendor.]—SAWYER-MASSEY CO. v. BENNETT (1909), 10 W. L. R. 539; 2 Sask. L. R. 93; *revid.*, 12 W. L. R. 249.—*CAN.*

h. — Right of subrogation or cancellation.]—BAYDA v. CANADA NORTH DAKOTA LAND CO. (Sask.) (1913), 25 W. L. R. 159; 4 W. W. R. 1333; 13 D. L. R. 1.—*CAN.*

k. ——If an agreement for the sale of land requires an assignment thereof to be approved by the vendor, the vendor's assignee can reject a tender of the purchase-money from an assignee of the purchaser & sue the purchaser therefor where approval of the assignment has not been obtained & the tender is made by said assignee on the condition that the transfer be made to him.—*HALLSON v. BROUNSTEIN (Sask.)*, [1925] 4 D. L. R. 327; [1925] 3 W. W. R. 337.—*CAN.*

l. — Sub-purchasers of separate

parcels—Payments from one accepted by original vendor—Liability of others for balance.]—KESNER v. LANG (1911), 17 W. L. R. 721.—*CAN.*

m. — Additional payment by sub-purchaser for title from original vendor—After recognition of sub-purchaser on default by purchaser.]—DUGGAN v. WADLEIGH (1912), 20 W. L. R. 102; 4 Alta. L. R. 114; 1 W. W. R. 594; 1 D. L. R. 871.—*CAN.*

n. — Ineffective notice of cancellation of original agreement—Recognition of sub-purchaser as assignee of agreement.]—CONSTANTINO v. DICK (Sask.) (1913), 26 W. L. R. 741; 5 W. W. R. 1319; 15 D. L. R. 413.—*CAN.*

o. — Maintenance of caveat—Onus on sub-purchaser to show valid subsisting contract with purchaser.]—McCULLOUGH v. CANADIAN PACIFIC RY. CO., [1920] 1 W. W. R. 663.—*CAN.*

p. Agreement to sell land by person having no title—Owner afterwards induced to sell—Right of sub-purchaser on cancellation by owner to recover from original vendor.]—MARTIN v. ANDERSON (1914), 29 W. L. R. 568.—*CAN.*

q. Right of purchaser under agreement to assign lease.]—The purchaser under an agreement for the sale & purchase of land who has leased the land can assign his interest in the

SECT. 2.—ASSIGNMENT BY EITHER PARTY PENDING COMPLETION.

SUB-SECT. 1.—ASSIGNMENT OF THE PROPERTY.

A. Disposition by Purchaser.

1698. General rule.]—PAINE v. MEILLER, No. 1576, *ante*.

1699. —.]—CAPEL v. GIRDLER, No. 1495, *ante*.

1700. —.]—SHAW v. FOSTER, No. 1197, *ante*.

B. Disposition by Vendor.

(a) Rights of Purchaser.

i. To Restrain Alienation by Vendor.

1701. Whether alienation restrained.]—ECHELIFF v. BALDWIN (1809), 16 Ves. 267; 33 E. R. 986.

Annotations:—*Refd.* *A.-G. v. Liverpool Corpn.* (1835), 1 My. & Cr. 171; *G. W. Ry. v. Birmingham & Oxford Junction Ry.* (1848), 2 Ph. 597.

1702. —.]—Injunction, restraining the sale of an estate until answer to a bill, alleging a parol agreement to exchange, partly performed by pltf., having purchased an estate for the purpose.—CURTIS v. BUCKINGHAM (MARQUIS) (1811), 3 Ves. & B. 108; 35 E. R. 412, L. C.

Annotations:—*Refd.* *A.-G. v. Liverpool Corpn.* (1835), 1 My. & Cr. 171; *G. W. Ry. v. Birmingham & Oxford Junction Ry.* (1848), 2 Ph. 597.

1703. —.]—Injunction to restrain the vendor of copyhold premises, after delivery of possession & receipt of part of the purchase-money, from surrendering them to persons other than the purchasers.

In general, during a suit for specific performance, the ct. will not restrain the owner from dealing with his property.—*SPILLER v. SPILLER* (1819), 3 Swan. 556; 36 E. R. 974, L. C.

Annotations:—*Consd.* *Shrewsbury & Chester v. Shrewsbury & Birmingham Ry.* (1851), 1 Sm. N. S. 410. *Expld.* *Hadley v. London Bank of Scotland* (1865), 3 De G. J. & Sm. 63. *Apld.* *London & County Banking Co. v. Lewis* (1882), 21 Ch. D. 490. *Refd.* *G. W. Ry. v. Birmingham & Oxford Junction Ry.* (1848), 2 Ph. 597.

1704. —.]—TURNER v. WIGHT (1841), 4 Beav. 40; 49 E. R. 252.

1705. —.]—HADLEY v. LONDON BANK OF SCOTLAND, LTD., No. 1496, *ante*.

lease only subject to the rights of the vendor.—*CANADIAN PACIFIC RY. CO. v. FULLER (Alta.)*, [1917] 3 W. W. R. 90; 36 D. L. R. 404.—*CAN.*

r. Assignee of vendor failing to give notice to purchaser—Right of purchaser to claim conveyance.]—Where a vendor transfers the land agreed to be sold to a third party before the last payments are due from the purchaser & no notice is given to the purchaser who makes his payments to the vendor, the purchaser is entitled to a transfer of the land from the third party.—*GRACE v. KUEBLER (Alta.)*, [1917] 1 W. W. R. 1213; 33 D. L. R. 1; *affd.*, [1918] 1 W. W. R. 182.—*CAN.*

t. Liability of sub-purchaser on covenants of purchaser—Whether covenant to fall plough runs with the land.]—A covenant by the purchaser that he will fall plough the land is not a covenant which runs with the land so as to make the purchaser's assignee liable thereon to the vendor.—*SMITH v. MILLER*, [1920] 1 W. W. R. 539.—*CAN.*

u. Sale to co-purchaser by one of three joint purchasers—Liability of selling purchaser to contribute balance on failure of other co-purchasers.]—MCKILLIP v. HICK & MCCORVIE (Alta.), [1922] 3 W. W. R. 779; 69 D. L. R. 240.—*CAN.*

Sect. 2.—Assignment by either party pending completion: *Sub-sect. 1, B. (a) ii. & iii., & (b) sub-sect. 2, A.]*

ii. To Enforce Contract Notwithstanding Alienation.

See Sub-sect. 1, B. (b), post.

iii. Damages.

1706. Right to damages—On sale to third party.]—If a man seised of lands in fee, covenants to enfeoff J. S. of them upon request, & afterwards makes a feoffment in fee of the said lands. J. S. shall have an action of covenant without request.—*MAIN'S CASE* (1596), as reported in 1 Co. Rep. 20 b; 77 E. R. 80; *sub nom.* SCOT v. MAINY, Poph. 109.

Annotations:—Mentd. LUXMORE v. ROBSON (1818), 1 B. & Ald. 584; Newton v. Wilmot (1841), 8 M. & W. 711; Bradley v. Copley (1845), 14 L. J. C. P. 222; Sands v. Clarke (1849), 8 C. B. 751.

1707. ———.]—On a bill for a specific performance of an agreement for the sale of a house pltf. made out his case; but it appeared that deft. had actually sold the house to another person for a valuable consideration & without notice. The ct. directed the master to inquire what damages pltf. had sustained by the non-performance of the agreement & that such damages, together with the costs of the suit, should be paid by deft.—*DENTON v. STEWART* (1786), 1 Cox Eq. Cas. 258; 17 Ves. 276, n.; 29 E. R. 1156.

Annotations:—Consd. Greenaway v. Adams (1806), 12 Ves. 395. *Distd.* Gwillim v. Stone (1807), 14 Ves. 128. *Overd.* Todd v. Gee (1810), 17 Ves. 273. *Consd.* Aberaman Ironworks v. Wickens (1868), L. R. 5 Eq. 485. *Refd.* Blore v. Sutton (1817), 3 Mer. 237; Williams v. Hignett (1828), 6 L. J. O. S. Ch. 125; Kendall v. Beckett (1830), 2 Russ. & M. 88; Jenkins v. Parkinson (1833), 2 My. & K. 5; Sainsbury v. Jones (1839), 5 My. & Cr. 1; Prothero v. Phelps (1855), 2 Jur. N. S. 173; Onions v. Cohen (1865), 2 Hem. & M. 354.

1708. ———.]—Pltf. in a bill for specific performance of a contract is not entitled generally to satisfaction by way of damages for the non-performance to be ascertained by an issue or a reference to the master.—*TODD v. GEE* (1810), 17 Ves. 273; 34 E. R. 106, L. C.

Annotations:—Consd. Jenkins v. Parkinson (1833), Coop. temp. Brough. 179. *Refd.* Williams v. Hignett (1828), 6 L. J. O. S. Ch. 125; Kendall v. Beckett (1830), 2 Russ. & M. 88; Sainsbury v. Jones (1839), 5 My. & Cr. 1; Prothero v. Phelps (1855), 2 Jur. N. S. 173; Onions v. Cohen (1865), 11 Jur. N. S. 198; Aberaman Ironworks v. Wickens (1868), L. R. 5 Eq. 485; Jolliffe v. Baker (1883), 11 Q. B. D. 255. *Mentd.* James v. Sadgrove (1822), 1 Sim. & St. 4.

1709. ———.]—Pltf. declared upon a contract by deft., then holding land for a term of years, to assign all his interest to pltf. on payment, by pltf., within seven years from a day named, of £140. Breach that, before the seven years had expired, deft. assigned all his interest to a stranger. On special demurrer:—*Held*: (1) it was not necessary that the declaration should aver tender of money, or request, by pltf., or pltf.'s readiness to accept an assignment; (2) the breach, as laid, was a good ground of action, deft. having incapacitated himself from performing the contract, if called on.—*LOVELOCK v. FRANKLYN* (1846), 8 Q. B. 371; 15 L. J. Q. B. 146; 10 Jur. 246; 115 E. R. 916; *sub nom.* FRANKLAND v. LOVELOCK, 6 L. T. O. S. 345.

Annotations:—As to (2) Refd. Frost v. Knight (1872), L. R. 7 Exch. 111; Soc. Générale de Paris v. Milders (1883), 49 L. T. 55.

1710. ———.]—*YOUNG v. BENNETT* (1858), 31 L. T. O. S. 98.

1711. ———.]—Deft. before, & as an inducement to, his marriage with pltf. promised in writing as part of the terms of the marriage, to leave a house & land to her for her life. Pltf. consented to the terms proposed, & the marriage took place; but deft. subsequently conveyed the property by deed to a third person. In an action to recover damages for breach of contract:—*Held*: as deft. had put it out of his power to perform the contract there had been a breach, in respect of which pltf. had an immediate right of action to recover damages, & the measure of such damages was the value of the possible life estate to which pltf. would be entitled if she survived deft.—*SYNGE v. SYNGE*, [1894] 1 Q. B. 466; 63 L. J. Q. B. 202; 70 L. T. 221; 58 J. P. 396; 42 W. R. 309; 10 T. L. R. 194; 9 R. 265, C. A.

Annotations:—Apld. Re Cavendish Browne's Settlement, Trusts, Horner v. Rawle (1916), 61 Sol. Jo. 27. *Refd.* Central Trust & Safe Deposit Co. v. Snider, [1916] 1 A. C. 266.

(b) Position of Vendor's Alienee.

1712. Right of purchaser to claim conveyance—Alienee with notice of prior contract of sale.]—A. agrees verbally to sell an estate to B. he afterwards agrees in writing to sell it to C. & then conveys it to B. in pursuance of the first contract B. having notice of the second. *Semble*: C. cannot call on B. for a conveyance.—*DAWSON v. ELLIS* (1820), 1 Jac. & W. 524; 37 E. R. 467.

1713. ———.]—*SPENCE v. HOGG* (undated), 1 Coll. 225; 63 E. R. 394, L. C.

1714. ———.]—If a vendor contract with two different persons for the sale to each of them of the same estate, the ct. will, *prima facie*, enforce the contract which was first made; & if the party with whom the second contract was made should, after notice of the first contract, procure a conveyance of the legal estate in pursuance of the second contract, the ct. will, in a suit for specific performance by the first purchaser against the vendor & the second purchaser, decree the latter to convey the estate to pltf.—*POTTER v. SANDERS* (1846), 6 Hare, 1; 67 E. R. 1057.

Annotations:—Mentd. British & American Telegraph Co. v. Colson (1871), L. R. 6 Exch. 108; Re Imperial Land Co. of Marseilles, Harris' Case (1872), 7 Ch. App. 587; Household Fire Insce. v. Grant (1879), 4 Ex. D. 216.

1715. ———.]—It was proposed by a co. to carry a railway through two contiguous estates belonging to A. & B. A., who had been previously in treaty with B. for his property, opposed the line, but eventually withdrew his opposition on an agreement between himself & co.'s solr., that if the co. purchased a certain part of B.'s property they would sell it to A. This agreement was subsequently executed by the co., but pending its execution, the co.'s solr. purchased B.'s property, as he alleged, on his own account, & after selling a part of it to the co., for their purposes, retained the residue. On the completion of the line, the co. agreed to sell a portion of that residue to a second railway co. Thereupon A. filed a bill against the first co. & their solr. for specific performance of his agreement:—*Held*: he was entitled to a decree & to the execution of a proper conveyance of the property.—*HENDERSON v. ROY* (1867), 17 L. T. 435.

1716. ———.]—By two contracts dated respectively June 18 & July 2, 1908, debtor agreed to sell for £880 four houses which were subject to mtg. for £600. Debtor was indebted to the purchaser in the sum of £257 for work done by

PART VI. SECT. 2, SUB-SECT. 1.—
B. (b).

1712 i. Right of purchaser to claim conveyance—Alienee with notice of prior

contract of sale.—*McDONALD v. ELDER* (1850), 1 Gr. 513.—**CAN.**

b. Burden of proof—To show sale

bona fide for value & without notice.—*HIMATLAL MOTILAL v. VASUDEW GANESH* (1912), 1 L. R. 36 Bom. 446.—**IND.**

the purchaser to certain houses, including those to be sold. On July 11, 1908, the purchaser heard for the first time that debtor had committed an act of bkpcy. on the previous June 30. On Oct. 12, 1908, a receiving order was made against debtor in a county ct., & adjudication followed. The purchaser, having accepted the title & entered into possession, applied to the county ct. judge, against the trustee in bkpcy., for specific performance of the two contracts & for a declaration that he was entitled to set off the £257 due to him from debtor against the balance of the purchase-money due from him to debtor after deducting the amount due on the mtge. The county ct. judge held that the purchaser was only entitled to specific performance on payment of the balance of the purchase-money in full to the trustee:—*Held*: there had been mutual dealings between debtor & the purchaser within Bankruptcy Act, 1883 (c. 52), s. 38, & the purchaser was therefore entitled to specific performance upon the terms that the £257 due to him from debtor be set off against the balance of the purchase-money.

The purchaser can under ordinary circumstances by application to the ct. enforce his rights to a conveyance of the land against the new owner of the legal title (that is to say he can require that the land shall be transferred to him) on his payment to such owner of the balance of the purchase-money (FLETCHER MOULTON, L.J.).—*Re TAYLOR, Ex p. NORVELL*, [1910] 1 K. B. 562; 79 L. J. K. B. 610; 102 L. T. 84; 17 Mans. 145; *sub nom. Re TAYLOR, Ex p. SUTCLIFFE*, 26 T. L. R. 270; 54 Sol. Jo. 271, C. A.

Annotations:—*Consd. Re City Life Assoc., Grandfield's Case, Stephenson's Case*, [1920] Ch. 191. *Reid. Ellis' Trustee v. Dixon-Johnson*, [1924] 2 Ch. 451.

SUB-SECT. 2.—ASSIGNMENT OF THE CONTRACT.

A. Transfer of Benefit.

Assignment of contracts generally.—*See CONTRACT, Vol. XII., pp. 596–607.*

1717. Assignment by purchaser.—It is extremely clear that an equitable interest under a contract of purchase may be the subject of sale. A person claiming under that contract becomes in equity a trustee for the persons with whom he afterwards contracts; without entering into any covenants for that purpose, they are obliged to indemnify him from the consequence of all acts which he must execute for their benefit; & a court

of equity not only allows, but actually compels, him to permit them to use his name, in all proceedings for obtaining the benefit of their contract (LORD ELDON, C.).—*WOOD v. GRIFFITH* (1818), 1 Swan. 43; 1 Wils. Ch. 34; 36 E. R. 291, L. C.

Annotations:—*Reid. Cockell v. Taylor* (1852), 15 Beav. 103; *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186; *James v. Kerr* (1889), 40 Ch. D. 449. *Mentd. Hawksworth v. Brammall* (1840), 5 My. & Cr. 281; *Nickels v. Hancock* (1855), 7 De G. M. & G. 300; *Blackett v. Bates* (1865), 2 Hem. & M. 610; *Selby v. Whitebread*, [1917] 1 K. B. 736.

1718. — Of right to accept offer.—The assignment of an unaccepted offer made to one individual with specific views, & for a specific purpose, could not easily enable the assignee to give an acceptance which should turn the offer into an agreement as against the person who made it. The acceptance of an offer, unless it be a single acceptance without any variation whatever, cannot amount to an agreement. The first thing essential in a valid contract is certainty as to the parties to the contract, & in the simple case of an offer by A. to sell to B. an acceptance of the offer by C. can establish no contract with A. there being no privity (STUART, V.-C.).—*MEYNELL v. SURTEES* (1854), 3 Sm. & G. 101; 24 L. T. O. S. 120; 1 Jur. N. S. 80; 3 W. R. 36; 65 E. R. 581; *on appeal* (1855), 25 L. J. Ch. 257, L. C.

Annotation:—*Mentd. Benecke v. Chadwicke* (1856), 4 W. R. 687.

1719. Right of vendor—Against original purchaser—After acceptance of assignment.—Bill for specific performance of an agreement to purchase, against the original vendee & an assignee of his contract, dismissed as against the former, pltf. being held, by delivery of abstract & offer to execute a conveyance, to have accepted the latter as purchaser. *Qu.*: if the bill had been filed against the original purchaser only.—*HOLDEN v. HAYN & BACON* (1815), 1 Mer. 47; 35 E. R. 594.

1720. — To repudiate contract—On notice of assignment.—If A., for valuable consideration, undertakes to surrender a copyhold to B., & B., on borrowing money from C., enters into a written agreement with C., that he, B., will surrender the same copyhold to C. by way of mtge. security, A. is not justified in refusing to surrender the copyhold to B., because he, A., has received notice from C. of the agreement between him & B. The surrender by A. to B. does not prejudice, but promotes, that agreement.—*v. WALFORD* (1828), 4 Russ. 372; 38 E. R. 845.

Annotation:—*Consd. M'Cright v. Foster* (1870), 5 Ch. App. 604.

PART VI. SECT. 2, SUB-SECT. 2.—A.

1718 i. Assignment by purchaser—Of right to accept offer.—*CROSDALE v. PADDON* (B. C.) (1911) 19 W. L. R. 318; 1 W. W. R. 28.—*CAN.*

c. — Of sub-lease of oil wells —Right to contribution from assignees for expense of specific performance action against vendor.—*LEDGARD v. MCLEAN* (1863), 10 Gr. 139.—*CAN.*

d. — To avoid defaulting in payment—Right of assignee to rescission to purchaser after payment.—*HALLIDAY v. VINCENT* (1907), 7 W. L. R. 7.—*CAN.*

e. — Without consent of vendor in breach of agreement—Right of assignee to file caveat.—*Re LAND TITLES ACT, MASSEY-HARRIS CO., LTD.'S CASE*, [1922] 1 W. W. R. 816; 63 D. L. R. 428; 15 Sask. L. R. 316.—*CAN.*

f. — Right of assignee to rescind.—Where a vendor of land holds the same under an agreement for sale from a prior vendor to him

which contains a provision against reselling without the prior vendor's consent, & he makes an agreement for sale without such consent, his purchaser cannot rescind for that reason if he, the vendor, is in a position to make title, for example, by his having paid the purchase-money in full to the prior vendor, or where the vendor, after action commenced by him against his purchaser on the agreement, but before judgment, obtains the consent of the prior vendor to the agreement.—*MOSIMAN v. CARVETH*, [1923] 2 W. W. R. 372; [1923] 2 D. L. R. 725; varying, 68 D. L. R. 232; 16 Sask. L. R. 23.—*CAN.*

1719 i. Right of vendor — Against original purchaser—After acceptance of assignment.—Where an agreement for the sale & purchase of land is made with the purchaser, "or assigns," the former is not relieved from his obligation under the contract by assigning it, unless the vendor has accepted the assignee in place of the purchaser.—*VIVIAN (H. H.) CO. v. CLERGUE* (1908),

16 O. L. R. 372; 11 O. W. R. 1014.—*CAN.*

1719 ii. — — — — ——*ROCKDESCHER v. BIRCH* (1920), 55 D. L. R. 717.—*CAN.*

1719 iii. — — — — ——*WADDINGTON v. BUSH*, [1923] 3 D. L. R. 884; 32 B. C. R. 434.—*CAN.*

g. — — — — ——*Effect of extension of time given by vendor to assignee.*—*WILSON v. LAND SECURITY CO.* (1896), 26 S. C. R. 149.—*CAN.*

h. — — — — ——*After assignment by vendor subject to prior agreement.*—*FAMA v. WHITE* (1906), 6 S. R. N. S. W. 415; 23 N. S. W. W. N. 154.—*AUS.*

k. — — — — ——*Without notice to original purchaser.*—*MURRAY v. STENTIFORD* (1914), 20 B. C. R. 162.—*CAN.*

l. — — — — ——*DELL v. SAUNDERS* (1914), 27 W. L. R. 844; 6 W. W. R. 657; 17 D. L. R. 279; 19 B. C. R. 500.—*CAN.*

Sect. 2.—Assignment by either party pending completion: Sub-sect. 2, A. & B. Sect. 3: Sub-sect. 1, A. (a).]

1721. — To receive purchase-money—After notice of assignment.]—A vendor of land may receive the balance of the purchase-money, & convey the estate to the purchaser, without regard to the receipt of a notice that the purchaser had agreed to assign the contract.

A vendor agreed to sell leaseholds which were under a heavy rent, & received part of the purchase-money. The purchaser afterwards agreed to assign to a bank, if required, the contract for the purchase by way of security for money advanced, & the bank gave notice of this agreement to the vendor. The bank afterwards refused to advance to the purchaser the money required to complete, but this was not known to the vendor. The purchaser, after the time fixed for completion, paid the balance of the purchase-money, the vendor executed an assignment, & the purchaser assigned to an assignee without notice of the security to the bank:—*Held*: the vendor was entitled to complete without giving notice to the bank, & the bank had no remedy against him.—*McCREIGHT v. FOSTER* (1870), 5 Ch. App. 604; 39 L. J. Ch. 792; 23 L. T. 224; 18 W. R. 905, L. C.

Annotations:—Fold. Crabtree v. Poole (1871), L. R. 12 Eq. 13. *Reid. Shaw v. Foster* (1872), L. R. 5 H. L. 321.

1722. — — — — —.]—*SHAW v. FOSTER*, No. 2388, *post*.

Assignment of benefit of contract or covenant.]—*See CHOSER IN ACTION*, Vol. VIII., pp. 430, 431, Nos. 79–84.

1721 i. — To receive purchase-money—After notice of assignment.]—*ALEXANDER v. GERMAN* (Sask.) (1910), 15 W. L. R. 261.—*CAN.*

m. — Priority of vendor's mechanics' lien.—Where assignment without consent in breach of agreement.]—A provision in an agreement for the sale of land that no assignment thereof by the purchaser shall be valid without the consent or approval of the vendor is for the benefit of the vendor only & only in his capacity as vendor, & cannot be invoked by him to protect an interest he acquired as assignee of a mechanics' lien registered after the purchaser assigned his interest in the agreement & after the assignee had protected his interest by caveat.—*NASH & CANADIAN BANK OF COMMERCE v. FITZPATRICK*, [1924] 4 D. L. R. 1207; [1924] 3 W. W. R. 913; 19 Sask. L. R. 114.—*CAN.*

n. Right of assignee of vendor—Agreement by vendor to indemnify against default of purchaser—Whether right lost by foreclosure of purchaser.]—*MEINDL v. BRAVENDER* (1915), 31 W. L. R. 924; 23 D. L. R. 108.—*CAN.*

o. —.]—The assignees of an agreement for sale of land take subject to the equities.—*QUEBEC BANK v. GREENLEES*, [1917] 2 W. W. R. 144; 33 D. L. R. 696.—*CAN.*

p. — Assignment by purchaser in breach of agreement—Right to removal of caveat filed by assignee of purchaser.]—An agreement of sale of land provided that no assignment thereof should be valid unless approved & countersigned by the vendor & that nothing between the purchaser & an assignee should preclude the vendor from the right to convey the premises to the purchaser. The purchaser assigned the agreement without such being approved or countersigned & the assignee filed a caveat to protect his interest. The vendor transferred the land & assigned his rights under the agreement to the applicant, who

applied to have the caveat discharged. The ct. refused to discharge the caveat.—*Re CAVEAT No. 109121, IWANICKI v. LEVIN*, [1924] 1 D. L. R. 171; 33 Man. L. R. 420; [1923] 3 W. W. R. 1122.—*CAN.*

q. Right of assignee of purchase against original vendor—Assignment in breach of agreement.]—An assignee of an agreement for sale of lands containing a restriction against assignment, without the approval of the registered vendor, has no status to file a *lis pendens* or caveat without obtaining such approval. Such an assignee cannot be said to have an interest in land; he has merely a personal right against his own vendor.—*ATLANTIC REALTY & IMPROVEMENT CO., LTD. v. JACKSON* (1913), 18 B. C. R. 657.—*CAN.*

r. — Assignment with consent of vendor—Right to benefit of covenants for title.]—*CANADIAN NORTHERN RY. v. PETERSON* (1914), 29 W. L. R. 286; 6 W. W. R. 1554; 7 W. W. R. 741; 7 Sask. L. R. 166.—*CAN.*

t. — Right to relief on cancellation for default of purchaser.]—Where an assignee of an absolute agreement for the sale of land exercised as much diligence as he could under the circumstances to obtain a transfer of said land from the owner upon payment of the amount due, the ct. relieved against the cancellation of the said agreement under which the assignor had made default in payment.—*HOWLETT v. BRODER* (1914), 29 W. L. R. 718; 7 W. W. R. 397; 7 Sask. L. R. 149; 20 D. L. R. 576.—*CAN.*

a. Right of joint assignee of purchaser to indemnify from co-assignees.]—*BENDING v. FITZGERALD* (1915), 31 W. L. R. 507.—*CAN.*

b. Priority of assignees of purchaser—Prior assignment without consent of vendor in breach of agreement—Consent to subsequent assignment ob-

Assignment of claim to damages, compensation or rescission.]—*See CHOSER IN ACTION*, Vol. VIII., pp. 431–433, Nos. 85–99.

B. Action by Assignee.

See, generally, SPECIFIC PERFORMANCE.

1723. Right of assignee to sue—On performance of all terms of original contract.]—*DYER v. PULTENEY* (1740), Barn. Ch. 160; 27 E. R. 596, L. C. *Annotation:—Apld. Fenwick v. Bulman* (1869), L. R. 9 Eq. 165.

1724. — — — — —.]—A vendor agreed to sell a piece of land to M. with immediate possession, the purchase to be completed in five years. Before completion, M. agreed to sell the land to C., & the agreement was registered in the district registry, with a receipt for part of the consideration money which C. had laid out for M. in buildings on the land. C. offered to pay the vendor the amount agreed upon between him & M., & applied for the delivery of the abstract, but the vendor refused to convey to him the land in question unless he would purchase other land also agreed to be sold to M., & shortly afterwards the vendor & M. conveyed the land to H. On a bill filed by C. against the vendor, M., & H., alleging that H. had constructive notice of his title, & praying a conveyance of the estate:—*Held*: whether H. had such notice or not, the conveyance to him could not be set aside.—*CRABTREE v. POOLE* (1871), L. R. 12 Eq. 13; 40 L. J. Ch. 468; 24 L. T. 895.

1725. — Specific performance.]—A. entered into a written agreement with B. for the purchase of certain freehold premises. The agreement

tained by fraud.]—McLEOD v. SAWYER-MASSEY CO. (1910), 22 W. L. R. 625.—*CAN.*

c. — — — — —.]—*Re GREEN CAVEAT* (1912), 23 W. L. R. 57; 6 Sask. L. R. 6.—*CAN.*

d. — Prior assignment with consent of vendor—Subsequent assignment fraudulently approved.]—*SCHARF v. WARNER* (Alta.) (1913), 24 W. L. R. 898; 4 W. W. R. 1181.—*CAN.*

e. — Over mortgage by purchaser after assignment—Mortgagee with notice of assignment.]—Where the purchaser of land under an agreement for sale assigns his interest as security & afterwards obtains title & mortgages the land to a mtgee. who has notice of the assignee's interest the assignee is entitled to a lien upon the land in priority to the mtgee., for the amount which the assignment secured, notwithstanding the fact that the assignee filed a caveat & permitted it to lapse, since the caveat is unnecessary, under the circumstances, in respect to the mtgee.—*BOULTER-WAUGH & CO., LTD. v. PHILLIPS*, [1918] 3 W. W. R. 27; 11 Sask. L. R. 297; 42 D. L. R. 548.—*CAN.*

PART VI. SECT. 2, SUB-SECT. 2.—B.

1723 i. Right of assignee to sue—On performance of all terms of original contract.]—*Pltf.*, who was the assignee of S.'s interest under an agreement for the sale of land by debt. to S., claimed from debt. damages occasioned by debt. allowing the land to be sold under a mtge. made by him:—*Held*: *pltf.*, by reason of his failure to comply with the terms of the agreement of sale, was without redress.—*DOOL v. ROBINSON* (Man.) (1912), 22 W. L. R. 248; 7 D. L. R. 205.—*CAN.*

stipulated, "that, if any dispute should arise as to the title, the same should be submitted to a conveyancer, to be agreed upon by both parties; the objections to be stated in writing, within six months of the date of the agreement, to the solr. of the vendor; & in case he should be of opinion that a good title could not be made out, then either party should be at liberty to rescind the contract on two calendar months' notice after the opinion of counsel had been obtained." This agreement was entered into by A., at the request of C., which circumstance, however, was not known to B. By a subsequent agreement, A. agreed to sell the premises to C., upon the same terms, etc., under which he had contracted to purchase of B. D., the mother of B., had a life estate in the premises, which circumstance, though known to B. & his solr., was not known to either A. or C. D. did not, in respect of her life estate, sanction the agreement. A. & C., as co-plffs., filed their bill against B. & D. for specific performance of the original agreement. After that bill had been answered, but before either party had gone into evidence, A. died intestate, & C. then filed a bill of revivor & supplement against the original defts. & the heir-at-law & personal representatives of A. Upon those two bills, no answer to the latter having been filed, the parties joined issue:—*Held*: C. was entitled to have specific performance of the agreement, with compensation in respect of D.'s life estate.—*NELTHORPE v. HOLGATE* (1844), 1 Coll. 203; 8 Jur. 551; 63 E. R. 384.

Annotations:—*Consd.* *Wilson v. Williams* (1857), 3 Jur. N. S. 810. *Distd.* *Beeston v. Stutely* (1858), 27 L. J. Ch. 156. *Apld.* *Barnes v. Wood* (1869), L. R. 8 Eq. 424. *Consd.* *Re Jackson & Haden's Contract*, [1906] 1 Ch. 412; *Merrett v. Schuster*, [1920] 2 Ch. 240. *Refd.* *Price v. Griffith* (1851), 18 L. T. O. S. 190; *Edwards Wood v. Marjoribanks* (1858), 3 De G. & J. 329; *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212; *Carroll v. Keays*, *Keays v. Carroll* (1873), 22 W. R. 243; *Davenport v. Charsley* (1886), 54 L. T. 372; *Vowles v. Bristol*, etc. Bldg. Soc. (1900), 44 Sol. Jo. 592; *Procter v. Pugh*, [1921] 2 Ch. 256; *Re Des Reaux & Setchfields Contract*, [1926] Ch. 178. *Mentd.* *Re Robinson, Ex p. Burrell* (1876), 1 Ch. D. 539, n.; *Said v. Butt*, [1920] 3 K. B. 497.

1726. ————]—Vendors, to their bill against their purchaser for specific performance of, or for rescinding the agreement, made a sub-purchaser a deft.; & the sub-purchaser afterwards filed a bill against his vendor for specific performance of his agreement, & made the original vendors defts. A demurrer by the original vendors to the sub-purchaser's bill was overruled on the ground that they had made him a deft. to their bill.—*FENWICK v. BULMAN* (1869), L. R. 9 Eq. 165; 21 L. T. 628; 18 W. R. 179.

17 B. C. R. 126; 2 D. L. R. 899.—*CAN.*

f. ———— *Right to conveyance free from caveat for which vendor not responsible.*—*COLE v. CROSS* (Man.) (1912), 19 W. L. R. 780; 1 W. W. R. 458; 1 D. L. R. 127.—*CAN.*

g. ———— *Assignee of purchaser from half-breed entitled to land scrip.*—*PATTERSON v. LANE* (1904), 6 Terr. L. R. 92.—*CAN.*

h. ———— *Purchaser as necessary party.*—*BROUGH v. MCCLELLAND* (1908), 18 Man. L. R. 279.—*CAN.*

k. ———— *Assignee of purchaser as necessary party.*—In an action by the assignee of a vendor's agreement for the sale of land, against purchaser, the assignee, to whom the purchaser has, to the knowledge of the vendor & his assignee & before the vendor's assignment, assigned his interest under the agreement, is a necessary party.—*GALE v. POWLEY* (1915), 32 W. L. R. 65; 24 D. L. R. 450.—*CAN.*

SECT. 3.—CHANGE IN POSITION OF PARTIES.

SUB-SECT. 1.—DEATH.

A. *Death of Purchaser.*

(a) *In General.*

1727. *Right of vendor to rescind*—After long delay.]—An estate was sold by auction, & the purchase was to be completed in two months according to the conditions of sale. The buyer died soon afterwards, & suits were instituted both in the spiritual ct. & the Ct. of Ch. respecting his affairs, which prevented the completion of the contract. Four or five years after the sale the vendor filed his bill to have the contract rescinded, & the affairs of the buyer still remaining unsettled, the ct. rescinded the contract & gave plff. his costs out of the deposit.—*MACKEETH v. MARLAR* (1786), 1 Cox, Eq. Cas. 259; 29 E. R. 1156.

1728. *Right of heir to specific performance*—Contract must be binding on purchaser.]—A person having contracted for the purchase of an estate in fee simple, in possession, free from incumbrances, died intestate before the completion of the contract: it subsequently appeared that a good title in possession could not be made in consequence of an outstanding lease, for the life of a person, at a low rent: a bill was filed by the heir-at-law of the purchaser for a specific performance of the contract, with an abatement from the purchase-money as a compensation for the lease for life, & seeking to have the purchase-money paid out of the personal assets of the purchaser:—*Held*: the purchaser could not have been compelled to perform the contract, & the heir was not entitled to have it completed for his benefit.—*COLLIER v. JENKINS* (1831), You. 295; 159 E. R. 1004.

1729. ————]—When an heir-at-law seeks to have a contract, entered into by his ancestor, carried into effect for his benefit, he must show that there was a binding contract at the death of the ancestor, & one which could be enforced against an unwilling purchaser.

In 1853 A. agreed to purchase some real estate, but he died intestate before the completion of the purchase. It turned out that part of the property had been held for twenty-seven years under a parol exchange entered into by a mere tenant for life; but, after A.'s death, the exchange was confirmed by the trustees:—*Held*: the contract could have been enforced against A. in his lifetime, & his heir-at-law was entitled to have it completed for his own benefit at the expense of A.'s personal estate.—*GARNETT v. ACTON* (1860), 28 Beav. 333; 54 E. R. 394.

l. ———— *Where assignment by purchaser in breach of agreement.*—If an agreement of sale requires the vendor's approval to any assignment of the vendee's interest, & an assignment is made without such approval, the assignee has no right upon tendering the amount due to insist upon the transfer being made to him. But he has an equitable interest in the property, & in an action by the vendor for cancellation of the agreement the assignee has the right to redeem, & if he redeems, to such protection as the ct. deems proper, & the ct. may direct a transfer to be made to him.—*FITZPATRICK v. FITZPATRICK*, [1923] 1 W. W. R. 1188; 16 Sask. L. R. 286.—*CAN.*

m. *Action by vendor as assignee of purchaser against sub-purchaser*—*Purchaser as necessary party.*—If a vendor of land takes from A. his purchaser, a quit-claim deed & a verbal assignment of the moneys due under an agreement of sale to purchasers

from A., the original vendor is an equitable assignee, & in suing the purchasers from A. on their covenant in the agreement of sale to them, should in the absence of special circumstances, add A. as a party to the action.—*BRODER v. RINK, McRADU*, [1920] 3 W. W. R. 213.—*CAN.*

PART VI. SECT. 3, SUB-SECT. 1.—A. (a).

n. *Right of heir to compensation*—*On resale by vendor.*—Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to a specific performance of the contract; & the vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, & it afterwards passed into the hands of persons without notice:—*Held*: the heir could sue the vendor in equity for compensation.—*FORSYTH v. JOHNSON* (1868), 14 Gr. 639.—*CAN.*

Sect. 3.—Change in position of parties: Sub-sect. 1 A. (a), (b) & (c), & B. (a), (b) & (c).]

1730. — Purchase by trustee of trust property.—Where one of two trustees for sale bid at a sale by auction & the property was knocked down to him but he died before the sale was completed, it was held that his heir-at-law could not as against the next of kin compel the specific performance of the contract, so as to give him the benefit of the contract.—*INGLE v. RICHARDS* (No. 1) (1860), 28 Beav. 361; 3 L. T. 46; 6 Jur. N. S. 1178; 8 W. R. 696; 54 E. R. 405.

1731. Right of sub-purchaser to complete.—A purchaser under a decree agreed to sell the lots he had purchased to A. & died, his heir being abroad. Ordered that A. should be substituted for him as the purchaser, & should be at liberty to pay the purchase-money into ct. & be let into possession.—*PEARCE v. PEARCE* (1834), 7 Sim. 138; 58 E. R. 789.

1732. Enforcement against executor.—A verbally agreed with B. his solr. for the sale of land to B. This agreement, which was never reduced to writing, provided that B. should bear all expenses of making out the title, that possession should be at once given, & that the purchase-money should be paid at a fixed future date with interest in the meantime. B. entered into possession, but took no further steps in completion of the purchase, & before the purchase-money became due, died. In a suit by A. for specific performance against the exor. of B.:—*Held*: B., as A.'s solr., ought to have had an agreement in writing prepared, & the exor. was bound to complete the purchase & pay the costs of the suit.—*BRAFIELD v. SCRIVEN* (1873), 22 W. R. 202.

(b) *Devolution of Estate.*

See, now, Administration of Estates Act, 1925 (c. 23), s. 1.

1733. Title of devisee or heir.—A man purchases absolutely of a mtgee. in fee in possession, & dies. As between his heir & exor. it shall be considered as real estate & go to the heir.—*OTTON v. ILES* (1684), 1 Vern. 271; 23 E. R. 464.
Annotation:—*Refd.* *Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31.

1734. —.—*DARRIS'S CASE* (1697), 3 Salk. 85; 91 E. R. 707.

1735. —.—*FARR v. MIDDLETON* (1701), Prec. Ch. 174; 2 Eq. Cas. Abr. 466; 24 E. R. 84.

1736. —.—A. having agreed to purchase a real estate, the purchase-money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, as to all the worldly goods that it had pleased God to bless him with, gave & bequeathed to his wife & two sons, all his goods, cattle, chattels, personal estate, & effects whatsoever; & in case they died without issue, etc., gave the children's share of the personal estate & effects over; testator dying before the purchase could be completed:—*Held*: the agreement ought to be specifically performed; & the words of the will, being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son & his heirs, etc.—*CAVE v. CAVE* (1762), 2 Eden, 139; 28 E. R. 849, L. C.

Annotation:—*Refd.* *Carr v. Ellison* (1786), 2 Bro. C. C. 56.

1737. —.—*PAINE v. MELLER*, No. 1576, ante.

1738. —.—Decree upon the answer, ad-

mitting a contract, & a letter, offering to sell at a valuation, for a conveyance on payment of the purchase-money into the bank by pltf., on a certain day; in default of payment the bill to be dismissed with costs. No binding contract until payment. The estate therefore did not pass by a previous device; but descended to the heir.—*GASKARTH v. LOWTHER* (LORD) (1805), 12 Ves. 107; 33 E. R. 41, L. C.

Annotation:—*Refd.* *Agar v. Macklaw* (1825), 4 L. J. O. S. Ch. 16.

1739. —.—If a contract is entered into for the purchase of an estate, under hand & seal, that estate by force of the contract becomes the estate of the purchaser; & will go to his heir, who will take it free from all debts by simple contract (LORD ELDON, C.).—*BROOME v. MONCK* (1805), 10 Ves. 597; 32 E. R. 976, L. C.

Annotations:—*Consd.* *Morgan v. Holford* (1852), 1 Sm. & G. 101. *Refd.* *Hudson v. Cook* (1872), L. R. 13 Eq. 417; *Re Rix, Steward v. Lonsdale* (1921), 90 L. J. Ch. 474. *Mentd.* *Halford v. Dillon* (1820), 2 Brod. & Blng. 12.

Effect of doctrine of conversion.—*See EQUITY*, Vol. XX., pp. 353-358, Nos. 925-966.

(c) *Provision of Purchase-Money.*

See, now, Administration of Estates Act, 1925 (c. 23), s. 35.

Vendor's lien.—*See LIEN*, Vol. XXXII., pp. 275-287, Nos. 552-651.

Purchaser's lien.—*See LIEN*, Vol. XXXII., pp. 268-273, Nos. 492-551.

Marshalling of assets.—*See EXECUTORS*, Vol. XXIII., pp. 527, 528, Nos. 5939-5943.

Liability of specific & residuary devisees.—*See EXECUTORS*, Vol. XXIII., p. 521, Nos. 5884, 5887.

Application of Real Estate Charges Act, 1854 (c. 43).—*Administration of Estates Act, 1925 (c. 25), s. 35.*—*See EXECUTORS*, Vol. XXIII., p. 488, Nos. 5561-5565.

B. Death of Vendor.

(a) *In General.*

See Administration of Estates Act, 1925 (c. 23), s. 1.

1740. Whether contract enforceable.—By purchaser.—*WESTON v. DANVERS* (1584), Toth. 105; 21 E. R. 137.

1741. —.—*HIGHAM v. LADD* (1631), Toth. 139; 21 E. R. 148.

1742. —.—Agreement to assign a lease, whether it shall be carried into execution against an extrix.—*SMITH v. WATSON, LASSELS, JENKINS & KING* (1719), Bunb. 55; 145 E. R. 593.

Annotation:—*Mentd.* *Gibson v. Holland* (1865), L. R. 1 C. P. 1.

1743. —.—A vendor, after the contract & before the conveyance to the purchaser, died, without having devised the legal estate in the premises in trust to complete the purchase, & a suit for a specific performance of the contract against the trustees & the infant devisees of interests in his estate having become necessary, the ct. made the decree without costs, there having been no default on either side.—*HINDER v. STREETEN* (1852), 10 Hare, 18; 20 L. T. O. S. 40; 16 Jur. 650; 68 E. R. 820.

Annotations:—*Refd.* *Midland Counties Ry. v. Rice* (1854), 2 Eq. Rep. 1109; *Armitage v. Askham, Re L. & N. W. Ry.* (1855), 1 Jur. N. S. 227; *Re Fenton's Will* (1855), 3 W. R. 331; *Worham v. Dacre* (1856), 2 K. & J. 437; *Cresswell v. Haines* (1861), 8 Jur. N. S. 208; *Sanderson v. Chadwick* (1863), 2 New Rep. 414; *Barker v. Venables* (1865), 11 Jur. N. S. 480.

1744. —.—**Against purchaser.**—*BUBB'S CASE* (1678), Freem. Ch. 38; 22 E. R. 1044.

PART VI. SECT. 3, SUB-SECT. 1.—B. (a).

17441. Whether contract enforceable.—*Against purchaser.*—The vendor of real estate having died before the

conveyance, leaving infant heirs, the purchaser proceeded at law to recover back the purchase money paid, partly to the vendor & partly to his administrators; whereupon a bill was filed by

the representatives of the vendor, to restrain the action & for specific performance. The ct. made the decree.—*VAN WORMER v. HARDING* (1867), 14 Gr. 167.—*CAN.*

1745. — — —.]—A. articles to sell lands, & dies before a conveyance made. The heir decreed to convey, & the purchase-money to be paid to the exors.—*BADEN v. PEMBROKE* (COUNTRESS) (1690), 2 Vern. 213; 23 E. R. 739; *sub nom.* *PEMBROKE (EARL) v. BOWDEN*, 3 Rep. Ch. 217.

1746. — — —.]—The vendor of a real estate died before completion intestate as to his real estate:—*Held*: the legal personal representatives of the vendor might maintain a bill against the vendor's heir & the purchaser for a specific performance, & although the interest of vendor was equitable & the purchaser had since got in the legal estate.—*HODDEL v. PUGH* (1864), 33 Beav. 489; 10 L. T. 446; 10 Jur. N. S. 534; 12 W. R. 782; 5 E. R. 458.

1747. — — —.]—*If contract binding—Leave of court not obtained.*—A nobleman was tenant for life of estates settled by Act of Parliament, & thereby vested in trustees. He was also owner of estates in fee simple. By his will he gave the real possessor of the title a right of pre-emption of his unsettled estates, at a stated price. During his life he had entered into a correspondence with the trustees of the settled estates for the sale to them of one particular unsettled estate, & the trustees had petitioned the ct. for leave to purchase, but no final order was made. The nobleman died, & his successor in the title claimed to exercise his rights of pre-emption, but, on the other hand, the trustees of the settled estates claimed that the contract should be carried into effect, & the exors. of deceased supported the same view, & claimed the purchase-money to be paid by the trustees as personal estate:—*Held*: the parties to the correspondence not being then the authorised agents for purchase, & there being no final order of the ct., to conclude the bargain, the contract was not a binding one, & therefore the claim of pre-emption was correct; & that of the trustees & of the exors. not sustainable.—*SHREWSBURY (EARL) v. SHREWSBURY (COUNTRESS)* (1854), 23 L. T. O. S. 86; 18 Jur. 397.

1748. *Effect of death of vendor—Consideration annuity to vendor.*—S. agrees to sell his estate to B. in consideration of an annuity for his life. The time limited for the conveyance was Oct. 31; but the annuity was to commence, & A. was to have the rents & profits of the estate, from Apr. 5 preceding. S. died on Nov. 12, before any conveyance was executed. On a bill brought by A. for a specific performance of this agreement, the ct. dismissed it, but without costs.—*POPE v. ROOTS* (1774), 1 Bro. Parl. Cas. 370; 1 E. R. 628, H. L.

Annotations:—*Consd.* *Wyvill v. Exeter (Bp.)* (1811), 1 Price, 292. *Refd.* *Davies v. Cooper* (1840), 5 My. & Cr. 270.

1749. — — —.]—*& bankruptcy of purchaser.*—The purchaser of a real estate became insolvent after part, but before the whole, of the purchase-money was paid, or the conveyance executed. The vendor died, having devised the estate to pltfs., & appointed one of them his exor. The bill was filed against the provisional assignee of insolvent, & an equitable mtgee. by deposit of the agreement for purchase, & it prayed the payment of the residue of the purchase-money by defts., or by sale of the estate. Pltfs. did not prove their title as devisees. Defts. disclaimed:—*Held*: the ct. could not make the decree sought without evidence of the devise; but upon payment of the costs of defts., the ct. might, defts. not opposing, declare pltfs. absolutely entitled to the estate.—*GABRIEL v. STURGIS* (1846), 5 Hare, 97; 15 L. J. Ch. 201; 6 L. T. O. S. 452; 10 Jur. 215; 67 E. R. 843.

Annotations:—*Refd.* *Kell v. Nokes* (1866), 12 Jur. N. S. 780. *Mentd.* *Ohrlv v. Jenkins* (1847), 11 Jur. 1001.

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1750. — — —.]—*On right of pre-emption—To be exercised "at all times hereafter."*—A right of pre-emption held limited to the life of the owner of the property. *Semble*: a right of pre-emption, "at all times thereafter," cannot be enforced after the death of the owner of the property.—*STOCKER v. DEAN* (1852), 16 Beav. 161; 51 E. R. 739.

— *Sale of copyholds.*—*See* COPYHOLDS, Vol. XIII., pp. 74, 113, Nos. 946, 1434–1437.

— *Liability of executors.*—*See* EXECUTORS, Vol. XXIV., p. 623, Nos. 6527–6530.

(b) *Devolution of Estate.*

See EQUITY, Vol. XX., pp. 353–358, Nos. 925–966.

— *Trusteeship of Vendor and Heir.*

See, now, Trustee Act, 1925 (c. 19), s. 44.

1751. *Vendor trustee for purchaser—Trust binding on heir.*—*STEPHENS v. BAILY* (1666), Nels. 106; 21 E. R. 802.

Annotation:—*Folld.* *Gell v. Vermedun* (1694), Freem. Ch. 199.

1752. — — —.]—*GELL v. VERMEDUN* (1694), Freem. Ch. 199; 22 E. R. 1158.

1753. — — —.]—*Within meaning of Trustee Acts.*—A vendor who dies before the completion of the contract is a trustee within 4 & 5 Will. 4, c. 23, though expressly excepted out of the 1 Will. 4, c. 60.—*Re* *LOWE'S ESTATE* (1848), 2 Ph. 690; 12 L. T. O. S. 325; 12 Jur. 638; 41 E. R. 1110; *sub nom.* *Ex p. LOWE*, 17 L. J. Ch. 430, L. C.

1754. — — —.]—By an order under 25 & 26 Vict. c. 111, the guardians of the poor of N. were authorised to sell a freehold belonging to A., a person of unsound mind, & to receive the purchase-money & execute a conveyance. The property was sold in May, 1885, the sale to be completed in Nov. An abstract of title was delivered, & no objection was taken to the title. On June 28 A. died. The guardians now presented a petition asking that A. might be declared a trustee within Trustee Act, 1850 (c. 60), & that their clerk might be appointed a trustee of the property & the estate vested in him in trust to complete the sale:—*Held*: A. could not be held a trustee within Trustee Act, 1850 (c. 60), & the order could not be made.—*Re* *COLLING* (1886), 32 Ch. D. 333; 55 L. J. Ch. 486; 54 L. T. 809; 34 W. R. 464, C. A.

1755. — — —.]—A rector contracted to sell the rectory house, but died before completion of the purchase. No successor to the living had been appointed, & none was likely to be appointed. The purchaser had accepted the title:—*Held*: the ct. had power to declare that the late rector was at the time of his death a trustee & to make a vesting order.—*Re* *PEEK'S CONTRACT* (1920), 65 Sol. Jo. 220.

1756. *Whether heir-at-law trustee — Within meaning of Trustee Acts.*—*SMITH v. HIBBARD* (1789), 2 Dick. 730; 21 E. R. 455, L. C.

Annotation:—*Refd.* *Mackreth v. Symmons* (1808), 15 Ves. 329.

1757. — — —.]—The infant heir of a person who has died intestate, leaving real estate which he had in his lifetime contracted to sell, is not a constructive trustee for the purchaser within Trustee Act, 1850 (c. 60), unless he has been declared to be so by a decree of the ct.—*Re* *CARPENTER* (1854), Kay, 418; 69 E. R. 177.

Annotations:—*Apprvd.* *Re* *Colling* (1886), 32 Ch. D. 333. *Mentd.* *Worham v. Dacre* (1856), 27 L. T. O. S. 63; *Gale v. Gale* (1877), 36 L. T. 690.

1758. — — —.]—*Re* *FAULDER*, [1866] W. N. 83.

1759. — — —.]—Where the owner of land has agreed to sell land to a railway co., but dies before

Sect. 3.—Change in position of parties: Sub-sect. 1, B. (c), & C.: sub-sect. 2, A. & B.]

completion of the purchase, having devised the land to an infant, such infant can be declared a trustee within Trustee Act, 1850 (c. 60), upon petition, without the institution of a suit.—*RE LOWRY'S WILL* (1872), 1 L. R. 15 Eq. 78; 42 L. J. Ch. 509; 21 W. R. 428.

Annotations:—Dtd. Re Colling (1886), 55 L. J. Ch. 486. *Refd. Re Elementary Education Acts, 1870 & 1873* (1908), 78 L. J. Ch. 281.

See, now, Trustee Act, 1925 (c. 19), s. 44.

C. Parties to Action.

See R. S. C., Ord. 16, r. 8; Administration of Estates Act, 1925 (c. 23), s. 1.

SUB-SECT. 2.—BANKRUPTCY.

A. Of Vendor.

See Land Charges Act, 1925 (c. 22), ss. 3, 7, & generally, BANKRUPTCY, Vols. IV. & V.

1760. Effect of—Legal estate vests in trustee—Subject to equitable rights of purchaser.]—If a bkpt. or liquidating debtor, under circumstances which are not impeachable under any particular provision connected with his bkpcy. or insolvency, enters into a contract with respect to his real estate for a valuable consideration, that contract binds his trustee to bkpcy. as much as it binds himself (JAMES, L.J.).—*Re SCHEIBLER, Ex p. HOLTHAUSEN* (1874), 9 Ch. App. 722; 44 L. J. Bcy. 26; 31 L. T. 13, L. J.J.

Annotations:—Consd. Re Bastable, Ex p. The Trustee, [1901] 2 K. B. 518. Refd. Mercer v. Vans Colina (1897), 4 Mans. 363; *Powell v. Marshall, Parkes, [1899] 1 Q. B. 710. Mentd. Bank of Africa v. Cohen, [1909] 2 Ch. 129; British South Africa Co. v. De Beers Consolidated Mines, [1910] 1 Ch. 354.*

1761. — — — —.]—A bkpt. had, before adjudication, the purchaser having had no notice of any act of bkpcy., contracted to sell some leasehold property, & had received a deposit in respect of the purchase-money. After the adjudication had been made, but before it had been advertised, the purchaser, having no notice of the adjudication, paid the remainder of the purchase-money to bkpt.:—*Held*: the trustee in the bkpcy. could not be compelled to assign the lease to the purchaser except upon the terms of his paying the purchase-money.

Qu.: whether, if the lease had been assigned before the adjudication, but a part of the purchase-money had not been paid, & the purchaser had, after the adjudication, paid it to the bkpt., without notice of the adjudication, he could have been compelled to pay it over again to the trustee.

Upon the adjudication being made, the legal estate in the property vested in the trustee in the bkpcy., subject to the equity of the purchaser under the contract (JAMES, L.J.).—*Re POOLEY, Ex p. RABBITGE* (1878), 8 Ch. D. 367; 48 L. J. Bcy. 15; 38 L. T. 663; 26 W. R. 646, C. A.

Annotations:—Folld. Pearce v. Bastable's Trustee in Bankruptcy, [1901] 2 Ch. 122. Consd. Re Taylor, Ex p. Norvell, [1910] 1 K. B. 562; Re Wigzell, Ex p. Hart, [1921] 2 K. B. 835. Refd. Powell v. Marshall, Parkes, [1899] 1 Q. B. 710. Mentd. Scranton's Trustee v. Pearce, [1922] 2 Ch. 87.

1762. — — — —.]—Specific performance may be enforced against the trustee in bkpcy. of a vendor of property, & if the property be leasehold, he cannot disclaim the contract without disclaiming the lease.—*PEARCE v. BASTABLE'S TRUSTEE IN BANKRUPTCY, [1901] 2 Ch. 122; 70 L. J. Ch. 446; 84 L. T. 525; 17 T. L. R. 366; 8 Mans. 287.*

Annotation:—Mentd. Re Wait, [1926] Ch. 902.

1763. Act of bankruptcy—Valid objection to title.]—An act of bkpcy. a sufficient objection to title without showing a debt, upon which a commission could issue.—*LOWES v. LUSH* (1808), 14 Ves. 547; 33 E. R. 631.

Annotations:—Consd. Smith v. Death (1820), 5 Madd. 371. *Refd. Franklin v. Brownlow* (1808), 14 Ves. 550; *Pott v. Turner* (1830), 6 Bing. 702; *Pyrke v. Waddingham* (1852), 10 Hare, 1.

1764. — — — —.]—Where a devisee of real estate, subject to debts & legacies, had contracted to sell the estate, in order to raise money to pay the debts, & afterwards a bill was filed against her by the legatees for the administration of testator's estates, & the purchaser consented to go before the master, upon a reference as to the title in that suit:—*Held*: he was not thereby bound to take an equitable title, but might insist on having the same title, as he might have required if a suit had been instituted against him for a specific performance of his contract; & as two commissions of bkpt. had issued against the devisee before the contract was entered into, though neither of them was proceeded in, he was not bound to accept the title.—*CANN v. CANN* (1823), 1 Sim. & St. 284; 1 L. J. O. S. Ch. 219; 57 E. R. 115.

1765. — — — —.]—An act of bkpcy., committed by the vendor, though no commission of bkpt. issue, is a valid objection to the title.—*FOSTER v. GOULD* (1825), 3 L. J. O. S. Ch. 200.

1766. — — — —.]—This was a bill filed by plffs., who are assignees of William Pool, a bkpt., for the specific performance of a contract of purchase . . . deft. received the abstract at a time when, as it seems to me, it was impossible for the title to have been completed within the period limited. For according to the evidence, there was no possibility of making a good title, at all events, till the expiration of a twelvemonth from the execution of the assignment from Pool to plffs. . . . He ought therefore to have refused to accept the abstract, or to have sent it back forthwith (ALDERSON, B.).—*HIPWELL v. KNIGHT* (1835), 1 Y. & C. Ex. 401; 4 L. J. Ex. Eq. 52.

Annotation:—Mentd. Simpson v. Margitson (1847), 11 Q. B. 23.

1767. — — — —.]—*WESTERN v. HARRIS, WESTERN v. MARKS, GILBERT v. WOODLEY* (1889), 24 L. J. N. C. 113, C. A.

Annotation:—Refd. Powell v. Marshall, Parkes (1899), 68 L. J. Q. B. 477.

1768. — — — —.]—On a contract for the sale of the lease of a public-house a day was fixed for completion, & pltf., the purchaser, paid a deposit to defts. as stakeholders. It was a term of the contract that the deposit should be forfeited in case the purchaser refused to perform his part of the agreement. Before the date fixed for completion the vendor committed an act of bkpcy., which came to the notice of the purchaser, who thereupon refused to complete, & demanded the return of the deposit:—*Held*: (1) though the contract for sale was protected by Bkpcy. Act, 1883 (c. 52), s. 49, the assignment & the payment of the purchase-money, in pursuance of the contract but after notice of the act of bkpcy., would not have been protected, & the purchaser was therefore not bound to complete; (2) the purchaser was entitled to the return of his deposit because, if he had paid the purchase-money & the vendor had become bkpt., he might have had to pay it over again to the trustee in bkpcy.—*POWELL v. MARSHALL, PARKES & Co., [1899] 1 Q. B. 710; 68 L. J. Q. B. 477; 80 L. T. 509; 47 W. R. 419; 15 T. L. R. 289; 43 Sol. Jo. 382; 6 Mans. 157, C. A.*

1769. Right of purchaser to specific performance.]—*Re TAYLOR, Ex p. NORVELL*, No. 1716, *ante*.

1770. Right of assignees of bankrupt to specific performance.]—T. S. becoming a bkpt., the estate was sold by auction, the purchaser agreeing to pay for the same at Easter, 1803, on having a good title, the conveyances to be at his own expense:—*Held*: the above title appearing on the abstract delivered, & no other being shown, till after an action brought by the purchaser, for the deposit money had & received, the purchaser might recover, in such action, without tendering a conveyance, notwithstanding that, in fact, bkpt., being heir general of testator, & having no sons, his assignees might afterwards proceed in equity to compel a specific performance of the agreement.—*SEAWARD v. WILLOCK* (1804), 5 East, 198; 1 Smith, K. B. 390; 102 E. R. 1046.

Annotations:—*Mentd.* *Wight v. Leigh* (1809), 15 Ves. 564; *Britton v. Twining* (1817), 3 Mer. 176; *Mortimer v. West* (1828), 2 Sim. 274; *Harris v. Davis* (1844), 1 Coll. 416; *Ferrand v. Wilson* (1845), 15 L. J. Ch. 41; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Forsbrook v. Forsbrook* (1866), L. R. 2 Eq. 799; *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332; *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502.

1771. —.]—A trader makes a conveyance of all his real & personal property to trustees to sell for the benefit of his creditors, under which the trustees contract to sell certain lands to debt. The contract not being completed, they file a bill against debt. for a specific performance; but, before answer, the trader becomes bkpt., & his assignees file a supplemental bill to enforce the contract:—*Held*: although the conveyance to the trustees was an act of bkpcy., the assignees may compel the performance of the contract made under it.—*GOODWIN v. LIGHTBODY, WELLINGS v. LIGHTBODY* (1818), Dan. 153; 159 E. R. 866.

1772. Payment of purchase-money to bankrupt—After adjudication—Liability of purchaser to trustee.]—*Re POOLEY, Ex p. RABBIDGE*, No. 1761, *ante*.

1773. —.]—*POWELL v. MARSHALL, PARKES & Co.*, No. 1768, *ante*.

1774. Sale by compounding debtor—Whether purchaser bound to inquire as to payment of instalments.]—Debtor who has filed a petition for liquidation in bkpcy. & has effected a composition with his creditors, has complete dominion over his property, & full power to dispose of it, until, upon action taken by his creditors under Bkpcy. Act, 1869 (c. 71), s. 126, the composition has been set aside & the debtor adjudged bkpt.; & a purchaser from him is not bound to inquire as to the payment of instalments under the composition.—*Re KEARLEY & CLAYTON'S CONTRACT* (1878), 7 Ch. D. 615; 47 L. J. Ch. 474; 38 L. T. 92; 26 W. R. 324.

Annotations:—*Mentd.* *Sharp v. McHenry, Sharp v. Brown* (1887), 33 Ch. D. 427; *Re McHenry, Ex p. McDermott* (1888), 21 Q. B. D. 580.

1775. Recovery of deposit.]—*SEAWARD v. WILLOCK*, No. 1770, *ante*.

1776. —.]—*LEVY v. STODDON*, No. 1971, *post*.

1777. —.]—*POWELL v. MARSHALL, PARKES & Co.*, No. 1768, *ante*.

Disclaimer by trustee.]—*See BANKRUPTCY*, Vol. V., pp. 938–953, Nos. 7666–7814.

B. Of Purchaser.

See, generally, BANKRUPTCY, Vol. IV., Vol. V.

1778. Whether vendor bound to prove.]—A. sells land to B. who afterwards becomes a bkpt., part of the purchase-money not being paid. A.

shall not be bound to come in as a creditor under the statute, but the land shall stand charged with the money unpaid, though no agreement for that purpose.—*CHAPMAN v. TANNER* (1684), 1 Vern. 267; 23 E. R. 461.

Annotations:—*Expld.* *Fawell v. Heelis* (1773), Amb. 724; *Mackreth v. Symmons* (1808), 15 Ves. 320. *Refd.* *Blackburn v. Gregson* (1785), 1 Bro. C. C. 420; *Re Lightoller, Ex p. Peake* (1816), 1 Madd. 316.

1779. Right of vendor to resell—& prove for residue.]—*BOWLES v. ROGERS* (1800), 6 Ves. 95, n.; 31 E. R. 957, L. C.

Annotation:—*Refd.* *Ex p. Gwynne* (1806), 12 Ves. 379.

1780. Vendor taking proceedings for specific performance—Bankruptcy of purchaser after decree—Stay of proceedings.]—A purchaser, against whom the vendor had obtained a decree for specific performance, subject to a reference as to title, became, in the interim, bkpt., & his assignee declined to accept the contract. The chief clerk made his certificate of good title:—*Held*: an order should be made staying all proceedings in the suit, without prejudice to any application which pltf. might be advised to make under Bkpcy. Act, 1849 (c. 106).—*KELL v. NOKES* (1866), 35 L. J. Ch. 729; 14 L. T. 697; 12 Jur. N. S. 780; 11 W. R. 908.

1781. — Right to enforce judgment.]—Where a vendor has got a judgment for specific performance against the purchaser, & the purchaser becomes bkpt., the vendor's proper course is to go on & enforce his rights under his judgment, not to serve notice on the trustee in bkpcy. under Bkpcy. Act, 1883 (c. 52), s. 55 (1), (4), calling on him to elect whether he will disclaim or not.—*Re JEWELL* (1897), 4 Mans. 28.

1782. — After bankruptcy of purchaser—Necessity for consent of trustee to decree.]—Specific performance of a liquidating debtor's contract will not be decreed against his trustee without the latter's consent.—*HOLLOWAY v. YORK* (1877), 25 W. R. 627.

Annotations:—*Distd.* *Peirce v. Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122. *Mentd.* *Crowe v. Barnicot* (1877), 6 Ch. D. 753; *Birmingham Estates Co. v. Smith* (1880), 13 Ch. D. 506.

1783. Right of purchaser to specific performance—After act of bankruptcy.]—An act of bkpcy. & a docket struck, though no commission issued, a sufficient objection to a bill for specific performance of a previous contract for the sale of an estate to pltf.; in a case even, where part of the money had been paid; the sub-contracts for sale of part entered into by pltf.; & debts. had agreed to convey accordingly.—*FRANKLIN v. BROWNLOW (LORD)* (1808), 14 Ves. 550; 33 E. R. 632.

Annotation:—*Distd.* *Dyster v. Randall*, [1926] Ch. 932.

1784. Forfeiture of deposit.]—*DEPREE v. BEDBOROUGH*, No. 1982, *post*.

1785. —.]—*COLLINS v. STIMSON*, No. 1990, *post*.

1786. Rights of sub-purchaser.]—Where a person, who is subsequently adjudicated bkpt., has entered into a contract for the purchase of land & into a sub-contract to sell the same land with a building thereon to be erected by him, his trustee in bkpcy. is entitled to disclaim the sub-contract of sale without being obliged to disclaim the contract of purchase. In such case the rights of the sub-purchaser are as follows, if he has paid a deposit he has a lien upon such interest in the land as the bkpt. possessed before his bkpcy., including the right, if any, to specific performance of the contract of purchase of the land; he may also

Sect. 3.—Change in position of parties: Sub-sect. 2, B.; sub-sects. 3, 4 & 5. Sect. 4. Part VII. Sect. 1.]

prove in the bkpey. for any damage for breach of the agreement to build; but he is not entitled to specific performance of the contract to build, & his equity is subject to the overriding equity of the original vendor.—*Re GOUGH, Ex p. HANNING v. LOWE* (1927), 96 L. J. Ch. 239; 71 Sol. Jo. 470, D. C.

Vendor's lien.—*See LIEN*, Vol. XXXII., pp. 297–299, Nos. 724–742.

SUB-SECT. 3.—WINDING UP.

See, generally, COMPANIES, Vol. X., pp. 814 et seq.

1787. Effect on vendor's rights—Action for specific performance commenced before winding-up order—Necessity for leave to continue.—A vendor's suit was instituted against a co. for specific performance, & an injunction obtained restraining an action to recover the deposit money paid on the contract. Interrogatories were filed, but before the answer was put in deft. co. was in course of voluntary winding up under supervision. On a summons for leave to continue the suit, notwithstanding the winding up, the ct. gave leave to enforce an answer, but directed that no further proceedings should be taken without leave of the ct.

The land will have to be sold in the winding up, & pltf. co. satisfied out of the purchase-money, & they will also prove against the co. for any deficiency in the proceeds of sale to make up the amount due to them (MALINS, V.-C.).—*THAMES PLATE GLASS CO. v. LAND & SEA TELEGRAPH CO.* (1870), L. R. 11 Eq. 248; 40 L. J. Ch. 165; *sub nom. Re LAND & SEA TELEGRAPH CO., LTD., THAMES PLATE GLASS CO., LTD. v. LAND & SEA TELEGRAPH CO., LTD.*, 19 W. R. 303.

1788. — Right to have property resold.—*THAMES PLATE GLASS CO. v. LAND & SEA TELEGRAPH CO.*, No. 1787, *ante*.

1789. — Right to prove for deficiency.—*THAMES PLATE GLASS CO. v. LAND & SEA TELEGRAPH CO.*, No. 1787, *ante*.

SUB-SECT. 4.—EXECUTIONS AND JUDGMENTS.

See Land Charges Act, 1925 (c. 22), s. 7 &, generally, EXECUTION, Vol. XXI., pp. 415 et seq.

1790. Execution—Against vendor—After completion.—Demurrer by a judgment creditor to a bill, for an injunction to restrain him from taking out execution on his judgment, against an estate sold before he obtained judgment, & ineffectually

conveyed to the purchaser, pltf., whereby the legal estate descended, since the date of his judgment, to the heir-at-law, overruled.—*PRIOR v. PENPRAZE* (1817), 4 Price, 99.

1791. — Against purchaser—Appointment of receiver—Contract never completed.—*RIDOUT v. FOWLER*, No. 1491, *ante*.

1792. Judgment—No lien on legal estate.—On Nov. 27 & 28, 1809, W. conveyed a reversion in fee to A. by way of mtge. On Jan. 1, 1810, E., on the part of the Duke of Norfolk, entered into a written agreement with W. for the purchase of reversion. On Mar. 15, 1810, A. the mtgee. who was paid off by E. joined with W. in conveying the estate to E. & a part of the purchase-money, then unpaid, was secured to W. by a mtge. term created by that deed. W. was indebted to F. upon a bond dated Nov. 16, 1809, & a warrant of attorney of the same date was given by W. upon which judgment was entered up & docketed on Feb. 15, 1810, & an inquisition was had thereon on Feb. 20, 1810. On Apr. 15, 1810, notice was given by F. of his judgment, the money secured to W. by the mtge. term being then unpaid:—*Held*: F. had no lien upon the term in the hands of the debtor, & consequently no lien upon the term in the hands of his assignee.—*FORTH v. NORFOLK (DUKE)* (1820), 4 Madd. 503; 56 E. R. 791.

Annotation:—*Reid. Lodge v. Lyseley* (1832), 4 Sim. 70.

1793. — No objection to title.—A father, tenant for life, with remainder to his son in tail, joined with his son in conveying the estate to trustees in trust to sell, & to pay £30,000 to the father & the residue to the son; & it was declared that the trustees' receipts should be sufficient discharges. The trustees contracted to sell to deft. & afterwards judgments were entered up against the father:—*Held*: the existence of the judgments was no objection to the title.—*LODGE v. LYSELEY* (1832), 4 Sim. 70; 58 E. R. 27.

Annotations:—*Consd. Langton v. Horton* (1842), 1 Hare, 549; *Whitworth v. Gauguin* (1814), 3 Hare, 416.

SUB-SECT. 5.—LUNACY.

See Lunacy Act, 1890 (c. 5), s. 120 (i); Trustee Act, 1925 (c. 19), s. 54; R. S. C., Ord. 55, r. 14 B; Statutory Rules & Orders, 1925, No. 1024, r. 13; LUNATICS, Vol. XXXIII., p. 212, Nos. 1189, 1190.

1794. Of vendor—Rights of purchaser—Specific performance.—Specific performance of an agreement [for sale of a reversion] decreed against one who afterwards became a lunatic.—*OWEN v. DAVIES* (1748), 1 Ves. Sen. 82; 27 E. R. 905, L. C.

Annotations:—*Reidd. Hall v. Warren* (1804), 9 Ves. 605; *Maddison v. Alderson* (1883), 8 App. Cas. 467. *Mentd. Stanton v. Percival* (1855), 5 H. L. Cas. 257.

1795. — Vesting order.—M., by writing,

PART VI. SECT. 3, SUB-SECT. 4.

o. Execution—Against purchaser—Payment by creditor with priority—Right of other creditors to lien on lands after transfer to prior creditor.—*BURNHAM v. DENNISTOUN* (1865), 12 Gr. 135.—**CAN.**

p. Judgment—Postponed to purchaser & party advancing money to complete title.—A person equitably interested in land under an agreement for purchase agreed to convey portions thereof to purchasers for value, & subsequently a judgment was recovered against him, which was duly registered. Afterwards a party advanced a sum of money to complete the purchase, &

the owner conveyed to the vendee, who conveyed to the person advancing the money, for the benefit of himself & the other purchasers:—*Held*: the purchasers had not thereby waived their priority over the judgment, & the judgment held the land subject also to the sum advanced to perfect the title.—*MCQUESTIEN v. CAMPBELL* (1860), 8 Gr. 242.—**CAN.**

q. — Priority by registration over unregistered agreement—Effect of abolition of registration of judgments.—*JURON v. GARDINER* (1864), 11 Gr. 23.—**CAN.**

r. — County court judgment against purchaser—Crop payment agreement.—The binding effect of the

registration of a certificate of a county ct. judgment against the lands of the judgment debtor, under County Cts. Act, 1902, s. 213, is not nearly so extensive as in the case of a registered judgment of the Ct. of King's Bench under Judgments Act, 1902; & when the only interest or estate of the judgment debtor in the land in question is under an agreement of purchase providing for payment by delivery of one-half of each year's crop & in no other way, the judgment creditor, having only a registered county ct. judgment, does not acquire all the rights or position of an assignee of the benefits of the agreement.—*McGRIGOR v. WITHERS* (1905), 15 Man. L. R. 434.—**CAN.**

agreed to sell his leasehold premises & his business to T. & G. for a sum of which £2,535 was to be paid at once, the residue, £3,050, at the end of five years. Possession was given, & the £2,535 duly paid. After this M., who resided abroad, was found lunatic abroad, & a curator was appointed, with authority to receive the £3,050. T. & G., & the curator, petitioned that on payment of the £3,050, & interest to the curator, the leasehold premises might be ordered to vest in T. & G.:—*Held*: under Lunacy Act, 1890 (c. 5), s. 135, an order could be made vesting the leasehold in T. & G., such order to be dated & drawn up after payment of the £3,050 to the curator.—*Re PAGANI, Re PAGANI'S TRUST*, [1892] 1 Ch. 236; 66 L. T. 244; 36 Sol. Jo. 152, C. A.

SECT. 4.—OTHER CASES.

1796. Sale of renewable leasehold—Obligation of vendor to procure benefit of renewal for purchaser.]—*MONRO v. TAYLOR*, No. 1696, *ante*.

1797. Injunction to restrain purchaser from entering into further contract—On ground that first contract thereby made impossible.]—A vendor cannot prevent his purchaser from buying a second estate from some one else, pending the first transaction, on the ground that, by making such second purchase, he may be rendered unable to complete his first.—*SYERS v. BRIGHTON BREWERY CO., LTD., WRIGHT v. SAME* (1864), 11 L. T. 560; 13 W. R. 220.

1798. Investment of deposit—Variation in value—Whether vendor or purchaser affected.]—Money paid in as earnest at a sale of an estate, & ordered to be laid out in the funds, is part payment of

the purchase-money, & the vendor must abide by the rise or fall of the funds.—*POOLE v. RUDD* (1790), 3 Bro. C. C. 49; 29 E. R. 401.

Annotations:—*Apld.* *Smith v. Jackson* (1816), 1 Madd. 618. *Refd.* *Harington v. Hoggart* (1830), 9 L. J. O. S. K. B. 14.

1799. ————.]—When a purchaser pays into ct. part of his purchase-money, & it is invested in stock, the vendor sustains the loss & enjoys the benefit of subsequent variations in the price of funds.—*GELL v. WATSON* (1825), 2 Sim. & St. 402; 57 E. R. 400; *sub nom.* — *v. WATSON*, 3 L. J. O. S. Ch. 199.

Annotation:—*Consd.* *Humphries v. Horne* (1814), 3 Hare, 276.

1800. ————.]—A purchaser cannot throw upon a vendor the risk of an investment of the purchase-money; & if he makes a payment to or on account of the vendor in respect of the purchase-money, the money paid becomes the property of the vendor, so that the purchaser can claim no benefit of any investment which the vendor may make.

Pending a dispute respecting the title to land contracted to be sold, & to avoid the question as to the interest of the purchase-money, the vendor gave the purchaser the opportunity of investing the purchase-money in consols in the joint names of the vendor & purchaser, provided the investment was made by a certain day, & the purchaser made the investment accordingly:—*Held*: the vendor, having proposed the investment, could not have charged the purchaser with the loss, if the funds had fallen, & the vendor was entitled to the benefit accruing from the funds having risen.—*BURROUGHS v. BROWNE* (1852), 9 Hare, 609; 22 L. J. Ch. 148; 68 E. R. 656.

Annotation:—*Consd.* *St. Paul v. Birmingham, Wolverhampton & Stour Valley Ry.* (1853), 11 Hare, 305.

Part VII.—Vendor and Purchaser Summons.

SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 49.

1801. Object of Act—To dispense with suit for specific performance—By summary decision of matters within scope of jurisdiction.]—*Re BURROUGHS, LYNN & SEXTON*, No. 1806, *post*.

1802. Application of Act—Contract relating to land or interest in land.]—A mtgee. of land & policies of assurance on the life of the mtgor., which were mortgaged by one deed, acting under his power of sale, sold the land by public auction, but retained the policies. In reply to the purchaser's requisition on the vendor's abstract of title, the vendor's solrs. stated that all the abstracted deeds in the vendor's possession, which description included the mtge. deed, would be delivered up on completion. When the purchase was completed, however, they refused to deliver up that deed on the ground that part of the property to which it related, viz. the policies, had been retained by the vendor, but offered instead a statutory acknowledgment, for its production & indorsed a notice of the purchase thereon. On a summons by the purchaser under Vendor & Purchaser Act, 1874 (c. 78), for delivery up of the mtge. deed:—*Held*: Vendor & Purchaser

Act, 1874 (c. 78), applies only to land or an interest in land; the vendor, in retaining the policies, did not retain any part of an estate within sect. 2, r. 5, of that Act, & the mtge. deed must be delivered up to the purchaser.—*Re WILLIAMS & NEWCASTLE'S (DUCHESS) CONTRACT*, [1897] 2 Ch. 144; *sub nom.* *Re FULLER & LEATHLEY'S CONTRACT*, 66 L. J. Ch. 543; 76 L. T. 646; 61 J. P. 454; 45 W. R. 627; 13 T. L. R. 412; 41 Sol. Jo. 529.

1803. — Voluntary grant—With nominal consideration.]—The tenant for life of certain lands, of which the tenant in tail in remainder was an infant, was desirous of making a voluntary grant of part thereof as a site for a church.

An application was made to the ct. under Vendor & Purchaser Act, 1874 (c. 78), s. 9, for an opinion whether it was necessary, under Places of Worship Sites Act, 1873 (c. 50), s. 1, to appoint a guardian to concur in the grant on behalf of the infant:—*Held*: Vendor & Purchaser Act, 1874 (c. 78), did not apply to a voluntary grant, but this defect might be cured by the admission of a contract for a nominal consideration.—*Re SALISBURY (MARQUIS)* (1875), L. R. 20 Eq. 527; 44 L. J. Ch. 541; 23 W. R. 824; *reversd.* on other grounds, 2 Ch. D. 29, C. A.

Questions determinable on summons.]—*See* Sect. 2, *post*.

Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2.]

1804. Position of parties—Analogous to position in suit for specific performance.]—*Re BURROUGHS, LYNN & SEXTON, No. 1806, post.*

1805. Analogous powers of judge in Bankruptcy.]—Where a dispute has arisen in respect of title on a contract for the sale of a lease, the matter would, as a general rule, be decided in the Ch. Div. on a vendor & purchaser summons, but where the estate of the vendor has subsequently become vested in a trustee in bkpcy., a judge of the K. B. Div. sitting in Bkpcy., may, for the convenience of the parties & with their consent, hear the application.—*Re MARTIN, Ex p. DIXON v. TUCKER* (1912), 106 L. T. 381.

SECT. 2.—QUESTIONS DETERMINABLE ON SUMMONS.

SUB-SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 49.

1806. General rule—All matters which can be dealt with on reference as to title.]—The purchaser of a farm, consisting in part of 400 acres of heath land, took the objection that a title was not shown to the soil of the heath land, but only to rights of pasturage over it. The vendors took out a summons under Vendor & Purchaser Act, 1874 (c. 78), asking that it might be declared that the purchaser's objections & requisitions were sufficiently answered. Affidavits were filed on both sides, & the deponents were cross-examined. The Master of the Rolls rejected the affidavits & cross-examination, on the ground that evidence by affidavit upon requisitions as to title under the Act ought not to be given unless required by the judge:—*Held*: the evidence ought to have been admitted, for that, on a proceeding under Vendor & Purchaser Act, 1874 (c. 78), the parties are in the same position as they would have been under a reference as to title in a suit for specific performance.

I have always considered that the Act was intended to enable the ct. to decide in a summary way without a specific performance suit, such questions as whether a requisition has been sufficiently answered according to the practice of conveyances, whether a requisition is precluded by the conditions, & the like, but not to enable the ct. to try in this way disputed questions of fact (*JAMES, L.J.*).

My opinion is that, upon the true construction of this Act of Parliament, whatever could be done in chambers upon a reference as to title under a decree where the contract was established, can be done upon proceedings under this Act (*JAMES, L.J.*).—*Re BURROUGHS, LYNN & SEXTON* (1877), 5 Ch. D. 601; 46 L. J. Ch. 528; 36 L. T. 778; 25 W. R. 520, C. A.

Annotation:—Reid. Re Blyth & Young (1880), 41 L. T. 746.

PART VII. SECT. 1.

18041. Position of parties—Analogous to position in suit for specific performance.]—In an application under Vendors & Purchasers Act, c. 109, it is only necessary that the same parties should be represented who would be parties in a suit for specific performance with a reference as to title. On such an application the ct. will construe the will or other instrument on which the vendor makes his title.—*Re EATON ESTATE* (1878), 7 P. R. 396.—*CAN.*

t. Jurisdiction—Judges of district courts.]—Notwithstanding anything in R. S. O., 1897, c. 109, s. 7, & R. S. O., 1897, c. 51, s. 185, judges of district cts. who are local judges of the high ct., have no jurisdiction to deal with applications under Vendors & Purchasers Act, or under Land Titles Act.—*Re MICHELL & PIONEER STEAM NAVIGATION CO.* (1900), 31 O. R. 542.—*CAN.*

a. — Local judges.]—A local judge has no jurisdiction to entertain

1807. Matters relating to requisitions.]—*Re BURROUGHS, LYNN & SEXTON, No. 1806, ante.*

1808. —.]—I have always thought that summonses under Vendor & Purchaser Act, 1874 (c. 78), should be limited to raising points which have been suggested by requisitions (*KEKEWICH, J.*).—*Re CALCOTT & ELVIN'S CONTRACT* (1898), 67 L. J. Ch. 327; 78 L. T. 417; 46 W. R. 457; 42 Sol. Jo. 395; 5 Mans. 116; *reversd.* on other grounds, [1898] 2 Ch. 460, C. A.

1809. Claim for compensation—Non-delivery of possession.]—*Re LAITWOOD'S CONTRACT* (1892), 36 Sol. Jo. 255.

1810. — Delay in completion.]—Delay in completing a sale occasioned by the vendors having omitted to take steps to procure certain admissions to copyholds held to arise from the wilful default of the vendors. Damages to the purchaser by reason of such delay:—*Held*: not recoverable as compensation under Vendor & Purchaser Act, 1874 (c. 78).—*Re WILSONS & STEVENS' CONTRACT*, [1894] 3 Ch. 546; 63 L. J. Ch. 863; 71 L. T. 388; 43 W. R. 23; 38 Sol. Jo. 682; 8 R. 640.

Annotation:—Reid. Bennett v. Stone, [1902] 1 Ch. 226.

1811. — Misdescription.]—A material misdescription in the particulars of a property sold by auction may be corrected by the auctioneer's verbal statement at the sale, & if this is done the purchaser will not be entitled to specific performance with compensation, even if he did not hear the auctioneer's statement; in such a case the vendor is entitled to annul the sale, notwithstanding the existence of a condition that a misstatement in the particulars should not annul the sale, but form the subject of compensation.

I cannot enforce specific performance with compensation against the vendor; & as the purchaser does not wish to complete without compensation, I will rescind the contract, order the return of the deposit with interest, & give the purchaser the costs of investigating the title down to the time he was furnished with the written statement of the auctioneer. Subject to this, I dismiss the summons without costs (*JOYCE, J.*).—*Re HARE & O'MORE'S CONTRACT*, [1901] 1 Ch. 93; 70 L. J. Ch. 45; 83 L. T. 672; 49 W. R. 202; 17 T. L. R. 46; 45 Sol. Jo. 79.

1812. Questions arising out of contract.]—*Re LAVERY & KIRK* (1888), 33 Sol. Jo. 127.

1813. —.]—*Re STEPHENSON & COX* (1892), 36 Sol. Jo. 287, C. A.

1814. —.]—*Re WALLIS & BARNARD'S CONTRACT*, No. 1835, *post*.

1815. —.]—Although upon a summons under Vendor & Purchaser Act, 1874 (c. 78), s. 9, evidence is adduced tending to throw a doubt upon the existence or validity of the contract itself, that does not preclude the ct. from deciding on the summons a specific question arising out of or connected with the contract as it stands, such as a question with regard to the vendor's right to limit, in the conveyance, the operation of the general words in Conveyancing Act, 1881 (c. 41), s. 6 (2). It is the duty of the ct. to deal with such a question on the summons, irrespective of the

an application under Vendor & Purchaser's Act.—*Re LEVY & JACOBS*, [1921] 4 D. L. R. 937; 61 O. L. R. 296.—*CAN.*

PART VII. SECT. 2, SUB-SECT. 1.

18071. Matters relating to requisitions.]—*KENNA v. RITCHIE*, [1907] V. L. R. 386.—*AUS.*

1807 II. —.]—*Re KISSOOK & CURRIE'S CONTRACT*, [1916] 1 I. R. 376.—*IR.*

c. *Fraud.*] — Questions of fraud cannot be entertained on a vendor & purchaser summons.—*Re DELANY &*

Sect. 2.—Questions determinable on summons: Sub-sect. 2. Sect. 3: Sub-sect. 1.]

right of either party to extraordinary or special damages.

(2) The ct. has jurisdiction to make such orders as are consequential upon the relief expressly authorised by the sect. to be given. Therefore, when the ct. has upon such a summons, made a declaration that the vendors had failed to show a good title, it has jurisdiction to go on & order the return of the deposit with interest from the date of payment, & payment to petitioner of the costs of investigating the title.

(3) Upon a summons taken out under this Act [Vendor & Purchaser Act, 1874 (c. 78)] you cannot question the validity of the contract—*e.g.* you cannot raise any question whether it is fraudulent or not (LINDLEY, L.J.).—*Re HARGREAVES & THOMPSON'S CONTRACT* (1886), 32 Ch. D. 454; 56 L. J. Ch. 199; 55 L. T. 239; 34 W. R. 708; 2 T. L. R. 681, C. A.

Annotations:—As to (1) Apld. Re Wilsons & Stevens' Contract, [1894] 3 Ch. 516. *As to (2) Follid. King v. Chamberlain*, [1887] W. N. 155. *Consd. Re Davis & Cavey* (1888), 40 Ch. 601. *Follid. Re Higgins & Percival* (1888), 59 L. T. 213; *Re Ebsworth & Tidy's Contract* (1889), 42 Ch. D. 23; *Re Bryant & Birmingham's Contract* (1890), 44 Ch. D. 218; *Re Marshall & Salt's Contract*, [1900] 2 Ch. 202; *Re Hædicke & Lipski's Contract*, [1901] 2 Ch. 666; *Re Furneux & Aird's Contract*, [1906] W. N. 215. *Refd. Re Arbib & Glass's Contract*, [1891] 1 Ch. 601; *Re Boulton & Cullingford's Contract* (No. 2) (1893), 37 Sol. Jo. 248; *Re Wilsons & Stevens' Contract*, [1894] 3 Ch. 546. *As to (3) Consd. Re Jackson & Woodburn's Contract* (1887), 37 Ch. D. 44. *Generally, Refd. Re Lord & Fullerton's Contract*, [1896] 1 Ch. 228.

1832. ———.]—At a sale by auction property described in the particulars as “leasehold business premises” was put up for sale under conditions providing that the title should commence with the conveyance to the vendors, & that no objection should be made in respect of anything contained in the lease. Nothing was said in the particulars or conditions as to the contents of the lease; no opportunity was given to intending purchasers to inspect the lease, & the property was bought by a purchaser who had not in fact inspected it. After the sale the purchaser discovered that the lease contained covenants restricting him from carrying on upon the premises any trade or business or doing any act to the nuisance, annoyance, or damage of the lessors or the adjoining tenants, or using the premises as a public-house. He then took out a summons under Vendor & Purchaser Act, 1874 (c. 78), for a declaration that the vendors had not shown a good title under the contract, & for a return of the deposit which he had paid on the purchase:—*Held*: (1) as the property was put up for sale as business premises the purchaser was entitled to have an assignment of property on which he could carry on any business, subject only to the restrictions imposed by the general law, or in force as to any particular trade; (2) as the covenant imposed serious restrictions upon the use of the premises as business premises, the purchaser was entitled to a declaration that the title was not such as he could be compelled to accept; (3) without prejudice to his right to bring an action for return of the deposit, he was not entitled to any further relief upon the summons.

(4) *Semle*: the ct. has no jurisdiction, upon a summons under Vendor & Purchaser Act, 1874 (c. 78), to make an order for a return of deposit

on the ground of misrepresentation, where such misrepresentation would support an action for rescission.

(5) Although a contract may be such that a ct. of equity would refuse to decree specific performance of it; yet it may be binding at law, & the purchaser may be unable to recover his deposit (STIRLING, J.).

(6) The purchaser . . . can only recover the deposit by raising a question which affects the validity of the contract, & therefore is not entitled to any further relief upon this summons (STIRLING, J.).

(7) Although the purchaser has not been entirely successful he has succeeded to a substantial extent, & I think that the costs ought to be paid by the vendors (STIRLING, J.).—*Re DAVIS & CAVEY* (1888), 40 Ch. D. 601; 58 L. J. Ch. 143; 60 L. T. 100; 53 J. P. 407; 37 W. R. 217, C. A.

Annotations:—As to (2) Refd. Dougherty v. Oates (1900), 45 Sol. Jo. 119. *As to (6) Explid. Re Boulton & Cullingford's Contract* (1893), 37 Sol. Jo. 248.

1833. ———.]—We cannot go into any question of fraud which might avoid the contract. This is a proceeding under the Vendor & Purchaser Act, 1874 (c. 78), which binds the parties to admit the contract (LORD HALSBURY, C.).—*Re SANDBACH & EDMONDSON'S CONTRACT*, as reported in [1891] 1 Ch. 99; 39 W. R. 193, C. A.

Annotations:—Refd. Re Scott & Alvarez's Contract, Scott v. Alvarez, [1895] 1 Ch. 596; *Blaiberg v. Keeses*, [1906] 2 Ch. 175.

1834. What amounts to—Right to rescind—Exercise of power of rescission.]—One of the questions for decision upon a summons taken out under Vendor & Purchaser Act, 1874 (c. 78), s. 9, was as to whether the vendor had properly exercised the power of rescission of the contract given to him under the ordinary conditions for rescission, in case of the purchaser insisting upon an objection which the vendor is unable or unwilling to remove. It was objected that such question affected the validity of the contract itself, & could not be decided upon a summons under sect. 9:—*Held*: as the question was one which arose out of the contract itself, it could properly be raised under sect. 9.

The ct. has jurisdiction, upon a summons under Vendor & Purchaser Act, 1874 (c. 78), s. 9, to determine the validity of a notice given by a vendor to rescind his contract to sell.

The matter, however, was not discussed at all in chambers, but the summons was adjourned at once into ct. (NORTH, J.).—*Re JACKSON & WOODBURN'S CONTRACT* (1887), 37 Ch. D. 44; 57 L. J. Ch. 243; 57 L. T. 753; 36 W. R. 396.

Annotations:—Refd. Re Higgins & Percival (1888), 59 L. T. 213; *Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1.

1835. ———.]—(1) A general declaration as to title ought rarely to be made on a vendor & purchaser summons, that procedure being only intended for the decision of isolated points arising out of or connected with the contract.

(2) An isolated point on the form of the conveyance may be dealt with on a vendor & purchaser summons, although resp. may have a right to obtain rescission of the contract on the ground of mistake. Such a right to obtain rescission does not give rise to “a question affecting the existence or validity of the contract” within Vendor & Purchaser Act, 1874 (c. 78), s. 9.

validity of the contract for sale cannot be tried, but only those matters which would be entertained upon a reference as to title under a decree for specific performance.—*Re MACNABB* (1882),

1 O. R. 94.—CAN.

1831 iii. ———.]—The Act R. S. O., 1877, c. 109, is intended to provide for a simple case where there is no dispute as to the validity of the contract & the

ct. ought not to enter upon the question of the validity of the title, until it is decided that the contract is binding.—*Re ROBERTSON & DAGANEAU* (1882), 9 P. R. 288.—CAN.

(3) A purchaser is entitled to a conveyance subject only to the restrictive covenants mentioned in the contract, although he has notice of others.—*Re WALLIS & BARNARD'S CONTRACT*, [1899] 2 Ch. 515; 68 L. J. Ch. 753; 81 L. T. 382; 48 W. R. 57.
Annotation:—*As to* (2) *Reid*. *Re Hughes & Ashley's Contract*, [1900] 2 Ch. 595.

SECT. 3.—RELIEF GIVEN.

SUB-SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 49.

1836. Declaration of failure to show good title.]—On making an order, upon a summons by a purchaser under Vendor & Purchaser Act, 1874 (c. 78), declaring that the vendor has not shown a good title to the property, the ct. has jurisdiction to order the vendor to pay the purchaser's costs of investigating the title, & to charge them upon the vendor's interest in the property.—*Re YEILDING & WESTBROOK* (1886), 31 Ch. D. 344; 55 L. J. Ch. 496; 54 L. T. 531; 34 W. R. 397.

Annotations:—*Reid*. *Re Hargreaves & Thompson's Contract* (1886), 32 Ch. D. 454; *Re Jackson & Woodburn's Contract* (1887), 37 Ch. D. 44; *Re Higgins & Percival* (1888), 59 L. T. 213; *Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53; *Re Furneaux & Aird's Contract*, [1906] W. N. 215.

1837. —.]—*Re DAVIS & CAVEY*, No. 1832, *ante*.

1838. —.]—*Re EBSWORTH & TIDY'S CONTRACT* (1889), as reported in 42 Ch. D. 53; 37 W. R. 657, C. A.

Annotations:—*Folld*. *Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53. *Mentd*. *Re Stamford, Spalding & Boston Banking Co. & Knight's Contract*, [1900] 1 Ch. 287.

1839. —.]—*Re BRYANT & BARNINGHAM'S CONTRACT*, No. 2048, *post*.

1840. —.]—(1) The vendor was the lessee of a public-house. The lease under which the property was held contained a covenant against assigning without the consent of the lessor, with the usual qualification as to refusal in the case of a respectable & responsible tenant. The vendor agreed to sell the property to the purchasers, who were brewers, under an open contract. The lessor refused to give his consent to the assignment, stating that the main ground of his objection was that he desired the house to remain a free house:—*Held*: upon summons taken out by the purchasers asking for a declaration that a good title had not been shown, the title was not one which could be forced upon an unwilling purchaser.

(2) I therefore think there should be the same order in this case as in *Re Hargreaves & Thompson's Contract*, No. 1831, *ante*, where the vendor was ordered to return the deposit with interest at 4 per cent. from the day when it was paid, & to pay the purchaser's costs of investigating the title (BYRNE, J.).—*Re MARSHALL & SALT'S CONTRACT*, [1900] 2 Ch. 202; 69 L. J. Ch. 542; 83 L. T. 147; 48 W. R. 508; 44 Sol. Jo. 429.

1841. —.]—(1) It is settled that a vendor of leasehold property must disclose the existence of onerous & unusual covenants, or at least afford the purchaser an opportunity of inspecting the leases.

An agreement for the sale of certain leasehold houses contained the following stipulation: "The vendor's title is accepted by the purchasers." The leases under which the property was held

contained onerous & unusual covenants the existence of which had not been disclosed by the vendor before the contract was entered into, & of which the purchasers had no notice:—*Held*: the condition as to the acceptance of the title did not affect the vendor's general duty of disclosure, & the purchasers were entitled to rescind the contract & to have the deposit returned with interest.

(2) It appears to me that the purchasers in this case are entitled to succeed, & although not without some hesitation, I think I may also, as in the case of *Re Hargreaves & Thompson's Contract*, No. 1831, *ante*, order the return of the deposit with interest & the costs of investigation of title (BYRNE, J.).—*Re HAEDICKE & LIPSKI'S CONTRACT*, [1901] 2 Ch. 666; 70 L. J. Ch. 811; 85 L. T. 402; 50 W. R. 20; 17 T. L. R. 772; 45 Sol. Jo. 738.

Annotations:—*As to* (1) *Reid*. *Hone v. Gakstatter* (1909), 53 Sol. Jo. 286. *As to* (2) *Folld*. *Molyneux v. Hawtreay*, [1903] 2 K. B. 487.

1842. Order for rescission of contract.]—An agreement was entered into in Nov. 1887, between A. & B. for the sale to B. of the remaining nine years of the lease of a residential house in Regent street & B. paid a deposit. A. was second under-lessee of the premises. B. sent in certain requisitions, one of which stated that the last receipt for the payment of the rent by A. must be produced. In compliance with this requisition A. produced a receipt signed by the original lessee from the Crown, to whom A. had paid the rent under threat of distress. The purchaser objected that that was not a compliance with the requisition in accordance with Conveyancing Act, 1881 (c. 41), s. 3 (5). On Mar. 4, 1888, the purchaser gave notice to the vendor that unless the requisition was duly complied with within one month, the contract was at an end. On Apr. 10, 1888, the vendor took out a summons asking the opinion of the ct. as to whether he had sufficiently complied with the requisition. The purchaser asked for a return of the deposit:—*Held*: (1) the receipt of the ground landlord was not sufficient; (2) although it was the vendor's summons, the purchaser was entitled to have the contract rescinded, & to a return of the deposit, together with 4 per cent. interest from the time of payment, with the costs of the summons, including the costs of investigating the title, the costs to be a charge on the vendor's interest in the property.—*Re HIGGINS & PERCIVAL* (1888), 57 L. J. Ch. 807; 59 L. T. 213.

Annotation:—*As to* (2) *Folld*. *Re Walker & Oakshott's Contract*, [1901] 2 Ch. 383.

1843. —.]—Trustees for sale put up for sale by auction in lots leasehold property comprised in a single lease, of which they were the assignees, subject to a condition that in the event of the lots being sold to different purchasers, which happened, the sale of each lot should be by way of underlease for the whole term, less one day, at an apportioned rent. The ct. has jurisdiction upon a vendor's summons under Vendor & Purchaser Act, 1874 (c. 78), to make an order for rescission of the contract & return of the deposit.—*Re WALKER & OAKSHOTT'S CONTRACT*, [1901] 2 Ch. 383; 70 L. J. Ch. 666; 84 L. T. 809; 50 W. R. 41; *on appeal*, [1902] W. N. 147.

Annotation:—*Reid*. *Re Judd & Poland & Skelcher's Contract*, [1906] 1 Ch. 684.

money & interest thereon.—*FURPHY v. NIXON* (1926), 37 C. L. R. 161; 26 S. R. N. S. W. 380.—AUS.

f. Removing clouds from title.]—*Re BOBIE & ONTARIO INVESTMENT ASSOCN.* (1888), 16 C. R. 259.—CAN.

PART VII. SECT. 3, SUB-SECT. 1.

der for rescission of contract.]—*HIRD & HICKY'S CONTRACT*, [1919] V. L. R. 717.—AUS.

e. Repayment of excess sum

voluntarily paid by purchaser.]—The ct. in its equitable jurisdiction has, on a vendor & purchaser summons under Equity Act, 1901, jurisdiction to order repayment of a sum of money involuntarily paid by a purchaser in excess of the money due for purchase-

Sect. 3.—Relief given: Sub-sects. 1 & 2. Sect. 4: Sub-sects. 1, 2, 3, 4 & 5.]

1844. No jurisdiction to give damages.]—*Re HARGREAVES & THOMPSON'S CONTRACT, No. 1831, ante.*

1845. —.]—*Re WILSONS & STEVENS' CONTRACT, No. 1810, ante.*

Consequential relief.]—*See Part VII., Sect. 3, sub-sect. 2, post.*

SUB-SECT. 2.—CONSEQUENTIAL RELIEF.

See, now, Law of Property Act, 1925 (c. 20), s. 49.

1846. General rule.]—*Re HARGREAVES & THOMPSON'S CONTRACT, No. 1831, ante.*

1847. Return of deposit—With interest.]—The ct. has jurisdiction, upon a summons under Vendor & Purchaser Act, 1874 (c. 78), s. 9, to order the return of a purchaser's deposit with interest.—*Re SMITH & STOTT (1883)*, 29 Ch. D. 1009, n.; 48 L. T. 512; 31 W. R. 411.

Annotation:—Mentd. Re Chapman & Hobbs (1885), 29 Ch. D. 1007.

1848. —.]—*Re BRYANT & BARNINGHAM'S CONTRACT, No. 2048, post.*

1849. —.]—*Re HAEDICKE & LIPSKI'S CONTRACT, No. 1811, ante.*

1850. —.]—*From date of payment.]—**Re HARGREAVES & THOMPSON'S CONTRACT, No. 1831, ante.*

1851. —.]—*Re HIGGINS & PERCIVAL, No. 1842, ante.*

1852. —.]—*Re EBSWORTH & TIDY'S CONTRACT (1889)*, as reported in 42 Ch. D. at p. 53; 37 W. R. 657, C. A.

Annotations:—Fold. Re Bryant & Cullingford to Barningham (1889), 62 L. T. 53. *Mentd. Re Stamford, Spalding & Boston Banking Co. & Knight's Contract*, [1900] 1 Ch. 287.

1853. —.]—*Re MARSHALL & SALT'S CONTRACT, No. 1810, ante.*

1854. —.]—*Re WALKER & OAKSHOTT'S CONTRACT, No. 1843, ante.*

1855. —.]—*Except where misrepresentation sufficient to support action for rescission.]—**Re DAVIS & CAVEY, No. 1832, ante.*

1856. Return of interest paid under mistake of law.]—*Semble: there is jurisdiction under Vendor & Purchaser Act, 1874 (c. 78) to compel a return of interest paid by a purchaser to a vendor under a mistake of law.—**Re YOUNG & HARSTON'S CONTRACT (1885)*, 31 Ch. D. 168; 53 L. T. 837; 50 J. P. 245; 34 W. R. 84, C. A.

Annotations:—Refd. Re Riley to Streatfield (1886), 56 L. T. 48; *Re Hetling & Merton's Contract*, [1893] 3 Ch. 269; *Re London Corp'n. & Tubbs' Contract*, [1894] 2 Ch. 524; *Re Wilsons & Stevens' Contract*, [1894] 3 Ch. 546; *Re Woods & Lewis' Contract*, [1898] 2 Ch. 211; *Bennett v. Stone*, [1903] 1 Ch. 509; *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648. *Mentd. Asiatic Petroleum Co. v. Lennard's Carrying Co.*, [1914] 1 K. B. 419; *Ingram & Royle v. Services Maritimes Du Treport*, [1914] 1 K. B. 541; *Metropolitan Water Board v. L. & N. E. Ry.*, [1924], 131 L. T. 123; *Re City Equitable Fire Insce.*, [1925] Ch. 407.

Costs of investigating title.]—*See Part V., Sect. 5, sub-sect. 10, ante.*

SECT. 4.—THE ORDER.

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), s. 49.

1857. Order directing reference to chambers—Form of conveyance.]—There had better be a reference to Chambers in case the parties differ as to the form of the conveyance (*BACON, V.-C.*).—*Re MONCKTON & GILZEAN (1884)*, 27 Ch. D.

555; 54 L. J. Ch. 257; 51 L. T. 320; 32 W. R. 973.

Annotation:—Refd. Riley v. Streatfield (1886), 34 Ch. D. 386.

1858. —.]—*Amount of compensation.]—*Purchasers, who were in occupation of certain premises, contracted to buy for £1,100, relying on a valuation shown to them by vendor, which described the premises as containing about 1,244 square yards & valued them at £1,200. The particulars stated that the premises contained about 1,200 square yards, & provided that in case of error or mistake in the description compensation should be given or allowed. The purchasers discovered that the premises contained only 935 square yards, the surveyor having made a miscalculation. Neither vendors nor purchasers previously knew the actual area. The purchasers claimed compensation under the condition which the vendors refused offering to cancel the contract. On a summons by the purchasers under Vendor & Purchaser Act, 1874 (c. 78):—*Held: purchasers were entitled to a reference as to what deduction should be made from the contract price.—**ASPINALLS TO POWELL & SCHOLEFIELD (1889)*, 60 L. T. 595; 5 T. L. R. 446.

1859. Order where good title not made—Direction for repayment of deposit—With interest from date of payment.]—*Re HIGGINS & PERCIVAL, No. 1842, ante.*

1860. —.]—*Re EBSWORTH & TIDY'S CONTRACT (1889)*, as reported in 42 Ch. D. at p. 53.

Annotations:—Fold. Re Bryant & Cullingford to Barningham (1889), 62 L. T. 53. *Mentd. Re Stamford, Spalding & Boston Banking Co. & Knight's Contract*, [1900] 1 Ch. 287.

What relief may be given.]—*See Sect. 3, ante.*

SUB-SECT. 2.—EFFECT OF ORDER.

1861. Upon whom binding—Parties not before court.]—I regret very much that I have not the Crown before me in any way so as to be bound by my decision in the case (*JESSEL, M.R.*).—*Re COOPER & ALLEN'S CONTRACT (1876)*, as reported in 4 Ch. D. 802; 35 L. T. 891.

Annotations:—Mentd. Wolverton v. A.-G., [1898] A. C. 535; *Northumberland v. A.-G.*, [1905] A. C. 406; *A.-G. v. Asheton-Smith*, [1924] 2 K. B. 25.

1862. —.]—*Vendor in questions between sub-vendor & sub-purchaser.]—*A summons under Vendor & Purchaser Act, 1874 (c. 78) asking for relief, to which it is plain from the contract that appct. cannot be entitled, will be stayed as frivolous & vexatious.

A. agreed with B. to sell him a public-house, & that in case A. should take, or be interested or concerned in a public-house, within one-third of a mile of the premises sold during the occupation of B. or his widow A. should pay to B. £500, & a covenant to this effect should be inserted in the conveyance. A's title to the property consisted of an agreement to purchase it from C. which contained a similar provision limited to the occupancy of A. & his widow, & not mentioning any covenant in the conveyance. B. accepted the title & tendered a conveyance containing a covenant by C. in the terms of A's agreement with B. C. refused to enter into this covenant, & B. took out a vendor & purchaser summons for a declaration that he was entitled to a covenant by C. A. moved to stay proceedings under the summons as frivolous & vexatious:—*Held: as it was clearly impossible to make a declaration on the summons which would be binding on B.*

& the relief, if any, to which appct. was entitled, was specific performance with abatement, to which the declaration asked would not help him, the summons ought to be struck out as frivolous & vexatious.—*Re BARTLETT & BERRY'S CONTRACT* (1897), 78 L. T. 751.

1863. — Parties to summons.]—(1) It is incumbent on the ct. to decide questions of law between a vendor & a purchaser, yet it must be borne in mind that any such decision does not technically bind any one else but the parties actually before the ct., & does not prevent any person not bound by the decision from at any time bringing fresh litigation upon the purchaser with reference to the same title (*JESSEL, M.R.*).

(2) Upon the question of costs, I do not consider that, because a particular title may be one which a conveyancer would not recommend a purchaser to accept without a decision of the ct., the purchaser ought not to pay costs if the ct. is of opinion that a good title can be made: on the contrary, the general rule is to order the purchaser to pay the costs, so as to assure his title & show that the ct. entertains no doubt upon it (*JESSEL, M.R.*).—*OSBORNE TO ROWLETT* (1880), 13 Ch. D. 774; 49 L. J. Ch. 310; 42 L. T. 650; 28 W. R. 365.

Annotations:—Generally, Mentd. Re Morton & Hallett (1880), 15 Ch. D. 143; *Re Pixton & Tong's Contract* (1897), 46 W. R. 187; *Re Rumney & Smith*, [1897] 2 Ch. 351; *Re Ravensworth, Ravensworth v. Tindale*, [1905] 2 Ch. 1; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

1864. ——[On a summons under the Vendor & Purchaser Act, 1874 (c. 78), the only persons between whom the ct. can decide anything are the vendor & the purchaser. But in the present case the lord & the steward of the manor came in & agreed to be bound (*COTTON, L.J.*).—*Re NAYLOR & SPENDLA'S CONTRACT* (1886), 34 Ch. D. 217; 56 L. J. Ch. 453; 56 L. T. 132; 35 W. R. 219; 3 T. L. R. 242, C. A.

1865. — Persons coming in & agreeing to be bound.]—*Re NAYLOR & SPENDLA'S CONTRACT*, No. 1864, *ante*.

1866. Subsequent summons by person not bound — Whether same point may be raised.]—*OSBORNE TO ROWLETT*, No. 1863, *ante*.

SUB-SECT. 3.—ENFORCEMENT OF ORDER.

1867. Application in chambers.]—A purchaser who has availed himself of the provisions of Vendor & Purchaser Act, 1874 (c. 78), & has thereby obtained an order on summons which has disposed of every objection which he thought fit to raise, & under which the vendor has been ordered to make compensation, is not entitled to bring an action, for specific performance of the contract for sale & damages. If a vendor does not comply with the order on the vendor & purchaser summons, the purchaser should apply in chambers to get it enforced.—*THOMPSON v. RINGER* (1880), 44 L. T. 507; 29 W. R. 520.

1868. Action for specific performance.]—*THOMPSON v. RINGER*, No. 1867, *ante*.

SUB-SECT. 4.—REVIEW OF ORDER.

1869. Jurisdiction of Chancery Division.]—(1) Where a good title has been declared on a

summons under Vendor & Purchaser Act, 1874 (c. 78), the purchaser is not at liberty to reopen the question by way of review, unless he can prove that since the order on the summons he has discovered material facts, which he could not with reasonable diligence have discovered earlier, showing that the title is defective; in which case he may bring an action of review, the jurisdiction of the old Ct. of Ch. as to allowing proceedings by way of review being still exercisable by the Ch. Div. of the High Ct.

(2) If the vendor has brought an action for specific performance, the purchaser may bring his action of review by way of counterclaim to the vendor's action.

(3) *Semble*: an action of review can now be commenced without leave.—*Re SCOTT & ALVAREZ'S CONTRACT, SCOTT v. ALVAREZ*, [1895] 1 Ch. 596; 64 L. J. Ch. 376; 72 L. T. 455; *on appeal*, [1895] 2 Ch. 603, C. A.

Annotations:—Generally, Reid. Re Calcott & Elvin's Contract (1898), 67 L. J. Ch. 327; *Re Wallis & Barnard's Contract*, [1899] 2 Ch. 515; *Re Hughes & Ashley's Contract*, [1900] 2 Ch. 595; *Toon v. Stanbury-Eardley* (1906), 22 T. L. R. 536; *Simpson v. Gilley* (1922), 92 L. J. Ch. 194; *Boytus v. Lodge*, [1925] Ch. 350. *Mentd. Re Wells, Boyer v. McLean* (1903), 72 L. J. Ch. 513.

1870. Necessity for proving discovery of new material facts.]—*Re SCOTT & ALVAREZ'S CONTRACT, SCOTT v. ALVAREZ*, No. 1869, *ante*.

1871. Whether leave necessary.]—*Re SCOTT & ALVAREZ'S CONTRACT, SCOTT v. ALVAREZ*, No. 1869, *ante*.

1872. Counterclaim to vendor's action for specific performance.]—*Re SCOTT & ALVAREZ'S CONTRACT, SCOTT v. ALVAREZ*, No. 1869, *ante*.

SUB-SECT. 5.—APPEAL.

See R. S. C., Ord. 63, rr. 9, 15.

1873. Time for appeal—General rule.]—(1) The time within which an appeal can be brought from an order under Vendor & Purchaser Act, 1874 (c. 78), s. 9, is twenty-one days.

(2) The mere communication by an unsuccessful party to his opponent of his intention to appeal is not sufficient notice of appeal; nor, in the absence of other special circumstances, is it ground for an extension of time for appealing.

(3) Resp. who, after the time for appealing has expired, knowingly allows his opponent to incur expense in preparing for the appeal, without warning him of his intention to object to the appeal being heard, may be deprived of his costs.—*Re BLYTH & YOUNG* (1880), 13 Ch. D. 416; 41 L. T. 746; 28 W. R. 260, C. A.

Annotations:—As to (1) Fold. Re Ricketts & Avent's Contract, [1890] W. N. 16. *Apld. Re Walker & Oakshott's Contract*, [1902] W. N. 147. *Generally, Mentd. Carter v. Stubbs* (1880), 29 W. R. 132; *Re New Callao* (1882), 22 Ch. D. 484.

1874. ——[*Re RICKETTS & AVENT'S CONTRACT*, [1890] W. N. 16, C. A.

1875. — Grounds for extension—Communication of intention to appeal.]—*Re BLYTH & YOUNG*, No. 1873, *ante*.

1876. — Order refusing application—Order containing opinion as to rights of parties.]—When an order refusing an application contains a declaration or expression of opinion of the judge as to the rights of the parties, it is not a mere refusal of the application so as to oblige an appeal to be

PART VII. SECT. 4, SUB-SECT. 3.
g. Summary procedure in lieu of action.]—If under R. S. O., 1877, c. 109, the ct. adjudicates upon a question of

title between vendor & purchaser, & directs the purchaser to carry out the contract, & the purchaser then fails to carry out the contract, it is unnecessary to bring an action for specific perform-

ance of the contract, & the requisite relief may be had on notice of motion for payment of the purchase money or in default a resale.—*Re CRAIG* (1883), 10 P. R. 33.—**CAN.**

Sect. 4.—The order: Sub-sects. 5 & 6. Sect. 5. Part VIII. Sect. 1: Sub-sect. 1, A.]

brought within twenty-one days from the date of the refusal under R. S. C., Ord. 58, r. 15.—*Re CLAY & TETLEY* (1880), 16 Ch. D. 3; 50 L. J. Ch. 164; 43 L. T. 402; 29 W. R. 5, C. A.

1877. Sufficiency of notice of appeal.—Communication of intention to appeal.]—*Re BLYTH & YOUNG*, No. 1873, *ante*.

Expiration of time for appeal—Effect of allowing opponent to incur expense in preparing for appeal.—No warning given of intention to object.]—*See* No. 1873, *ante*.

SUB-SECT. 6.—COSTS.

See, now, Law of Property Act, 1925 (c. 20), s. 49.

1878. Costs borne by party whose contention unsuccessful—Unfounded objection.]—I am told the purchaser is a willing purchaser, & I wish he had been as willing not to rush into a litigation which is idle & unsubstantial. He must pay the costs of the summons which his objection has occasioned (*BACON, V.-C.*).—*Re WADDELL'S CONTRACT* (1876), 2 Ch. D. 172; 45 L. J. Ch. 617; *sub nom. Ex p. WADDELL*, 31 L. T. 237.

1879. — No doubt about construction of will.]—*Re COOKES' CONTRACT* (1877), 4 Ch. D. 454.

1880. — Improper requisition.]—*Re FORD & HILL* (1879), 10 Ch. D. 365; 48 L. J. Ch. 327; 40 L. T. 41; 43 J. P. 334; 27 W. R. 371, C. A.

*Annotations:—***Refd.** *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Re Chafer & Randall's Contract*, [1916] 2 Ch. 8.

1881. — Vendor able to make out good title.]—*OSBORNE TO ROWLETT*, No. 1863, *ante*.

1882. — Vendor unable to make out good title.]—*Re YEILDING & WESTBROOK*, No. 1836, *ante*.

1883. — —.]—*Re EBSWORTH & TIDY'S CONTRACT* (1889), as reported in 42 Ch. D. at p. 53; 60 L. T. 841; 37 W. R. 657, C. A.

*Annotations:—***Fold.** *Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53. **Mentd.** *Re Stamford, Spalding & Boston Banking Co. & Knight's Contract*, [1900] 1 Ch. 287.

1884. — —.]—As to the costs, the purchaser is, upon the whole, in the right, & therefore the vendor must pay the costs of the summons, & of this adjournment into et. The only remaining question is as to the purchaser's costs of investigating the title. I doubt the jurisdiction, but I shall order those costs also to be paid by the vendor (*HALL, V.-C.*).—*Re HIGGINS & HITCHMAN'S CONTRACT* (1882), 21 Ch. D. 95; 51 L. J. Ch. 772; 46 J. P. 805; 30 W. R. 700.

*Annotations:—***Apprvd.** *Re Hargreaves & Thompson's Contract* (1886), 32 Ch. D. 454. **Fold.** *Re Yelding & Westbrook* (1886), 31 Ch. D. 344; *Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53. **Refd.** *Re Ebsworth & Tidy's Contract* (1889), 42 Ch. D. 23; *Re Furneaux & Aird's Contract*, [1906] W. N. 215.

1885. — Although not entirely successful.]—*Re DAVIS & CAVEY*, No. 1832, *ante*.

1886. — —.]—That dismisses the summons, necessarily with costs (*CHITTY, J.*).—*Re STARR-BOWKETT BUILDING SOCIETY & SIBUN'S CONTRACT* (1889), 42 Ch. D. 375; 58 L. J. Ch. 459; 60 L. T. 811; 5 T. L. R. 440; *on appeal*, 42 Ch. D. p. 386, C. A.

*Annotation:—***Refd.** *Quinlon v. Horne*, [1906] 1 Ch. 596.

1887. No order as to costs.]—Where a married woman entitled to a legacy charged on real estate

which had not been reduced into possession by her husband, obtained a protection order, in consequence of her husband's desertion, under Matrimonial Causes Act, 1857 (c. 85), s. 21:—**Held:** (1) the legacy on being paid to her after the date of the order, was property which then came to or devolved upon her within Matrimonial Causes Act, 1875 (c. 85), s. 25, & her receipt was a good discharge; (2) the question being raised by summons under Vendor & Purchaser Act, 1874 (c. 78), s. 9, in respect to the title to the estate charged that the declaration ought to be made without costs.—*Re COWARD & ADAM'S PURCHASE* (1875), L. R. 20 Eq. 179; 44 L. J. Ch. 384; 32 L. T. 682; 39 J. P. 708; 23 W. R. 605.

*Annotations:—***Generally.** *Mentd.* *Nicholson v. Drury Buildings Estate Co.* (1877), 7 Ch. D. 48; *Re Emery's Trusts* (1884), 50 L. T. 197; *Waite v. Morland* (1888), 38 Ch. D. 135.

1888. — Question properly brought before court.]—*FINCH v. JUKES*, [1877] W. N. 211.

*Annotation:—***Mentd.** *Mortgage Insc. Corp'n. v. Pound* (1895), 64 L. J. Q. B. 394.

1889. — —.]—I think there is no doubt about the power under Vendor & Purchaser Act, 1874 (c. 78), s. 9. But there was a fair point for discussion in the present case, & I shall make no order as to costs (*FRY, J.*).—*Re METROPOLITAN DISTRICT Ry. Co. & COSH* (1880), 13 Ch. D. 607; 49 L. J. Ch. 277; 42 L. T. 73; 44 J. P. 393; 28 W. R. 685, C. A.

*Annotations:—***Consd.** *Re L. & Y. Ry. & Derby's Contract* (1908), 100 L. T. 44. **Refd.** *Rosenberg v. Cook* (1881), 8 Q. B. D. 162; *Re Higgins & Hitchman's Contract* (1882), 21 Ch. D. 95; *Ware v. L. B. & S. C. Ry.* (1882), 52 L. J. Ch. 198; *Re Smith & Stott* (1883), 29 Ch. D. 1009, n.; *Mid. Ry. v. Wright*, [1901] 1 Ch. 738.

1890. — Question of exceptional difficulty—Arising from conflicting decisions.]—*OSBORNE TO ROWLETT*, No. 1863, *ante*.

1891. Costs borne by vendor—Vendor not exercising right to rescind—But allowing summons to proceed to hearing—Subsequent notice to rescind.]—Conditions of sale which give a vendor power to rescind the contract "if the purchaser shall insist on any requisition or objection which the vendor shall be unable or unwilling to remove or comply with . . . notwithstanding any attempt to remove the same or that there shall have been any intermediate or pending negotiation proceeding or litigation"; & provide that he shall thereupon return to the purchaser his deposit, "but without any interest, costs of investigating the title, or other compensation or payment whatsoever," do not protect the vendor from the payment of costs of litigation; & if the vendor allows a summons, under Vendor & Purchaser Act, 1874 (c. 78), to be proceeded with until the hearing & then gives notice to rescind, he will be ordered to pay the costs.—*Re SPINDLER & MEAR'S CONTRACT*, [1901] 1 Ch. 908; 70 L. J. Ch. 420; 84 L. T. 295; 49 W. R. 410; 45 Sol. Jo. 361.

1892. — Vendor refusing option to take out originating summons—Though successful when option accepted.]—*Re NICHOLS' & VON JOEL'S CONTRACT*, No. 1823, *ante*.

1893. Grounds for deprivation of costs—Allowing opponent to incur expense in preparing for appeal—Expiration of time for appeal—No warning of intention to object to appeal.]—*Re BLYTH & YOUNG*, No. 1873, *ante*.

1894. What costs are allowed—Costs of investigating title.]—*Re HIGGINS & HITCHMAN'S CONTRACT*, No. 1884, *ante*.

PART VII. SECT. 4, SUB-SECT. 6.

1881 i. Costs borne by party whose contention unsuccessful—Vendor able to make out good title.]—*Re JONES & CUMMING* (1912), 21 O. W. R. 248; 3 O. W. N. 672; 2 D. L. R. 77.—**CAN.**

1895. ———.]—*Re* YEILDING & WESTBROOK, No. 1836, *ante*.

1896. ———.]—*Re* HARGREAVES & THOMPSON'S CONTRACT, No. 1831, *ante*.

1897. ———.]—*Re* HIGGINS & PERCIVAL, No. 1842, *ante*.

1898. ———.]—*Re* EBSWORTH & TIDY'S CONTRACT (1889), as reported in 42 Ch. D. at p. 53; 60 L. T. 841; 37 W. R. 657, C. A.

Annotations:—*Fold*. *Re* Bryant & Cullingford to Barningham (1889), 62 L. T. 53. *Mentd.* *Re* Stamford, Spalding Boston Banking Co. & Knight's Contract, [1900] 1 Ch. 287.

1899. ———.]—*Re* BRYANT & BARNINGHAM'S CONTRACT, No. 2048, *post*.

1900. ———.]—*Re* MARSHALL & SALT'S CONTRACT, No. 1840, *ante*.

1901. ———.]—*Re* HAEDICKE & LIPSKI'S CONTRACT, No. 1841, *ante*.

1902. ———. Costs of additional parties.]—SEBRIGHT *v.* THORNTON, [1885] W. N. 176.

1903. Scale of costs—Party & party.]—SEBRIGHT *v.* THORNTON, [1885] W. N. 176.

1904. Costs charged on vendor's interest in property.]—*Re* YEILDING & WESTBROOK, No. 1836, *ante*.

1905. ———.]—*Re* HIGGINS & PERCIVAL, No. 1842, *ante*.

1906. ———.]—*Re* FURNEAUX & AIRD'S CONTRACT, [1906] W. N. 215.

SECT. 5.—PRACTICE.

See Law of Property Act, 1925 (c. 20), s. 49; R. S. C., Ord. 54, r. 9.

1907. Powers of court.]—*Re* BURROUGHS, LYNN & SEXTON, No. 1806, *ante*.

1908. Adjournment of summons—From chambers to court.]—Although the Act [Vendor & Purchaser Act, 1874 (c. 78)] compels me to hear all these cases argued in chambers, if in any

particular case I am of opinion that the title is good, & the purchaser desires to strengthen his title, I am willing to give my decision in *ct.* (JESSEL, M.R.).—*Re* COLEMAN & JARROM (1876), 4 Ch. D. 165; 46 L. J. Ch. 33; *sub nom.* COLEMAN *v.* JARROM, 35 L. T. 614; 25 W. R. 137.

Annotations:—*Mentd.* *Aplin v. Stone*, [1904] 1 Ch. 543; *Re Ofner, Samuel v. Ofner* (1908), 99 L. T. 813.

1909. ———.]—*Re* WARNER'S SETTLED ESTATES, WARNER TO STEEL (1881), 17 Ch. D. 711; 50 L. J. Ch. 542; 45 L. T. 37; 29 W. R. 726.

Annotation:—*Mentd.* *A.-G. v. Selborne*, [1902] 1 K. B. 388.

1910. ———.]—*Re* JACKSON & WOODBURN'S CONTRACT, No. 1834, *ante*.

1911. Evidence—*Affidavit*.]—*Re* BURROUGHS, LYNN & SEXTON, No. 1806, *ante*.

1912. Parties to summons—Incumbrancer.]

A tenant for life contracted to sell the estate free from incumbrances, & his wife, who claimed to be entitled as assignee for value to a charge on his life interest, refused to consent to the sale. The purchaser took out a summons asking for a declaration whether her consent was necessary, & if it was necessary, & had not been obtained, for rescission or specific performance, with compensation. This summons was served on the vendor & on his wife. At the hearing she appeared & objected to the jurisdiction:—*Held*: she ought not to have been served with the summons, & she must be dismissed from the proceedings.—*Re* AILESBUURY SETTLED ESTATES (1893), 62 L. J. Ch. 1012; 69 L. T. 493; 42 W. R. 45; 9 T. L. R. 616; 37 Sol. Jo. 715; 3 R. 704.

Annotation:—*Re* Keck & Hart's Contract (1898), 78 L. T. 287.

1913. Stay of proceedings—F frivolous & vexatious claim.]—*Re* BARTLETT & BERRY'S CONTRACT, No. 1862, *ante*.

Resisting production—Legal professional privilege—Communications between solicitor & client.]—*See* DISCOVERY, Vol. XVIII., p. 121, No. 710.

Part VIII.—Remedies under an Uncompleted Contract.

SECT. 1.—RESCISSION AND RESALE BY VENDOR.

SUB-SECT. 1.—RESCISSION.

A. In General.

1914. General rule—Purchaser's conduct must amount to repudiation of contract.]—*Howe v. Smith*, No. 1959, *post*.

1915. ———.]—*Deft.* in Aug. 1892, agreed to sell some land to *pltf.* for £150, of which £40 was paid at the time, & the balance was to be paid by twelve equal quarterly instalments of £9 3s. 4d. each. In case of default for thirty days in the payment of any instalment, the whole of the unpaid instalments were to become immediately due & payable, &, in the event of default for thirty days in payment, the vendor was to be at liberty to resell the land, & to retain out of the

proceeds of sale the unpaid instalments with interest, & was to pay the balance to the purchaser. The purchaser went into possession under the contract, & retained possession for a considerable time, &, though generally in arrear with the instalments, he had by Aug. 1895, paid them all except the last. The last instalment became due on Sept. 29, 1895, but it was never paid. Correspondence took place, in which the vendor called on the purchaser to pay, but he never gave him notice that, if payment was not made within a specified time, he should treat the contract as abandoned. In Oct. 1896, the purchaser went away, & the vendor was unable to find him. The vendor resumed possession of the land & endeavoured to sell it, but without success, & in Mar. 1898, he agreed to let it for three years

PART VII. SECT. 5.

h. Appeal from master on reference.]—Where a master, on a reference under Vendor & Purchaser Act to settle the title under a written agreement for a lease, ruled that evidence might be given to show that covenants the lease should contain, an appeal does not lie to the Supreme Ct. from the judgment affirming such ruling, it not being a final judgment & the case not coming

within the provisions of Supreme & Exchequer Cts. Act, s. 24 (e).—*CANADIAN PACIFIC RY. Co. v. CITY OF TORONTO CORPN.* (1900), 30 S. C. R. 337.—CAN.

PART VIII. SECT. 1, SUB-SECT. 1.—A.

k. Necessity for notice to purchaser.]—If the vendor elects to cancel without giving notice, he cannot do so by a mere operation of his mind, but

must do something by which he gives the purchaser clearly to understand that he decides to avoid the contract, & that the relation of vendor & purchaser no longer exists between them, or do some act directly affecting the vendee in his position or interest, as, for example, a sale to another.—*CZUACK v. PARKER* (1904), 15 Man. L. R. 456.—CAN.

& actual possession—Sale

Sect. 1.—Rescission and resale by vendor: Sub-sect. 1, A.]

to a tenant who took possession. In June, 1898, the purchaser reappeared, & wrote to the vendor that he was prepared to pay the final instalment. In July, 1898, the purchaser commenced an action against the vendor, claiming specific performance of the agreement of Aug. 1892, & damages in lieu of or in addition to specific performance:—*Held*: pltf.'s conduct did not amount to a repudiation of his contract, & the vendor was not justified in treating the contract as abandoned, &, though the purchaser was not entitled to specific performance of his contract, he was entitled to damages.—*CORNWALL v. HENSON*, [1900] 2 Ch. 298; 69 L. J. Ch. 581; 82 L. T. 735; 49 W. R. 42; 16 T. L. R. 422; 41 Sol. Jo. 514, C. A.

Annotation:—*Refd.* Von Freeden v. Hull & Turner (1906), 75 L. J. K. B. 359.

1916. Necessity for notice to purchaser—& return of deposit.]—Pltf. agreed to take a house of deft. for two years. Afterwards, on Sept. 4, 1817, he agreed to buy the estate of the vendor, in consideration of £25 paid down, & of the further sum of £425 to be paid on Dec. 25, 1817, on or before which time the conveyance was to be executed. An abstract was delivered on Oct. 20, 1817, & afterwards a draft of the conveyance, with the abstract, was sent to pltf., with a note of deft.'s solr., stating that the deeds were with him, & desiring to hear from pltf. if any objections occurred; & many ineffectual applications were made to see pltf. A notice was served on pltf. on Dec. 22, 1817, that deft. would, on Dec. 23, 24 & 26, attend at pltf.'s house to execute the conveyance, &, on default, he should consider pltf. as refusing to proceed in the purchase, & act accordingly. On Apr. 2, 1818, pltf. returned the abstract, with objections to the title. On Apr. 13 deft. distrained on pltf. for rent. On a bill filed by the vendee for a specific performance:—*Held*: the vendor should have given notice that he considered the agreement as at an end & should have returned the £25; & not having done so, the ct. directed the usual reference as to the title.—*REYNOLDS v. NELSON* (1821), 6 Madd. 18; 56 E. R. 995; *subsequent proceedings*, 6 Madd. 290. *Annotation*:—*Mentd.* Walker v. Jeffreys (1842), 1 Hare, 311.

1917. Grounds for rescission—Purchaser taking no steps to complete.]—*REYNOLDS v. NELSON*, No. 1916, *ante*.

Purchaser retaining possession without payment—Vendor unable to make good title.]—Where a party had contracted to purchase, & had been eight years in possession of premises to which the vendor was unable to make a good title, & refused either to abandon the agreement or accept such title as the vendor could give, having paid

no part of the purchase-money & no rent; the ct., upon a bill filed by the vendor for relief, directed the agreement to be delivered up to be cancelled, & the rents & profits received by the purchaser to be accounted for, & ordered the purchaser to pay the costs of the suit.—*KING v. KING* (1833), 1 My. & K. 442; 39 E. R. 749.

Annotations:—*Refd.* Pinchin v. London & Blackwall Ry. (1854), 1 K. & J. 34; *Onions v. Cohen* (1865), 2 Hem. & M. 354.

1919. — Bankruptcy of purchaser—Assignee required to make election—Refusal to elect.]—Bkpt. had bought some freehold property by auction, & had paid a deposit of £20 per cent. on the amount of the purchase-money; but there being some dispute about the title, the purchase was not completed before the bkpcy. Upon a petition by the vendor, that the assignee might be ordered to deliver up the agreement, & that the vendor might retain the deposit money, a special order was made, giving the assignee a fortnight to elect whether he would fulfil or abandon the agreement, without prejudice to his right to a return of the deposit money.—*Re GLOVER, Ex p. BRIDGER* (1836), 1 Deac. 581.

1920. — Default in payment—Purchase-money payable by instalments.]—Several suits at law & in equity, to determine the title to certain lands, were pending between persons claiming to be mtgees. of such lands, & one who claimed the same lands in fee by title, under a settlement, paramount to the mtge. Pltf., claiming to be a subsequent mtgee. of the same lands, contracted to purchase the interests of the prior mtgees. in their principal moneys, arrears of interest & securities, & to pay the purchase-money at certain stipulated times, all of which, except an annuity, were to be paid in 1843; & to pay & indemnify the prior mtgees. against the past & future costs of the suits & proceedings; & time was to be of the essence of the contract. Pltf. did not pay the instalments until a considerable time after the stipulated period, but such later payments were accepted by the vendors. The bill, filed in 1845, when some of the payments still remained to be paid, alleged that defts. refused to perform the agreement, & prayed a specific performance:—*Held*: every default by pltf. in payment of the instalments at the stipulated time was a new breach of the contract, giving defts. the right to rescind it; but, to preserve such a right, it must be asserted immediately after the breach occurred, &, in this case, the breach had been waived.—*HUNTER v. DANIEL* (1845), 4 Hare, 420; 14 L. J. Ch. 194; 9 Jur. 526; 67 E. R. 712.

Annotations:—*Refd.* Knight v. Bowyer (1858), 2 De G. & J. 421. *Mentd.* Hutley v. Hutley (1873), L. R. 8 Q. B. 112.

1921. — — — — — Delay in payment of last instalment.]—*CORNWALL v. HENSON*, No. 1915, *ante*.

by Farm Settlement Board.]—*WILSON v. WILSON* (1920), 47 N. B. R. 220; 52 D. L. R. 296.—*CAN.*

m. Grounds for rescission—Purchaser retaining possession without payment—Offer to give up possession.]—*FOX v. REID* (1913), 23 W. L. R. 963; 11 D. L. R. 735; 4 W. W. R. 200; 23 Man. L. R. 152.—*CAN.*

n. — Bankruptcy of purchaser.]—*Re MAINLAND PORTLAND CEMENT CO.*, [1927] 2 D. L. R. 742; 38 B. C. R. 417.—*CAN.*

1920 l. — Default in payment—Purchase-money payable by instalments.]—*PREIKS v. SCOTT* (Man.) (1911), 19 W. L. R. 198.—*CAN.*

1920 ll. — — — — —]—Where, in a contract for the sale of land, it is

agreed that the price shall be paid in several instalments, the vendor is not entitled, on the purchaser's failure to pay one instalment, to claim a rescission of the sale unless it appears from the contract that time is of its essence.—*HIDDINGH v. VON SCHADE* (1899), 16 S. C. 128.—*S. AF.*

o. — — — — — Right of purchaser to time to remedy default.]—*WHITLA v. RIVERVIEW REALTY CO.* (1910), 19 Man. L. R. 746.—*CAN.*

p. — — — — —]—An action for cancellation or rescission merely on the ground of non-payment of purchase money is not maintainable; the vendor's proper remedy is by action for specific performance.—*CANADIAN PACIFIC RY. CO. v. MEADOWS* (1908), 8 W. L. R.

806; 1 Alta. L. R. 344.—*CAN.*

q. — — — — —]—*THAGARD v. EDMISTON* (Man.), [1925] 4 D. L. R. 934; (1925) 3 W. W. R. 527.—*CAN.*

r. — — — — —]—When a vendor of land is not paid a portion of the consideration money, he cannot wholly disaffirm the contract but he can establish his lien on the land as an unpaid vendor.—*MOHSMUM ALLY v. BALASOO KOER* (1863), 2 Hay, 576.—*IND.*

t. — — — — —]—Although ordinarily, in a transaction of sale, it may be reasonable to suppose that the seller does not intend to pass the property to the purchaser until the purchase-money has been paid or secured, it is not an absolute rule of law

1922. — Vendor's agent exceeding authority.]

—Where a party seeks to set aside a contract for sale entered into by his agents in excess of their authority, but confirms a contract to let, which was within their authority, he has a right, before any bill is filed against him by the lessee & asserted purchaser for specific performance, to file a bill to have the agreement cancelled, offering to grant a lease if the lessee chooses; because, if he brought an ejectment, the contract to let would be an answer to his action; & if he had brought an action for rent, he might have been considered as acquiescing in the whole agreement, the contract to let & the contract to sell being in the same instrument.

A. gave his agents authority to let, & a qualified authority to state what was the selling price of property, but no authority to sell. The agents contracted in his name to let, with an option to the lessee to buy at a stated price. The lessor filed a bill to have the agreement delivered up to be cancelled, on the ground that the agents had exceeded their authority; & the lessee filed a bill for the specific performance of the contract:—

that the non-receipt of the consideration-money in full entitles a vendor to make void a sale which is otherwise complete.—*HEERA SINGH v. RAGHO NATH SUHAI*, *BHURTH SINGH v. RAGHO NATH SUHAI* (1868), 3 Agra, 30.—**IND.**

a. — *Where judgment registered against purchaser before conveyance.*—Where judgment is registered against the vendee prior to the conveyance being executed, the vendor is not entitled to a rescission of the contract in default of payment, but to a decree of foreclosure or sale.—*GALT v. BUSH* (1860), 8 Gr. 360.—**CAN.**

b. — *Though whole purchase money not due.*—A bill for rescission may be filed for default in payment of an instalment, although the whole purchase money may not be due.—*WEST v. LYNCH* (1888), 5 Man. L. R. 167.—**CAN.**

c. — *Refusal to pay until good title shown.*—*McILVENNA v. GOSS* (Sask.) (1912), 21 W. L. R. 180; 2 W. W. R. 285.—**CAN.**

d. — *Right of purchaser to redeem.*—*PENTLAND v. MACKISOCK* (Man.) (1913), 22 W. L. R. 947; 9 D. L. R. 572.—**CAN.**

e. — *—*—*DRAPER v. BIELBY* (1913), 23 W. L. R. 902; 10 D. L. R. 746; 4 W. W. R. 489; 6 Sask. L. R. 301.—**CAN.**

f. — *Time for redemption.*—In action for foreclosure of purchaser's interest under an agreement for sale of land, upon default in payment of purchase-money, the time limited for redemption was fixed at two months, following the usual practice which allows one or at most two months.—*DAVIS v. VON ALVENSLEBEN & GMB* (1914), 29 W. L. R. 296; 6 W. W. R. 1184; 20 D. L. R. 112; 20 B. C. R. 74.—**CAN.**

g. — *Agreement to pay "cash".—Reasonable time to wait for payment.*—*HIGGINBOTHAM v. MITCHELL* (1910), 13 W. L. R. 649.—**CAN.**

h. — *Mistake—Mutual mistake as to length of frontage.*—*BROWN v. FOX* (1897), 18 N. S. W. Eq. 8; 13 N. S. W. N. 129, 197.—**AUS.**

k. — *In identity of subject-matter.*—Deft. induced pltf.'s agent to agree with him for the sale of Blackacre, the agent supposing he was selling Whitacre. The agreement was set aside with costs, it appearing that the agent's error was either fraudulently occasioned, or confirmed by, or at all events well known to, deft., when he entered into the agreement.—*TALBOT v. HAMILTON* (1853), 4 Gr. 200.—**CAN.**

Held: the lessor A. was entitled to have the contract set aside.—*WIRE v. PEMBERTON*, *PEMBERTON v. WIRE* (1854), 23 L. T. O. S. 345.

1923. Rescission by waiver—Necessity for simultaneous assent of both parties.]—A valid contract cannot be waived unless both parties assent at the same time to the proposal to put an end to it.—*WHITTAKER v. FOX* (1865), 13 L. T. 588; 14 W. R. 192.

1924. Action for specific performance, rescission, & forfeiture—Whether time must be of the essence—Purchaser persistently refusing to complete.]—In an action for specific performance of a contract & also for rescission & forfeiture of the deposit, it is not necessary, where deft. purchaser has persistently refused to complete the purchase & a long period has elapsed since the date when the contract should have been performed, that time should be made of the essence of the contract. In such a case the agreement can be rescinded & the deposit forfeited notwithstanding that specific performance is sought in addition. The ordinary rule prevails that pltf. claiming alternative reliefs can choose at the hearing which relief he will

1. — *Refusal by purchaser to execute mortgage except on payment of part of costs—Refusal not going to root of contract.*—*RAY v. DAVIES* (1909), 9 C. L. R. 160.—**AUS.**

m. — *Inadequate consideration for agreement to cancel amounting to fraud.*—*WADIN v. BOYD* (Sask.) (1922), 65 D. L. R. 302.—**CAN.**

n. *What amounts to rescission—Whether variation of agreement as to part sufficient.*—The variation of an agreement for the sale of a lot of land, by a subsequent conveyance of a part of the lot to the purchaser in fee simple, will not of itself operate as a rescission of the agreement as to the remainder.—*BARLOW v. WILLIAMS* (1906), 16 Man. L. R. 164; 4 W. L. R. 233.—**CAN.**

o. *Rescission by parol—Before breach—On total abandonment of contract.*—An agreement for the sale of lands, good under Stat. Frauds, may be rescinded before breach of it by parol, provided there is a total abandonment of the whole contract, & not merely a partial waiver of some of its terms; nor does the validity of such rescission depend on the existence of a consideration.—*BARCLAY v. PROAS* (1878), 11 E. D. 317.—**CAN.**

p. *Effect of election to rescind—Whether right to sue for purchase-money waived.*—*FRASER v. RYAN* (1897), 21 A. R. 441.—**CAN.**

q. — *—*—*SCHURMAN v. EWING & MOORE* (Alta.) (1908), 7 W. L. R. 610.—**CAN.**

r. — *—*—*DAVIDSON v. SHARPE* (Sask.) [1920] 1 W. W. R. 888; 52 D. L. R. 186; 60 S. C. R. 72.—**CAN.**

t. — *Where a vendor under an agreement of sale of land has by obtaining an order nisi for cancellation, elected the remedy of determination or cancellation of the agreement, he cannot afterwards seek payment of any part of the purchase-money.*—*MILOS v. SCHMIDT*, [1923] 4 D. L. R. 1212; 16 Sask. L. R. 464; [1923] 1 W. W. R. 1444; [1923] 3 W. W. R. 1278.—**CAN.**

aa. — *Loss of right to enforce judgment for purchase-money.*—The vendor recovered a judgment against his vendee for a portion of the purchase-money. Afterwards he wrote the vendee a letter cancelling the agreement:—*Held:* having cancelled the contract, he could not afterwards enforce his judgment.—*CAMERON v. BRADBURY* (1862), 9 Gr. 67.—**CAN.**

bb. *Loss of right to rescind—By enforcement of payment of purchase-*

money.—*GUEST v. BOSTON* (1904), 7 Terr. L. R. 173.—**CAN.**

cc. — *—*—Judgment for the recovery of money due under an agreement for the sale of land & full foreclosure & cancellation of the contract are inconsistent, & a vendor who has obtained judgment, issued executions & realised thereon for most of the money, cannot afterwards have the contract cancelled, without, at any rate, giving back the money realised on his first election, except that executions will not have to be withdrawn in so far as they cover costs.—*DE VISSCHER v. WEIR*, [1918] 2 W. W. R. 399; 11 Sask. L. R. 180; 40 D. L. R. 757.—**CAN.**

dd. *Action for damages, specific performance, rescission & sale to realise lien—Vendor must show good title.*—In an action by a vendor against a purchaser on an executory contract for the purchase of land, where pltf. is not merely seeking a declaration that he has effectively exercised a legally binding express provision for rescission, or a legally binding express provision or the implied provision for resale, he may claim, (1) damages, (2) specific performance, (3) rescission, (4) sale to realise vendor's lien. In order to succeed the vendor must show a good title.—*MERHAM v. PAISON* (1908), 8 W. L. R. 340; 1 Alta. L. R. 262.—**CAN.**

ee. *Relief of purchaser in discretion of court.*—In passing c. 31 of 1917 (1st sess.) the Legislature in taking away the right of a vendor of land of cancellation by notice under the terms of the contract & enforcing a resort to the cts. for cancellation, was protecting the purchaser from the exercise of such right & leaving the question of cancellation to the discretion of the ct. Apart from such statute the ct. has a right, upon application by a vendor of land for cancellation of the contract, to fix a time within which the purchaser may pay.—*PROVINCIAL SECURITIES CO., LTD. & MCBAIN v. GRATIAS*, [1919] 2 W. W. R. 83; 12 Sask. L. R. 165; 46 D. L. R. 104.—**CAN.**

ff. *Acceptance by purchaser of notice of rescission—How far conclusive.*—*MILALEY v. MCNALLY* (Sask.) (1921), 62 D. L. R. 692.—**CAN.**

gg. *Amount due to vendor on cancellation likely to be greater than value of property—Order for cancellation conditional on payment into court.*—*MUNNONS LAND SALES CO., LTD. v. FRIESEN*, [1925] 3 D. L. R. 335; [1925] 1 W. W. R. 894; 19 Sask. L. R. 590.—**CAN.**

Sect. 1.—Rescission and resale by vendor: Sub-sect. 1, A. & B.; sub-sect. 2.]

ask for.—**FARRANT v. OLIVER** (1922), 91 L. J. Ch. 758; 127 L. T. 145; 66 Sol. Jo. 283.

Annotation:—Apld. Glover v. Broome, [1926] W. N. 46.

B. Effect of Order for Specific Performance.

1925. Default in payment after decree—Right to rescind.—After decree against a purchaser for specific performance, deft. made default in payment of the purchase-money:—*Held*: the vendor was entitled to rescind the contract.—**FOLIGNO v. MARTIN** (1853), 16 Beav. 586; 51 E. R. 906.

Annotations:—Folld. Sweet v. Meredith (1863), 4 Giff. 207; *Watson v. Cox* (1873), 27 L. T. 814. **Expld. Hutchings v. Humphreys** (1885), 54 L. J. Ch. 650. **Refd. Henty v. Schröder** (1879), 12 Ch. D. 666.

1926. ———.]—Where, after a decree against a purchaser for specific performance, he made default in payment of the purchase-money, the ct., upon the application of the vendor, rescinded the contract & stayed all further proceedings in the cause, except as to any application which might be made by the vendor to assess the damages incurred by him in consequence of the breach of the contract.—**SWEET v. MEREDITH** (1863), 4 Giff. 207; 32 L. J. Ch. 147; 7 L. T. 664; 9 Jur. N. S. 569; 66 E. R. 680.

Annotations:—Folld. Watson v. Cox (1873), 27 L. T. 814. **Consd. Hutchings v. Humphreys** (1885), 54 L. J. Ch. 650. **Refd. Henty v. Schröder** (1879), 12 Ch. D. 666.

1927. ———. **With costs.**]—A decree for specific performance was made against a purchaser in possession, but he was unable to complete the purchase. The ct. rescinded the contract & ordered the purchaser to pay to the vendor the rents received by him, together with the costs of suit & those occasioned by the non-completion of the purchase.—**CLARK v. WALLIS** (1866), 35 Beav. 460; 55 E. R. 974.

Annotation:—Consd. Hutchings v. Humphreys (1885), 54 L. J. Ch. 650.

1928. ———. ———.]—Pltf. in a specific performance suit may obtain a rescission of the contract on deft.'s default in obeying the decree.

A decree was made for specific performance of an agreement to take a lease of a house, & an order on further consideration for payment of a sum of money by deft., & thereupon for the execution of the lease. Deft. having made default & absconded, an order was made on pltf.'s motion for rescission of the contract, & the stay of all proceedings in the suit except as to pltf.'s costs & damages.—**WATSON v. COX** (1873), L. R. 15 Eq. 219; 42 L. J. Ch. 279; 27 L. T. 814; 21 W. R. 310.

Annotations:—Expld. Hutchings v. Humphreys (1885), 54 L. J. Ch. 650. **Refd. Henty v. Schröder** (1879), 12 Ch. D. 666.

1929. ———. ———.]—In a vendor's action for specific performance, judgment had been recovered against deft. in default of appearance, & an order made on further consideration that deft. should pay the costs; that the usual account of rents, profits, interest, & costs should be taken, & on payment of the balance a conveyance should be executed to deft. The accounts had been taken into chambers, but not proceeded with.

The vendor now moved, upon evidence that the purchaser had no means & could not complete, for rescission of the contract & stay of all proceedings except for the recovery of costs:—*Held*: the only order the ct. could make was that the contract be rescinded & all proceedings stayed, deft. to pay the costs of this application.—**JEFFERY v. STEWART** (1899), 80 L. T. 17.

Annotation:—Refd. Olde v. Olde (1903), 73 L. J. Ch. 81.

1930. ———. ———.]—After a decree for specific performance of an agreement against a purchaser who was unable to complete, on a motion by pltf. that the agreement might be rescinded, & all further proceedings in the action stayed except as to any application which might be made to the ct. to award & assess the damages which pltf. had sustained by the breach of the agreement:—*Held*: pltf. were only entitled to have the agreement rescinded, & could not at the same time claim damages for its breach.—**HENTY v. SCHRÖDER** (1879), 12 Ch. D. 666; 48 L. J. Ch. 792; 27 W. R. 833.

Annotations:—Folld. Hutchings v. Humphreys (1885), 54 L. J. Ch. 650. **Consd. Baker v. Williams** (1893), 62 L. J. Ch. 315. **Folld. Jones v. Lapthorne** (1893), 37 Sol. Jo. 268; *Jeffery v. Stewart* (1899), 80 L. T. 17.

1931. ———. ———.]—After a decree for specific performance of a contract, if the party in whose favour the decree has been made is unable or neglects to carry the decree into effect, the party against whom the decree was made is entitled to an order for rescission of the contract, retaining the benefit of any direction as to costs of the action but not to damages or to occupation rent. He is also entitled to the costs of obtaining the order for rescission.—**HUTCHINGS v. HUMPHREYS** (1885), 54 L. J. Ch. 650; 52 L. T. 690; 33 W. R. 563.

Annotation:—Refd. Jones v. Lapthorne (1893), 37 Sol. Jo. 268.

1932. ———. ———.]—After a judgment for specific performance against a purchaser, with declaration of lien, & liberty to apply to enforce it, the purchaser made default. On motion by the vendor, the ct. made an order to rescind the agreement.—**BAKER v. WILLIAMS** (1893), 62 L. J. Ch. 315; 68 L. T. 634; 41 W. R. 375; 37 Sol. Jo. 231; 3 R. 305.

1933. ———. ———.]—**JONES v. LAPTHORNE** (1893), 37 Sol. Jo. 268.

1934. ———. ———.]—**JACKSON v. DE KADICH** (1904), 48 Sol. Jo. 687.

Annotation:—Consd. Hall v. Burnell, [1911] 2 Ch. 551.

1935. ———. ———.]—**HALL v. BURNELL**, No. 1985, *post*.

1936. ———. ———.]—**JONES v. BURNELL**, [1911] W. N. 153.

1937. ———. ———.]—**HOLFORD v. TRIM**, No. 1989, *post*.

1938. ———. **Whether vendor entitled to damages.**]—**SWEET v. MEREDITH**, No. 1926, *ante*.

1939. ———. ———.]—**HENTY v. SCHRÖDER**, No. 1930, *ante*.

1940. ———. ———.]—**HUTCHINGS v. HUMPHREYS**, No. 1931, *ante*.

1941. ———. ———.]—**JACKSON v. DE KADICH** (1904), 48 Sol. Jo. 687.

Annotation:—Consd. Hall v. Burnell, [1911] 2 Ch. 551.

PART VIII. SECT. 1, SUB-SECT. 1.—B.

1925 i. Default in payment after decree—Right to rescind.]—Where a vendor has obtained a judgment for specific performance of a contract for the sale of land against a purchaser in default of appearance & delivery of defence, & the purchaser does not comply with such judgment, the vendor will not, at all events without actual notice to the

purchaser, be entitled to an order giving liberty to rescind & re-sell & charge the purchaser with any deficiency in accordance with a clause incorporated in the contract, unless the existence of such a clause was indicated in the statement of claim, upon which the judgment for specific performance was given. **Griffiths v. Vezev** ([1906] 1 Ch. 796) considered.—**NODEN v. MASON**, [1926] V. L. R. 41; 47 A. L. T. 101;

[1926] Argus L. R. 86.—**AUS.**

1925 ii. ———. ———.]—**TYLEE v. LANDES** (1868), 15 Gr. 99.—**CAN.**

h. Vendor's action for specific performance—Property in occupation of purchaser—Right of vendor to possession before time allowed for purchaser to remedy default.—**WALKER v. BARKER** (Alta.) (1913), 25 W. L. R. 331.—**CAN.**

1942. — Right to rents received by purchaser.]—CLARK *v.* WALLIS, No. 1927, *ante*.

1943. — Whether vendor entitled to occupation rent.]—HUTCHINGS *v.* HUMPHREYS, No. 1931, *ante*.

1944. — Form of order for rescission.]—Form of order in a vendor's action where judgment for specific performance with costs has been obtained & the purchaser having subsequently failed to comply with the judgment, the vendor moves to rescind the contract & to stay further proceedings except for recovery of the costs of the action & motion.—OLDE *v.* OLDE, [1904] 1 Ch. 35; 73 L. J. Ch. 81; 89 L. T. 604; 52 W. R. 260.

1945. Rescission in default of specific performance—Single decree.]—FORSTER *v.* GREAT EASTERN RY. CO., [1868] W. N. 122.

1946. Vendor's action for specific performance—Whether vendor may have judgment for rescission—Admission of unwillingness to perform.]—Where upon the trial of a vendor's action for specific performance of a contract for the sale of land defendant makes default in appearance, but has by his pleading admitted that he is unwilling to perform the contract, the vendor is entitled only to the relief claimed & not to a judgment for rescission.—STONE *v.* SMITH (1887), 35 Ch. D. 188; 56 L. J. Ch. 871; 56 L. T. 333; 35 W. R. 545.

*Annotations:—*Consd. Farrant *v.* Olver (1922), 91 L. J. Ch. 758. *Refd.* Cooper *v.* Morgan, [1909] 1 Ch. 261.

1947. —.]—FARRANT *v.* OLVER, No. 1924, *ante*.

1948. Rescission ordered in purchaser's action for specific performance—Vendor failing to clear incumbrance.]—Applt. agreed to sell certain parcels of land to resp. The purchase was to be completed by a fixed date, & time was to be "in all respects strictly of the essence of the contract." There was a small balance due on an outstanding mtgee., & the vendor had agreed with the mtgee. before the date fixed for the completion of the sale to pay off the mtgee., but it was not actually paid off before that date. The purchaser was accidentally prevented from completing at the fixed date, & the vendor claimed a right to rescind the contract. In an action by the purchaser for specific performance:—*Held*: the vendor was entitled to rescind, notwithstanding the fact that he had not paid off the mtgee., & procured the legal estate to be revested in him, the unrevoked consent of the mtgee. being effectual though revocable, to validate his title.—BRICKLES *v.* SNELL, [1916] 2 A. C. 599; 86 L. J. P. C. 22; 115 L. T. 568, P. C.

*Annotation:—*Refd. *Re* Hailes & Hutchinson's Contract, [1920] 1 Ch. 233.

SUB-SECT. 2.—RESALE.

1949. When right arises—Default in payment.]—A. agreed with B. by deed that he, A., would, on payment of £900, as thereafter mentioned, grant, sell, & convey to B. the messuage, lands, & premises therein mentioned; & B. covenanted to

pay the sum on or before Jan. 1, then next, or whenever a good title to the messuage, etc., should be tendered to him; but it was agreed that if B. should, on or before Jan. 1, be desirous that that sum should remain a charge on the premises, then B. might require same, so that upon the completion by A. of the conveyances, B. should execute to A. proper conveyances for securing the sum of £900 on the premises, with interest. Covenant by B. to pay the interest so long as the principal sum should remain unpaid. Proviso, that in case the interest should be in arrear thirty days next after same should have become due, B. should be considered as a tenant to A. of the messuage, lands, etc., from the date thereof, at the yearly rent of £40 10s. payable on Apr. 16 & Oct. 16 in every year; & it should be lawful for A., his heirs & assigns, to enter & distrain, & to sell & dispose of the distress, or otherwise to deal with same, in like manner as in distresses for rent reserved by lease, to the end that A. might be fully paid & satisfied the interest & costs. B. gave due notice that he would require the purchase-money to remain a charge on the premises for five years; he was let into possession & received the rents, & in July, 1828, became bkpt., & half a year's interest being in arrear for more than thirty days, A. distrained on the tenants then in possession of the premises. The assignees paid the amount of the distress. On Oct. 16, 1828, after bkpt. had obtained his certificate, another half year's interest became due, & an action of covenant was brought against bkpt. to recover same:—*Held*: the unpaid vendor was entitled to have the estate resold, & the produce & interest applied in payment of the purchase-money, & to prove against the estate for the residue.—HOPE *v.* BOOTH (1830), 1 B. & Ad. 498; 9 L. J. O. S. K. B. 21; 109 E. R. 872.

1950. —.]—TANNER *v.* RADFORD (1834), 4 My. & Cr. 519, n.; 41 E. R. 200.

*Annotation:—*Refd. Harding *v.* Harding (1839), 4 My. & Cr. 514.

1951. —.]—BUCKLEY *v.* BARTON (1843), 1 L. T. O. S. 227.

—*Enforcement of lien.*—*See, generally*, LIEN, Vol. XXXII., p. 293, Nos. 682–689.

—*Compulsory purchase.*—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 231, Nos. 1193–1202.

1952. Recovery of expenses of resale.]—TANNER *v.* RADFORD (1834), 4 My. & Cr. 519, n.; 41 E. R. 200.

*Annotation:—*Refd. Harding *v.* Harding (1839), 4 My. & Cr. 514.

1953. —.]—HAWKINS *v.* BONE (1865), 4 F. & F. 311, N. P.

1954. Liability for deficiency.]—A purchaser will not be relieved from his purchase under order of the ct., except upon the terms of making up the deficiency upon a resale.—HARDING *v.* HARDING (1839), 4 My. & Cr. 514; 9 L. J. Ch. 124; 3 Jur. 1164; 41 E. R. 198, L. C.

1955. —.]—Where on a sale by auction the purchaser makes default, the omission to resell

tion money, the sale of the property should be provided for, & in case the same does not realise sufficient to pay the money with six years' arrears of interest there should be a personal decree for payment of the balance by the purchaser.—SKELLY *v.* SKELLY (1871), 18 Gr. 495.—CAN.

m. — *Part payment of purchase-money.*—PARENT *v.* BOURBONNIÈRE (1900), 20 C. L. T. 358; 13 Man. L. R. 172.—CAN.

n. — *Plt., by written agreement, sold certain lots to deft.*

PART VIII. SECT. 1, SUB-SECT. 2.

1949 i. When right arises—Default in payment.]—Independently of any express provision, a right of resale exists in favour of the vendor under an agreement of sale upon default by the purchaser.—MOODIE *v.* YOUNG (1908), 9 W. L. R. 310; 1 Alta. L. R. 337.—CAN.

1949 ii. —.]—ROBINSON *v.* STARR (1913), 20 W. L. R. 261; 14 D. L. R. 767; 23 Man. L. R. 84.—CAN.

k. — *Refusal to complete.*—Where a sale has proved abortive by reason of the purchaser refusing to complete the contract, a resale will be granted *ex parte*, but if any relief is asked against such defaulting purchaser, notice must be served on him.—MARTIN *v.* PURDY (1859), 1 Ch. Ch. 263.—CAN.

l. *Recovery of expenses of resale—Deposit retained as set-off.*—TILT *v.* KNAPP (1882), 9 P. R. 314.—CAN.

1954 i. Liability for deficiency.]—In case of a decree for unpaid considera-

Secl. 1.—Rescission and resale by vendor: Sub-sect. 2. Sect. 2: Sub-sects. 1 & 2, A.]

under the usual clause is not necessarily a breach of trust.

We always have a condition upon a sale by auction that if the buyer does not within a given time pay the price, it shall be lawful to resell the property; & that whatever is the loss sustained on that resale, it shall fall upon the first purchaser (LORD ST. LEONARDS, C.).—*THOMSON v. CHRISTIE* (1852), 1 Macq. 236, H. L.

1956. ———.]—*HAWKINS v. BONE* (1865), 4 F. & F. 311, N. P.

1957. ———. **Part payment of purchase-money—Retention as set-off.**—Defts. agreed to sell a house to pltf.'s assignors, who paid a deposit which was to be forfeited if the sale was not completed, & a further sum which was not to be forfeited. The sale went off, & the purchasers assigned to pltf. their right to recover the further sum. Defts. attempted to resell, & while these attempts were being made pltf. sued them for the further sum:—*Held*: the sum claimed could not be retained by defts. as a set-off against any loss that they might suffer on the resale, & pltf. was entitled to recover.—*HARRISON v. HOLLAND*, [1922] 1 K. B. 211; 91 L. J. K. B. 337; 126 L. T. 390; 38 T. L. R. 157; 66 Sol. Jo. 217, C. A.

Annotation:—*Consd.* Mayson v. Clouet, [1924] A. C. 980.

Proof for deficiency.—*See* BANKRUPTCY, Vol. IV., pp. 255, 388, 389, Nos. 2430, 3555, 3557.

SECT. 2.—FORFEITURE AND RECOVERY OF DEPOSIT.

SUB-SECT. 1.—IN GENERAL.

1958. **Nature of deposit—Whether security for performance.**—*COLLINS v. STIMSON*, No. 1999, *post*.

1959. ———.]—On a sale of real estate the purchaser paid £500, which was stated in the contract to be paid "as a deposit, & in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, & that if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell & to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, & after repeated delays, the vendor resold the property for the same price. The original purchaser having brought an action for specific performance:—*Held*: (1) the purchaser had lost by his delay his right to enforce specific performance. (2) The deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, & pltf. having failed to perform his contract within a reasonable time, had no right to a return of the deposit.

(3) In order to enable the vendor to act [retain deposit] . . . there must be acts on the part of

the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance but which would make his conduct amount to a repudiation on his part of the contract (COTTON, L.J.).

(4) The effect of this clause is . . . that the purchaser seeking damages is no longer obliged to prove his willingness & readiness to complete on the day named, but may still recover if he can prove such readiness & willingness within a reasonable time after the stipulated day (FRY, L.J.).—*HOWE v. SMITH* (1884), 27 Ch. D. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 48 J. P. 773; 32 W. R. 802, C. A.

Annotations:—As to (2) *Fold*. *Soper v. Arnold* (1887), 35 Ch. D. 384; *Hall v. Burnell*, [1911] 2 Ch. 551. *Apld.* *Mayson v. Clouet*, [1924] A. C. 980. *Consd.* *Farr, Smith v. Messers* (1927), 44 T. L. R. 48. *Reid.* *Soper v. Arnold* (1887), 37 Ch. D. 86; *Jackson v. De Kadiach* (1904), 48 Sol. Jo. 687; *Sprague v. Booth*, [1909] A. C. 576; *Monnickendam v. Leanse* (1923), 39 T. L. R. 445. As to (3) *Apld.* *Levy v. Stogdon*, [1898] 1 Ch. 478. *Consd.* *Chillingworth v. Esche*, [1924] 1 Ch. 97. *Reid.* *Cornwall v. Henson*, [1900] 2 Ch. 298; *Stickney v. Keeble*, [1915] A. C. 386; *Harrison v. Holland & Hannen & Cubitts* (1921), 91 L. J. K. B. 337; *Cohen v. Sellar*, [1926] 1 K. B. 536. As to (4) *Reid.* *Akt. Reidar v. Arcos*, [1927] 1 K. B. 352. *Generally*, *Reid.* *Bishop v. Taylor* (1891), 60 L. J. Q. B. 556.

1960. ———.]—The conditions in a contract of sale of land provided that the purchaser should pay a deposit, & that if he failed to comply with the conditions the deposit should be forfeited & the vendors should be at liberty to resell. The purchaser paid the deposit, & accepted the title, but when the time for completion arrived he could not provide the residue of the purchase-money. The vendors thereupon gave the purchaser notice that the contract was rescinded & the deposit forfeited. Three years afterwards, the vendors having contracted to sell to another purchaser, it was decided that their title was bad, owing to a defect which had appeared upon the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake & failure of consideration:—*Held*: the title having been accepted, & the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit.

The deposit serves two purposes, if the purchase is carried out it goes against the purchase-money, but its primary purpose is this, it is a guarantee that the purchaser means business (LORD MACNAGHTEN).—*SOPER v. ARNOLD* (1889), 14 App. Cas. 429; 59 J. L. Ch. 214; 61 L. T. 702; 38 W. R. 449; 5 T. L. R. 698, H. L.

Annotations:—*Consd.* *Chillingworth v. Esche*, [1924] 1 Ch. 97. *Reid.* *May v. Platt*, [1900] 1 Ch. 616; *Monnickendam v. Leanse* (1923), 39 T. L. R. 445. *Mentd.* *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326.

———.]—*LEVY v. STODDON*, No. 1971, *post*.

1962. ———.]—*HALL v. BURNELL*, No. 1985, *post*.

1963. ———.]—*HOLFORD v. TRIM*, No. 1989, *post*.

1964. ———. **In absence of express agreement.**—*CHILLINGWORTH v. ESCHÉ*, No. 2006, *post*.

Some payments were made, & deft. defaulted as to others. Under a provision in the agreement pltf. cancelled it, & having sold a portion of the property now sued deft. for balance of purchase money:—*Held*: he could not recover.—*TOFFET v. AGNEW* (Sask.) (1908), 9 W. L. R. 610.—*CAN.*

o. Right of vendor to declaration of rights of purchase to facilitate resale of property—After ejectment of pur-

chaser for default.—Where under the terms of the contract the purchaser is let into possession, but on his default the vendor brings ejectment & turns him out, the vendor cannot afterwards obtain specific performance, but he has a right to come into this ct., in order that either the contract may be specifically performed or the purchaser's rights so bound as to enable the vendor to dispose of the property.—*O'NEAL v. MCMANON* (1851), 2 Gr. 145.—*CAN.*

p. Effect of election to resell—Waiver of right to sue for purchase money.—*MCCORD v. HARPER* (1876), 26 C. P. 96.—*CAN.*

q. What amounts to resale—Whether transfer to guarantor of purchase sufficient.—*CAMPBELL v. MUNROE* (1913), 24 W. L. R. 732; 4 W. W. R. 1007; 12 D. L. R. 289; 6 Alta. L. R. 176.—*CAN.*

1965. — **Part payment.**—*HOWE v. SMITH*, No. 1959, *ante*.
 1966. — — — — —.]—*SOPER v. ARNOLD*, No. 1960, *ante*.
 1967. — — — — —.]—*LEVY v. STODDON*, No. 1971, *post*.
 1968. — — — — —.]—*HALL v. BURNELL*, No. 1985, *post*.
 1969. — — — — —.]—*HOLFORD v. TRIM*, No. 1989, *post*.
 1970. — — — — —.]—*CHILLINGWORTH v. ESCHÉ*, No. 2006, *post*.

SUB-SECT. 2.—FORFEITURE.

A. In General.

1971. **General rule—Forfeiture on default by purchaser.**—The deposit is not merely a part payment of the purchase-money, but constitutes a security for the completion of the purchase, so that if the purchaser fails to perform his part the vendor may retain it. On the other hand if the vendor fails to perform the contract on his part, & there is no default on the part of the purchaser, the latter may, in the absence of a stipulation to the contrary, recover the deposit from the vendor (*STIRLING, J.*).—*LEVY v. STODDON*, [1898] 1 Ch. 478; 67 L. J. Ch. 313; 78 L. T. 185; *on appeal*, [1899] 1 Ch. 5, C. A.

Annotations:—*Reid*, *Cornwall v. Henson*, [1899] 2 Ch. 710; *Davies v. Thomas*, [1900] 2 Ch. 462.

1972. — — — — —.]—*BEYFUS v. LODGE*, No. 2072, *post*.

1973. **What amounts to default—Failure to complete on appointed day—Time not of the essence—Necessity for notice of intention to compel strict performance.**—In general, the time appointed for the performance of a contract is of the essence of the contract itself.

But, where, from the nature of the subject-matter, the exact day does not appear to be material, a party who seeks to exact a forfeiture in case of failure on the appointed day must give notice to the other party that he intends to hold him to the day.—*CARPENTER v. BLANDFORD* (1828), 8 B. & C. 575; *Dan. & Ll.* 175; 3 Man. & Ry. K. B. 93; 7 L. J. O. S. K. B. 58; 108 E. R. 1156.

Annotation:—*Reid*, *Tilley v. Mollett* (1864), 16 C. B. N. S. 298.

1974. — — — — — **Time of the essence—Stipulation in nature of penalty.**—A co. incorporated by Act of Parliament for making a dock agreed with a landowner to purchase a piece of land for £4,000, of which £2,000 was to be paid at once, & the

remaining £2,000 on a future day named in the agreement, with a provision that if the whole of the £2,000 & interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of their former estate, without any obligation to repay any part of the purchase-money:—*Held*: this stipulation was in the nature of a penalty, from which the co. was entitled to be relieved on payment of the balance of the purchase-money, with interest.—*Re DAGENHAM (THAMES) DOCK CO., Ex p. HULSE* (1873), 8 Ch. App. 1022; 43 L. J. Ch. 261; 38 J. P. 180; 21 W. R. 898, L. J.

Annotations:—*Apld.* *Kilmer v. British Columbia Orchard Lands*, [1913] A. C. 319. *Reid*, *Cornwall v. Henson*, [1900] 2 Ch. 298. *Mentid.* *Re Dixon*, *Heynes v. Dixon*, [1900] 2 Ch. 561.

1975. **Whether purchaser released after forfeiture.**—Purchaser before a master submitting to forfeit his deposit, not bound to proceed in the purchase.—*SAVILE v. SAVILE* (1721), 1 P. Wms. 745; 2 Eq. Cas. Abr. 679, pl. 4; 24 E. R. 596, L. C.

Annotation:—*Consd.* *Palmer v. Temple* (1839), 9 Ad. & El. 508.

1976. — — — — —.]—A purchaser has no right to say that he will put an end to the agreement, forfeiting his deposit (*LORD ELDON, C.*).—*CRUTCHLEY v. JERNINGHAM* (1817), 2 Mer. 502; 35 E. R. 1032, L. C.

1977. **Relief against forfeiture—On what terms granted.**—(1) The bill praying an inquiry into the title & a specific performance, on deft.'s motion after answer an inquiry was directed as to the title, at what time the abstract was delivered, & whether it was sufficient: but the ct. would not decide upon any matter of relief.

(2) Relief against forfeiture of the deposit upon putting the other party in the same situation as if the contract had been performed at the time agreed.—*MOSS v. MATTHEWS* (1796), 3 Ves. 279; 30 E. R. 1010, L. C.

Annotations:—*As to (1)* *Reid*, *Gibson v. Clarke* (1813), 2 Ves. & B. 103; *Paton v. Rogers* (1813), 1 Ves. & B. 351.

1978. **Deposit in hands of agent—At whose risk.**—Vendor, resisting an application by the purchaser for payment into ct. of the deposit, in the hands of the vendor's agent, charged with a loss by the agent's failure.

This is not strictly a sale by auction. Upon a sale by auction the vendor determines who is to receive the deposit. The auctioneer is not a stakeholder of the purchaser: at least not of his choice. If he were a stakeholder for both parties, either would have a right to propose to change the stakeholder; & the party refusing takes upon himself the risk.

PART VIII. SECT. 2, SUB-SECT. 1.

1965 i. **Nature of deposit—Part payment.**—Where by the terms of an agreement of sale the purchase-money is payable by instalments, & a cash, or "down," payment is made & referred to in the agreement, the payment is not to be regarded as a deposit, & therefore forfeited, unless there is something specifically stated in the agreement to that effect.—*TAVENDER v. EDWARDS* (1908), 1 Alta. L. R. 333; 8 W. L. R. 308.—CAN.

1965 ii. — — — — —.]—*MEICHEN v. KUFFEN* (1914), 27 W. L. R. 881.—CAN.

r. — — — — — **Or loan—Construction of contract.**—*NEBRASKA INVESTMENT CO. v. MORSEY ISLAND LUMBER CO.* (1914), 27 W. L. R. 973; 8 W. W. R. 1940; 17 D. L. R. 790; 19 B. C. R. 341.—CAN.

PART VIII. SECT. 2, SUB-SECT. 2.—A.

1971 i. **General rule—Forfeiture on**

default by purchaser.—*DELONG v. OLIVER* (1867), 26 U. C. R. 612.—CAN.

1971 ii. — — — — —.]—Where a contract for the purchase of real estate is rescinded, owing to the default of the purchaser, he cannot recover back his deposit.—*ROBERTSON v. DUMBLE* (1883), 1 Man. L. R. 321.—CAN.

1971 iii. — — — — —.]—*PERKINS v. JONES* (1905), 7 Terr. L. R. 103; 1 W. L. R. 41.—CAN.

1971 iv. — — — — —.]—*YOUNG v. PLOTYMEKI* (1912), 23 O. W. R. 56; 4 O. W. N. 94; 5 D. L. R. 887.—CAN.

1971 v. — — — — —.]—*STINSON v. HOAR* (1913), 25 W. L. R. 53; 4 W. W. R. 1273; 13 D. L. R. 524; 18 B. C. R. 360.—CAN.

1971 vi. — — — — —.]—*WHITELY v. RICHARDS* (1920), 48 O. L. R. 537; 57 D. L. R. 728; 19 O. W. N. 357.—CAN.

1971 vii. — — — — —.]—*CHAMBERS & CAMPBELL v. MERCHANTS BANK OF CANADA* (Alta.), [1922] 1 W. W. R.

437; 68 D. L. R. 381.—CAN.

1971 viii. — — — — —.]—*SANDERSON v. MOIRTON* (1923), 54 O. L. R. 479.—CAN.

1971 ix. — — — — —.]—*BALVANTA AP-PAJI v. WHATEKAR BIRA* (1897), 1 L. R. 23 Bom. 56.—IND.

1971 i. **Relief against forfeiture—On what terms granted.**—Where a purchaser who sues to recover payments made upon an agreement for sale which has been cancelled does not offer to carry out his part of the contract he is not entitled to be relieved from forfeiture of the money paid, & if he is relieved terms may be imposed, such as payment for use & occupation while in possession, & costs.—*COWIE v. McDONALD* (Sask.), [1917] 2 W. W. R. 356; 34 D. L. R. 159.—CAN.

t. — — — — — **Loss of right by delay.**—*DOBSON v. DOUMANI* (1909), 9 W. L. R. 692; 2 Sask. L. R. 190.—CAN.

s. — — — — —.]—*BUTCHART v. MACLEAN* (B. C.) (1911), 17 W. L. R. 432.—CAN.

Sect. 2.—Forfeiture and recovery of deposit: Sub-sect. 2, A., B., C. & D.; sub-sect. 3, A.]

The motion in ct. has at least as much weight as a private proposition. This proposition was resisted upon the ground that the deposit was secure in the hands of the agent. The refusal to concur in that proposition throws the risk of his credit on the party refusing. Under these circumstances, without entering into the general question, it would be too hard to throw that loss upon this purchaser (GRANT, M.R.).—FENTON v. BROWNE, BROWNE v. FENTON (1807), 14 Ves. 144; 33 E. R. 476.

Annotations:—Consd. Smith v. Jackson (1816), 1 Madd. 618. **Mentd.** Brooke v. Routhwalte (1846), 5 Hare, 298.

1979. Action for specific performance, rescission & forfeiture—Whether time must be of the essence—Purchaser persistently refusing to complete.]—FARRANT v. OLVER, No. 1924, *ante*.

Sale of settled land—Whether forfeited deposit is capital or income.]—See SETTLEMENTS, p. 677, No. 2131, *post*.

Regarded as liquidated damages.]—See DAMAGES, Vol. XVII., p. 147, Nos. 494–497.

Forfeiture under condition of contract.]—See Part IV., Sect. 2, sub-sect. 16, *ante*.

B. Whether Stipulation for Forfeiture Necessary.

1980. Intention that deposit should be forfeited—How ascertained—Terms of agreement.]—PALMER v. TEMPLE, No. 1981, *post*.

1981. Whether deposit forfeited in absence of stipulation—Provision for default—Payment of sum as liquidated damages.]—*Qu.*: where A. agrees to demise a house to B. for a term, in consideration of £300 then paid “by way of deposit, & in part of £5,500,” the whole purchase-money, possession to be delivered & accepted on a day named, & B. agrees to accept such demise, but, on the day, refuses to accept, & A. afterwards disposes of the house to a third party, whether, in the absence of any provision that the deposit shall be forfeited, or of any clause in the agreement, except as above, showing the intention of the parties in this respect, B. can recover the deposit from A.?

The intention may be collected from other parts of the agreement. Thus, where there was a distinct clause providing that either party making default should forfeit £1,000:—**Held**: the deposit was not to be forfeited, & might be recovered back on A.’s disposing of the house as above, but it could not be recovered back before A. disposed of the house.—PALMER v. TEMPLE (1839), 9 Ad. & El. 508; 1 Per. & Dav. 379; 8 L. J. Q. B. 179; 112 E. R. 1304.

Annotations:—Consd. Hinton v. Sparkes (1868), L. R. 3 C. P. 161. **Distd.** Howe v. Smith (1884), 27 Ch. D. 89; Cornwall v. Henson, [1899] 2 Ch. 710. **Consd.** Harrison v. Holland & Hannen & Cubitts (1921), 91 L. J. K. B. 337. **Refd.** Ockenden v. Henly (1858), 27 L. J. Q. B. 361; Casson v. Roberts (1862), 32 L. J. Ch. 105; Bishop v. Taylor (1891), 60 L. J. Q. B. 556; Chillingworth v. Esche, [1924] 1 Ch. 97.

1982. — Purchaser in default.]—Where a purchaser became bkpt. after signing an agreement for the purchase of certain property sold by auction by order of the ct., & his assignees refused to complete the purchase:—**Held**: the assignees were not entitled to the deposit which had been paid by the bkpt. on signing the agreement, though the conditions of sale did not stipulate for the forfeiture of the deposit in the event of the purchaser making default.—DEPREE v. BEDBOROUGH (1863), 4 Giff. 479; 3 New Rep. 187; 33 L. J. Ch. 134; 9 L. T. 532; 12 W. R. 191; 66 E. R. 795; *sub nom.*

DEPREE v. BEDBOROUGH, *Re* DEPREE’S WILL & CLERKENWELL IMPROVEMENT ACT, 1861, GRIFFITHS v. BEDBOROUGH, 9 Jur. N. S. 1317.

Annotations:—Refd. Moeser v. Wisker (1871), 40 L. J. C. P. 94; Howe v. Smith (1884), 27 Ch. D. 89.

1983. — — —.]—Where a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit.

By a contract for sale of real estate it was stipulated that a portion of the purchase-money should be paid immediately, & the residue on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser’s default. After the title had been accepted the purchaser became bkpt., & the trustee disclaimed the contract under Bankruptcy Act, 1869 (c. 71), s. 23, & called upon the vendor to repay the deposit:—**Held**: the vendor was entitled to retain the deposit.—*Re* PARNELL, *Ex* p. BARRELL (1875), 10 Ch. App. 512; 44 L. J. Bcy. 138; 33 L. T. 115; 23 W. R. 846, L. J.J.

Annotations:—Apld. Howe v. Smith (1884), 27 Ch. D. 89; Hart v. Portgail Harbour Co., [1903] 1 Ch. 690. **Consd.** Workman, Clark v. Lloyd Brazileño, [1908] 1 K. B. 968; Harrison v. Holland & Hannen & Cubitts (1922), 91 L. J. K. B. 337. **Refd.** Holloway v. York (1877), 25 W. R. 627; Cornwall v. Henson, [1899] 2 Ch. 710; Chillingworth v. Esche (1923), 129 L. T. 808; Cohen v. Sellar, [1926] 1 K. B. 536.

1984. — — — Conduct amounting to repudiation.]—HOWE v. SMITH, No. 1959, *ante*.

1985. — No express stipulation to contrary.]—The deposit paid upon a contract between vendor & purchaser is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase-money, & a vendor obtaining rescission owing to default in completion by the purchaser is entitled to the deposit, in the absence of any express stipulation to the contrary in the contract.

A purchaser on signing the contract for sale paid a deposit to vendor’s solrs. as stakeholders. The contract did not contain a clause forfeiting the deposit on default by the purchaser. The purchaser failed to complete & the vendor obtained judgment for specific performance, which the purchaser failed to comply with:—**Held**: the vendor was entitled to rescission of the contract & also to receive & retain the deposit.—HALL v. BURNELL, [1911] 2 Ch. 551; 81 L. J. Ch. 46; 105 L. T. 409; 55 Sol. Jo. 737.

Annotations:—Apld. Holford v. Trim (1921), 65 Sol. Jo. 768. **Refd.** Farrant v. Olver (1922), 91 L. J. Ch. 758.

C. Effect of Proceedings for Specific Performance.

1986. Purchaser failing to obtain decree—Failure to pay purchase-money—Vendor refused costs unless deposit returned.]—Under two agreements for sale, one of which was to be completed on June 1, & the other on Sept. 29, both in 1846, disputes arose upon the title, & upon certain valuations incident to the purchase. The conveyances were engrossed on Jan. 4, 1847, & the vendor made two requisitions to the purchaser to complete the first on Jan. 11, & the second on Jan. 25, 1847, & intimated that non-compliance with the requisitions would be treated by the vendor as a breach of the agreements. The purchaser did not comply; but his solrs. reiterated claims to certain deductions & abatements. The disputes continued until after Feb. 13, 1847, when the purchaser filed a bill seeking specific performance:—**Held**: the circumstances & delay did not constitute a case of such default by pltf. as to preclude him from a title

PART VIII. SECT. 2, SUB-SECT. 2.—B.

1982.1. Whether deposit forfeited in absence of stipulation—Purchaser in

default.]—WARD v. ELLERTON, [1927] V. L. R. 494; 49 A. L. T. 49; [1927] Argus L. R. 360.—**AUS.**

1982.ii. — — —.]—KORMAN v. ABRAMSON (1921), 49 O. L. R. 9; 58 D. L. R. 609; 19 O. W. N. 394.—**CAN.**

to specific performance; but, it appearing on the correspondence that the claims of deduction & abatements had not been the cause which delayed the completion of the purchase, but that want of means on the part of the purchaser to pay even so much purchase-money as, according to his view, he had to pay, was the cause of the delay up to & until after the date of the filing of the bill, the purchaser had so acted as to have lost the right to enforce a specific performance. But the ct. declined giving deft. costs, except upon the terms of his returning the deposit.—*GEE v. PEARSE* (1848), 2 De G. & Sm. 325; 64 E. R. 146.

Annotations.—*Consd.* Aberaman Ironworks v. Wickens (1868), L. R. 5 Eq. 485. *Refd.* Macbryde v. Weekes (1856), 22 Beav. 533.

1987. Vendor obtaining decree—Forfeiture on non-compliance by purchaser.—Where deft. by a decree in a suit for specific performance was decreed to pay the purchase-money within a specified time, & failed to do so. The ct., on the application of the vendor, ordered the contract to be rescinded, & stayed all proceedings in the suit with costs, to be paid by deft., & refused to make an order for the return of the deposit to deft.—*DUNN v. VERE* (1870), 5 L. J. N. C. 235; 23 L. T. 432; 19 W. R. 151.

Annotation.—*Refd.* Hutchings v. Humphreys (1885), 51 L. J. Ch. 650.

1988. ———. *JACKSON v. DE KADICH* (1904), 48 Sol. Jo. 687.

Annotation.—*Consd.* Hall v. Burnell, [1911] 2 Ch. 551.

1989. ———. *—*—*—*.—A vendor who has brought an auction for specific performance against a purchaser who neglects to complete can, even after a good title has been shown on inquiry as to title before the master, deft. not appearing or attending any of the proceedings, obtain judgment for forfeiture of the deposit & rescission of the contract. The deposit is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase-money.—*HOLFORD v. TRIM* (1921), 65 Sol. Jo. 768.

1990. Forfeiture allowed—Alternative claim for specific performance.—*FARRANT v. OLVER*, No. 1924, ante.

1991. ———. *—*—*—*.—*GLOVER v. BROOME*, [1926] W. N. 46.

D. I.O.U. Given for Deposit.

I.O.U.'s generally.—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 459, 460.

1992. When amount recoverable—Vendor failing to make good title.—A purchaser of a leasehold may object to the vendor's title, on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the annual premium of insurance pursuant to his covenant; although it does not appear that the lessor has taken advantage of the forfeiture.

Upon a sale of a leasehold, the purchaser agreed to pay a deposit of £50, & the residue on completion. Instead of actually paying the £50, he gave the vendor £5 & an I.O.U. for £45.—*Held*: the vendor, failing to make a good title, was not entitled to recover the £45 upon an account stated; & the defence was admissible under never indebted.—*WILSON v. WILSON* (1854), 14 C. B. 616; 2 C. L. R. 818; 23 L. J. C. P. 137; 23

L. T. O. S. 158; 18 Jur. 581; 2 W. R. 421; 139 E. R. 253.

Annotation.—*Mentd.* Camillo Tank S.S. Co. v. Alexandria Engineering Works (1921), 38 T. L. R. 134.

1993. — As damages on resale by vendor—Though loss less than deposit.—An agreement for the sale of a public-house by pltf. to deft. contained the following clauses: " &, as earnest of the agreement, the said purchaser has paid into the hands of the vendor the sum of £50, which is to be allowed in part at the completion of this agreement, & if the said purchaser should fail to fulfil his part of the agreement then the deposit money shall become forfeited in part of the following damages. . . . If either of the said parties should neglect to perform or refuse to comply with any part of this agreement, the party so refusing or neglecting shall pay to the other the sum of £50, hereby mutually agreed upon to be the damages ascertained & fixed on breach thereof." Deft., instead of paying the deposit gave pltf. an I.O.U. for the amount & ultimately refused to complete the purchase, & pltf. resold at a loss.—*Held*: pltf. was entitled to recover the £50 & not merely the actual damage which he had sustained by deft.'s breach of contract.—*HINTON v. SPARKES* (1868), L. R. 3 C. P. 161; 37 L. J. C. P. 81; 17 L. T. 600; 16 W. R. 360.

Annotations.—*Appld.* Lea v. Whitaker (1872), L. R. 8 C. P. 70. *Consd.* Wallis v. Smith (1882), 21 Ch. D. 213. *Refd.* Magee v. Lavell (1874), 43 L. J. C. P. 131; Howe v. Smith (1884), 27 Ch. D. 89; Pye v. British Automobile Commercial Syndicate (1906), 22 T. L. R. 287.

1994. — Sale by auctioneer.—Pltfs. were auctioneers employed to sell certain premises which were put up to auction for sale & knocked down to deft. as the highest bidder & purchaser. Deft. signed a contract in writing, acknowledging himself the purchaser, & that he had paid by way of deposit a sum in part of the purchase-money. He had not in fact actually paid any part of the purchase-money, but had given an I.O.U. to the auctioneers for the deposit.—*Held*: in an action by the auctioneers upon an account stated to recover the sum for which the I.O.U. was given, there was evidence to go to the jury to support it, & the action was well brought.—*CLEAVE v. MOORE* (1857), 28 L. T. O. S. 255; 3 Jur. N. S. 48; 5 W. R. 234.

SUB-SECT. 3.—RECOVERY OF DEPOSIT.

A. By Whom Recoverable.

1995. Principal—Deposit paid by agent in own name.—A., as the agent of B. the owner of a landed estate, enters into an agreement for the sale of it with C., who appears to act on his own account, but in fact is the agent of D., & A., etc., bind themselves in a penalty for the performance of the agreement. Whereupon C., pays A., part of the purchase-money as a deposit. Upon breach of the conditions of sale on part of the vendor:—*Held*: an action for money had & received lies at the suit of D. against B., to recover back the deposit without proof of the money being paid over by A. to B.—*NORFOLK (DUKE) v. WORTHY* (1808), 1 Camp. 337; 170 E. R. 997, N. P.

Annotations.—*Consd.* Bickerton v. Burrell (1816), 5 M. & S. *Refd.* Humble v. Hunter (1848), 12 Q. B. 310; Ellis v. Goulton, [1893] 1 Q. B. 350. *Mentd.* Leach v.

PART VIII. SECT. 2, SUB-SECT. 2.—C.

1987 I. Vendor obtaining decree—Forfeiture on non-compliance by purchaser.—*GRAY v. ABBOTT* (1924), 33 Man. L. R. 224; [1923] 2 W. W. R. 424.—*CAN.*

1987 II. ———. *—*—*—*.—Where a vendor

sues for specific performance & prays that in default thereof he may have the purchaser's interest cancelled & determined, he is entitled, if the purchaser does not pay the amount due within the time fixed by the ct., to have the agreement determined & to retain the moneys paid thereunder, even if the

agreement is an open one in that it contains no clause permitting the vendor to cancel it & retain the moneys paid to him.—*EPISCOPALE CATHOLIQUE ROMAIN DE PRINCE ALBERT CORPORATION v. MAHON*, [1926] 1 D. L. R. 411; [1926] 1 W. W. R. 186, 20 Sask. L. R. 318.—*CAN.*

Sect. 2.—Forfeiture and recovery of deposit: Subsect. 3, A., B. & C. (a).]

Mullett (1827), 3 C. & P. 115; Wright v. Wilson (1832), 1 Mood. & R. 207; Flight v. Booth (1834), 1 Bing. N. C. 370; Marston v. Roe d. Fox (1838), 8 Ad. & El. 14; Taylor v. Bullen (1850), 5 Exch. 779; *Re Davis & Cavey* (1888), 40 Ch. D. 601.

1996. Purchaser from assignee in bankruptcy—Bankruptcy superseded—Trustee without title.]—

Bkpt.'s assignees had contracted for the sale of his copyhold lands & received a deposit. The commission was afterwards superseded because when it issued petitioning creditor's debt was not due. Another commission issued upon the petition of another creditor & the same assignees were chosen:—*Held*: pltf. having abandoned his contract pending the old commission might recover back his deposit.—*BARTLETT v. TUCHIN* (1815), 6 Taunt. 259; 1 Marsh. 583; 128 E. R. 1034.

Annotation:—*Mentd.* Smallcombe v. Olivier (1844), 13 M. & W. 77.

1997. Agent—Action for supposed principal—Repudiation by principal.]—

A. becomes the purchaser of an estate sold by deft. at a public auction, & signs a memorandum of agreement, in which he is described as the agent of M. The supposed principal afterwards repudiates the contract; & after notice of the fact to the agent of the vendor, A. pays the deposit money, according to the conditions of sale. Upon its turning out that the title is defective, A. is entitled to recover the deposit in his own name.—*LANGSTROTH v. TOULMIN* (1822), 3 Stark. 145; 171 E. R. 802, N. P.

1998. Lunatic—Vendor ignorant of lunacy.]—Pltf. contracted for the purchase of an estate from deft., & paid a deposit on the terms that unless he objected to the title within a certain time, same should be considered as accepted. No objection was made by him to the title. Pltf. at the time of the contract & of the payment of the deposit was a lunatic, incapable of understanding the meaning of a contract or of managing his affairs, & derived no benefit from the contract; but these facts were unknown to deft., who made the contract with him fairly & *bona fide*, believing him capable of understanding the meaning of same:—*Held*: pltf. was not entitled to recover the deposit notwithstanding he was a lunatic incapable of contracting or of understanding the meaning of contracts.—*BEAVAN v. M'DONNELL* (1854), 9 Exch. 309; 2 C. L. R. 474; 23 L. J. Ex. 94; 22 L. T. O. S. 243.

Annotation:—*Mentd.* Wiltshire v. Marshall (1866), 14 W. R. 602.

1999. Trustee in bankruptcy of purchaser—Agreement for forfeiture—Through non-completion by purchaser.]—

W. having secretly realised the greater part of his available property & effects, absconded with the proceeds. W. was subsequently adjudicated a bkpt., & on Oct. 4, 1882, pltf. was appointed a trustee of the estate. On Oct. 10, W. entered into an agreement, in an assumed name, with F. for the purchase of certain house property, & paid to deft., as stakeholder under the agreement, a certain sum by way of deposit, which it was admitted formed part of the proceeds of the secret realisation. The agreement provided (*inter alia*), that the deposit money should be forfeited to the vendor if the purchaser neglected or failed to complete the purchase. W. was shortly afterwards arrested & convicted as an absconding bkpt., & the purchase of the property was consequently never completed.

It was admitted that both deft. & F. had acted throughout *bona fide* in the ordinary course of business, & that the non-completion of the agreement was not caused by any default on the part of F. Pltf. having claimed to have the deposit money paid over for the benefit of bkpt.'s estate:—*Held*: inasmuch as it was of the essence of the contract that the deposit money should be forfeited if the purchase was not completed, such money belonged to F. & could not be followed by the trustee of bkpt.'s estate.

According to the law of vendor & purchaser the inference is that such deposit is paid as a guarantee for the performance of the contract, & where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit. . . . In the present case the deposit was paid not to the vendor, but to an auctioneer, & the law, as is well known, is that an auctioneer to whom a deposit is paid under such circumstances receives it as the agent of both parties, & cannot part with it without the sanction of both of them (*POLLOCK, B.*).—*COLLINS v. STIMSON* (1883), 11 Q. B. D. 142; 52 L. J. Q. B. 440; 48 L. T. 828; 47 J. P. 439; 31 W. R. 920, D. C.

Annotations:—*Consd.* Howe v. Smith (1884), 27 Ch. D. 89. *Refd.* Bishop v. Taylor & Harris (1891), 60 L. J. Q. B. 556; Chillingworth v. Esche (1923), 129 L. T. 808. *Mentd.* Burdett v. Horne (1911), 27 T. L. R. 402.

B. Against Whom Recoverable.

2000. Executor.]—A. agrees with B. to purchase a copyhold for two lives; pays £200 in part, & was to pay the remainder in three months, & then to name his lives & take up his copy; a ct. is held, the three months expire, & the lives not named nor the copy taken up, & B. dies suddenly; & the manor comes to one who was not bound by this agreement. The exor. of B. decreed to repay the £200.—*AWBRY v. KEEN* (1687), 1 Vern. 472; 1 Eq. Cas. Abr. 28; 23 E. R. 597, L. C.

2001. Auctioneer—Stay of proceedings—In spite of misdescription.]—Injunction granted to stay action against the auctioneer for the deposit, although the estate sold, was represented as freehold with leasehold adjoining & turned out to be almost all leasehold, & although there had been great delay in making out pltf.'s title.—*FORDYCE v. FORD* (1794), 4 Bro. C. C. 494; 29 E. R. 1007.

Annotations:—*Refd.* Drewe v. Hanson (1802), 6 Ves. 675; Drewe v. Corp (1804), 9 Ves. 368; Halscy v. Grant (1806), 13 Ves. 73; Knatchbull v. Grueber (1817), 3 Mer. 124; Clive v. Beaumont (1848), 1 De G. & Sm. 397.

2002. — Agent of both parties.]—*COLLINS v. STIMSON*, No. 1999, *ante*.

—*See, generally, AUCTION & AUCTIONEERS*, Vol. III., pp. 23–27, Nos. 162–201.

—*Interpleader.]—See AUCTION & AUCTIONEERS*, Vol. III., p. 37, Nos. 271, 272.

Agent.]—See AGENCY, Vol. I., pp. 624, 668, Nos. 2486, 2810.

—**Solicitor.]—See AGENCY, Vol. I., pp. 667, 668, Nos. 2808, 2809, 2811–2814.**

C. Grounds for Recovery.

(a) Contract Not Binding.

2003. Contract not completed—Agreement unstamped & unsigned.]—Declaration on special agreement for the sale of a lease of a house in order to recover a deposit for the purchase, the supposed agreement being unstamped, but not having been signed by either of the parties, or by the auctioneer as their agent, pltf. may recover for money had

& received. In such case it is incumbent on deft. to show that when the deposit was demanded by pltf., he tendered an assignment of the lease.—*ADAMS v. FAIRBAIN* (1817), 2 Stark. 277; 171 E. R. 645, N. P.

2004. — Purchaser refusing to sign contract.]

—Pltf. contracted to purchase of deft. the lease, etc., of a public-house by a memorandum in the following form: "Received of Mr. Moeser the sum of £80 being the deposit on account of £800, the purchase-money for the Wheat Sheaf Tavern, the contract for which is now being prepared, to be signed by the vendor & purchaser when completed & ready for signature. B. B. Wisker." The contract tendered to pltf. for signature contained amongst others, stipulations that the purchaser should pay the expenses of the investigation of the vendor's title, & that, if the purchaser should insist on any objection or requisition as to title which the vendor should be unable or unwilling to remove or comply with, the vendor might annul the sale, & return the deposit, but without any interest or costs of investigating the title; & that if the purchaser should fail to comply with the above conditions his deposit should thereupon be forfeited to the vendor, who should be at liberty to resell the property. Pltf. refused to sign this contract, on the ground that it contained unreasonable terms, & deft. resold the property:—*Held*: the pltf. was entitled to recover back his deposit.—*MOESER v. WISKER* (1871), L. R. 6 C. P. 120; 40 L. J. C. P. 94; 24 L. T. 134; 19 W. R. 351.

Annotation:—*Distd.* Chillingworth v. Esche, [1924] 1 Ch. 97.

2005. — Formal contract to be prepared.]

—*HELBY v. DENYER & COLLINS* (1915), *Times*, Feb. 8.

2006. — — — — —.]—By a document of July 10, 1922, the purchasers agreed to purchase certain freehold land & a nursery from the vendor "subject to a proper contract to be prepared by the vendor's solrs." & acknowledged having paid £240 "as deposit & in part payment of the purchase-money." Completion was fixed for Nov. 2. The purchasers signed the document & the vendor added & signed a receipt for the deposit confirming the sale.

A proper contract was subsequently prepared by the vendor's solrs., approved by the purchasers' solr., executed by the vendor, & tendered to the purchasers for execution. The purchasers, however, refused to sign it, declined to proceed with the transaction, & claimed the return of the deposit:—*Held*: the document of July 10, 1922, was only conditional, & did not constitute a firm contract, & the purchasers were in the circumstances entitled to recover the deposit; *semble*: the deposit, unless expressly stated to be so, is not a guarantee that the purchaser will do his best to carry out the purchase, & so forfeitable to the vendor if he fails to do so; but is an anticipatory part payment of the purchase-money.—*CHILLINGWORTH v. ESCHÉ*, [1924] 1 Ch. 97; 93 L. J. Ch. 129; 129 L. T. 808; 40 T. L. R. 23; 68 Sol. Jo. 80, C. A.

Annotations:—*Refd.* Lockett v. Norman-Wright, [1925] 1 Ch. 56; Keppel v. Wheeler, [1927] 1 K. B. 577.

2007. Specific performance refused.—Inadequacy of price.]—Where his bill for specific performance

is dismissed on the ground of inadequacy of consideration, the ct. will not aid him in recovering his deposit, or giving him compensation for his loss, by decreeing an account.—*KENDALL v. BECKETT* (1830), 2 Russ. & M. 88; 9 L. J. O. S. Ch. 24; 39 E. R. 327, L. C.

Annotations:—*Refd.* Sainsbury v. Jones (1839), 5 My. & Cr. 1; Aberaman Ironworks v. Wickens (1868), L. R. 5 Eq. 485; Foulkes v. Davies (1868), L. R. 7 Eq. 42. *Mentd.* Suisse v. Lowther (1843), 7 Jur. 808.

2008. Contract not enforceable — Statute of Frauds.]

—Lands of deft. were put up by him to auction; one condition of the sale was, that the purchaser should pay a deposit & half the auction duty. Pltf. purchased & paid as above. He signed a written memorandum of the contract, which J. N., the auctioneer's clerk, also signed as follows: "Witness J. N." J. N. received the above sums for M. the auctioneer, & signed the receipt, being authorised by M. to do so, as follows: "For Mr. M.—J. N." Money was afterwards paid over by the auctioneer, on the purchase, to B., deft.'s attorney, as his agent. Deft. not being able to make out his title, B., as his agent, wrote a letter to pltf.'s attorney, naming pltf. & deft., saying that he could not make out the title to "this property as freehold," advising pltf. "to relinquish his purchase," & referring to the "charges" to be made by pltf.'s attorney:—*Held*: J. N. did not sign the memorandum as agent to deft.; neither his agency nor the contract were recognised by the receipt of the money or B.'s letter; here was, consequently, no proof of a contract to make a title on which deft. could be charged under Stat. Frauds, s. 4; & therefore, although pltf. might recover the deposit & moiety of auction duty as money had & received, he could not recover interest thereon, nor his expenses of investigating the title.—*GOSBELL v. ARCHER* (1835), 2 Ad. & El. 500; 1 Har. & W. 31; 4 Nev. & M. K. B. 485; 4 L. J. K. B. 78; 111 E. R. 193.

Annotations:—*Apld.* Casson v. Roberts (1862), 31 Beav. 613. *Consd.* Monnickendam v. Leanse (1923), 39 T. L. R. 445. *Refd.* Scott v. Alvarez (No. 2) (1895), 43 W. R. 694; Chillingworth v. Esche (1923), 129 L. T. 808.

2009. — — — — — Repudiation by purchaser.]

—Where on a contract for the sale of a house a memorandum is drawn up which does not satisfy the requirements of Stat. Frauds, s. 4, & is consequently unenforceable, & a deposit is paid by the purchaser, if the purchaser repudiates the agreement, he is not entitled to recover the amount deposited by him.—*MONNICKENDAM v. LEANSE* (1923), 39 T. L. R. 445; 67 Sol. Jo. 706.

2010. — No special agreement for recovery.]—*CASSON v. ROBERTS*, No. 2013, *post*.

2011. Contract conditional.—Consent of lessor to be obtained.—Sufficiency of consent.]—A. contracted with B. for the purchase of the goodwill & fixtures of a public-house, at the sum of £120; £50 was to be paid as a deposit on the landlord's consenting to the change of tenancy, & on the remainder of the purchase-money being paid, A. was to have possession. The landlord, on application, gave a verbal consent, & the £50 was accordingly paid. A. sent part of his furniture to the house, & went to reside in part of it; B., however, still continuing to reside & carry on the business

2008 i. Contract not enforceable.—Statute of Frauds.]—Money paid on an oral agreement for the sale of lands, cannot, without showing more, be recovered back on the ground that the agreement is void by Stat. Frauds.—*BARBER v. ARMSTRONG* (1842), 6 O. S. 543.—*CAN.*

2008 ii. — — — — —.]—*LOCKE v. SNYDER* (Sask.) (1912), 22 W. L. R. 287; 1 W. W. R. 939.—*CAN.*

2008 iii. — — — — —.]—A purchaser can recover back a deposit paid by him under a contract for the sale & purchase of land where the contract is not enforceable against him owing to the want of a sufficient memorandum thereof in writing signed by him to satisfy Stat. Frauds.—*REEVES v. WHEATLEY* (1905), 24 N. Z. L. R. 839.—*N.Z.*

c. — — — — —.]—*NORTON v. ANGLUS*, [1926]

S. R. Q. 104.—*AUS.*

d. — — — — —.]—*MACKLEY v. BRIGHTON* (1914), 34 N. Z. L. R. 314.—*N.Z.*

e. *Contract conditional.—On arrangement of government loan.]*—*GIBSON v. BAIN* (1925), *Gaz.* L. R. 407.—*N.Z.*

f. — — — — —.]—*On approval of third party.]*—Pltfs. made a deposit on a proposed contract for the sale of land which was not to be binding until

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there. Some time afterwards, the remainder of the purchase-money not having been paid, & possession not having been given up to A., the landlord withdrew his consent:—*Held*: the contract was conditional on the landlord's consent being obtained; & the verbal consent originally given having been withdrawn before any change of tenancy had taken place, it must be considered as not having been given, & the condition not having been performed, the money was paid on a consideration which had failed, & A. might maintain money had & received, to recover back the £50 paid.—*WRIGHT v. NEWTON* (1835), 2 Cr. M. & R. 124; 5 Tyr. 736; 1 Gale, 67; 150 E. R. 53.

2012. Contract discharged—New contract entered into.—*EAST LANCASHIRE RY. CO. v. ETTEFIELD* (1851), 18 L. T. O. S. 65.

2013. Parol contract.—In the absence of special agreement, a deposit paid on account of purchase-money, where the contract is not enforceable, is not forfeited in the event of the contract not being completed, but the purchaser is not necessarily entitled to interest thereon.

Where one contracted by parol for the purchase of lands & paid a deposit, & afterwards declined to complete:—*Held*: his right to a return of the deposit constituted a sufficient debt to support a creditors' suit against the representative of the vendor.—*CASSON v. ROBERTS* (1862), 31 Beav. 613; 1 New Rep. 9; 32 L. J. Ch. 105; 7 L. T. 588; 27 J. P. 73; 8 Jur. N. S. 1199; 11 W. R. 102; 54 E. R. 1277.

Annotations:—*Consd.* *Hinton v. Sparkes* (1868), L. R. 3 C. P. 161. *Distd.* *Thomas v. Brown* (1876), 1 Q. B. D. 714.

Dtd. *Monnickendam v. Leanse* (1923), 39 T. L. R. 445.

2014. Vendor not named in contract—Effect of knowledge at time of payment of deposit.—Pltf. signed a contract for the purchase of a leasehold shop from "the vendor," subject to particulars & conditions; & the auctioneer signed "as agent for the vendor." Pltf. paid a deposit, & the vendor's solr. forwarded to pltf.'s solrs. an abstract of title, & in reply they wrote: "without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next to examine abstract of title, with deeds, etc." After examining the abstract they forwarded requisitions, writing at the foot of them, "The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises." Pltf. subsequently repudiated the contract, on the ground (*inter alia*), that the contract did not disclose the name of the vendor, & brought an action to recover the deposit:—*Held*: pltf. could not recover, having chosen, knowing that the vendor's name did not appear in the memorandum, to pay the deposit & receive the abstract of title; & the expression in the correspondence, "without prejudice to any question which may arise as to the contract of purchase," could not have been meant or understood as referring to the validity of the contract.—*THOMAS v. BROWN* (1876), 1 Q. B. D. 714; 45 L. J. Q. B. 811; 35 L. T. 237; 24 W. R. 821, D. C.

Annotations:—*Consd.* *Monnickendam v. Leanse* (1923), 39 T. L. R. 445. *Refd.* *Rossiter v. Miller* (1877), 25 W. R. 890; *Chillingworth v. Esche* (1923), 129 L. T. 808.

approved by a certain third party representing deft., the proposed vendor. Such third party's approval was refused & the pltf. would not execute the agreement in the form in which he approved of it:—*Held*: the deposit must be returned.—*SIGVALDSON v. HITSMAN* (1922), 65 D. L. R. 317; 15

Sask. L. R. 244; [1922] 1 W. W. R. 1146.—*CAN.*

PART VIII. SECT. 2, SUB-SECT. 3.—C. (b).

2017. When deposit recoverable—No title at time of contract.—*NOVA SCOTIA DIOCESAN SYNOD v. O'BRIEN*

(b) Title of Vendor Defective.

2015. When deposit recoverable—Necessity for legal estate in vendor.—Under a limitation in a marriage settlement to the husband for life, then to the wife for life, then to the heirs of the body of the wife & their heirs, the wife took an estate tail & though it was recited in the deed that the husband's father conveyed, in consideration of the marriage, & "for settling & establishing the lands, etc., to the uses thereafter expressed," & subsequent uses were added in the deed, this ct. would only take notice of the legal estate, & the husband & wife having levied a fine, & having agreed to sell the estate to a purchaser, from whom they had received part of the purchase-money, this ct. would not permit the purchaser to receive back the deposit money in an action for money had & received.—*ALPASS v. WATKINS* (1800), 8 Term. Rep. 516; 101 E. R. 1521.

Annotation:—*Mentd.* *Phillips v. James* (1865), 2 Drew. & Sm. 404.

2016. ———. —The vendor of newly inclosed lands undertakes to convey them to the vendee, this is an undertaking to convey the legal estate; & the vendor having only an equitable interest previous to the assignment by the comrs. the vendee is entitled to recover his deposit.—*CANE v. BALDWIN* (1815), 1 Stark. 65; 171 E. R. 403, N. P.

2017. — No title at time of contract.—By a contract for the sale of freehold property dated Sept. 27, 1917, the date fixed for completion was Nov. 1. The vendors having failed to show a title by Nov. 6, the purchaser on that date gave notice of repudiation unless a proper title was shown by Nov. 11:—*Held*: the notice was reasonable, & the vendor's failure to comply with the notice, entitled the purchaser to repudiate & recover the deposit. *Semble*: the purchaser would be entitled to the same relief on the ground that at the date of the contract the vendors had no title to the property, & there was therefore a want of mutuality.—*Ile BAYLEY & SHOESMITH'S CONTRACT* (1918), 87 L. J. Ch. 626.

2018. — No title when purchaser called upon to fulfil term of contract.—*ROPER v. COOMBES*, No. 2163, *post*.

2019. — Abandonment of contract on account of defect.—*GOSBELL v. ARCHER*, No. 2008, *ante*.

2020. — Vendor entitled only to share in proceeds of sale.—*HEATH v. BIRLEY* (1854), 22 L. T. O. S. 242.

2021. — Ability to make good title resting on doubtful question of fact.—*SIMMONS v. HESELTINE*, No. 2103, *post*.

2022. — Purchaser precluded from objecting to title.—The vendor, the lessee of building land, erected houses thereon & let them separately for the whole of his term, subject to the payment of annual rents. He then put up these rents for sale, & described them as "improved leasehold ground rents." One of the conditions of sale was, that the title would commence with the lease granted to him, & that purchasers were not to object to there being no reversion in him, the vendor:—*Held*: assuming that these were not improved leasehold ground "rents" a purchaser was precluded from objecting thereto by the condition of sale, & could not recover back his deposit

(1879), R. E. D. 352.—*CAN.*

2019.1. — Abandonment of contract on account of defect.—*BENNETT v. STUART* (1927), 27 S. R. N. S. W. 317; 44 N. S. W. W. N. 75.—*AUS.*

2019.11. — ———. —*WOODROW v. CONNOR* (1922), 52 O. L. R. 631.—*CAN.*

on the ground of there being no reversion in the vendor.—*WILLS v. CATTING* (1859), 33 L. T. O. S. 145; 7 W. R. 448.

2023. ———.]—A contract for sale of superfluous land of a railway co. which had been conveyed by the co. to the vendor contained a stipulation that the purchaser should assume & admit that everything, if anything was necessary, was done by the co. to enable them to sell the land as surplus land, & should not call for or require production of any evidence to that effect; & a further stipulation that if the purchasers should fail to comply with the terms of the agreement the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; & as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit & damages. The vendor then sold the land to one of the prior owners:—*Held*: the purchaser was bound by the stipulations to admit the title of the co. to sell to the vendor; & as he had refused to abide by that stipulation he had broken the contract, & could not maintain the action, or claim a return of his deposit.—*BEST v. HAMAND* (1879), 12 Ch. D. 1; 27 W. R. 742; *sub nom.* *HAMAND v. BEST*, 48 L. J. Ch. 503; *sub nom.* *HAMMOND v. BEST*, 40 L. T. 769, C. A.

Annotation:—*Consd.* *Re Davis & Cavey* (1888), 40 Ch. D. 601.

2024. ———.]—*KING v. CHAMBERLAYN*, [1887] W. N. 158.

2025. ———.]—*Re DAVIS & CAVEY*, No. 1832, *ante*.

2026. ———.]—A purchaser of real estate at public auction paid a deposit on the purchase-money, & signed an agreement to complete the purchase according to the conditions of sale, the third of which provided that the title should commence with a conveyance on sale of a certain date, & that the prior title whether appearing in any abstracted document or not should not be required investigated or objected to. The purchaser afterwards discovered *aliunde* what he regarded as a serious defect in the prior title; but it was not suggested that the alleged defect was known to the vendor when framing the conditions of sale. On a summons under the Vendor & Purchaser Act, 1874 (c. 78), for a declaration that the vendors had not shown a good title to the property, & for an order for repayment of the deposit with interest & costs:—*Held*: the purchaser was precluded by the third condition of sale from making any objection in respect of the alleged defect in the prior title, & the summons must be dismissed.—*Re NATIONAL PROVINCIAL BANK OF ENGLAND & MARSH*, [1895] 1 Ch. 190; 71 L. T. 629; 43 W. R. 186; 39 Sol. Jo. 43; 13 R. 347; *sub nom.* *Re MARSH'S PURCHASE*, 64 L. J. Ch. 255. *Annotation*:—*Consd.* *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596.

2027. ———.]—Pltf. offered for sale by auction a leasehold house which was purchased by deft. One of the conditions of sale provided that the purchaser should make no objection or requisition as to the title between the date of an underlease & the date of an assignment of that underlease, but should assume that the assignment vested in the assignee a good title for the residue of the term. Deft. discovered that owing to a breach of trust & the fraudulent concealment of a will during the period covered by the condition, the title offered by pltf. was positively

bad even as a holding title. He therefore refused to complete. Pltf. brought an action for specific performance & deft. counterclaimed for a return of the deposit which he had paid:—*Held*: pltf. was not entitled to specific performance; & deft. was not entitled to a return of the deposit.—*Re SCOTT & ALVAREZ'S CONTRACT*, *SCOTT v. ALVAREZ*, [1895] 2 Ch. 603; 64 L. J. Ch. 821; 73 L. T. 43; 43 W. R. 694; 11 T. L. R. 471; 39 Sol. Jo. 621; 12 R. 488, C. A.

Annotations:—*Distd.* *Simpson v. Gilley* (1922), 92 L. J. Ch. 194. *Apld.* *Beyfus v. Lodge*, [1925] 1 Ch. 350. *Refd.* *Re Calcott & Elvin's Contract* (1898), 67 L. J. Ch. 327; *Re Wallis & Barnard's Contract*, [1899] 2 Ch. 515; *Re Hughes & Ashley's Contract*, [1900] 2 Ch. 595; *Toon v. Stanbury-Eardley* (1906), 22 T. L. R. 536. *Mentd.* *Re Wells, Boyer v. McLean* (1903), 72 L. J. Ch. 513.

2028. ———.]—*Good title not deduced in action for specific performance.*—Where, in a suit by vendor for specific performance it was certified that a good title was not deduced, the ct. ordered a return to deft. of his deposit money, with interest at 4 per cent., & declared deft. entitled to a lien on the estate for the same, & also for his costs, with liberty to apply, & subject thereto, dismissed the bill.—*TURNER v. MARRIOTT* (1867), L. R. 3 Eq. 744; 15 L. T. 607; 15 W. R. 420.

Annotations:—*Folld.* *Re New Land Development Assocn. & Fagence* (1892), 61 L. J. Ch. 323. *Refd.* *Kilton v. Howett*, [1904] W. N. 21; *Re Furneaux & Aird's Contract*, [1906] W. N. 215.

2029. ———.]—*PEARL LIFE ASSURANCE CO. v. BUTTENSCHAW*, [1893] W. N. 123.

2030. ———.]—*Title to commence with particular instrument—Incorporation of covenants in earlier deed.*—Pltf. contracted to purchase of defts. a house described as a "freehold" residence, etc., being lot 2 referred to in the particulars, subject to certain conditions of sale, & paid the deposit. Condition (5): "The abstract of title to lots 1, 2, & 3, being the freehold portion of the property, will commence with a conveyance of Apr. 17, 1860, & no purchaser shall investigate, or take any objection in respect of the title prior to the commencement of the abstract." (9) "If any error or misstatement shall appear to have been made in the particulars of sale, it is not to annul the sale; but shall entitle the purchaser to compensation." The abstract of the deed of Apr. 17, 1860, recited an indenture of Mar. 2, 1850, whereby E. assigned to R. in fee, & another deed whereby R. assigned to certain trustees in fee, & by the deed the trustees conveyed to defts.' testator in fee, subject, so far as the premises were subject thereto, to the covenants & conditions on the part of the grantee, his heirs & assigns, in the indenture of Mar. 2, 1850. Pltf. refused to complete the purchase without further explanation of what these covenants & conditions were, & defts. refused any further abstract, relying on conditions (5) & (9):—*Held*: the property having been sold as "freehold," pltf. was entitled to have an unencumbered freehold title under the deed of Apr. 17, 1860: conditions (5) & (9) did not protect defts.: & pltf. was therefore entitled to rescind the contract & recover the deposit, etc.—*PHILLIPS v. CALDCLEUGH* (1868), L. R. 4 Q. B. 159; 9 B. & S. 967; 38 L. J. Q. B. 68; 20 L. T. 80; 17 W. R. 575.

Annotations:—*Apld.* *Hone v. Gakstatter* (1909), 53 Sol. Jo. 286. *Refd.* *Cato v. Thompson* (1882), 9 Q. B. D. 616.

2031. ———.]—*Previous voluntary conveyance by vendor—Invalidity doubtful.*—Deft. having executed a voluntary conveyance, agreed to sell the property comprised in it to pltf., who paid a deposit. Pltf. refused to accept the title & sued

2028 i. ———.]—*Good title not deduced in action for specific performance.*—*BULLEN v. WILKINSON* (1912), 21 O. W. R. 427; 3 O. W. N. 859; 2 D. L. R. 190.—*CAN.*

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for the deposit:—*Held*: deft. could not make a good title, because the voluntary conveyance might have since been confirmed by a consideration, & its invalidity therefore depended on a doubtful state of facts, & because deft. could not compel pltf. to concur in defeating the previous conveyance, & making a good title to himself; & pltf. was therefore entitled to recover the deposit.—*CLARKE v. WILLOTT* (1872), L. R. 7 Exch. 313; 41 L. J. Ex. 197; 21 W. R. 73.

Annotations:—*Refd. Re Briggs & Spicer*, [1891] 2 Ch. 127; *Noyes v. Paterson* (1893), 8 R. 323.

2032. — **Whether purchaser may compel vendor to make good title.**—*CLARKE v. WILLOTT*, No. 2031, *ante*.

2033. — **Objection not made within stipulated time.**—Pltf. was the purchaser, at a sale by auction, of an estate put up for sale by deft., together with A. since deceased, subject to conditions of sale. By the third condition the vendors were to deliver an abstract of title within seven days, & "all objections & requisitions not stated in writing & delivered to the vendors' solr. within fourteen days from the delivery of the abstract, were to be considered as waived," & in that respect, "time was to be of the essence of the contract." The twelfth condition stipulated that "the vendors being trustees should not be required to obtain the concurrence of any one interested in the proceeds of the sale," & the fourteenth condition stated that "if the purchaser should fail to comply with these conditions his deposit should be thereupon actually forfeited to the vendors," who were to be at liberty to resell & recover the deficiency, if any, & the costs of resale from the defaulting purchaser. Pltf. signed the usual agreement to complete the purchase according to the conditions, & paid a deposit of £300. An abstract of title was delivered within seven days, which showed that the property had been devised to deft. & his co-trustee A., since deceased, upon trust to pay the income to F., testator's son-in-law, for life, & after his decease to sell the estate & stand possessed of the proceeds "upon the trusts for the children of F. as therein mentioned." It was stated in the abstract that F. would join in conveying the property; but the abstract was silent as to whether or not F. had any children. An objection, though not until after the expiration of the stipulated fourteen days, was made by the purchaser to the title, on the ground that F. being still alive the power of sale had not arisen & the vendors could make no title, to which the vendors replied, that the objection was made too late; & it was not a valid one. It subsequently appeared that the trusts in favour of the children of F. were for the benefit of such of his children by H., testator's daughter, as should be living at testator's death, to be paid

to them if sons at twenty-one, or if daughters at that age or marriage, with limitations over for the benefit of survivors on the death of any child under twenty-one & being a daughter unmarried. F. & H. had eight children living at testator's death, all of whom at the date of the sale had attained twenty-one, & three of whom being daughters had married & settled their shares of the trust fund. An action having been brought by pltf., the purchaser, to recover his deposit:—*Held*: he was entitled to recover it back, although the objection to the sale was not made within the stipulated fourteen days, the vendors having in fact no title at all to sell the property, & no power to make one.—*WANT v. STALLIBRASS* (1873), L. R. 8 Exch. 175; 42 L. J. Ex. 108; 29 L. T. 293; 21 W. R. 685.

Annotations:—*Distd. Soper v. Arnold* (1887), 37 Ch. D. 96. *Refd. Saxby v. Thomas* (1890), 64 L. T. 65.

2034. — **Vendor refusing to procure release of restrictive covenants—Agreement by vendor to make good marketable title.**—T. agreed to sell to C. certain freehold houses, & to make a good marketable title. On investigation of the title it appeared that the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, & the jury found that he did:—*Held*: this evidence could not be admitted to modify the terms of the express contract, & the pltf. was entitled to recover.—*CATO v. THOMPSON* (1882), 9 Q. B. D. 616; 47 L. T. 491, C. A.

Annotations:—*Consd. Ashburner v. Sewell*, [1891] 3 Ch. 405. *Apld. May v. Platt*, [1900] 1 Ch. 616. *Consd. Rudd v. Lascelles*, [1900] 1 Ch. 815; *Alderdales Estate Co. v. McGrory*, [1917] 1 Ch. 414. *Refd. Ellis v. Rogers* (1885), 29 Ch. D. 681; *Halkett v. Dudley*, [1907] 1 Ch. 590; *Simpson v. Gilley* (1922), 92 L. J. Ch. 194.

2035. — **Forfeiture of deposit under condition—Resale to another purchaser—Vendor unable to make good title.**—*SOPER v. ARNOLD*, No. 1960, *ante*.

2036. — **Act of bankruptcy by vendor.**—*POWELL v. MARSHALL, PARKES & CO.*, No. 1768, *ante*.

2037. — **Vendor entitled under uncompleted contract.**—*Re HUCKLESBY & ATKINSON'S CONTRACT*, No. 2170, *post*.

2038. **Proof of defect of title—On whom onus lies.**—(1) In an action for money had & received, to recover back a deposit on a sale, on the ground of a defect of title, the party bringing the action must prove the title bad; & it shall not be sufficient to show that the title has been deemed insufficient by conveyancers, who have been employed to advise upon it.

(2) Under the general count for money paid, the buyer of a property shall not recover the expenses

20371. — **Vendor entitled under uncompleted contract.**—*CHAPMAN & FIELD v. KEYS* (1908), 27 N. Z. L. R. 769.—N.Z.

g. — **Vendor unable to make title to material part of premises sold.**—*PERRIN v. KEYNOLDS* (1886), 12 V. L. R. 440.—AUS.

h. — **Title subject to incumbrances.**—*A purchaser of land has a right to a title free from incumbrances, & if the vendor is unable to give such a title, the purchaser may recover back his deposit.*—*SCOTT v. GARNETT* (1853), 7 N. B. R. (2 All.) 824.—CAN.

k. — **—**—*WRAYTON v. NAYLOR* (N. S.) (1895), 24 S. C. R. 295.—CAN.

l. — **—**—*SUTCLIFFE v. SMITH* (1912), 21 W. L. R. 326.—CAN.

m. — **No title to part of property.**—After a contract had been made for the purchase of 73 acres the purchaser discovered that the vendor had no title to 5 acres of the land. He then gave notice of rescission & demanded a return of his deposit:—*Held*: he was entitled to repayment.—*CLARK v. EVERETT* (1884), 1 Man. L. R. 229.—CAN.

n. — **Vendor's right to sell derived under power in mortgage—Power occasionally exercised.**—*LOOKING v. HALSTED* (1888), 16 O. R. 32.—CAN.

o. — **Defect cured after issue of**

writ.—Purchaser's action to rescind & for a return of his deposit on the ground that the vendor was unable to make title at the time fixed by the contract for closing when time was of the essence of the contract, is not defeated by showing that the defect had been cured since the issue of the writ.—*McNIVEN v. PIGOTT* (1914), 31 O. L. R. 365; 19 D. L. R. 846; 6 O. W. N. 341.—CAN.

p. — **Probability of land still subject to dower.**—*Re MORRIS & CHERTKOFF*, [1925] 2 D. L. R. 1115; 56 O. L. R. 665.—CAN.

q. — **Vendor unable to give title contracted for.**—*IBRAHIMBAI v.*

of investigating the title, if it afterwards turns out to be bad.—*CAMFIELD v. GILBERT* (1802), 4 Esp. 221; 170 E. R. 698, N. P.; *subsequent proceedings* (1803), 3 East, 516.

2039. Equitable title.—In an action to recover back the deposit on a purchase, upon the vendor's failure to make a good title, the ct. will collaterally inquire whether the title be good in equity. *Qu.*: whether interest necessarily accrues on a deposit which is recovered back, & whether it can be recovered as damages on the money counts, without a special count for interest.—*MABERLEY v. ROBINS* (1814), 5 Taunt. 625; 1 Marsh. 258; 128 E. R. 835.

Annotations:—*Reid*. *Smith v. Jackson & Lloyd* (1816), 1 Madd. 618; *Lee v. Munn* (1817), 8 Taunt. 45.

2040. —. —. —. In *assumpsit* to recover money deposited upon a purchase, upon an allegation that deft. has failed to make a proper title, this ct. will not consider whether the title is of a doubtful description, such as a ct. of equity would not compel an unwilling purchaser to take, but simply whether deft. has or has not a legal title to convey.—*BOYMAN v. GUTCH* (1831), 7 Bing. 379; 5 Moo. & P. 222; 9 L. J. O. S. C. P. 63; 131 E. R. 147.

Annotations:—*Consd.* *Simmons v. Heseltine* (1858), 5 C. B. N. S. 554. *Reid*. *Brumfit v. Morton* (1857), 3 Jur. N. S. 1198; *Stevens v. Austen* (1861), 3 E. & R. 685. *Mentd.* *Pott v. Turner* (1830), 8 L. J. O. S. C. P. 282; *Neeves v. Burrage* (1849), 14 L. T. O. S. 394.

2041. Sale of leasehold—Assignment of lease necessary to complete title—Duty of vendor to show tender of assignment.—*ADAMS v. FAIRBAIN*, No. 2003, *ante*.

(c) *Power of Sale Defective.*

2042. When deposit recoverable—Power subject to conditions—Conditions not fulfilled.—Pltf. purchased land, & paid a deposit. The condition of sale stated that the sale was made by a first mtgee. under a power of sale. It afterwards appeared that the power of sale was given only in case the mtgee. should give notice in writing to the mtgor. to pay the money due, & the mtgor. should not pay within three calendar months after such notice; & it was provided that the receipts of the mtgee. should discharge the person paying from being answerable for misapplication of the money, or inquiring into the propriety of the sale purporting to be made in pursuance of the power, & from being obliged to be satisfied whether the terms on which the sale was made by virtue of the power were complied with. After this mtge. & before the sale, the mtgor. had executed several additional mtges. on the property. No notice was in fact given to him by the mtgee., but, before the sale, & after the subsequent mtges., he agreed in writing that it should be lawful for the first mtgee. to sell without giving notice:—*Held*: the purchaser, upon discovery of these facts, was entitled to rescind the contract & recover the deposit. Although, after the sale & before the rescinding of the contract, the mtgor., the first mtgee. & several, whether all or not did not appear, of the subsequent mtgees., had executed an indenture, whereby it was declared & agreed that the sale should be valid although no notice had been given.—*FORSTER v. HOGGART* (1850), 15 Q. B. 155; 19 L. J. Q. B. 340; 15 L. T. O. S. 134; 117 E. R. 417; *sub nom.* *FOSTER v. HOGGART*, 14 Jur. 757.

Annotation:—*Reid*. *Jennings v. Brunt* (1868), 19 L. T. 705.

2043. — Sale by trustees of settlement—Conditions of sale not fulfilled.—Upon a contract for the sale of an estate, one of the conditions of sale disclosed that the estate was limited to the use of Mrs. C. for life, with remainder to trustees to sell for the benefit of her children; & "there being three only of such children, all of whom had attained the age of twenty-one," it was stipulated that such children, or their assigns or trustees, should, if required, join in the conveyance to the purchaser; but that no objection should be taken to the title by the purchaser on account of the sale taking place in the lifetime of Mrs. C. It appeared that two of the children of Mrs. C. were married women with children, & that they had settled their funds in trust for themselves for life, with remainder to their children:—*Held*: as the grandchildren of Mrs. C. were minors, & neither they nor their trustees could effectually join in the conveyance, the condition of sale was not fulfilled, & the purchaser was entitled to recover back his deposit.—*MOSLEY v. HIDE* (1851), 17 Q. B. 91; 20 L. J. Q. B. 539; 17 L. T. O. S. 106; 117 E. R. 1216; *sub nom.* *MOSELEY v. HIDE*, 15 Jur. 899.

Annotation:—*Fold*. *Want v. Stallibrass* (1873), L. R. 8 Exch. 175.

2044. — Sale of lease by way of under-lease.—*Re WALKER & OAKSHOTT'S CONTRACT*, No. 1843, *ante*.

2045. — Sale to be "by order of executors"—Sale by administrator durante absentia.—*WEBB v. KIRBY*, No. 2111, *post*.

2046. — Sale by assignee of executors—Assignee not a donee of power of sale.—(1) S., being seised in fee of a messuage, & having other real & personal estate, died, having devised all his real & the residue of his personal estate to W. S. & H. S., "their heirs, exors. & administrators," upon trust that W. S. & H. S., or the survivor of them, or the heirs, exors., or administrators of such survivor, should sell. Testator further declared that W. S. & H. S., or the survivor of them, or the exors. or administrators of such survivor, should hold the proceeds of the sale in trust to pay debts & invest all the residue of the trust moneys in govt. or real securities, & pay the dividends equally between testator's wife & daughter during their lives, & wholly to the survivor after the decease of one of them; & after the decease of that survivor to divide the whole equally amongst all the then living children of testator, or, failing them, according to the Stat. Distributions. Testator also appointed W. S. & H. S. his exors. They acted in the trust, & H. S., the survivor, devised all his real & personal trust estates to A. & B., whom he also appointed his exors., to hold to them, their heirs, exors., administrators & assigns, upon the same trusts as testator H. S. held them. After the death of H. S., A. & B. sold the messuage in question to C., who subsequently contracted with pltf. to sell it to him in fee. In an action by pltf. to recover the deposit money paid under this contract, on the ground that C. had failed to make out a good title:—*Held*: pltf. was entitled to recover; inasmuch as, by reason of the omission of "assigns" in the description of the donees of the power of sale in the devise by S. creating the trust, the title of the devisees of H. S. to convey to C. was too doubtful for a ct. of equity to compel specific performance of the contract.

FLETCHER (1896), L. L. R. 21 Bom. 827.—*IND.*

r. Action for recovery—Necessity for notice of rescission & demand.—

Where there is a want of title, a notice of rescission & demand for the deposit is not necessary before bringing action; the commencement of an action for

the money is the strongest kind of a demand & of notice of rescission.—*LAYCOCK v. FOWLER* (1910), 16 W. L. R. 441.—*CAN.*

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(2) S. in 1810 bought the messuage in fee for £462. The price paid to A. & B. by C., upon the sale of it to him in 1855, was only £73 4s., & the contract price between C. & pltf., in 1859, was £350:—*Held*: the inadequacy of the price at which A. & B. sold constituted a breach of trust; & as pltf., having notice, was affected thereby, pltf. was entitled on that ground to refuse to complete the contract.—*STEVENS v. AUSTEN* (1861), 3 E. & E. 685; 30 L. J. Q. B. 212; 3 L. T. 810; 7 Jur. N. S. 873; 121 E. R. 600.

Annotation:—As to (1) Consd. Osborne to Rowlett (1880), 13 Ch. D. 774.

2047. — Sale under power of attorney—Sale not authorised by power.]—B. executed a voluntary settlement of land in favour of his wife & children, which contained a power of sale; subsequently, B. being about to leave England, executed a power of attorney to E., authorising him to sell all or any of his lands, but in general terms. E., as B.'s attorney, agreed to sell a portion of the land comprised in the settlement to deft., & deft. contracted the next day, May 4, 1876, to sell the same piece of land to pltf. On the execution of this contract a deposit of £200 was paid, & the purchase was to be completed on Jan. 1, 1877. The title was objected to by pltf. on the ground that the power of attorney did not authorise the sale to deft., & an action was commenced in the Exch. Div. in Aug. 1877 for the return of their deposit, & for damages for breach of the contract; deft. asserted that the contract was binding & the title good, & by his counter-claim asked for specific performance. An order had been obtained by consent in another action to administer the trusts of the settlement, confirming the proposed sale by E. to deft., & it had also been decided in the action that an order might be made directing a person to convey for B. Deft. subsequently offered a conveyance direct from B. or from the trustees of the settlement, which was declined:—*Held*: the power of attorney did not authorise E. to sell to deft. any portion of the land comprised in the settlement; & such a sale was not sufficient to call into operation the 27 Eliz., c. 4, pltf. could not be affected by the order in the administration action, & the title being defective, pltf. were entitled to recover their deposit, with the costs of the action, the damages to be ascertained to be limited to the conveyancing costs.—*GENERAL MEAT SUPPLY ASSOCN., LTD. v. BOUFFLER* (1879), 40 L. T. 126; *on appeal*, 41 L. T. 719, C. A.

2048. — Sale by trustees of will—No immediate power of sale conferred—Offer to procure conveyance by tenant for life.]—Vendors contracted to sell land as trustees for sale & the purchaser paid a deposit. Upon investigation of the title it appeared that the vendors had no power of sale until the death of an existing tenant for life. The purchaser objected to the title, & the vendors thereupon offered to procure a conveyance from the tenant for life under the powers of Settled Land Acts. The purchaser declined to enter into a new contract with the tenant for life, & took out a summons under Vendor & Purchaser Act, 1874 (c. 78), to have it declared that the vendors had not shown a good title in accordance with the contract, & claiming a return of the deposit, with interest thereon at 4 per cent. *per annum* from the

date of the contract until payment & the costs of investigating the title:—*Held*: the purchaser was entitled to an order in the terms of his summons.—*Re BRYANT & BARNINGHAM'S CONTRACT* (1890), 44 Ch. D. 218; 59 L. J. Ch. 636; 63 L. T. 20; 38 W. R. 469, C. A.

Annotations:—Apld. Re Head's Trustees & Macdonald (1890), 45 Ch. D. 310; *Re Cooke & Holland's Contract* (1898), 78 L. T. 106. *Distd. Re Baker & Selmon's Contract*, [1907] 1 Ch. 238. *Reid. London & Scottish Issue Co. v. Adams* (1893), 9 T. L. R. 396.

2049. — Offer to obtain concurrence of beneficiaries.]—Trustees & exors. entered into a contract for the sale of part of their testator's real estate under the belief, which proved to be erroneous, that they had an immediate power of sale. The purchaser objected to the title; & after the time fixed for completion had passed, the vendors offered to obtain the concurrence of the beneficiaries, & make a title in that way:—*Held*: the purchaser could not, after the time for completion was passed, be compelled to take a title which was different from that which he had agreed to take, & which required investigation; & the vendors must repay to him the deposit that he had paid, with interest, & pay his costs of investigating the title.—*Re HEAD'S TRUSTEES & MACDONALD* (1890), 45 Ch. D. 310; 59 L. J. Ch. 604; 63 L. T. 21; 38 W. R. 657, C. A.

Annotations:—Apld. Bellamy v. Debenham, [1891] 1 Ch. 412. *Distd. Re Baker & Selmon's Contract*, [1907] 1 Ch. 238; *Brickles v. Snell*, [1916] 2 A. C. 599. *Consd. Re Hales & Hutchinson's Contract*, [1920] 1 Ch. 233. *Reid. London & Scottish Issue Co. v. Adams* (1893), 9 T. L. R. 396.

(d) *Delay by Vendor.*

2050. General rule.]—Motion for an injunction to restrain an action against the auctioneer for the deposit, refused, where there had been great delay on the part of the vendor.—*LLOYD v. COLLETT* (1793), 4 Bro. C. C. 469; 4 Ves. 689, n.; 29 E. R. 992, L. C.

Annotations:—Folld. Venn v. Cattell (1872), 27 L. T. 469. *Reid. Fordyce v. Ford* (1794), 4 Bro. C. C. 494; *Omerod v. Hardman* (1801), 5 Ves. 722; *Seton v. Slade, Hunter v. Seton* (1802), 7 Ves. 265; *Alley v. Deschamps* (1806), 13 Ves. 225; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Firth v. Greenwood* (1855), 1 Jur. N. S. 866; *Stickney v. Keeble*, [1915] A. C. 386.

2051. Non-completion by time specified.]—*CORNISH v. ROWLEY* (1800), 1 Selwyn's, N. P. 13th ed. p. 219.

Annotation:—Consd. Farquhar v. Farley (1817), 1 Moore, C. P. 322.

2052. —.]—*CARPENTER v. BLANDFORD*, No. 1973, *ante*.

2053. — Question as to purchaser's liability to complete.]—*HOWE v. LAWRIE* (1843), 1 L. T. O. S. 252.

2054. — Time essence of contract.]—Time is of the essence of a contract or agreement for the sale of land at law; & if the conveyance is not completed on or before the day specified in such contract, the vendee may recover back his deposit money in an action for money had & received.—*BEAMISH v. OWENS* (1846), 7 L. T. O. S. 187.

2055. — Conditions contemplating postponement.]—Pltf. was the purchaser of a reversion at a public auction under conditions of sale by which the purchaser was to pay a deposit of 20 per cent. into the hands of the auctioneers as part of the purchase-money, & sign agreements for payment of the remainder on or before Aug. 17, at the offices of the vendor's solrs., when & where the purchase was to be completed, but

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2051 i. Non-completion by time specified.]—*BURNS v. GRIFFIN* (1876), 26 C. P. 61.—*CAN.*
t. — *Failure to make title.]—Re GOLDENBERG & GLASS* (1925), 56 O. L. R. 414.—*CAN.*

should the completion of the purchases be delayed from any cause whatever beyond that period the purchaser was to pay interest on the balance of the purchase-money from that day until the completion of the purchase at the rate of 5 per cent. *per annum*. Pltf. paid the deposit at the time of the sale, but owing to objections taken to the title the contract was not completed by Aug. 17. In an action against the vendor & auctioneers to recover the deposit:—*Held*: pltf. was not entitled to recover, for that by the conditions of sale, the parties had expressly contemplated a postponement of completion of the contract beyond Aug. 17, & time was not of the essence of the contract.—*PATRICK v. MILNER* (1877), 2 C. P. D. 342; 46 L. J. Q. B. 537; 36 L. T. 738; 41 J. P. 568; 25 W. R. 790, D. C.

Annotation:—*Mentd. Akt. Reidar v. Arcos*, [1927] 1 K. B. 352.

2056. — Vendor attempting to resell.]—A vendor, having power under his contract to rescind in the event of the purchaser insisting upon any requisition which the vendor is unable or unwilling to comply with, must exercise that power promptly & in good faith, & may not delay the exercise of it for the purpose of obtaining time to negotiate, behind the purchaser's back, for the sale to a third party of the property the subject of the contract. A contract for the sale of certain property contained the usual provision that, in the event of the purchaser insisting upon any requisition which the vendor was unable or unwilling to comply with, the vendor might, by notice in writing, rescind the contract. A requisition was made & insisted upon which was the subject of considerable correspondence extending beyond the day fixed for completion, & in which the purchaser inquired, but without result, whether the vendor intended to rescind. In the meantime the vendor had, unknown to the purchaser, been negotiating for the sale of the property to a third party. Finally, the purchaser commenced an action for repayment of the deposit, & other relief. The vendor counterclaimed specific performance:—*Held*: the purchaser was entitled to be relieved from the contract & to repayment of the deposit.—*SMITH v. WALLACE*, [1895] 1 Ch. 385; 64 L. J. Ch. 240; 71 L. T. 814; 43 W. R. 539; 13 R. 201.

2057. — Vendor not in position to complete.]—*WARREN v. MOORE* (1898), 14 T. L. R. 497, C. A.

2058. Reasonable notice to vendor fixing time—For showing proper title.]—*Re BAYLEY & SHOESMITH'S CONTRACT*, No. 2017, *ante*.

2059. — For ratification by other owners.]—*LEE v. SOAMES*, No. 2176, *post*.

2060. — For delivery of abstract.]—*COMPTON v. BAGLEY*, No. 2178, *post*.

2061. — For completion.]—S. agreed to purchase from K. & J., land speculators, a farm for his own occupation forming part of a much larger estate which K. & J. had contracted to purchase with a view of sub-selling it in several lots at a profit. The contract between S., & K. & J. named Oct. 11, 1911, as the day for completion. On the date K. & J., however, were not the legal owners of the estate & could not complete. Ultimately, on Jan. 30, 1912, S. gave them notice of cancellation unless the purchase was completed within fourteen days. K. & J. were still unable to complete, & S. issued his writ claiming the return of his deposit. Thereupon K. & J. resold the farm to another purchaser:—*Held*: the equitable doctrine that the times fixed for completion was not to be regarded as the essence of a contract had no application in cases where the stipulation

as to time could not be disregarded without injustice being done to one or other of the parties, or where one of the parties had put himself in default, as where a vendor had been guilty of unnecessary delay in completion, & the purchaser had served him with a notice reasonably limiting the time at the expiration of which he would treat the contract at an end.—*STICKNEY v. KEEBLE*, [1915] A. C. 386; 84 L. J. Ch. 259; 112 L. T. 664, H. L.; *subsequent proceedings*, 84 L. J. Ch. 927.

Annotations:—*Appld. Jamshed Khodaram Irani v. Burjorji Dhunjibhha* (1915), 32 T. L. R. 156. *Refd. Re Bayley & Shoesmith's Contract* (1918), 87 L. J. Ch. 626.

(e) *Misdescription and Misrepresentation.*

2062. *Misrepresentation — Abstract containing deeds not executed & representing incumbrances to be paid off.*—*BEDFORD v. FORBES* (1843), 1 Car. & Kir. 33; 2 L. T. O. S. 192, N. P.

2063. *Misdescription—Tied public-house sold as free.*]—In the conditions of sale of the lease of a public-house, it was described as "a free public-house"; the lease contained a covenant that the lessee & his assigns should take their beer from a particular brewer; this lease was all read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public-house, & that the covenant about the beer had been decided to be bad:—*Held*: a purchaser, who heard the lease read over, was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit.—*JONES v. EDNEY* (1812), 3 Camp. 285; 170 E. R. 1384, N. P.

Annotations:—*Consd. Flight v. Booth* (1834), 1 Blng. N. C. 370. *Refd. Brumfit v. Morton* (1857), 30 L. T. O. S. 98; *Grosvenor v. Green* (1858), 28 L. J. Ch. 173; *Re Davis & Carey* (1888), 40 Ch. D. 601; *Re Fawcett & Holmes' Contract* (1889), 42 Ch. D. 150.

2064. — *Underlease sold as lease.*]—*BLAKE v. PHINN*, No. 2300, *post*.

2065. — *Property wrongly described as "land tax redeemed."*]—By the particulars on a sale by auction of freehold land, the property was described as "land tax redeemed." The only evidence of that fact was a statement in the witnessing part of a conveyance, dated 1844, twelve years before the date of the sale from M. to H., from whom the property came by various *mesne* assignments to the vendor, in which the then vendor acknowledged to have received the amount of the purchase-money for the purchase of the premises " & the fee simple & inheritance thereof in possession, free from land tax & all other incumbrances," & a statutory declaration by M., to the effect that, to best of his knowledge & belief, no land tax had ever been paid for or in respect of the land "subsequently to the purchase or redemption thereof in or about the year 1799":—*Held*: this was not such evidence of the fact of the land tax having been redeemed as to entitle the vendor to insist upon the completion of his purchase, notwithstanding a condition which provided that "Every deed or entry on or copy of court roll dated more than ten years ago shall be conclusive evidence of everything recited or stated therein" for, this was not a direct statement or recital of the fact that the land tax had been redeemed, but only an acknowledgment by the then vendor that the then purchaser had paid a certain sum for the land as being free of land tax & other incumbrances, & it was consistent with such statement that the land tax had not been redeemed, but that it had been purchased or assigned to the then purchaser, or to a trustee for him, in whom or in whose representatives it might still be vested; purchaser was entitled to recover back

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the deposit with interest & costs of investigating the title.—*POPPLETON v. BUCHANAN*, *BUCHANAN v. POPPLETON* (1858), 4 C. B. N. S. 20; 27 L. J. C. P. 210; 31 L. T. O. S. 83; 22 J. P. 546; 4 Jur. N. S. 414; 6 W. R. 372; 140 E. R. 986.

2066. — *Of ground rents.*—*ROBINS v. EVANS*, No. 2204, *post*.

2067. — *Sale of term certain—Lessor having right of option to determine lease.*—*WESTON v. SAVAGE*, No. 2113, *post*.

2068. — *Effect of provision for error.*—*RE HARE & O'MORE'S CONTRACT*, No. 1811, *ante*.

2069. — *Property substantially different.*—*JACOBS v. REVELL*, No. 2189, *post*.

2070. *Statements calculated to mislead—Purchaser induced to believe that vendor is stating facts within his knowledge.*—(1) Where a vendor puts up a property for sale with the intention of selling the whole of it in lots, with restrictive covenants to be entered into by each of the purchasers, it is a question of fact whether there was any intention that the restrictive covenants should be in favour of each purchaser as against the others; & if such was the intention, the covenants can be enforced by the purchasers & their assigns *inter se*.

(2) Neither a condition of sale which provides that a property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, nor the provisions of the Conveyancing & Law of Property Act, 1881 (c. 41), s. 3 (3), relieve a vendor from disclosing any incumbrance or liability of which he is aware or which he has the means of knowing.

(3) Where a vendor of property or his agent makes a statement which is calculated to mislead the purchaser into believing it to be a statement of facts within his knowledge, & the purchaser, relying on such statement, enters into a contract to purchase the property & pays a deposit, the vendor cannot enforce the contract, but the purchaser is entitled to rescind the contract & to recover the deposit from the vendor.—*NOTTINGHAM PATENT BRICK & TILE CO. v. BUTLER* (1886), 16 Q. B. D. 778; 55 L. J. Q. B. 280; 54 L. T. 444; 34 W. R. 405; 2 T. L. R. 391, C. A.

Annotations:—As to (1) Ext'd. *Collins v. Castle* (1887), 38 Ch. D. 243. *Apl'd.* *Bower v. Sandford* (1889), 5 T. L. R. 570. *Cons'd.* *Birmingham & District Land Co. v. Allday*, [1893] 1 Ch. 312. *Refd.* *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Spicer v. Martin* (1888), 14 App. Cas. 12; *Davis v. Leicester Corp'n.*, [1894] 2 Ch. 208; *Nalder & Collyer's Brewery Co. v. Harman* (1900), 82 L. T. 594; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Formby v. Barker*, [1903] 2 Ch. 539; *Reid v. Bickerstaff*, [1909] 2 Ch. 305; *Willé v. St. John*, [1910] 1 Ch. 84; *Kelly v. Barrett*, [1924] 2 Ch. 379. *As to (2) Ref'd.* *Simpson v. Gilley*, (1922), 92 L. J. Ch. 194. *As to (3) Cons'd.* *Saxby v. Thomas* (1890), 63 L. T. 695. *Refd.* *Beyfus v. Lodge*, [1925] Ch. 350. *Generally, Ref'd.* *Whitehouse v. Hugh*, [1906] 1 Ch. 253.

(f) *Non-Disclosure.*

2071. *Non-disclosure on sale of leasehold—Landlord's notice to repair.*—A landlord having given notice to his lessee, under a covenant in the lease, that he would re-enter if the premises were not put into repair within three months, if an auctioneer sell the lease without communicating the notice to the vendee, the latter may recover his deposit from the auctioneer, although he knew the dilapidated state of the premises at the time of sale.—*STEVENS v. ADAMSON* (1818), 2 Stark. 422; 171 E. R. 692, N. P.

Annotations:—Cons'd. *Re Leyland & Taylor* (1900), 69 L. J. Ch. 764. *Fold.* *Carlsh v. Salt*, [1906] 1 Ch. 335. *Cons'd.* *Beyfus v. Lodge*, [1925] Ch. 350.

2072. — *Purchaser precluded from ob-*

jecting to non-disclosure.—On July 31, 1924, deft. purchased from pltf's. two leasehold houses & paid a deposit. Completion was fixed for Aug. 21, 1924. Under the lease the vendors were bound to do the inside & outside repairs. The conditions of sale provided that the purchaser should execute all necessary repairs. Requisitions on title were delivered, one of which asked whether any notices from landlords had been served on the property. The answer was that the vendors were not aware of any. The answer was made in good faith, but in fact the vendors had received landlord's notices on July 7, 1924, calling upon them, within three months of July 4, 1924, to make good the dilapidations found to have accrued on the premises "as per the schedule hereto annexed." On discovering their mistake the vendors, on Aug. 20, 1924, sent copies of the notices to the purchaser, who then declined to complete unless the vendors complied with the notices at their own expense. Condition (a) of the conditions of sale provided that the production of the last receipt for rent should be conclusive evidence that all the covenants had been complied with. Condition (b) provided that if any notices were outstanding they should be complied with at the expense of the purchaser. Pltf's. brought an action for specific performance of the contract by deft. Deft. counterclaimed for the rescission of the contract & the return of his deposit:—*Held*: (1) the notices contained material facts which it was the duty of the vendors to disclose, & that the non-disclosure deprived them of the right to the special relief of specific performance; that neither condition (a) nor condition (b) relieved the vendors from the obligation of disclosing the notices, because the former required the purchaser to assume to be true that which the vendors knew at the time of the sale to be untrue, & the latter only stated as a contingency that which the vendors knew to be a fact; (2) the purchaser having made out no case for the rescission of the contract it was good at law, & since the purchaser refused to complete according to its terms he was not entitled to the return of his deposit.—*BEYFUS v. LODGE*, [1925] Ch. 350; 95 L. J. Ch. 27; 133 L. T. 265; 41 T. L. R. 429; 69 Sol. Jo. 507.

2073. — *Dropping of life.*—(1) Where, in the particulars of sale, property was stated to be held under the C. estate upon three lives, & it appeared in an action to recover back the deposit, that one of the lives had dropped before the sale, & that the property was not held directly under the C. estate:—*Held*: deft. could not call the auctioneer to prove that he stated before the sale that the life had dropped; but deft. might give evidence to show that, before the sale, pltf. had read the original lease under which the property was held.

(2) A party recovering back a deposit paid on the purchase of real property is not entitled to interest.

(3) In an action against the vendor of an estate to recover the deposit on a contract for the purchase, if deft. on notice produce the contract, pltf. need not prove its execution.—*BRADSHAW v. BENNETT* (1831), 5 C. & P. 48; 1 Mood. & R. 143; 172 E. R. 872, N. P.

2074. — *Liability to compulsory acquisition.*—Certain leasehold houses were sold by auction, which were described in the particulars & conditions of sale as a well secured rental with reversionary interest, & as an eligible investment. By the provisions of a local Act, for the establishment of the South London Market co., the co. were authorised to treat for, purchase, & take

the premises in question for the purposes of the Act. No notice was given of this liability in the particulars & conditions of sale; & the jury found as a fact that the vendee had no notice of the liability. The conditions contained no express warranty of title:—*Held*: (1) *pltf.* was not justified in stating this contract in the declaration, as a warranty of a clear title, free from all charges, incumbrances, & liabilities; (2) the purchaser was entitled to rescind the contract, on ascertaining that the premises were liable to be taken for the purposes of the Act.—*BALLARD v. WAY* (1836), 1 M. & W. 520; 2 Gale, 61; Tyr. & Gr. 851; 5 L. J. Ex. 207; 150 E. R. 540.

2075. — Unusual covenants.—Covenant not to assign.—A lease contained a covenant by the lessee "not to assign or part with the possession of the premises without the consent of the lessor, such consent not to be unreasonably withheld." An intending purchaser of the lease had signed an agreement with the lessee to purchase the lease from him, & had paid a deposit in pursuance of the agreement; but before the day fixed for the completion of the purchase the purchaser became aware of the existence of this covenant in the lease, & he refused to complete, on the ground that this covenant was not disclosed to him before he signed the agreement:—*Held*: this covenant was an "unusual" covenant, & as it was not disclosed to the purchaser before signing the agreement, he was justified in refusing to complete the purchase, & was entitled to recover back the deposit.—*BISHOP v. TAYLOR & Co.* (1891), 60 L. J. Q. B. 556; 64 L. T. 529; 55 J. P. 695; 39 W. R. 542; 7 T. L. R. 419, D. C.

2076. — Effect of condition that title is to be accepted.—*Re HAEDICKE & LIPSKI'S CONTRACT*, No. 1841, *ante*.

2077. — Restrictive covenants.—*NOTTINGHAM PATENT BRICK & TILE CO. v. BUTLER*, No. 2070, *ante*.

2078. Non-disclosure on sale of freehold.—Restrictive covenants.—Where a vendor of freehold property mentioned to the purchaser that the property was subject to the same conditions as the adjoining property:—*Held*: (1) the purchaser was not fixed with constructive notice of restrictive covenants, & therefore specific performance was refused; (2) property described in a contract for sale as "freehold" means unincumbered freehold, & such a description does not properly describe freeholds subject to restrictive covenants; (3) there is an obligation on a vendor of freeholds to disclose restrictive covenants, & if he does not disclose them, the purchaser is entitled to a return of his deposit.—*HONE v. GAKSTATTER* (1909), 53 Sol. Jo. 286.

2079. — Service of party-wall notice.—The service of a party-wall notice under the London Building Act, 1894, c. ccxiii, & the issue of the usual award throwing upon the owner the liability to contribute a proportion of the cost of the party-wall works when completed, are material facts which a vendor is under an obligation to disclose to an intending purchaser, inasmuch as they affect the purchase price & constitute a latent defect in the title to the property; non-disclosure, however innocent, will afford the purchaser sufficient ground for obtaining rescission of his contract, followed by return of the deposit with interest, & payment of the costs of investigating the title.—*CARLISH v. SALT*, [1906] 1 Ch. 335; 75 L. J. Ch.

175; 94 L. T. 58; 54 W. R. 244; 50 Sol. Jo. 157.

Annotations:—*Distd.* *Beyfus v. Lodge*, [1925] Ch. 350. *Reid.* *Shepherd v. Croft*, [1911] 1 Ch. 521; *Tingley v. Müller*, [1917] 2 Ch. 144.

2080. — Right of way.—Trustees put up for sale by auction two adjoining freehold properties. Lot 2 was an hotel standing in its own grounds & approached from the main road by a carriage drive. Lot 3 was a house the only access to which from the main road was by a carriage sweep opening into the carriage drive of lot 2. Both properties were leased, & the lease of lot 2 reserved to the lessors a right of way over the carriage drive to get access to lot 3. By an error the particulars of sale of both lots 2 & 3 made no mention of the right of way, but on the sale plan, which formed no part of the contract, it was apparent that the only access to lot 3 was over the carriage drive. By the conditions of sale the properties were sold subject to all rights of way & other easements "whether or not the same shall be mentioned in or upon the Particulars . . . or the Sale Plan, if any, . . . but if there shall be found any such easement . . . not disclosed or partially or inaccurately disclosed in the Particulars or the Sale Plan, if any, such non-disclosure or partial or inaccurate disclosure shall be deemed to be an omission or error within the meaning of Clause 15."

By clause 15, "if any error, misstatement, or omission shall be discovered in the Particulars or Sale Plan, if any, . . . the same shall not annul the sale, nor shall any abatement or compensation be allowed or paid by the vendor or purchaser." The lease of lot 2 was produced to G., the purchaser, before the auction & was perused by his solr. G. was almost blind; but the particulars were read to him, & he bought lot 2 with the intention of building over the carriage drive. The abstract included the lease of lot 2, with a plan showing the carriage sweep to lot 3, but G.'s solr. made no requisition about it, & sent to the vendors' solr. a draft conveyance of the property unincumbered, in which the vendors' solr. inserted a reservation of the right of way to lot 3. G. refused to accept this addition. The vendors brought an action for specific performance with the reservation, or, alternatively, rescission & retention of the deposit. G. counterclaimed for rescission & return of the deposit:—*Held*: the condition as to errors only applied to errors which were not known to the vendors; & the purchaser was not bound to make a requisition as to the right of way, when the abstract showed a title to an unincumbered freehold; & the purchaser was entitled to rescission & return of the deposit.—*SIMPSON v. GILLEY* (1922), 92 L. J. Ch. 194; 128 L. T. 622.

(g) *Vendor Unable to Perform Contract.*

2081. General rule.—If A. agrees to sell an estate to B., & is afterwards disabled from doing so, B. may recover back the money deposited, in an action for money had & received although the contract for the sale be under seal.—*GREVILLE v. DA COSTA* (1797), Peake, Add. Cas. 113; 170 E. R. 213, N. P.

2082. ——Where money has been paid under a written agreement, but which agreement the party is unable to perform, the other may maintain an action for money had & received generally, & is not bound to declare on his special agreement.—

Sect. 2.—Forfeiture and recovery of deposit: Subsect. 3, C. (g) & (h), D. & E.]

FARRER v. NIGHTINGAL (1798), 2 Esp. 639; 170 E. R. 481.

2083. Sale of leasehold premises—Lease containing covenant to repair—Part of property pulled down before sale—Part pulled down not described in particulars.]—Where leasehold premises are sold by auction, & the lease containing the usual covenant to repair is produced & read to the bidders, if any of the buildings demised & described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, & may recover back his deposit, although the building pulled down be not described in the particulars of sale.—**GRANGER v. WORMS** (1814), 4 Camp. 83; 171 E. R. 27, N. P.

2084. Sale of licensed premises—Vendor unable to transfer license.]—Pltf. having agreed to assign an hotel, of which he was the proprietor, & the wine, beer, & spirit licenses, to deft., it was discovered when the agreement was to be executed, that he had omitted to renew his licenses at the previous annual licensing day, whereupon an agreement was entered into between pltf. & deft., that pltf. should deposit £150 as a security for the taking out of the licenses & that he would on or before Aug. 16, take or cause to be taken out & granted, the licenses, either in his own name or in that of deft., & in either case would transfer them to deft.; & further, that if same were not done so that deft. should be in a situation to enjoy the full benefit of the licenses, on or before Oct. 31, then & in such case pltf. should forfeit & pay to deft. the said sum of £150, & if the licenses should be procured & assigned, & deft. should exert himself, & be put to any expense in procuring, or endeavouring to procure the same, he should be entitled to be paid such expense out of the £150; & if the licenses were not obtained on or before Oct. 31, pltf. should allow deft. so much per week, as a remuneration for the loss occasioned by not obtaining the licenses by Aug. 16. On Aug. 16, an application was made by pltf. for licenses to the justices, who sent for deft., but, in consequence of his non-attendance, the licenses were not granted, the justices stating, that they would have granted them had he attended. The licenses were obtained in Nov., when pltf. & deft. both attended before the justices. In an action under Interpleader Act, 1831 (c. 58), to try the right to the deposit:—**Held**: pltf. was entitled to recover, as the obtaining of the licenses was prevented by the act of deft., in not attending before the justices on Aug. 16.—**BRYANT v. BEATTIE** (1838), 4 Bing. N. C. 254; 1 Arn. 65; 5 Scott, 751; 7 L. J. C. P. 78; 2 Jur. 276; 132 E. R. 786.

Annotation:—**Mentd.** Parfitt v. Chambre, *Ex p.* D'Alteyrac (1872), L. R. 15 Eq. 36.

2085. ——**]**—On Jan. 17, 1867, upon a contract for the sale of a public-house, the vendor agreed to make a proper assignment of the licences on Feb. 5, 1867, the day fixed for the completion of the contract, or as soon thereafter as might be. The business of the house had been carried on under the management & under a licence granted under Alehouse Act, 1828 (c. 61), in the name of the vendor's son A., as servant to his father. In Nov. 1866, A. went to America, & had not since been heard of, & since that time, but without any transfer of the licence from A., the business had been continued under the management of B.,

another son of the vendor:—**Held**: the vendor, not being able to obtain the indorsement of the licence by A., was not in a condition to perform his contract, & consequently the purchaser might recover back his deposit & the expenses which he had incurred in & about the purchase.—**CLAYDON v. GREEN, GREEN v. CLAYDON** (1868), L. R. 3 C. P. 511; 37 L. J. C. P. 226; 18 L. T. 607; 16 W. R. 1126.

Annotations:—**Reid.** Cowles v. Gale (1871), 7 Ch. App. 13, n., Tadmester Tower Brewery Co. v. Wilson, [1897] 1 Ch. 705. **Mentd.** Sharpe v. Wakefield (1888), 21 Q. B. D. 66.

2086. Agreement for sale made by vendor's agent—Property already sold by vendor.]—**TYRER v. KING**, No. 2276, *post*.

2087. Vendor unable to procure lessor's consent to assignment.]—A purchaser of leasehold property, which the vendor cannot assign without a licence from his lessor, is entitled to damages, beyond return of the deposit, with interest & expenses, for loss of his bargain by reason of the vendor's omission to do his best to procure such licence.

A vendor agreed with a purchaser for the sale of a leasehold hotel, subject to the consent of the lessor being obtained to the assignment of the lease, & the purchaser paid a deposit on his purchase-money. The vendor died without having completed his contract, & the purchaser then brought an action against his legal personal representative for specific performance. Deft., being desirous of freeing the vendor's estate from the action, induced the lessor to refuse his consent to the assignment, which the lessor accordingly did, & the purchaser thus lost his bargain. Thereupon the purchaser amended his action by claiming damages & return of the deposit:—**Held**: pltf. was entitled, not only to the return of his deposit, with interest & costs of investigating title, but also to the damages he had sustained by the loss of his bargain, through the omission of deft. to obtain the lessor's consent.—**DAY v. SINGLETON**, [1899] 2 Ch. 320; 68 L. J. Ch. 593; 81 L. T. 306; 48 W. R. 18; 43 Sol. Jo. 671, C. A.

Annotations:—**Distd.** Pease v. Courtney, [1904] 2 Ch. 503. **Consd.** *Re* Daniel, Daniel v. Vassall, [1917] 2 Ch. 405. **Apld.** Braybrooks v. Whaley, [1919] 1 K. B. 435. **Refd** Smith v. Butler (1900), 48 W. R. 583.

2088. Act of bankruptcy by vendor—Before date for completion—Unprotected transaction—Vendor unable to give good receipt for purchase-money.]—**POWELL v. MARSHALL, PARKES & Co.**, No. 1768, *ante*.

(h) Other Cases.

2089. Both parties in default.]—In an action by the vendee, on an agreement for the purchase of a public-house, with mutual stipulations, & liquidated damages for non-performance:—**Held**: both parties having made default under the agreement, pltf. was entitled to recover his deposit.—**CLARKE v. KING** (1826), 2 C. & P. 286; Ry. & M. 394; 172 E. R. 128, N. P.

2090. Purchaser compounding with creditors—Vendor agreeing not to enforce contract.]—A. having agreed to purchase an estate, & paid a deposit, B. the seller is unable to make a good title by the stipulated day. A. afterwards, upon negotiating a compromise with his creditors, states his apprehension that he may be compelled by B. to complete the purchase, & applies to B. to cancel the contract, & return the deposit. B. refuses to do either, but says that he will never

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C. (h).

b. *Mutual rescission.*—**CHRISTIE v. ROBINSON** (1907), 4 C. L. R. 1338.

c. —**]**—**CAMPBELL v. GREER** (1860), 10 C. P. 295; subsequent proceedings (1861), 11 C. P. 231.—**CAN.**

d. *Repudiation by purchaser accepted by vendor.*—**HENDERSON v. YOUNG & KUHLMAN** (1912), 15 W. A. L. R. 5.—**AUS.**

take any steps against A. to enforce the contract. Upon this footing, the composition proceeds; C. engaging to secure 7s. in the £1:—*Held*: it would be a fraud upon the creditors, & upon C. if B. were to seek to enforce the contract, & therefore A. cannot maintain an action against B. for the deposit.—*CLARK v. UPTON* (1828), 3 Man. & Ry. K. B. 89.

2091. Part of purchase-money to be raised by loans—Condition for return of deposit if no loans arranged—Meaning of "arranging a loan."—*HEITZMANN v. GOWENLOCK* (1891), 7 T. L. R. 611, C. A.

D. Effect of Proceedings for Specific Performance.

2092. Action for recovery in King's Bench Division—Specific performance subsequently decreed.—*HOGGART v. SCOTT*, No. 2158, *post*.

2093. — Vendor counterclaiming specific performance—Transfer to Chancery Division.—In an action by purchaser of land against vendor for return of deposit debt, counterclaimed specific performance:—*Held*: the action ought to be transferred to the Ch. Div.—*LONDON LAND CO., LTD. v. HARRIS* (1881), 13 Q. B. D. 540; 53 L. J. Q. B. 536; 51 L. T. 296; 33 W. R. 14.

2094. Repayment ordered by decree in specific performance proceedings.—*SOUTHCUMB v. EXETER* (BP.), No. 2124, *post*.

2095. Loss of right to specific performance—Delay of vendor—No defect in title.—*SOUTHCUMB v. EXETER* (BP.), No. 2124, *post*.

2096. — Delay of purchaser.—*HOWE v. SMITH*, No. 1959, *ante*.

2097. Specific performance refused—Undertaking by vendor.—*ROYOU v. PAUL*, No. 2126, *post*.

2098. — Contract still binding at law.—*RE DAVIS & CAVEY*, No. 1832, *ante*.

2099. Vendor's suit for specific performance—Injunction restraining action for recovery of deposit.—There is no general rule of practice to the effect that the ct. will not, in a suit for specific performance by a vendor, restrain an action by the purchaser to recover the deposit.

The purchaser of certain property by private contract having paid his deposit, considered the title defective, & brought an action for the recovery of such deposit. The vendor then filed a bill, & moved for an injunction to restrain such action:—*Held*: a ct. of equity was the proper tribunal to try a question of title, & on bringing the deposit into ct., the injunction must be granted.—*KELL v. NOKES* (1863), 32 L. J. Ch. 785; 8 L. T. 824; 11 W. R. 978; *subsequent proceedings* (1866), 35 L. J. Ch. 729.

E. Interest on Deposit.

2100. Whether interest on deposit allowed—Delay by vendor.—*CORNISH v. ROWLEY* (1800), 1 Selwyn's N. P., 13th ed. p. 219.

Annotation:—*Consd. Farquhar v. Farley* (1817), 1 Moore, C. P. 322.

2101. — Vendor failing to make good title.—In an action to recover back a deposit paid on the purchase of an estate, the vendor not being able to make a good title, if pltf. declare specially, & allege as special damage that he has lost the use of his money; on making out his case, he will

be entitled to interest on the deposit money from the time the purchase should have been completed.—*DE BERNALES v. WOOD* (1812), 3 Camp. 258; 170 E. R. 1375, N. P.

Annotations:—*Fold. Farquhar v. Farley* (1817), 1 Moore, C. P. 322. *Distd. Lee v. Munn* (1817), 1 Moore, C. P. 481. *Refd. Petre v. Duncombe* (1851), 2 L. M. & P. 107; *Stearns v. Village Main Reef Gold Mining Co.* (1904), 48 Sol. Jo. 700.

2102. — — — — — *MABERLEY v. ROBINS*, No. 2039, *ante*.

2103. — — — — — (1) Where the ability of the vendor to make a good title to a portion of the premises sold depends on a doubtful question of fact or of law, the title will not be deemed a good or sufficient title as between vendor & purchaser.

(2) Where, therefore, A. bought certain premises the description of which in the particulars included a stall, which was claimed by the purchaser of the adjoining house under the same vendor, & it was doubtful as a matter of fact whether the description had been corrected at the time of the sale to A. so as to exclude the stall, & as a matter of law whether the stall was included in the conveyance to the purchaser of the adjoining premises, & a ct. of equity had refused to decree specific performance against A.:—*Held*: A. was entitled to recover back his deposit & interest, & the expenses of investigating the title, in an action against the vendor.—*SIMMONS v. HESLITINE* (1858), 5 C. B. N. S. 554; 28 L. J. C. P. 129; 5 Jur. N. S. 270; 7 W. R. 133; 141 E. R. 224.

Annotations:—*As to* (1) *Consd. Stevens v. Austen* (1861), 3 E. & E. 685. *Refd. Osborne v. Rowlett* (1880), 13 Ch. D. 774.

2104. — — — — — *TURNER v. MARRIOTT*, No. 2028, *ante*.

2105. — — — — — *KING v. CHAMBERLAYN*, [1887] W. N. 158.

2106. — — — — — *Re BRYANT & BARNINGHAM'S CONTRACT*, No. 2048, *ante*.

2107. — — — — — *Re HEAD'S TRUSTEES & MACDONALD*, No. 2019, *ante*.

2108. — — — — — *BRADSHAW v. BENNETT*, No. 2073, *ante*.

2109. — — — — — Where contract not binding—No written contract.—*GOSBELL v. ARCHER*, No. 2008, *ante*.

2110. — — — — — Contract not enforceable.—*CASSON v. ROBERTS*, No. 2013, *ante*.

2111. — — — — — Vendor's power of sale defective.—Pltf. being administrator *de bonis non cum testamento annexo durante absentia* of A. H. who was next of kin of testator, & living in Canada, & being also administrator *durante absentia* of the said A. H. of the goods of L. H. who was the surviving trustee & extrix. of testator's will, put up certain of testator's leaseholds for sale. In the conditions of sale, it was stated that "the vendor sells under the will of J. H." testator; & in the particulars, that the sale was "by order of the exors." Debt. became the purchaser, but refused to complete, on the grounds that these statements were misrepresentations, the sale being by an administrator *durante absentia* & not by an exor., & also because the *cestui's que trust* under the will were not parties to the contract:—*Held*: (1) though the letters of administration *durante absentia* were good during the life of the principal until they were revoked yet, as he was at

PART VIII. SECT. 2, SUB-SECT. 3.—D.

2094 i. Repayment ordered by decree in specific performance proceedings.—*HAMILTON v. MACDONELL* (1910), 19 Man. L. R. 385.—*CAN.*

2094 ii. — — — — — *MCGREY v. HODDER* (1912), 23 O. W. R. 699; 4 J.—*VOL. XL.*

O. W. N. 536; 8 D. L. R. 755.—*CAN.*

2094 iii. — — — — — *ALOKISHI DASSI v. HARA CHAND DASS* (1897), 1 L. R. 24 Cal. 897; 1 C. W. N. 705.—*IND.*

PART VIII. SECT. 2, SUB-SECT. 3.—E.

2100 i. Whether interest on deposit allowed—Delay by vendor.—*GWILLAM*

v. LOTT (1909), 12 W. L. R. 4.—*CAN.*

e. — — — — — Where purchaser in possession until rescission.—*TURLEY v. EVANS* (1863), 13 C. P. 214.—*CAN.*

f. — — — — — Misrepresentation by vendor.—*POWER v. ATKINS*, [1921] N. Z. L. R. 763.—*N.Z.*

Sect. 2.—Forfeiture and recovery of deposit: Sub-sect. 3, E., F. & G. Sects. 3 & 4: Sub-sect. 1.

the time of the sale living in Canada, & it was therefore impossible to know when the agreement was made, whether he was then alive or not, *pltf.* was not entitled to specific performance; (2) interest at the rate of 4 per cent. *per annum* was allowed on the deposit on the purchase-money which had been paid by the intending purchaser under the conditions of sale.—*WEBB v. KIRBY* (1856), 7 De G. M. & G. 376; 26 L. J. Ch. 145; 28 L. T. O. S. 314; 3 Jur. N. S. 73; 5 W. R. 189; 44 E. R. 147, L. C.

Annotation:—As to (1) Consd. Hewson v. Shelley, [1914] 2 Ch. 13.

2112. — Misdescription by vendor.—*POPPLETON v. BUCHANAN, BUCHANAN v. POPPLETON*, No. 2065, *ante*.

2113. — —.—*S.*, being in the occupation of a public-house, contracted with *W.* to sell to him the residue of the lease, of which twelve & a half years at least were unexpired. *W.*, the day after signing the contract, by which he agreed to take possession on Apr. 15, 1878, paid a sum as a deposit to *S.*'s agent. The abstract of title showed that *S.*'s lessors had a right of option to determine the lease at the end of five years, & *W.* at once rescinded the contract, & required the return of the deposit money. *S.* refused to repay the money, & *W.* issued a writ in his action on Apr. 10, to recover it:—*Held*: (1) *W.*'s objection to the title was valid; he was not bound to wait till Apr. 15 before issuing the writ; (2) he was entitled to repayment of the deposit money with interest.—*WESTON v. SAVAGE* (1879), 10 Ch. D. 736; 48 L. J. Ch. 239; 27 W. R. 654.

Annotations:—As to (1) Apld. Bellamy v. Debenham, [1891] 1 Ch. 412. As to (2) Distd. Smith v. Butler (1900), 48 W. R. 583.

2114. — —.—*Re HARE & O'MORE'S CONTRACT*, No. 1811, *ante*.

2115. — Vendor unable to procure licence to assign.—*DAY v. SINGLETON*, No. 2087, *ante*.

2116. — Non-disclosure.—*CARLISH v. SALT*, No. 2079, *ante*.

2117. Damages for loss of interest on deposit—Who may recover—Personal representative of purchaser.—(1) Where the vendor of an estate, the vendee having made a deposit in part payment of the purchase-money, fails to make out a good title by the time stipulated, & the vendee dies, the personal representative of the vendee, & not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, & for expenses incurred by the vendee in endeavouring to procure a title, the injury accruing to the personal estate.

(2) After bringing an action in which the

grievance alleged is the loss sustained by breach of the contract I think it would be impossible to bring a second action, or to resort to any other means to enforce the contract, inasmuch as the first action is to be deemed an election as to the remedy sought (*TINDAL, C.J.*).—*ORME v. BROUGHTON* (1834), 10 Bing. 533; 4 Moo. & S. 417; 3 L. J. C. P. 208; 131 E. R. 1002.

Recovery from auctioneer.—*See AUCTION & AUCTIONEERS*, Vol. III., p. 25, Nos. 178–184.

F. Purchaser's Lien.

Lien for deposit.—*See LIEN*, Vol. XXXII., pp. 270–272, Nos. 511–523.

Lien for interest on deposit.—*See LIEN*, Vol. XXXII., p. 272, Nos. 525–529.

G. Practice.

2118. Whether new objections to title may be raised.—In an action to recover the deposit on the purchase of an estate on the ground of a defect in the vendor's title, specified on rescinding the contract, no objection can be insisted on at the trial which was not stated as a reason for refusing to complete the contract, if it be of such a nature that it might, if then stated, have been removed.—*TODD v. HOGGART* (1827), Mood. & M. 128, N. P.

2119. Production of contract by vendor—Proof of execution by purchaser.—*BRADSHAW v. BENNETT*, No. 2073, *ante*.

2120. Costs—Right of purchaser to.—*TURNER v. MARRIOTT*, No. 2028, *ante*.

2121. — —.—*Re NEW LAND DEVELOPMENT ASSOCN. & GRAY*, [1892] 2 Ch. 138; 61 L. J. Ch. 323; 66 L. T. 404; 40 W. R. 295; 36 Sol. Jo. 254; *on appeal*, [1892] 2 Ch. p. 146, C. A.

Annotations:—Mentd. Re Ailesbury S. E. (1893), 9 T. L. R. 616; Re Clayton & Barclay's Contract, [1895] 2 Ch. 212; Re Poppleton & Jones' Contract (1896), 74 L. T. 582; Re Calcott & Elvin's Contract (1898), 67 L. J. Ch. 327; Hunt v. Fripp, [1898] 1 Ch. 675; Bird v. Philpott, [1900] 1 Ch. 822; London & County Contracts v. Tallack (1903), 19 T. L. R. 156; Official Receiver v. Cooke, [1906] 2 Ch. 661; Preston's Trustee v. Cooke (1906), 75 L. J. Ch. 757; Re Kent County Gas Light & Coke Co., [1909] 2 Ch. 195; Re Behrend's Trust, Surman v. Biddell, [1911] 1 Ch. 687.

2122. Plaintiff having option to proceed by vendor & purchaser summons—Whether costs allowed.—*KING v. CHAMBERLAYN*, [1887] W. N. 158.

Recovery by vendor & purchaser summons.—*See Part VII., Sect. 2, ante*.

SECT. 3.—RECOVERY OF INSTALMENTS.

2123. Provision for forfeiture of deposit Whether instalments paid included.—A contract for the sale of land provided that a deposit should be paid immediately, that two instalments of cash,

PART VIII. SECT. 2, SUB-SECT. 3.—G.

g. Action for recovery for failure of consideration—Terms of agreement must be shown.—In order to recover back money paid by *pltf.*, under an agreement for sale of lands to him, on the ground of failure of consideration, *pltf.* must give evidence of the terms of the agreement.—*MCDONALD v. MCDONALD* (1853), James, 41.—*CAN.*

PART VIII. SECT. 3.

h. When right to recover arises—Mutual rescission of contract—No provision for return of money paid.—*CAMPBELL v. HENDERSON* (1857), 3 N. S. R. (2 Thom.) 335.—*CAN.*

pa. — — — — —
to an agreement for the sale of land, the purchase price of which was to be paid in instalments after the making

of the cash payment & before the next instalment became due, verbally agreed that the purchaser should retain the crop planted & deliver possession to the vendor:—*Held*: the contract was rescinded & nothing having been said by the parties as to the cash payment the purchaser was not entitled to recover it.—*SAULSBERRY v. OZIAS* (1915), 32 W. L. R. 409; 24 D. L. R. 885.—*CAN.*

l. — — — — —
After rescission of contract.—*MULHOLLAND v. HOLCOMB* (1857), 6 C. P. 520.—*CAN.*

m. — — — — —
A purchaser can be entitled to a return of the purchase-money paid only after the contract has been rescinded either by the parties themselves or by the ct.—*BANTON v. MARSH BROTHERS & WELLS* (Sask.) (1911), 16 W. L. R. 338.—*CAN.*

n. — — — — —
Title of vendor defective—Vendor unable to make title to material part of premises.—*SNYDER v. PROUDFOOT* (1858), 15 U. C. R. 532.—*CAN.*

o. — — — — —
—*GIBB v. DAVIDSON* (1862), 12 C. P. 588.—*CAN.*

p. — — — — —
—*KILBORN v. WORKMAN* (1862), 9 Gr. 255.—*CAN.*

q. — — — — —
—*JOHNSON v. HENRY* (Man.) (1911), 18 W. L. R. 583.—*CAN.*

r. — — — — —
—*REEVE v. MULLEN* (1913), 25 W. L. R. 445; 5 W. W. R. 128; 14 D. L. R. 345; 6 Alta. L. R. 291.—*CAN.*

t. — — — — —
—*CHRISTIE v. TAYLOR & COLLINGS* (Alta.) (1914), 26 W. L. R. 673; 5 W. W. R. 1034; 15 D. L. R. 614.—*CAN.*

u. — — — — —
Sale of "lands"—Vendor not owner of minerals.—

being 10 per cent. of the rest of the agreed price, should be paid at certain dates, & that the balance of the price should be paid within ten days of the production of a certificate that certain buildings upon the land were completed; if the purchaser failed to comply with the conditions of the contract his deposit might be forfeited & the land resold. The purchaser paid the deposit & the two instalments, but failed to pay the balance of the price at the stipulated time. The vendor rescinded the contract. In an action claiming a return of the instalments paid:—*Held*: the rights of the parties depended upon the contract; & although the purchaser was in default, the instalments were recoverable, since the contract distinguished between the deposit & the instalments & provided for a forfeiture of the deposit only.—*MAYSON v. CLOUET*, [1924] A. C. 980; 93 L. J. P. C. 237; 131 L. T. 645; 40 T. L. R. 678, P. C.

SECT. 4.—REPUDIATION BY PURCHASER.

SUB-SECT. 1.—IN GENERAL.

2124. Purchaser in possession—Assertion of paramount title—Whether possession to be given up Before formal entry.—(1) The purchaser being in possession of part of the property under the arrangement, & being advised to rescind the contract & assert his paramount title to the property, was not bound to give up the possession before he could assert such paramount title by making a formal entry on the property.

RAYMOND v. KNIGHT (1909), 11 W. L. R. 687; 2 Alta. L. R. 157.—**CAN.**

b. ——— *Vendor unable to make title without concurrence of third party.*—A purchaser under agreement of sale was held entitled to return of moneys paid with interest by reason of inability of vendor to make title without concurrence of a third person which he could not compel.—*METCALFE v. VAN HOUTEN* (B. C.), [1919] 2 W. W. R. 110.—**CAN.**

c. ——— *Money paid by mistake.*—*DRURY v. DART* (1909), 12 W. L. R. 520.—**CAN.**

d. ——— *—*—*McKee v. Philip*, [1917] 1 W. W. R. 690.—**CAN.**

e. ——— *Vendor unable to convey.*—*SPENCER v. DAVIDSON* (1911), 17 W. L. R. 571; 4 Sask. L. R. 172.—**CAN.**

f. ——— *Misrepresentation.*—*WEAVER v. WHALEY, WEAVER v. WALLACE* (1908), 9 W. L. R. 579.—**CAN.**

g. ——— *—*—*Dunn v. Alexander* (1912), 20 W. L. R. 902; 1 W. W. R. 1117; 17 B. C. R. 347; 2 D. L. R. 553.—**CAN.**

h. ——— *—*—*Cram v. Tink* (Sask.) (1914), 28 W. L. R. 239; 17 D. L. R. 14.—**CAN.**

k. ——— *Resale by vendor.*—Where deft. agreed to sell land to pltf., & afterwards sold to another, pltf. was held entitled to a return of money, paid with interest, & to damages for breach of the contract.—*SMART v. MCINTOSH* (Sask.) (1912), 22 W. L. R. 883; 3 W. W. R. 609; 8 D. L. R. 871.—**CAN.**

l. ——— *Neglect of property by purchaser while in possession.*—*DOUGLAS v. ARTHUR*, [1923] 3 D. L. R. 800; 53 O. L. R. 83.—**CAN.**

m. ——— *Repudiation by purchaser accepted by vendor—Acceptance by mistake.*—Where a purchaser of land has materially failed to carry out his contract & the vendor, understanding from one whom he believes to be the agent of or associated with the purchaser that the purchaser has

(2) Where the vendor's bill for specific performance is dismissed on the ground of his laches in instituting the suit, & without any decision on the question of title, the ct. will not order the deposit to be returned to the purchaser, but will leave both parties to their legal remedies.—*SOUTHCOMB v. EXETER* (Br.) (1847), 6 Hare, 213; 16 L. J. Ch. 378; 9 L. T. O. S. 293; 12 Jur. 744; 67 E. R. 1145.

Annotations:—As to (2) Distd. *Monro v. Taylor* (1850), 8 Hare, 51. *Apld.* *Parkin v. Thorold* (1852), 16 Beav. 59. *Distd.* *Sharp v. Milligan* (1856), 22 Beav. 606. *Apld.* *Sharp v. Wright* (1859), 28 Beav. 150; *Hedges v. Met. Ry.* (1860), 28 Beav. 109; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527. *Reid.* *Eads v. Williams* (1854), 4 De G. M. & G. 674; *Venn v. Cattell* (1872), 27 L. T. 469.

2125. Election to repudiate or accept—Inclusion of covenants by vendor—Not acceptable to purchaser.—A purchaser contracted to purchase a piece of land. On the abstract it appeared that the land was subject to covenants. The purchaser tendered a draft conveyance, to which the vendors added similar covenants on the part of the purchaser. The purchaser refused to execute these covenants. The vendors thereupon filed a bill for specific performance:—*Held*: the purchaser could elect either to take a conveyance with the covenants, or to rescind the contract.—*LUKEY v. HIGGS* (1855), 3 Eq. Rep. 510; 24 L. J. Ch. 495; 25 L. T. O. S. 7; 1 Jur. N. S. 200; 3 W. R. 306.

2126. When right to repudiate arises—Conduct of vendor amounting to repudiation—Giving notice of intention to resell.—(1) Purchaser raised certain valid objections to his vendor's title, which the vendor refused to satisfy. The vendor gave notice,

abandoned the contract, puts the purchaser's tenant off the land & takes possession thereof, such taking possession only constitutes an acquiescence in the abandonment of the contract by the purchaser, & if there was in fact no such abandonment such acquiescence in that supposed state of affairs cannot be turned into a repudiation of the contract so as to entitle the purchaser to repayment of his purchase-money if the vendor, on learning that there has not been an abandonment, has expressed his willingness to perform the contract.—*LAWTON v. LINDSAY*, [1919] 2 W. W. R. 71; 12 Sask. L. R. 203; 16 D. L. R. 53.—**CAN.**

n. *Forfeiture—On default.*—*SANDERS v. THOMLINSON* (1910), 13 W. L. R. 121.—**CAN.**

o. ——— *Right to relief Loss of right by delay.*—*MANAHAN v. HAMELIN* (1907), 6 W. L. R. 460.—**CAN.**

p. ——— *—*—*McCreedy v. Clark & Wootton* (1910), 14 W. L. R. 480.—**CAN.**

q. ——— *—*—*Banton v. March* (1909), 12 W. L. R. 598.—**CAN.**

r. ——— *—*—*If a purchaser under agreement for sale of land makes it clear that he cannot pay the balance of the purchase money, & the vendor sells to another, the purchaser cannot, on the ground of such act of the vendor, claim damages or specific performance or, by an action at law, return of the purchase-moneys paid, but he may be entitled to equitable relief from forfeiture, by which, in a proper case, he may recover his purchase-moneys paid or part thereof.*—*SUTHERLAND v. JONES* (Alta.), [1922] 2 W. W. R. 1303; 68 D. L. R. 498.—**CAN.**

t. ——— *Possible increase in value of property.*—Where a vendor pltf. obtains an order of foreclosure of an agreement for sale with forfeiture of purchase moneys already received by him, the ct. may keep in view a possible future increase in the value of the land whereby, if the

vendor finally obtained full payment of his claim against the purchaser deft., it would be unjust to retain the purchase-moneys paid by the latter. In such a case leave may be reserved in the order whereby the deft. can apply to the ct. for a revision of the order in so far as the forfeiture is concerned.—*MORTGAGE CO. OF CANADA v. FILER* (Alta.), [1922] 3 W. W. R. 72; 66 D. L. R. 705.—**CAN.**

a. ——— *By abandonment of contract.*—Action to recover an amount paid by a purchaser under an agreement for purchase of land:—*Held*: as pltf. had abandoned the contract he could not recover.—*SMITHNESEKI v. WILTMIRE* (1909), 12 W. L. R. 533.—**CAN.**

aa. ——— *—*—*Vancouver Land & Improvement Co. v. Pillsbury Milling Co.* (1914), 26 W. L. R. 880; 5 W. W. R. 1320; 15 D. L. R. 775; 19 B. C. R. 40.—**CAN.**

bb. *Right to recover after failure of action for deceit.*—After making some payments to deft. on account of the purchase of land under an agreement, pltf. discovered that he had made a bad bargain & repudiated & abandoned the contract, which deft. then cancelled under the provisions thereof:—*Held*: pltf., having failed in his claim for damages in deceit founded on alleged misrepresentations of the deft. in making the sale, could not recover as an alternative the moneys he had paid on account of the purchase.—*KEEFE v. YEO* (1910), 20 Man. L. R. 129.—**CAN.**

cc. *Provision for return of purchase-money on purchaser desiring to sell.*—*EVANS v. HAMILTON* (Sask.), [1922] 2 W. W. R. 1171; 67 D. L. R. 521.—**CAN.**

PART VIII. SECT. 4, SUB-SECT. 1.

dd. *Purchaser in possession—Whether possession to be given up.*—A purchaser under an agreement for the sale of land who has gone into possession thereunder & who seeks to repudiate the agreement because of defects of title must give up the

Sect. 4.—*Repudiation by purchaser: Sub-sects. 1*

that if the purchaser refused to complete within five days, he should resell & charge the purchaser with the expenses. The purchaser thereupon gave the vendor notice, that he should bring an action for the deposit, if the requisitions were not complied with within a week. The action was commenced, & the vendor some time subsequently agreed to satisfy the requisitions at the purchaser's expense. Upon the purchaser's refusal, a bill was filed by the vendor for specific performance:—*Held*: the notice by the vendor of an intention to resell, was equivalent to a declaration that he would not seek specific performance of the contract, & the purchaser's action to rescind was effectual, & the bill was dismissed, with costs.

(2) Power of the ct. to order the return of the deposit where the vendor's bill is dismissed, he having given an undertaking.—*ROYOU v. PAUL* (1858), 28 L. J. Ch. 555.

Annotation.—As to (1) *Expld.* *Laughton v. Port Erin Comrs.*, [1910] A. C. 565.

2127. ——— *Insisting on wrong interpretation of contract.*—*BERNERS v. FLEMING*, No. 2133, *post*.

2128. ——— *Vendor committing breach of trust Sale at inadequate price.—Purchaser having notice.*—*STEVENS v. AUSTEN*, No. 2046, *ante*.

2129. ——— *Commission paid by vendor to pur-*

possession & all claim to a right thereof under the contract in order to make the repudiation effective.—*PEMBERTON v. COLE* (Alta.), [1918] 1 W. W. R. 269.—**CAN.**

1. *Election to repudiate or accept.—Requisition to vendor to remove objection without prejudice to right to repudiate.*—A purchaser, who on becoming aware of a defect in title requires the vendor to remove the objection, instead of immediately repudiating the contract, thereby elects to treat the contract as subsisting, & cannot avoid the consequences of such election, namely the loss of the right to rescind, merely by the addition of the prefatory statement to his requisition that it is "without prejudice to his right to repudiate the contract."—*HAYNES v. HIRST* (1927), 27 S. R. N. S. W. 480; 44 N. S. W. W. N. 138.—**AUS.**

2127 i. *When right to repudiate arises—Conduct of vendor amounting to repudiation.—Insisting on wrong interpretation of contract.*—*GREGG & THIRLAWAY v. FRANCO-CANADIAN MORTGAGE CO., LTD.*, [1917] 2 W. W. R. 121.—**CAN.**

2127 ii. ———.—Where a vendor who has sold an interest in land owns only a portion of what he has sold & wrongly contends that a transfer of such portion would constitute a fulfilment of his contract & refuses to carry out his obligations, the buyer may sue for rescission of the contract & for a refund of any purchase-price paid.—*LOOD'S TRUSTEES v. SCOTT & DE VILLIERS*, [1910] T. P. D. 47; L. L. R. 97.—**S. AF.**

Attempt to resell.—*BURGES v. WILLIAMS* (1912), 15 C. L. R. 504.—**AUS.**

h. ——— *Refusal to convey on account of dispute as to liability for taxes.*—*TARRABAIN v. ALLY* (Alta.), (1917), 36 D. L. R. 546.—**CAN.**

k. ——— *Resale by vendor.*—*CHAPMAN v. NESS* (Man.), [1923] 4 D. L. R. 621.—**CAN.**

l. ——— *Declaration of inability to make title contracted for.*—*MACONCHY v. CLAYTON*, [1898] 1 I. R. 291.—**IR.**

m. ——— *Commission paid by vendor to purchaser's agent.*—*SPARLING v. HOULIHAN* (1902), 14 Man. L. R. 134.—**CAN.**

n. ——— *Commission paid by vendor to co-purchaser.*—*Deft.* held not liable on a promissory note given by him for an instalment of purchase-money under an agreement of sale of land, because one of his co-purchasers, whose joining in the transaction induced *deft.* to become a purchaser, was, unknown to *deft.*, offered special inducements to join in the agreement of purchase, receiving a percentage of the commission paid to the vendor's agent & being relieved from making his share of the cash payment.—*MORRAN v. HANNAH* (Man.), [1919] 3 W. W. R. 1052; 49 D. L. R. 447.—**CAN.**

o. ——— *Fraud of co-purchaser acting as vendor's agent.*—*KILDONAN INVESTMENT CO. v. THOMPSON* (1915), 30 W. L. R. 626; 7 W. W. R. 1299; 21 D. L. R. 181.—**CAN.**

p. ——— *Failure of vendor to register plan.*—*Where sale according to registered plan.*—*ABBOTT v. RIDGEWAY PARK* (1915), 30 W. L. R. 667; 7 W. W. R. 1280.—**CAN.**

q. ——— *Effect of agreement not to register.*—*SHEPPARD v. GODFREY* (1915), 31 W. L. R. 617; 8 W. W. R. 999.—**CAN.**

r. ——— *Wrongful application by vendor of taxes paid by purchaser.*—*PATERSON v. MACNEIL* (1915), 30 W. L. R. 524.—**CAN.**

t. ——— *Purchaser unable to register title.—By reason of own delay.*—A purchaser who kept a transfer for twenty months without any effective attempt to register it & then was unable to obtain registration because of the filing of a plan of a railway right of way; but had not formally demanded a transfer with a registerable description:—*Held*: not entitled to rescission of the contract for sale.—*PROSSER v. HUDSON'S BAY CO.* (Alta.), [1919] 1 W. W. R. 10.—**CAN.**

a. ——— *Conditions excusing performance by purchaser.*—If by the terms of a contract its performance is to be excused under certain conditions, outside the control of the parties, then, in the absence of any provision declaring the rights of the parties in such event, the result of ascertaining that such conditions exist is merely to discharge from performance, & the party declining to perform

chaser's agent.—One of purchasers acting as agent.—Effect of knowledge of purchaser's solicitors.—

(1) The rule that a purchaser can rescind a contract of sale, entered into by his agent on his behalf, on the ground that the agent has received a secret commission from the vendor, only applies where the agent has by reason of the receipt of the commission an interest conflicting with his duty to his principal. Therefore, where one of the purchasers of land, who acted as agent for all the purchasers in negotiating the purchase, received a commission on the amount of the purchase-money from the vendor, but his interest was to obtain the land as cheaply as possible:—*Held*: the purchasers were not entitled to rescind.

(2) Knowledge of the solrs., acting for the purchasers in the matter, of the commission, such knowledge having been acquired by them while acting in the matter, binds the purchasers.—*ROWLAND v. CHAPMAN*, *ROWLAND v. CORRIE*, *ROWLAND v. BRANDRETH* (1901), 17 T. L. R. 669; 45 Sol. Jo. 691.

SUB-SECT. 2.—TIME FOR REPUDIATION.

2130. General rule.—As soon as possible after vendor's failure to make good title.—If a purchaser is entitled at all to insist that the vendor's

is not entitled to rescission from the beginning & return of moneys paid under the contract.—*GARRARD v. LUND*, [1921] 1 W. W. R. 329.—**CAN.**

b. *Rescission by parol.*—An agreement for the sale of lands good under Stat. Frauds may be rescinded before breach of it by parol, provided there is a total abandonment of the whole contract, & not merely a partial waiver of some of its terms; nor does the validity of such rescission depend on the existence of a consideration.—*BARCLAY v. PROAS* (1878), R. E. D. 317.—**CAN.**

c. *Restitution to original position impossible.*—*GARVEY v. MASSEY* (B. C.) (1913), 23 W. L. R. 7; 3 W. W. R. 767; 9 D. L. R. 366.—**CAN.**

d. ———.—A purchaser is not entitled to the rescission of an agreement to purchase unless he is in a position to make immediate restitution; it is not enough that he can get in the interest he has sold & then make restitution.—*BOYDELL v. HAINES* (1915), 30 W. L. R. 842; 8 W. W. R. 17; 21 D. L. R. 371.—**CAN.**

e. *Waiver by part performance.*—Where the buyer, under a contract of sale, has accepted a partial performance of the contract, he cannot afterwards repudiate the contract in toto & recover back the price.—*ALLIS-CHALMERS-BULLOCK, LTD. v. HUTCHINGS* (1913), 13 E. L. R. 277; 13 D. L. R. 211; 41 N. B. R. 444.—**CAN.**

aa. ———.—*CREIGHTON v. DUNKLEY* (1916), 34 W. L. R. 937.—**CAN.**

bb. *What amounts to repudiation.*—Repudiation is merely a notice by one party to a contract to the other that the party giving the notice is not going to perform the contract; it may be given expressly or it may be implied, & an allegation in a statement of defence that the contract had already been determined when the *pltf.* brought his action constitutes a repudiation.—*SMITH v. CRAWFORD*, [1918] 2 W. W. R. 298; 11 Sask. L. R. 170; 40 D. L. R. 224.—**CAN.**

PART VIII. SECT. 4, SUB-SECT. 2.

2130 i. General rule.—As soon as possible after vendor's failure to make good

having only a partial interest makes the contract void, he must insist upon the objection at once, & cannot avail himself of it after having treated the contract as good & required the concurrence of the persons who can complete the title.—*MURRELL v. GOODYEAR* (1860), 1 De G. F. & J. 432; 29 L. J. Ch. 425; 2 L. T. 268; 6 Jur. N. S. 356; 8 W. R. 398; 45 E. R. 426, L. J.

Annotations :—*Apld.* *Halkett v. Dudley*, [1907] 1 Ch. 590. *Refd.* *Reed v. Don Pedro North Del Rey Gold Mining Co.* (1864), 10 L. T. 836; *Hume v. Pocock* (1866), L. R. 1 Eq. 662.

2131. — — —.]—A tenant for life contracted to sell settled land under Settled Land Act, 1882 (c. 38), the purchase to be completed on Sept. 29, time not being of the essence of the contract. The purchaser objected that there were no trustees in existence for the purposes of Settled Land Act, 1882 (c. 38), & the vendor, who had at first contested this view, on Oct. 6, took out a summons for the appointment of trustees for the purposes of Settled Land Act, 1882 (c. 38), & informed the purchaser thereof. The purchaser replied, stating that as a good title had not been shown, & the day fixed for the completion was passed, the purchase was to be considered at an end. The trustees for the purposes of Settled Land Act, 1882 (c. 38), were duly appointed on Oct. 29, & waived notice under Settled Land Act, 1884 (c. 18), s. 5 (3). In an action by the purchaser to rescind:—*Held*: the fact of there being no trustees in existence for the purposes of Settled Land Act, 1882 (c. 38), was rather a defect of conveyance than a defect in the tenant for life's title to sell, it was not open to the purchaser forthwith to repudiate the contract, but he ought to have named a reasonable time within which to remedy the defect, & the defect having been so remedied, the contract must be enforced.

No doubt there are certain authorities which say that, where the defect is a defect of title, the purchaser is not bound to wait, after the day fixed for completion, for an indefinite time until the vendor can make a title to the thing he purports to sell: but I do not know that that doctrine has ever been carried beyond a case in which the defect is a defect of title: & that is why I have taken some pains to show that, in my opinion the defect is not a defect of title. I do not think that is the doctrine of this Ct. so far as I am aware, where the defect is a mere defect of conveyance

(*KAY, J.*)—*HATTEN v. RUSSELL* (1888), 38 Ch. D. 334; 57 L. J. Ch. 425; 58 L. T. 271; 36 W. R. 317.

Annotations :—*Apld.* *Mogridge v. Clapp*, [1892] 3 Ch. 382. *Refd.* *Re Bryant & Barningham's Contract* (1890), 44 Ch. D. 218; *Re Fisher & Grazebrook's Contract*, [1898] 2 Ch. 660.

2132. — — —.]—*HALKETT v. DUDLEY* (EARL), No. 1623, *ante*.

2133. — — —.]—(1) A vendor who claims specific performance of a written contract for sale & insists upon a wrong interpretation of the contract down to & at the trial, does not thereby forfeit his right to elect to have specific performance of the contract as rightly interpreted, the purchaser's offer, contained in his defence, to complete on those terms not having been withdrawn.

(2) A party to a contract who desires to avail himself of an act of repudiation by the other party must evidence his election to do so with every reasonable dispatch.

Accordingly, it is too late for a purchaser, who in his defence to an action by the vendor for specific performance has pleaded that he was willing to complete on the right interpretation of the contract, to seek at the trial to amend that offer & ask for rescission & recovery of his deposit, on the ground that *pltf.* by his conduct in insisting upon a wrong interpretation has repudiated the contract & had thereby given *deft.* the option to accept that repudiation.—*BERNERS v. FLEMING*, [1925] Ch. 264; 94 L. J. Ch. 273; 132 L. T. 822; 69 Sol. Jo. 507, C. A.

Annotation :—*Mentd.* *Never-Stop Ry. (Wembley) v. British Empire Exhibition* (1924) Incorporated, [1926] Ch. 877.

2134. Before vendor can give good title.]—*WYLLSON v. DUNN*, No. 2149, *post*.

2135. Where defect one of conveyance only.]—*HATTEN v. RUSSELL*, No. 2131, *ante*.

2136. Before decree of specific performance.]—*HALKETT v. DUDLEY* (EARL), No. 1623, *ante*.

2137. After decree of specific performance.]—*HALKETT v. DUDLEY* (EARL), No. 1623, *ante*.

2138. On defence to vendor's action for specific performance.]—*HALKETT v. DUDLEY* (EARL), No. 1623, *ante*.

2139. — — —.]—*BERNERS v. FLEMING*, No. 2133, *ante*.

Whether purchaser must give vendor opportunity to make good title.]—*See* Nos. 2162–2170, *post*.

title.]—*PAISLEY v. WILLS* (1891), 18 A. R. 210.—*CAN.*

2130 ii. — — —.]—A purchaser may, on discovering the vendor's lack of title, repudiate the contract of purchase & sale; but he must do so with reasonable promptitude.—*ROBINSON v. MOFFATT* (1915), 9 O. W. N. 99, 209, 35 O. L. R. 9.—*CAN.*

2130 iii. — — —.]—A purchaser who discovers that his vendor has not the title which he agreed to convey, & has no right to demand it from any third person, may, if he acts promptly, repudiate the contract & demand back & recover in Ct. the money he has paid.—*INNIS v. COSTELLO* (Alta.), [1917] 1 W. W. R. 1135.—*CAN.*

2130 iv. — — —.]—*SMITH v. GILBERT*, [1921] 3 W. W. R. 849; 62 D. L. R. 717; 17 Alta. L. R. 129.—*CAN.*

2130 v. — — —.]—*KING'S PARK CO. v. LUCHANAN*, [1922] 1 W. W. R. 874; 63 D. L. R. 666; 32 Man. L. R. 45.—*CAN.*

2130 vi. — — —.]—*CLEGG v. WRIGHT* (1920), 54 I. L. T. 69.—*IR.*

2137 i. After decree for specific per-

formance.]—After a decree for specific performance a *deft.* purchaser cannot repudiate the title or the contract without the leave of the Ct.—*FACEY v. RAWSTHORNE* (1925), 35 C. L. R. 566; 30 Argus L. R. 302.—*AUS.*

2137 ii. — — —.]—After judgment for specific performance in favour of the vendor in an action on an agreement for sale of land, the *deft.* purchaser, on discovering a defect in *pltf.*'s title such as might, but for the judgment, have given rise to a right of repudiation, cannot repudiate without the leave of the Ct.—*KIEHL v. FUSSELL & MAGUIRE LUMBER CO.* (No. 2), [1924] 1 D. L. R. 531; [1924] 1 W. W. R. 449; 18 Sask. L. R. 86.—*CAN.*

h. As soon as possible after knowledge of default of vendor.—*Misrepresentation by vendor.*—*LEE v. MACMAHON* (1885), 2 O. R. 654; 11 A. R. 555.—*CAN.*

k. — — —.]—A purchaser of lands who wishes to repudiate his agreement upon the ground of misrepresentation must do so promptly when knowledge of misrepresentation comes to him.—*FRANCO-BELGIAN*

INVESTMENT CO. v. SMALL (1916), 34 W. L. R. 857; 10 W. W. R. 921.—*CAN.*

1. Any time before title acquired by vendor.]—*HARRIS v. ROBINSON* (1892), 21 S. C. R. 390.—*CAN.*

m. — — —.]—The purchaser under an agreement of sale of lands can repudiate the contract for want of title in the vendor at any time before the vendor has acquired or placed himself in a position to acquire & convey title according to the exigency of the agreement.—*NIMMONS v. STEWART* (1908), 1 Alta. L. R. 384.—*CAN.*

n. Within time limited by agreement.]—*SHEARDOWN v. GOOD* (1913), 24 O. W. R. 658; 4 O. W. N. 143; 11 D. L. R. 863.—*CAN.*

o. Whether right waived by extension of time.]—*BALLANTYNE v. HETTINGER* (1914), 29 W. L. R. 937; 7 W. W. R. 526; 8 W. W. R. 440.—*CAN.*

p. — — —.]—*Extension on conditions.—Refusal of vendor to comply with condition.*—*DILLON v. HILLS* (1909), 29 N. Z. L. R. 355.—*N.Z.*

Sect. 4.—Repudiation by purchaser: Sub-sect. 3, A. (a).]

SUB-SECT. 3.—GROUNDS FOR REPUDIATION.

A. Title of Vendor Defective.

(a) In General.

2140. No title at time of contract.]—*Re BAYLEY & SHOESMITH'S CONTRACT, No. 2017, ante.*

2141. — No title when purchaser called upon to fulfil term of contract.]—*ROPER v. COOMBS, No. 2163, post.*

2142. No title at time of completion.]—*SMITH v. BUTLER, No. 2153, post.*

2143. Deed showing adverse claim—Untrue allegation by vendor that deed is forgery.]—In an action for money had & received to recover back the deposit money paid by pltf. on the purchase of an estate, a special case stated, that by the will of deft.'s father, the estate in question was devised to him after the death of his mother, & to his issue in tail, subject to a payment of £2 a year to his sister M., with remainder to testator's own right heirs. In the year 1817, & during the lifetime of his mother, deft., by lease & release, assigned the estate for his own life to his sister M., & R., upon trust to receive the rents & apply them to keep the tenements in repair, to pay to M. her annuity of £2 & to pay the residue to deft. After the mother's death, M., R. being dead, received one quarter's rent, since which the rents had been received by deft. In Feb. 1836, deft. advertised the estate for sale, & on the 25th of that month pltf. purchased it upon a contract stated in the conditions of sale. Amongst other conditions were the following: "That the premises are to be sold subject to a yearly rent of £2, payable during the life of M., the sister of deft., & which said M. having given notice that in consequence of a certain alleged indenture, bearing date Aug. 19, 1817, whereby she alleges deft. conveyed all his estate & interest, in the premises unto R., now deceased, & the said M. for the term of his the said deft.'s life, upon certain trusts in the alleged indenture contained, & that no conveyance of the premises could be made without the concurrence of her the said M., & who thereby declared she should refuse to execute any such conveyance, said deft. declared that the said alleged indenture is a fabrication, & has made a solemn affidavit that he never executed any such indenture, & that such indenture, as far as concerns any supposed signature or mark of him, deft., is a forgery, & the opinion of the A.-G. & K. have been taken as to the necessity of the said M.'s concurring in the sale, & were in favour of deft.'s being able, by virtue of the recent Act for abolishing fines & recoveries, to make a good title to the premises without the sanction & concurrence of the said M.; & the vendor is also prepared to prove that on the trial of an action of replevin of *S. v. M.* the presiding judge expressed himself favourably to the right of deft. to convey without the concurrence of the said M.; the purchaser therefore

shall not make any objection on account of the said alleged indenture, nor be entitled to call for any sanction, concurrence, etc., by or from the said M.; but if the purchaser shall think fit, in order to indemnify him or her against all action, suits, & other proceedings, claims, & demands by the said M., a portion of the purchase-money, not exceeding £200, may remain as a charge by way of mtge. on the premises, at interest after the rate of 4½ per cent., & that such charge, at the option of the purchaser, shall remain on such security during the life of the said M., & for a period not exceeding twelve months after her decease." Pltf. paid the deposit now sought to be recovered. The jury, at the trial, found a verdict for pltf. for the amount of the deposit, & that the deed of Aug. 19, 1817, was the deed of deft.:—*Held*: (1) whether the representation of the deed being a forgery were a warranty upon which pltf. might maintain an action or not, pltf. had no right to rescind the contract because it turned out to have been untrue; (2) by the stipulation, "that the purchaser should not make any objection on account of the alleged indenture," every species of objection to the title on the part of the purchaser arising out of the alleged deed was interdicted, & he was precluded from insisting either upon the existence of the deed, or upon its legal effect & operation, as a defect in the title which he had agreed to take.—*CORRALL v. CATTELL* (1839), 4 M. & W. 734; 8 L. J. Ex. 225; 150 E. R. 1617; *subsequent proceedings, sub nom. CATTELL v. CORRALL* (1840), 4 Y. & C. Ex. 228. *Annotation*:—*Mentd. Legg v. Pardoe* (1860), 7 Jur. N. S. 499.

2144. Vendor having no title to part of property.]—After the purchaser of an estate sold under a decree had approved of the title, a deed was discovered which showed that pltfs. could not make a title to more than a moiety of the estate. The ct. discharged the purchaser from his purchase.—*WARD v. TRATHEN, Ex p. BAILEY* (1844), 14 Sim. 82; 3 L. T. O. S. 157; 8 Jur. 303; 60 E. R. 288.

2145. —.]—A purchaser contracted to purchase a farm containing 41 acres, one of the parcels of which, according to the particulars, contained four acres, but according to the plan annexed to them it appeared to contain seven acres. The vendor was only entitled to four undivided sevenths of the 7 acres which, on the plan, appeared to be the parcel included in the sale. The situation of the parcel made it important to the purchaser to have the whole. The conditions of sale provided that misdescription should not annul the sale, & that no compensation should be allowed in respect of it, except such as the judge should direct:—*Held*: the purchaser was entitled to be relieved from his contract, on the ground of there being a failure in a substantial part of what he had contracted for, & he could not be forced to take compensation.—*Re ARNOLD, ARNOLD v. ARNOLD* (1880), 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635, C. A.

Annotations:—*Consd. Re Fawcett & Holmes' Contract*

PART VIII. SECT. 4, SUB-SECT. 3.—
A. (a).

2140 i. No title at time of contract.]—Bill to set aside a conveyance & mortgage, & for an injunction:—*Held*: apart from all questions of fraud or knowledge, which had not been made out, the case was simply this, that deft. having no title to any interest in the property in question at the time of the contract bargained as if she had & thereby prevailed on pltf. not only to purchase but to enter into a covenant for the purchase money; under such circumstances the vendee was entitled to relief; the conveyance

would be set aside with costs.—*STEWART v. FOULKES* (1845), Res. & Eq. Jud. 70.—*AUS.*

2140 ii. —.]—*ASH v. CLARKE* (1846), 5 N. B. R. (3 Kerr) 187.—*CAN.*

2140 iii. —.]—*WIRTH v. COOK* (1909), 12 W. L. R. 102.—*CAN.*

2140 iv. —.]—*LETT t. GETTINGS* (Sask.), [1918] 3 W. W. R. 614; 43 D. L. R. 247.—*CAN.*

2140 v. —.]—*HENWOOD v. BEHM* (1920), 56 D. L. R. 742.—*CAN.*

2141 i. — No title when purchaser called upon to fulfil term of contract.]—*MUSK v. DOSCAS* (1910), 13 W. A. L. R.

55.—*AUS.*

2141 ii. —.]—*MORIN v. WILKINSON* (1851), 2 Gr. 157.—*CAN.*

2141 iii. —.]—*GRAVES v. MASON* (1908), 8 W. L. R. 542.—*CAN.*

2141 iv. —.]—*BASKIN v. LINDEN* (1914), 28 W. L. R. 418; 6 W. W. R. 1053; 17 D. L. R. 739; 24 Man. L. R. 459.—*CAN.*

2144 i. Vendor having no title to part of property.]—*BANNERMAN v. GREEN* (1908), 1 Sask. L. R. 394; 8 W. L. R. 441.—*CAN.*

q. — Sale of part while purchaser in possession—Credit on sale

(1889), 42 Ch. D. 150. **Apld.** *Jacobs v. Revell*, [1900] 2 Ch. 858. **Refd.** *Re London Corpn. & Tubbs' Contract* (1894), 63 L. J. Ch. 580.

2146. Title to commence with particular instrument—Incorporation of covenants in earlier deed—Covenants not disclosed.]—*PHILLIPS v. CALDCLEUGH*, No. 2030, *ante*.

2147. Necessity for concurrence of third parties—Agreement for lease voidable at option of third party.]—A vendor contracted to sell & a purchaser to purchase an agreement for a lease. The purchaser afterwards repudiated the contract. At the date of the agreement, & of the repudiation, the agreement to lease was voidable at the will of a third party, but the third party took no steps to avoid the agreement, but was willing to confirm it on certain conditions:—**Held**: the purchaser was entitled to repudiate the contract.—*BREWER v. BROADWOOD* (1882), 22 Ch. D. 105; 52 L. J. Ch. 136; 47 L. T. 508; 31 W. R. 115.

Annotations:—*Distd.* *Farnham Brewery Co. v. Hunt* (1893), 68 L. T. 440. **Consd.** *Brickles v. Snell*, [1916] 2 A. C. 599. **Apld.** *Re Bayley & Shoosmith's Contract* (1918), 87 L. J. Ch. 626. **Refd.** *Ellis v. Rogers* (1885), 29 Ch. D. 661; *Wylson v. Dunn* (1887), 34 Ch. D. 569; *Lee v. Soames* (1888), 59 L. T. 366; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Bellamy v. Debenham* (1891), 60 L. J. Ch. 166.

2148. —.]—*HALKETT v. DUDLEY* (EARL), No. 1623, *ante*.

2149. Sale of agreement for lease—Vendor having no agreement to transfer.]—A proposal had been made that two plffs. should buy a triangular field of about 3 acres, & that deft. should buy half an acre of it from them. One of plffs. & deft. met on the field; deft. wished to have a piece in one of the angles, & pltf. stepped so as to mark out where a base line would cut off half an acre. Some days afterwards same pltf. wrote to deft. asking her to let them have a letter agreeing to purchase the half acre she had selected for £350. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre of the land as agreed upon for £350. Plffs. did not obtain a contract with the owner of the land for the purchase until Nov. 4, which was three months afterwards. On Nov. 13 deft. threatened to withdraw, & on Nov. 20 her solr. wrote that she did withdraw from the contract:—**Held**: though deft. might have withdrawn at any time before Nov. 4 when plffs. first became able to perform their part, she could not withdraw afterwards.

If a man contracts to sell an agreement for a lease, & it turns out that he has not got an agreement for a lease, the purchaser, when he finds that to be so, may say, "I will not enter into it; I am not repudiating the contract, for I never entered into it; I am entitled to be off & I am off; I

have contracted to buy that which you have not to give, & therefore you cannot enforce any contract against me" (*KEKEWICH, J.*).—*WYLSON v. DUNN* (1887), 34 Ch. D. 569; 56 L. J. Ch. 855; 56 L. T. 192; 51 J. P. 452; 35 W. R. 405.

Annotation:—**Refd.** *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295.

2150. No trustees in existence—For purpose of Settled Land Acts.]—*HATTEN v. RUSSELL*, No. 2131, *ante*.

2151. Sale of freehold—Vendor not owner of minerals.]—On Apr. 17, 1889, deft. wrote to pltf.'s agent offering £800 for the freehold of a house at C. with possession at midsummer, assuming the title to be satisfactory. Pltf.'s agent replied on the 18th accepting the offer, subject to the owner's ratification, which was subsequently obtained. Further correspondence ensued, in the course of which pltf.'s solrs. sent to deft.'s solrs. a draft contract containing special conditions as to the title, which were objected to by the one side & insisted on by the other. On May 20 deft.'s solr. having discovered that pltf. was not the owner of the minerals under the house, repudiated the agreement. Pltf. offered to purchase the minerals before the time for completion, & to waive the special conditions, but deft. took no notice of this offer. Pltf. obtained a conveyance of the minerals in Sept. 1889. In an action for specific performance & damages:—**Held**: assuming the existence of a concluded contract, as to which *quære*, deft. was justified in repudiating before the time for completion, on the ground that pltf. was not the owner of the minerals.—*BELLAMY v. DEBENHAM*, [1891] 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 478; 39 W. R. 257; 7 T. L. R. 199, C. A.

Annotations:—**Consd.** *Perry v. Suffields*, [1916] 2 Ch. 187. **Refd.** *Re Cooke & Holland's Contract* (1898), 73 L. T. 106; *Mason v. Von Buch* (1899), 15 T. L. R. 430; *Halkett v. Dudley*, [1907] 1 Ch. 590; *Brickles v. Snell*, [1916] 2 A. C. 599.

2152. Stipulation for right of way—Right of way disputed.]—A purchaser of land who stipulates for a right of way cannot be compelled to complete, & may rescind the contract to purchase if the right of way is disputed.—*KING v. STACEY* (1892), 8 T. L. R. 396.

2153. Condition that vendor should procure consent of mortgagee—Not capable of fulfilment by time for completion.]—Pltf. agreed to purchase from deft. the lease of a public-house on which there was a subsisting mtgee., on condition that the consent of the mtgee. should be obtained to the same amount of money remaining on mtgee. as was then due. A date was fixed for completion & a deposit paid, which was to be forfeited if the sale went off through the default of pltf. At an interview between pltf., deft., & the mtgee., the

given to purchaser.]—*REYNOLDS v. CRAWFORD* (1854), 12 U. C. R. 168.—**CAN.**

r. — Small portion to which title subsequently made.]—Where a party apparently in the ownership & *prima facie* appearing to have a title sells land under agreement for sale, & it afterwards turns out that a very small portion of it is not his, & he obtains title to that portion upon discovering the lack, his purchaser will not be entitled to cancellation of the agreement.—*GREER v. CLARK* (1916), 34 W. L. R. 543; 10 W. W. R. 659.—**CAN.**

2148 i. Necessity for concurrence of third parties.]—A purchaser under an agreement of sale of land who becomes aware of a substantial defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the

vendor has no power to require, may repudiate his contract, & such repudiation is a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial.—*GROSSENBACH v. GOODYEAR* (Man.), [1919] 1 W. W. R. 730; 45 D. L. R. 629.—**CAN.**

2148 ii. —.]—*PEARCE v. STEVENS* (1904), 24 N. Z. L. R. 357.—**N.Z.**

2151 i. Sale of freehold—Vendor not owner of minerals.]—It is sufficient to justify repudiation by the purchaser if the vendor of land has not title to the minerals under the land sold.—*UNIVERSAL LAND SECURITY CO., LTD. v. JACKSON* (Alta.), [1917] 1 W. W. R. 1352; 33 D. L. R. 764.—**CAN.**

2151 ii. —.]—In an action for the rescission of an agreement for the sale of lands on the ground of absence of title to the coal thereunder, a defence

which alleges that there is not & never was any coal on or under the land in question, is not a good defence, nor is it a good defence to allege that if there is any coal there it would be impossible to work it.—*ROYAL BANK OF CANADA v. NESBITT & HANSEN*, [1918] 1 W. W. R. 766; 13 Alta. L. R. 408.—**CAN.**

2151 iii. —.]—*ENGLESON v. WEEL* (Alta.), [1922] 1 W. W. R. 708.—**CAN.**

2151 iv. —.]—*NEILSON v. MORGAN* (Alta.), [1925] 3 D. L. R. 329; [1925] 1 W. W. R. 968.—**CAN.**

2151 v. —.]—*STANKIEVICH v. ARMACOST*, [1926] 2 D. L. R. 401; [1926] 1 W. W. R. 758; 22 Alta. L. R. 56.—**CAN.**

t. Plan of property not registered.]—*VEILLEUX v. BOULEVARD HEIGHTS* (1914), 29 W. L. R. 940; 31 W. L. R. 10; 7 W. W. R. 616; 8

Sect. 4.—Repudiation by purchaser: Sub-sect. 3, A.
(a) & (b), & B.]

latter would only agree to a lesser amount remaining on mtge. Pltf. thereupon treated the contract as at an end. Subsequently, & before the date fixed for completion, deft. obtained the consent of the mtgee. to the full amount of the mtge. debt remaining on mtge., but pltf. refused to proceed with the purchase. In an action to recover the deposit:—*Held*: (1) in the absence of circumstances which would justify the pltf. in treating the refusal of the mtgee. as final, or of an agreement express or implied that it should be so treated, the deft. had until the date fixed for the completion of the contract in which to perform the condition by obtaining the consent of the mtgee.; that the contract had therefore gone off through the default of pltf.; & that he could not recover the deposit.

It was sought to establish an alternative right in pltf. to treat the contract as existing, & to succeed on the ground that deft. had not performed the condition by the date fixed for completion; but pltf. having finally renounced the contract & adhered to this throughout cannot be heard to say that he was ready & willing to complete (COLLINS, L.J.).

(2) It is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mtgee. to the acceptance of the purchaser as mtgor. (3) Though the condition is one that may be fulfilled at any time before completion, yet the purchaser is not always bound to wait till that date. I can suggest four such cases, though I by no means say that the list is exhaustive. One case is that the purchaser may be able to show by sufficient evidence that the condition cannot be practically fulfilled by the date fixed. (4) A second case is where the vendor has substantially admitted that the condition is incapable of fulfilment. (5) The third case is that there may be an agreement between the vendor & the purchaser that a particular refusal of the mtgee. to accept the purchaser as mtgor. should be taken as conclusive, & this agreement may be implied from the circumstances & need not be express. (6) The fourth case is that of a refusal by the mtgee. so treated by the vendor as to justify the purchaser in regarding the matter as at an end (ROMER, J.).

(7) All the cases that were cited were, with one exception, cases in which the purchaser ascertained before the time for completion that the vendor had not the title which he professed to have, & had no legal means then available to complete the contract. In such cases the purchaser is entitled at once to treat the contract as at an end because the vendor cannot ask the purchaser to wait on the chance that the former

may acquire the property (ROMER, L.J.).—SMITH v. BUTLER, [1900] 1 Q. B. 694; 69 L. J. Q. B. 521; 82 L. T. 281; 48 W. R. 583; 16 T. L. R. 208, C. A.

2154. — Admission by vendor that condition cannot be fulfilled.]—SMITH v. BUTLER, No. 2153, ante.

2155. — Refusal of mortgagee—Stipulated to be conclusive.]—SMITH v. BUTLER, No. 2153, ante.

2156. — Vendor's treatment of refusal justifying repudiation.]—SMITH v. BUTLER, No. 2153, ante.

Sale in lots.]—See Nos. 2230–2232, post.

Sale by court—Discharge by purchaser.]—See Part III., Sect. 9, sub-sect. 2, B., ante.

(b) Possibility of Vendor Making Good Title.

2157. Effect of vendor obtaining title—After action brought.]—When a party sells an estate, or any interest, & at the time has no title, or not such as he sells; if he nevertheless obtains such estate or interest at any time before he is called upon, to complete the purchase, it is sufficient & if an action is brought, showing that the party had never been called upon, & had at that time a good title, is a sufficient answer to the action.—THOMSON v. MILES (1794), 1 Esp. 184; 170 E. R. 322, N. P.

Annotation:—Reid. Laythorpe v. Bryant (1835), 1 Hodg 19.

2158. — Whether bar to right of repudiation.]—Pltf. in a bill for the specific performance of a contract is entitled to a decree, if, at the hearing, he can show a good title, although he had not such title at the time of the contract; but deft. might, if he had thought fit, have retired from the contract, as soon as the want of title was discovered, & was not bound to wait, till pltf. could acquire a good title.—HOGGART v. SCOTT (1830), 1 Russ. & M. 293; Taml. 500; 9 L. J. O. S. Ch. 54; 39 E. R. 113.

Annotations:—Consd. Halkett v. Dudley, [1907] 1 Ch. 590. Refd. Bellamy v. Debenham, [1891] 1 Ch. 412.

2159. — Specific performance of a contract for sale of an estate in fee simple decreed in favour of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, & the vendor being able by means of the consent of the parties interested in remainder to make a good *prima facie* title to the fee simple at the hearing.—SALISBURY v. HATCHER (1842), 2 Y. & C. Ch. Cas. 54; 12 L. J. Ch. 68; 6 Jur. 1051; 63 E. R. 24.

Annotations:—Consd. Halkett v. Dudley, [1907] 1 Ch. 590. Refd. Lee v. Soames (1888), 36 W. R. 884.

2160. — WYLLSON v. DUNN, No. 2149, ante.

2161. — SMITH v. BUTLER, No. 2153, ante.

2162. Whether vendor should be given opportunity.]—Purchaser cannot insist on being discharged upon a report of defective title; if

W. W. R. 440; 8 Alta. L. R. 16; 20 D. L. R. 858.—CAN.

a. — CHAUNCEY v. PALMER (1916), 34 W. L. R. 978.—CAN.

b. Vendor's title not registered.]—FRONT v. WELCH (B. C.), [1923] 3 W. W. R. 834.—CAN.

PART VIII. SECT. 4, SUB-SECT. 3.—
A. (b).

c. Effect of vendor obtaining title—After time for repudiation—Whether bar to right of repudiation.]—ST. DENIS v. HIGGINS (1892), 24 O. R. 230.—CAN.

d. — HAMILTON v. MCNEILL (1894), 2 Terr. L. R. 31.—CAN.

e. — KROMN v. KAISER (1915), 7 W. W. R. 185; 18 D. L. R. 226; 31 W. L. R. 742; 8 W. W. R. 239; 7 Alta. L. R. 467.—CAN.

f. — BARBERS v. UPHAM, [1927] N. Z. L. R. 273.—N.Z.

g. — GILFILLAN v. CADELL & GRANT (1893), 21 R. (Ct. of Sess.) 269; 31 Sc. L. R. 216; 1 S. L. T. 366.—SCOT.

2162 i. Whether vendor should be given opportunity.]—BELL v. SCOTT (1922), 30 C. L. R. 387.—AUS.

2162 ii. — HARTT v. WISHARD LANGAN CO., LTD. (1908), 18 Man. L. R. 376; 9 W. L. R. 519.—CAN.

2162 iii. — GREGORY v. FERRIER

(1910), 14 W. L. R. 219; 3 Sask. L. R. 191.—CAN.

2162 iv. — If the vendor in a contract for the sale of land has no title in himself to the land sold, & is not in a position to compel a conveyance of it from the registered owner, the purchaser may, as soon as he becomes aware of that fact, repudiate the contract, & he does not need to give the vendor time to secure title. Where the vendor is in a position to compel a conveyance to himself & time is not of the essence of the contract, the purchaser on paying his last instalment of purchase money cannot repudiate because the vendor has not title in himself at that moment, but must give him a reasonable time to obtain

capable of being made good within a reasonable time; as to which the vendor will be put under terms.—*COFFIN v. COOPER* (1807), 14 Ves. 205; 33 E. R. 499, L. C.

Annotations:—*Consd.* Halkett v. Dudley, [1907] 1 Ch. 590. *Refd.* *Berners v. Fleming*, [1925] Ch. 264.

2163. — To acquire small outstanding term.—If the vendor, at the time of contracting to sell has no title, & has no title when he calls upon the purchaser to fulfil one of the terms of the contract. *Semble*, the purchaser may abandon the purchase, & demand back his deposit.

A deficiency in the smallest portion of interest, in the subject of sale, either as to quantity or duration, is, at law, a total want of title.

Accordingly, a seller contracted to grant a lease for twenty-one years at a premium, part of which was to be paid on a given day; & on that day, he required payment, & he was then, on the other hand, required to show his title. He did not then show it; whereupon the purchaser abandoned the contract; & it turning out that a term of only five days was outstanding, of which the seller was not aware:—*Held*: the purchaser might recover back his deposit; though the title in other respects was good, & though the seller could, no doubt, have gotten in the five days time.—*ROPER v. COOMBS* (1827), 6 B. & C. 534; 9 Dow. & Ry. K. B. 562; 5 L. J. O. S. K. B. 200; 108 E. R. 548.

Annotations:—*Refd.* *Kintrea v. Preston* (1856), 25 L. J. Ex. 287; *Stranks v. St. John* (1867), L. R. 2 C. P. 376.

2164. ——*HOGGART v. SCOTT*, No. 2158, *ante*.

2165. — To register assignments of lease.—In an action for non-performance of a contract for the sale of a leasehold house, the declaration alleged that deft. had not lawful right & title to sell & assign the lease, at the time the contract was made. It was ascertained after the sale, that the assignments of the lease to the vendor, & to former assignees, had not been registered; & also that the vendor was restrained from assigning without a licence from the ground landlord; & that no such licence had been obtained at the time the contract was made:—*Held*: neither of these objections impeached the validity of the vendor's title, as the defects were capable of being remedied.—*STOWELL v. ROBINSON* (1837), 3 Bing. N. C. 928; 3 Hodg. 197; 5 Scott, 196; 6 L. J. C. P. 326; 132 E. R. 668.

Annotations:—*Refd.* *Horne v. Wingfield* (1841), 3 Scott, N. R. 340; *Coldham v. Showler* (1846), 3 C. B. 312; *Parkin v. Thorold* (1851), 2 Sim. N. S. 1; *St. Leonard's, Shoreditch Vestry v. Hughes* (1864), 17 C. B. N. S. 135; *Hickman v. Haynes* (1875), L. R. 10 C. P. 598; *Howe v. Smith* (1884), 27 Ch. D. 89; *Morrell v. Studd & Millington* (1913), 109 L. T. 628; *Williams v. Moss' Empires*, [1915] 3 K. B. 242; *Morris v. Baron*, [1918] A. C. 1. *Mentd.* *Emmet v. Dewhurst* (1851), 3 Mac. & G. 587.

2166. — To acquire part of property belonging to third party.—If A. agrees to sell an estate, & it is afterwards discovered that a small portion of it is the property of another person, the ct. will not discharge the purchaser from his contract without giving A. an opportunity of acquiring a title to that portion.—*CHAMBERLAIN v. LEE* (1840), 10 Sim. 444; 59 E. R. 687.

Annotations:—*Refd.* *Bellamy v. Debenham* (1890), 63 L. T. 220; *Berners v. Fleming*, [1925] Ch. 264.

2167. — To induce third person to join in making title.—*MURRELL v. GOODYEAR*, No. 2130, *ante*.

2168. ——Where a person sells pro-

perty which he is neither able to convey or to enforce a conveyance from other proper parties, the purchaser may repudiate the contract, & is not bound to wait to see if the vendor can induce some third person to join in making a good title. Pltf. agreed to grant to deft. a lease for twenty-one years, with a right to relet; but he had only a term of twenty years, & could not underlet without the consent of his landlord. Deft. repudiated the contract. Pltf. afterwards filed his bill for specific performance, & pending the suit, the landlord agreed to concur:—*Held*: the contract could not be enforced, & the bill was dismissed with costs.—*FORRER v. NASH* (1865), 35 Beav. 167; 6 New Rep. 361; 11 Jur. N. S. 789; 14 W. R. 8; 55 E. R. 858.

Annotations:—*Apld.* *Brewer v. Broadwood* (1882), 22 Ch. D. 105. *Distd.* *Wilson v. Dunn* (1887), 34 Ch. D. 569. *Apld.* *Bellamy v. Debenham*, [1891] 1 Ch. 412. *Distd.* *Warren v. Moore* (1897), 14 T. L. R. 138. *Apld.* *Re Cooke & Holland's Contract* (1898), 78 L. T. 106. *Consd.* *Brickles v. Snell*, [1916] 2 A. C. 599. *Distd.* *Re Hailes & Hutchinson's Contract*, [1920] 1 Ch. 233. *Refd.* *Lee v. Soames* (1888), 59 L. T. 366; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Smith v. Butler* (1900), 48 W. R. 583.

2169. — To procure licence to assign—Time for production not arrived—At date of repudiation.—*ELLIS v. ROGERS*, No. 2216, *post*.

2170. — Vendor having no title—Inability to compel third parties to supply title.—(1) Where a vendor contracts under an open contract to sell real estate which he informs the purchaser he has recently purchased from B., & having delivered an abstract ending with a conveyance of the estate to B., when asked by requisition to abstract the subsequent title replies that "B. will convey to the purchaser" by his direction, he does not, since he has the right to control the legal title, give the purchaser the right forthwith absolutely to repudiate the contract & claim the deposit, but the ct. will make no order as to costs.

(2) I think that it is abundantly clear that if the vendor has not a title in himself & cannot compel third parties to supply him with the title, the moment the purchaser becomes aware of that fact, he is entitled to repudiate the contract, & he is under no obligation to give the vendor time to make good a title which is so imperfect at the date of the contract (*EVE, J.*).—*Re HUCKLESBY & ATKINSON'S CONTRACT* (1910), 102 L. T. 214; 51 Sol. Jo. 342.

B. Vendor's Power of Sale Defective.

2171. Power subject to conditions—Conditions not fulfilled.—*FORSTER v. HOGGART*, No. 2012, *ante*.

2172. Vendors purporting to sell as trustees of will—Vendors not trustees of will.—A contract was entered into at an auction on Dec. 7, 1896, subject to particulars & conditions of sale. The property passed under the will of M. in 1856 to J. & another, as tenants in common, in equal moieties, & the difficulty arose as to the moiety which passed to J. He by his will gave his property to trustees upon trust for sale & payment of debts, etc., & then to lay aside £12,000, which was to be invested for the benefit of his daughters & their children, & subject thereto to hold the residue for his son. J. died in 1876, & in 1880 two deeds were executed by which part of the property was mortgaged to the amount of £12,000

the necessary conveyance.—*GUNNE v. CONSOLIDATED LAND & MORTGAGE CO.* (1916), 33 W. L. R. 716; 9 W. W. R. 1185.—*CAN.*

2162 v. ——A purchaser under agreement of sale of land cannot

repudiate on the ground of his vendor's lack of title if at the time of such repudiation the vendor is in a position to convey or compel conveyance of title.—*ALLIANCE SECURITIES, LTD. v. POSNEKOFF* (Sask.), [1922] 3 W. W. R.

1201.—*CAN.*

2167 l. — To induce third person to join in making title.—*NIELSEN v. JENEWEIN*, [1924] 3 D. L. R. 508; [1924] 2 W. W. R. 696; 18 Sask. L. R. 342.—*CAN.*

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to two persons who were not trustees of the will. Later one of these persons was appointed a trustee of the will. These two persons purported to sell the property. Objection was taken on the requisitions that they could not give a good title, & notice to rescind was given. On a summons taken out by the purchaser claiming rescission:—*Held*: the defect could only be removed (a) by procuring the trustees of the will to be parties; (b) by obtaining the sanction of the ct.; & (c) by showing that the £12,000 had been properly invested; that, as to (a) & (b), neither on the day of the notice to rescind, nor on that fixed for completion, were the vendors in a position to remove the defect; as to (c), there was no evidence that the £12,000 could be so invested; &, in the absence of any such evidence, the notice to rescind must be deemed effectual.—*Re COOKE & HOLLAND'S CONTRACT* (1898), 78 L. T. 106.

C. Delay by Vendor.

2173. Purchaser let into possession—Delay in clearing incumbrances & making good title.—A. contracts for the purchase of an estate, & is let into possession. The estate being greatly incumbered, A. pays off some of the incumbrances. Great delay is used on the part of the vendor in clearing other incumbrances, & making good the title; but the purchaser shall not for that reason be discharged from his contract.—*SMITH v. DOLMAN* (1708), 6 Bro. Parl. Cas. 291; 2 E. R. 1088, H. L.

2174. Reasonable notice given to vendor fixing time—For showing title.—*Re BAYLEY & SHOESMITH'S CONTRACT*, No. 2017, *ante*.

2175. — For satisfying requisition.—Where the vendor did not satisfy a valid objection made by the purchaser, after a correspondence in which the vendor stated that he could not & would not furnish any better evidence, & the purchaser gave him notice to furnish the evidence within fourteen days, or in the alternative that he should rescind the contract:—*Held*: the vendor having made default, the purchaser was entitled, upon the expiration of the fourteen days, to treat the contract as at an end.

Qu.: whether the purchaser was bound, under the circumstances, to have given the vendor any notice prior to rescinding the contract.—*NOTT v. RICCARD* (1856), 22 Beav. 307; 25 L. J. Ch. 618; 26 L. T. O. S. 267; 2 Jur. N. S. 1038; 4 W. R. 269; 52 E. R. 1126.

Annotations:—*Apld.* King v. Chamberlayn, [1887] W. N. 158. *Reid.* Wells v. Maxwell (No. 1) (1863), 32 Beav. 408.

2176. — For ratification by owners other than vendor—Rescission in default of ratification by fixed time.—A. being seised of the bare legal estate in freeholds without any power of sale, contracted to sell to B., on discovering that there were several beneficial owners, required that they should ratify the contract, & eventually fixed a short day for rescission of the contract unless ratification should be previously obtained. Ratification not having been obtained by the day named:—*Held*: B. was entitled to rescind

& to have his deposit returned.—*LEE v. SOAMES* (1888), 59 L. T. 366; 36 W. R. 884.

Annotation:—*Reid.* Bolton Partners v. Lambert (1889), 41 Ch. D. 295.

2177. — To remedy defect in conveyance.]

HATTEN v. RUSSELL, No. 2131, *ante*.

2178. — For delivery of abstract.—By a contract made on Aug. 25, 1890, for the sale of a farm, it was, amongst other things, stipulated that the purchaser should have possession by the beginning of Oct. following, & that the vendor should deduce a good title. Notwithstanding repeated requests, the vendor had failed to deliver a complete abstract until Nov. 28, 1890, more than six weeks after a notice delivered by the purchaser that, in default of delivery of a proper abstract within fourteen days from the date of the notice, he should rescind the contract. Shortly after the expiration of the fourteen days the purchaser gave notice of rescission, & sued for a return of the deposit & damages:—*Held*: in the circumstances the limit of fourteen days was reasonable, & the purchaser was entitled to rescind & to a return of the deposit with interest, & to be paid the expense of investigating the title by way of damages.—*COMPTON v. BAGLEY*, [1892] 1 Ch. 313; 61 L. J. Ch. 113; 65 L. T. 706.

Annotation:—*Reid.* Stickney v. Keeble, [1915] A. C. 386.

2179. — For completion.]—*STICKNEY v. KEEBLE*, No. 2061, *ante*.

2180. Time of the essence—Waiver—Vendor's conduct after notice.—Reference as to title, directed on motion after answer to a bill for specific performance by the vendor against the purchaser, notwithstanding the purchaser stated that his requisitions on the abstract had not been complied with, although the time for completion of the contract had long expired, & he had given notice of his intention to rescind the contract.

The purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract. Whether he can do so after the expiration of notice, where time has not been made of the essence of the contract, or, being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice.—*WOOD v. MACHU* (1846), 5 Hare, 158; 16 L. J. Ch. 21; 8 L. T. O. S. 210; 10 Jur. 1001; 67 E. R. 868.

2181. — Necessity for notice.]—To make time of the essence of a contract it must either be expressly made so by the terms of the contract itself or by special notice given subsequently.

Continuing negotiations after the day fixed for completion of the contract is passed amounts to a waiver of the objection that time was the essence of the contract.—*WEBB v. HUGHES* (1870), L. R. 10 Eq. 281; 39 L. J. Ch. 606; 18 W. R. 749.

Annotation:—*Fold.* Patrick v. Milner (1877), 2 C. P. D. 342.

2182. — Execution of work by vendor.]—Pltf. contracted to purchase from deft. a lease of a house & garage, & paid a deposit of £50, & a further sum of £50 on account of a premium of

PART VIII. SECT. 4, SUB-SECT. 3.—C.

h. Time of the essence—Possession required for particular purpose—Ploughing.—*CAIRNS v. DUNKIN* (1907), 6 W. L. R. 256.—*CAN.*

k. Time not of the essence.]—Whether a day is or is not fixed for

completion by a contract for the sale of land, unless time has been made of the essence of the contract, neither party is entitled to rescind, on the ground of the delay of the other in completing, without first giving him notice, calling upon him to complete within a reasonable time.—*COVER v.*

McLAUGHLIN (1897), 18 N. S. W. L. R. (Eq.) 107.—*AUS.*

l. Delay in delivering documents.]—Purchaser held justified in treating agreement of sale of land as abandoned & to be entitled to rescission through vendor's unreasonable delay in deliver-

£150, on Oct. 28, & 29, 1926, respectively. Pltf. as the deft. knew, intended to use the premises for the business of a garage proprietor, & deft. agreed to clear away the hedge & trees in front of the house before the time for completion, which was originally fixed as "on or about Dec. 6, 1926," but was subsequently extended to Dec. 15. On Dec. 10, it being apparent that deft. could not do the work he had undertaken by Dec. 15, pltf. rescinded the contract & claimed the return of the money:—*Held*: time was of the essence of the contract, & pltf. was entitled to recover the money.—*BERNARD v. WILLIAMS* (1928), 44 T. L. R. 437, D. C.

2183. Time not of the essence—Necessity for notice.]—*WOOD v. MACHU*, No. 2180, *ante*.

2184. — Repudiation after expiration of notice—Necessity for considering vendor's conduct after notice.]—*WOOD v. MACHU*, No. 2180, *ante*.

2185. — Remedy of defect of conveyance.]—*HATTEN v. RUSSELL*, No. 2131, *ante*.

2186. Effect of continuing negotiations—Title not perfected within reasonable time—Purchaser in possession—Purchaser aware of objections to abstract.]—A purchaser cannot declare off a contract, on the ground of the vendor not having perfected the title within a reasonable time, where the former who was in possession had been aware, from an early period of the treaty, that there was some objection to the abstract, but has nevertheless continued to negotiate with the latter down to a recent period, & then on a sudden, a fortnight after the last act of negotiation, tells him, that he abandons the contract. An injunction will be granted to stay an action commenced at law by the purchaser to recover back whatever of the purchase-money has been previously paid under such circumstances, on motion, almost as of course; & if the case were made out, it would be sufficient on the hearing. Time is not of the essence of such a contract. Had the purchaser declared off, on delivery of the abstract, he might perhaps have got rid of it, & given up the possession.—*WARDE v. JEFFERY* (1817), 4 Price, 294; 146 E. R. 469.

2187. —.]—A purchaser who allows the time appointed for the completion of his contract to elapse without showing any intention to claim his right to enforce the completion of the contract at such time, & continues the correspondence, so as to induce the vendor to incur additional expense, cannot afterwards take advantage of the non-completion of the contract at the appointed time.—*BOYES v. LIDDELL* (1842), 6 Jur. 725; *previous proceedings* (1841), 1 Y. & C. Ch. Cas. 133.

Annotation:—*Reid*. *Wood v. Machu* (1846), 5 Harc. 158.

D. Misdescription and Misrepresentation.

(a) In General.

2188. Property substantially different from property offered.]—*FLIGHT v. BOOTH*, No. 2199, *post*.

2189. —.]—If the vendor comes to enforce specific performance, he cannot succeed if what

he offers to convey is substantially different from what he offered to sell (*BUCKLEY, J.*).—*JACOBS v. REVELL*, [1900] 2 Ch. 858; 69 L. J. Ch. 879; 83 L. T. 629; 49 W. R. 109.

Annotations:—*Apld.* *Lee v. Rayson*, [1917] 1 Ch. 613. *Reid. Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391.

2190. Effect of purchaser's knowledge.]—In a case depending on alleged misrepresentation of value, there cannot be a more effectual bar to pltf. than by showing that he was from the beginning cognisant of all the matters complained of, or, after full information of them, continued to deal with the property.—*VIGERS v. PIKE* (1842), 8 Cl. & Fin. 562; 8 E. R. 220, H. L.

Annotations:—*Apld.* *Erlanger v. New Sombbrero Phosphate Co.* (1878), 3 App. Cas. 1218. *Reid.* *Wilde v. Gibson* (1848), 1 H. L. Cas. 605.

2191. Misrepresentation made to sub-vendor—Whether sub-purchaser may take advantage.]—*ABERAMAN IRONWORKS v. WICKENS*, No. 2207, *post*.

2192. Statements calculated to mislead—Purchaser induced to believe that vendor speaks from knowledge.]—*NOTTINGHAM PATENT BRICK & TILE CO. v. BUTLER*, No. 2070, *ante*.

2193. Opportunity given to make representation good—Failure to make good—Effect on right to repudiate.]—When a purchaser discovers that a representation made to him by a vendor is untrue, if the vendor suggests that, if time be given him, the representation may be cured, & the purchaser put in as good a position as if the representation had been true; the purchaser, by giving the vendor time, does not lose his right to rely on the misrepresentation & determine the contract, if, at the end of the time, the vendor fails to make good his suggestion.—*TIBBATS v. BOULTER* (1895), 73 L. T. 534.

2194. Sale under direction of court—Duty of court to guard against misrepresentation.]—In sales under the direction of the ct. it is incumbent on the ct. to be scrupulous in the extreme to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. Sale by auction held under the direction of the ct. set aside at the instance of the purchaser on the ground of misrepresentation as to the subject-matter of the sale.—*MAHOMED KALA MEA v. HARPERINK* (1908), 25 T. L. R. 180, P. C.

2195. Whether innocent misrepresentation sufficient.]—*LAWRENCE v. HULL*, No. 2244, *post*.

2196. Expression of opinion—Sheep-carrying capacity of land.]—A representation of fact may be inherent in a statement of opinion; in any case the existence of the opinion in the person expressing it is a question of fact. When it is sought to rescind a contract on the ground of the falseness of a statement of opinion by which it was induced, it must be inquired what was the meaning of the statement made, & whether it was true. Relevant to those inquiries are, the material facts of the transaction, the knowledge of the parties, the words used, & the actual condition of the subject-matter.

In an action by a vendor of land in New Zealand

ing certain documents.—*SMITH & HURON & ERIE MORTGAGE CORPN. v. ASH* (Sask.), [1919] 1 W. W. R. 633.—*CAN.*

m. Title not perfected within reasonable time—Delay in registration of title.]—*MCGIRR v. DEVINE*, [1925] N. 1. 94.—*IR.*

PART VIII. SECT. 4, SUB-SECT. 3.—D. (a).

2188 i. Property substantially different from property offered.]—*JOHNSTON v. DOWSETT* (Man.), [1913], 24 W. L. R. 759; 4 W. W. R. 971.—*CAN.*

2188 ii. —.]—*SCORIE v. WALLACE* (1913), 24 O. W. R. 641; 4 O. W. N. 1345; 11 D. L. R. 841.—*CAN.*

2188 iii. —.]—*BESSONET v. ROBINS* (1837), *Sau. & Sc.* 142.—*IR.*

2188 iv. —.]—*CULLEN v. O'MEARA* (1868), 1 R. 4 C. L. 537.—*IR.*

2190 i. Effect of purchaser's knowledge.]—*STRACHAN v. MCGINN* (Sask.) (1913), 23 W. L. R. 66; 3 W. W. R. 759; 9 D. L. R. 448.—*CAN.*

2195 i. Whether innocent misrepresentation sufficient.]—At the suit of the

purchaser against the vendor, an agreement for the sale & purchase of land was set aside, & the vendor was ordered to repay the sums paid by the purchaser on account of the purchase price, on the ground of misrepresentation by the vendor, in that, whether innocently or not, the vendor, professing to show the purchaser the land, had shown him entirely different land.—*OLIPHANT v. ALEXANDER* (B. C.) (1914), 27 W. L. R. 56; 15 D. L. R. 618.—*CAN.*

2196 i. Expression of opinion—Sheep-carrying capacity of land.]—*BARTLETT*

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(a) & (b).]

to recover under the contract, the purchaser claimed to rescind the contract on the ground of the falseness of a statement as to the carrying capacity of the land for sheep:—*Held*: applying the above considerations, the statement was merely of an opinion which the vendor honestly held; & accordingly the defence failed.—*BISSET v. WILKINSON*, [1927] A. C. 177; 96 L. J. P. C. 12; 136 L. T. 97; 42 T. L. R. 727, P. C.

Rescission for misrepresentation generally.]—
See MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 65–78, Nos. 616–762.

Rescission under condition providing for error.]—
See Part IV., Sect. 2, sub-sect. 9, C., ante.

Sale in lots.]—*See No. 2233, post.*

(b) Particular Instances.

2197. Misdescription—Term of lease.]—Where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, & on the faith of such assurance at a considerable expense enters into the possession of them, he shall not, on his refusing to complete his purchase, on account of the seller having a shorter term, be charged in an action for use & occupation.—*HEARN v. TOMLIN* (1793), Peake, 253, N. P.

Annotations:—Distd. Hull v. Vaughan (1818), 6 Price, 157.
Refd. Winterbottom v. Ingham (1845), 7 Q. B. 611.

2198. ——— Slight difference.]—Where there was a written agreement to sell & assign “the unexpired term of eight years’ lease & good will” of a public-house:—*Held*: the purchaser could not refuse to perform the agreement on the ground that when it was entered into, there were only seven years & seven months of the term unexpired.

BELWORTH v. HASSELL (1815), 4 Camp. 140, N. P.

2199. ——— Restrictive covenants.]—The particulars of sale of certain leasehold premises in Covent Garden stated, that under the original lease “no offensive trade was to be carried on, & that the premises could not be let to a coffee-house keeper or working hatter.” The original lease, when produced, appeared to prohibit the business of brewer, baker, sugar baker, vintner, victualler, butcher, tripe seller, poultryer, fishmonger, cheese seller, fruiterer, herb seller, coffee-house keeper, working hatter, & many others, & the sale of coals, potatoes, or any provisions:—*Held*: there was

F. GRAHAM, [1921] N. Z. L. R. 315.—**N.Z.**

n. ———.]—*BAUMAN v. CROSBIE* (1915), 30 W. L. R. 510.—**CAN.**

o. Election to affirm—Part performance before knowledge of misrepresentation.]—*BOWLES v. CHATFIELD* (Man.) (1913), 25 W. L. R. 32, 12 D. L. R. 773.—**CAN.**

p. ——— Part performance after knowledge of misrepresentation.]—*Rescission of an agreement of sale of land asked for by the purchaser on the ground of fraudulent misrepresentation was refused, because after the purchaser discovered the facts he continued to occupy the land & made a payment on account of the purchase-price, thereby electing to affirm the contract.*—*HASPER v. SHAUER*, [1921] 3 W. W. R. 260.—**CAN.**

q. ———.]—*HASTE v. GOODMAN* (Alta.) (1922), 66 D. L. R. 360; [1922] 2 W. W. R. 850.—**CAN.**

r. ———.]—*Pltfs. sued for the rescission of certain contracts made by them for the purchase of lands from defts., alleging misrepresentations, & in the alternative for damages in respect of the fraudulent misrepresentations*

alleged:—Held: pltfs., by continuing to make payments upon the contracts after they had acquired full knowledge of the untruth of the representations alleged to have been made to them, had elected to confirm the contracts, & were precluded from seeking rescission.—*HUGHES v. OIRWAY REALTY CO. LTD.* (1924), 55 O. L. R. 611.—**CAN.**

t. ——— After discovery of fraud.]—*SCHRADEK v. MANVILLE* (1915), 30 W. L. R. 528; 7 W. W. R. 1376.—**CAN.**

a. Representation relied on to knowledge of vendor.]—If a representation amount to a wilful falsehood by the vendor, the deceit will release the purchaser from the bargain; but to enable the purchaser so to take advantage of the falsehood, he must show that at the time of the bargain he made the vendor understand definitely that he relied upon the representation & would hold him to it.—*BRADSHAW v. GOER* (1879), 5 V. L. R. 26.—**AUS.**

b. Opportunity for purchaser to discover falsity of representation.]—It is no answer to an action for rescission of a contract for the sale of land on the

such a material discrepancy between the particulars & the lease, as to entitle a purchaser to rescind his contract.

Where the misdescription, although not proceeding from fraud, is in a material & substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, & the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of sale (*TINDAL, C.J.*).—*FLIGHT v. BOOTH* (1834), 1 Bing. N. C. 370; 1 Scott, 190; 4 L. J. C. P. 66; 131 E. R. 1160.

Annotations:—Consd. Pope v. Garland (1841), 4 Y. & C. Ex. 391. *Apld. Re Davis & Cavey* (1888), 40 Ch. D. 601; *Re Fawcett & Holmes’ Contract* (1889), 42 Ch. D. 150; *Jacobs v. Revell*, [1900] 2 Ch. 858; *Re Puckett & Smith’s Contract*, [1902] 2 Ch. 258. *Distd. Shepherd v. Croft*, [1911] 1 Ch. 521. *Consd. Re Courcier & Harrold’s Contract*, [1923] 1 Ch. 565. *Refd. Dykes v. Blake* (1838), 6 Scott, 320; *Gibson v. D’Este* (1813), 2 Y. & C. Ch. Cas. 542; *Brumfit v. Morton* (1857), 30 L. T. O. S. 98; *Lee v. Hayson*, [1917] 1 Ch. 613. *Mentd. Pemsell & Wilson v. Tucker*, [1907] 2 Ch. 191.

2200. ——— Sale of leasehold including yard—Yard in fact held from year to year.]—Particulars of the sale by auction of a public-house, described the premises as being held for an unexpired term of years at a rent of £55; & as comprising, amongst other things, a yard. By the conditions the contract was to be completed on June 25, & any error or mistake in the description of the property was to be matter of compensation, to be fixed by arbn. In fact the yard was not held under the lease, but under a tenancy from year to year, at a further rent of £10; the vendors, however, procured a lease for the same term of the yard at an additional rent of £8 dated on June 23, but not, in fact, executed until long after June 25. The yard was essential to the enjoyment of the premises:—*Held*: this defect was not matter of compensation under the terms of the condition; but such a defect in title as justified the vendee in vacating the contract.—*DOBELL v. HUTCHINSON* (1835), 3 Ad. & El. 355; 1 Har. & W. 394; 5 Nev. & M. K. B. 251; 4 L. J. K. B. 201; 111 E. R. 448.

Annotations:—Refd. Re Fawcett & Holmes’ Contract (1889), 42 Ch. D. 150. *Mentd. Midgway v. Wharton* (1857), 6 H. L. Cas. 238; *Matthews v. Baxter* (1873), 28 L. T. 669; *Peiree v. Corf* (1874), L. R. 9 Q. B. 210; *Thomas v. Brown* (1876), 45 L. J. Q. B. 811; *Cave v. Hastings* (1881), 7 Q. B. D. 125.

ground of misrepresentation that the purchaser might with reasonable diligence have discovered that the representation was untrue.—*WILKINSON v. DETMOLD* (1890), 16 V. L. R. 439.—**AUS.**

c. ——— Examination by purchaser with competent knowledge of subject of sale.]—*HENRY & HILL v. PINDAR* (1875), 22 Gr. 257.—**CAN.**

d. Fraud must be conclusively proved.]—*WINNIPEG & MORRIS IMPROVEMENT CO. v. WATSON* (1910), 15 W. L. R. 592.—**CAN.**

PART VIII. SECT. 4, SUB-SECT. 3.—
D. (b).

e. Misdescription—Incumbrance.]—*Re Booth & McLEAN* (1891), 21 O. R. 452.—**CAN.**

f. ——— Reservations—Description not specific.]—An agreement for the sale of land subject to “reservations” will not be rescinded on the ground that the reservations are not specifically described if there is sufficient description to put the purchaser upon inquiry.—*MANUFACTURERS LIFE INSURANCE CO. v. WALSH* (1914), 30 W. L. R. 178; 7 W. W. R. 808; 8

2201. — Underlease described as lease.—Bill filed by a purchaser to rescind a contract, pltf. alleging that he had been induced to enter into it by fraud & misrepresentation: it appeared that the advertisement out of which the contract arose was of the sale of six houses, total rental £131 6s. per annum, lease about seventy-five years, at a moderate ground rent of £50 a year, but what pltf., who agreed to give £420 for the property, found himself liable to take was an underlease of the houses at a rent of £50. The Lord Chancellor, reversing the order appealed from, dismissed the bill without costs, being satisfied that though there was a misdescription of the property, there was no such substantial misrepresentation as called upon the ct. to exercise its jurisdiction.—*BARTLETT v. SALMON* (1855), 6 De G. M. & G. 33; 26 L. T. O. S. 82; 4 W. R. 32; 43 E. R. 1142, L. C.

Annotation :—*Consd. Re Beyfus & Masters' Contract* (1888), 39 Ch. D. 110.

2202. — Situation of house.—A. became the purchaser at a public auction of a freehold house, under particulars of sale which described it as "a freehold estate, being No. 58 on the north side of Pall Mall, opposite Marlborough House." No allusion was made in the particulars of sale to its being situated at the end of a long passage, variously stated as being sixty feet & seventy-three feet in length, or that it was actually not facing Pall Mall, but at the rear of No. 57, Pall Mall, which was so in fact. The solr. of A. inspected the title deeds in a part of the house which was the subject of the contract. The vendors themselves had only a right of way over the passage, which was supported on timber beams, & insufficient to support heavy weight:—*Held*: the purchaser was entitled to have the contract rescinded; the description of the premises in the particulars of sale amounted to misrepresentation, of which however, there was a waiver, the purchaser's solr. having inspected the title-deeds in the building itself; the access to the house was not such as the purchaser was bound to accept, having regard to the particulars of sale.—*STANTON v. TATTERSALL* (1853), 1 Sm. & G. 529; 1 Eq. Rep. 543; 21 L. T. O. S. 333; 17 Jur. 967; 1 W. R. 502; 65 E. R. 231.

Annotation :—*Apld. Tomance v. Bolton* (1872), L. R. 14 Eq. 124.

2203. — Tenure—Copyhold described as freehold.—The conditions of sale had described the property to be sold as freehold. Subsequently, after the purchaser had paid his consideration money, but before the final completion of the conveyance, it turned out to be copyhold:—*Held*: the purchaser was entitled to have his contract for purchase rescinded, & money repaid with interest.—*TURNER v. WEST BROMWICH UNION GUARDIANS* (1860), 3 L. T. 662; 9 W. R. 155.

2204. — Ground rents.—Pltf. purchased at a sale by auction certain property described in the particulars & conditions of sale as follows: "Four freehold ground rents of £10 4s. each, viz. £15 ground rent & £4 4s. garden rent, amounting to £76 10s. per year, arising from the four capital residences of the annual value of £384, held by four leases granted to W. for a term of ninety-five years each, wanting ten days, from Sept. 29, 1844, with reversion to the property in about eighty years." In accordance with the conditions of sale,

pltf. paid deft., the auctioneer, the sum of £282 as a deposit & in part payment of the purchase-money. The vendors in making out this title produced a counterpart of a lease granted by one R. to one W., the other three leases being similar. This lease demised a piece of land, with a messuage erected thereon, at "the yearly rent of £15 of lawful money, payable," etc., & thereby "for the considerations agreed, & also in consideration of the further rent thereafter reserved, & of the covenants & agreements of W.," R. covenanted & agreed with W. that for the term of ninety-five years W. should "have the right to enter in & upon & use & enjoy as a pleasure ground or garden the piece of land adjoining," etc. The deed contained a covenant by W. to pay to R. the yearly sum of £15, & that he would also "pay the further yearly rent of £4 4s. for & in respect of the right of user thereinbefore granted of the said garden or pleasure ground":—*Held*: the garden rent of £4 4s. was not a freehold ground rent within the particulars of sale; & pltf., therefore, had a right to rescind the contract & recover back the deposit.—*ROBINS v. EVANS* (1863), 2 H. & C. 410; 159 E. R. 169; *sub nom. EVANS v. ROBINS*, 33 L. J. Ex. 68; 11 L. T. 211; 10 Jur. N. S. 473; 12 W. R. 601, Ex. Ch.

Annotation :—*Reidf. Camberwell & South London Bldg. Soc. v. Holloway* (1879), 13 Ch. D. 751.

2205. — Effect of trusts of reversionary interest.—Where conditions of sale incorrectly state the effect of the trusts of a reversionary interest, the purchaser of that interest is not bound to accept the title.—*HADLEY v. ROBINS* (1866), 14 L. T. 100; 11 W. R. 387.

2206. — Land sold as fit for building purposes—Use for building purposes forbidden by bye-laws—Unless land is excavated.—Land offered for sale at an auction was described as "The capital freehold building site . . . in the midst of a capital letting class of property . . . ripe for immediate development." It was, in fact, land which had been filled up with refuse from roads, dustbins, etc., & under the bye-laws of the London County Council could not be used for building purposes without excavating the rubbish & filling in:—*Held*: this was such a misdescription as to entitle the purchaser to rescind.—*BAKER v. MOSS* (1902), 66 J. P. 360.

2207. Misrepresentation—Acreage—Purchaser able to ascertain extent of estate.—The owner of an estate agreed to sell it for £250,000, representing it to contain 1,530 acres. The purchaser agreed to sell it to a co. for £350,000, of which £150,000 was paid to him, £75,000 in cash, & bonds for £75,000, & he paid the vendor of the estate £50,000 as a deposit. It appeared that the estate contained less than 1,100 acres, & the co., having at the time only £1,536 in hand, complained to the purchaser of the deficiency, & he then wrote to the vendor declining to complete. The co. afterwards rescinded the contract, & the purchaser brought an action against the vendor for the deposit, which was compromised by the vendor repaying the deposit & rescinding the contract. The co. filed a bill against the purchaser & some other defts. who had agreed to share with him, for a return of the £75,000 & of the bonds:—*Held*: (1) although the financial position of the co. might render it convenient to them to rescind the

Alta. L. R. 90; 20 D. L. R. 504.—*CAN.*

E.—*Easements—Description not specific.*—*ENNIS v. BELL* (1918), 52 N. S. R. 31; 40 D. L. R. 3.—*CAN.*
h.—*Length of frontage.*—*Dowd-*

ING v. BROWN, [1920] 1 W. W. R. 698.—*CAN.*

2207 i. Misrepresentation—Acreage—Purchaser able to ascertain extent of estate.—*Re OAKLEY & FITCH'S CONTRACT* (1916), 12 Tas. L. R. 18.—*AUS.*

2207 ii.—*FRY v. REYNOLDS* (1848), 2 Men. 153, 161.—*S. AF.*

J.—*Statement by agent of ability to sell for purchaser at increased price.*—*MCCALLUM v. HART* (1908), 1

Sect. 4.—Repudiation by purchaser: Sub-sect. 3, D. (b), & E.]

contract, & though they might otherwise have been ready to take the smaller quantity of land, they were entitled to rescind the contract, as the purchaser was unable to complete with them; (2) the co. were entitled to rescind on the ground of misrepresentation though they might have been able to ascertain the extent of the estate; (3) the co. were entitled to repayment of what they had paid, & to a return of the bonds, & they had a lien on a portion of the £50,000 repaid to the purchaser, which had been paid into ct.

(4) One of the arts. of the contract provided that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds:—*Held*: this was merely a conveyancing condition as to identify, & coupled with the representation as to the acreage, it did not estop the co. from rescinding on the ground of deficiency in acreage.

(5) The same relief was asked against the other defts. as against the purchaser. One of these defts. by his answer said that the suit was unnecessary & improper; another, that he was improperly made a party to the suit:—*Held*: they, whether necessary or not, were proper parties to the suit, but no relief in the shape of repayment could be given against them, & if they had merely submitted to any order which the ct. might make they would have been entitled to their costs, but as they had answered in this manner they would not have their costs.—*ABERAMAN IRONWORKS v. WICKENS* (1868), 4 Ch. App. 101; 20 L. T. 89; 17 W. R. 211, L. C.

Annotations:—*As to* (1) *Refd.* *Torrance v. Bolton* (1872), L. R. 14 Eq. 121. *As to* (3) *Apd.* *Mycock v. Beatson* (1879), 13 Ch. D. 381. *As to* (5) *Expld.* *Fleming v. Loe*, [1901] 2 Ch. 591. *Refd.* *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165; *Goodford v. Stonehouse & Nallsorth* (1869), 38 L. J. Ch. 307.

2208. — Tenant described as “most desirable”

Tenant in bad financial position.—Pltfs. advertised for sale by auction an hotel, stated in the particulars to be held by a “most desirable tenant.” Defts. sent their secretary down to inspect the property & report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent, £100, rates, & taxes. Defts., however, relying on the statements in the particulars, authorised the secretary to attend the sale & to bid up to £5,000. The property was bought in at the sale, & the secretary purchased it by private contract for £4,700. It appeared subsequently that the quarter's rent previous to the sale had not been paid; the previous quarter had been paid by instalments, & six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year

as previously, & that the month of the tenant's failure was the best he had had. Pltfs. brought an action for specific performance, relying, in answer to the defence, & counterclaim for rescission on the ground of misrepresentation, on the fact that defts. had made their own inquiries:—*Held*: defts. were entitled to rescission of the contract.—*SMITH v. LAND & HOUSE PROPERTY CORPN.* (1884), 28 Ch. D. 7; 51 L. T. 718; 49 J. P. 182, C. A.

Annotations:—*Consd.* *Bisset v. Wilkinson*, [1927] A. C. 177. *Refd.* *Hughes v. Twisden* (1886), 55 L. J. Ch. 481.

2209. — Sale of land fit for building—Covenant restricting building purposes.—By an order, dated Jan. 25, 1905, the hereditaments comprised in lot 6 of the particulars & conditions of the sale held on July 7, 1905, were directed to be sold under the direction of the ct. The particulars of sale described lot 6 as valuable freehold land immediately ripe for development as a building estate which could be utilised for the erection of residences. By an indenture, dated July 29, 1887, one E., through whom the vendors claimed, had covenanted that he, his exors., administrators, & assigns, would forthwith erect almshouses on the piece of land thereby conveyed, & would not at any time use the land or the buildings, or suffer the same to be used, for any purpose whatever other than as almshouses. The conditions of sale provided that the vendors, if any purchaser should take any objection or make any requisition which the vendors were advised not to remove or comply with, might with the sanction of the judge by written notice, notwithstanding intermediate negotiation, rescind the contract for sale upon such terms as the judge should approve, & the purchaser should thereupon be entitled to receive back his deposit, & should accept the same in discharge of all claims for costs or otherwise. The purchaser, having by his requisitions taken the objection that the negative covenant in the deed of 1887 would bind any person purchasing with notice, the vendors, with the sanction of the judge, gave him notice to rescind the contract. On the purchaser's summons asking that he might be discharged from being such purchaser, & for a return of his deposit & for his costs, charges, & expenses occasioned by his bidding for lot 6:—*Held*: the vendors' notice to rescind the contract, whether served before or after the issue of the purchaser's summons asking for relief from his purchase, did not prevent the purchaser from recovering costs, charges, & expenses beyond the amount to which he would have been entitled under the condition, because the purchaser was entitled to rescind the contract on the overriding ground of misrepresentation, not merely on the terms of the condition.—*HOLLIWELL v. SEACOMBE*, [1906] 1 Ch. 426; 75 L. J. Ch. 289; 94 L. T. 186; 54 W. R. 355.

Sask. L. R. 482; 9 W. L. R. 338. — **CAN.**

k. — Nature, quality & value of land—Opportunity of purchaser to ascertain real nature of property.—*LUNDY v. CLOUTHIER* (1910), 15 W. L. R. 190.—**CAN.**

l. — Situation of property—Not fronting road as described.—*McIVOR v. KERR* (Man.) (1911), 18 W. L. R. 209.—**CAN.**

m. — — — — — *PORTER v. ROGERS* (1913), 12 E. L. R. 551; 11 D. L. R. 304; 42 N. B. R. 82.—**CAN.**

n. — — — — — *STEWART v. CUNNINGHAM* (1915), 8 W. W. R. 579; 21 B. C. R. 255.—**CAN.**

o. — Value.—Pltf. sued for the second instalment of the purchase-

price of land under an agreement of sale & purchase; & deft. alleged misrepresentation by pltf. as to the value of the land, & counterclaimed for rescission:—*Qu.*: whether, it is over possible to rescind for misrepresentation as to value.—*KNOX v. BUNCH* (Alta.) (1913), 24 W. L. R. 265; 11 D. L. R. 377.—**CAN.**

p. — — — — — *LAMB v. WALTERS*, [1926] App. D. 358.—**S. AF.**

q. — Intention of vendor to connect purchased lands with neighbouring city.—*Held*: a misrepresentation by a vendor of lands that he had a charter for & was intending to build a street car line to connect a neighbouring city with the purchased lands, entitled the purchaser to rescission of the contract for sale.—*MCCALLUM v. DOMI-*

NION CO-OPERATIVE N.T. & REALTY CO. (Alta.), [1917] 1 W. W. R. 821.—**CAN.**

r. — Sale by plan showing roads—Roads not taken over by local authority.—Since Public Works Act, 1903, if a vendor in selling land produces to the purchaser a plan of the land on which are marked roads giving access to the land, & these roads have not been taken over by the local authority, or sanctioned as private roads by the local authority, the production of the plan is a sufficient misrepresentation to entitle the purchaser to a rescission of the contract.—*FRANCIS v. BECKER* (1906), 26 N. Z. L. R. 332.—**N.Z.**

t. — Land described as open to application for Crown lease—Land

2210. — Rents & outgoings.—*CREE v. STONE* (1907), *Times*, May 10.

2211. — Condition of drains.—*CREE v. STONE* (1907), *Times*, May 10.

— **Sale in lots.**—See No. 2233, *post*.

Rights under particular conditions.—See Part IV., Sect. 2, sub-sect. 9, C. (b), *ante*.

E. Non-Disclosure.

2212. Incumbrance concealed by holder.—*ANON.* (circa 1675), *Freem. K. B.* 310; *Freem. Ch. App.* 310; 89 *E. R.* 228.

2213. Concealment of defect in title—By vendor's solicitor.—A purchaser will be discharged from his purchase, though the vendors have, since the date of the report against the title, put themselves in a condition to make a good title, if the objection, which they have enabled themselves to cure, was known to their solicitor previously, & concealed from the purchaser.—*DALBY v. PULLEN* (1830), 1 *Russ. & M.* 296; 8 *L. J. O. S. Ch.* 74; 39 *E. R.* 114, *L. C.*

Annotations :—*Consd. Casamajor v. Strode* (1834), 2 *My. & K.* 706. *Refd. Croome v. Lediard* (1834), 2 *My. & K.* 251.

2214. ——In an action for breach of contract, the declaration charged that deft. put up certain property for sale by auction, subject to certain conditions, by the fourth of which conditions it was provided that within twenty-one days after delivery of the abstract of title the purchaser should deliver in writing his objections & requisitions to or on the title as deduced by such abstract, & at the expiration of the twenty-one days, the title should be considered as approved, subject to such objections, etc., & that the vendor, in case any objection, etc., should be made which should be unable, or should not think fit, to answer or remove, should be at liberty to rescind the contract by notice in writing to the purchaser, notwithstanding any intermediate negotiation, or attempts to remove or answer such objections, etc. Averment, that pltf. became the purchaser, etc., & did all things necessary, etc. Breach, that defendant had not any title to sell & convey, & was not ready, willing, or able, & wholly neglected & refused, to sell or convey the property to pltf.; & allegation of damage thereby. Plea that after pltf. became the purchaser of the property objections, etc., were made, which the vendor was not able or did not see fit to answer or remove, & thereupon, by notice, etc., he rescinded the contract, & pltf. received back his deposit. Replication, that the objections & requisitions, which deft. was not able, or which he did not see fit, to answer or remove, were not objections, etc., to the abstract, or to the title as deduced by the abstract, "but were objections to the title of the vendor which were by deft. fraudulently concealed from pltf. & omitted from the abstract," & by reason of such fraudulent concealment & omission the negotiations, etc., were delayed, & the deposit was withheld for a longer time than it otherwise would have been, & the expenses, etc., were greatly increased :—*Held* : the replication was a good

answer to the plea, & no departure.—*COOKE v. MOORE* (1866), 15 *L. T.* 409.

2215. Restrictive covenants—Covenant contemplated by agreement.—By a contract for the sale of a public-house, the vendor agreed to assign & the purchaser agreed to take the lease, "subject to the yearly rent of £90 & the performance of the covenants thereby reserved & contained, such covenants being common & usual in leases of public-houses." Upon investigating the title, the purchaser found that the lease under which the premises were held contained this clause :— "Provided always & these presents are upon this express condition, that all & every underlease, deed of assignment, etc., which shall be made & executed during the term, shall be left with the solr. of the ground landlord within two months of its date, for the purpose of registration, & a fee of one guinea paid for such registration," & a power of re-entry in case of "breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to."

—The purchaser refused to complete, on the ground that this was not a common & usual covenant; & the jury so found :—*Held* : whether the proviso in the head lease was a "covenant" in the strict sense or not, it was at all events a covenant within the contemplation of the agreement, & the purchaser was not bound to complete.—*BROOKES v. DRYSDALE* (1877), 3 *C. P. D.* 52; 37 *L. T.* 467; 26 *W. R.* 331.

Annotation :—*Refd. Westcott v. Hahn*, [1917] 1 *K. B.* 605.

2216. — Believed by purchaser to be terminated—Vendor unaware of covenants.—Deft. contracted to purchase pltf.'s interest under an agreement for a building lease with a railway co. The property was purchased by the railway co. under their compulsory powers, subject expressly to certain restrictive covenants affecting the right of building & carrying on trades upon the property. Deft. required that the covenants should be released, but this being refused, he declined to complete. Pltf.'s action originally was for specific performance, but the pleadings were afterwards amended, & only damages for breach of the agreement were claimed. It was shown that, when the contract was entered into, deft. was aware of the existence of the restrictive covenants, but thought they had been put an end to by the compulsory purchase. The railway co.'s agreement with pltf. contained a clause prohibiting him from assigning his interest under it without the consent of the co., but such consent was not to be unreasonably withheld. When pltf. brought the action he had not obtained any licence from the railway co. to assign to deft. :—*Held* : pltf. being unaware of the restrictive covenants, & deft. thinking that they had been put an end to by the compulsory purchase of the land by the co., both parties had contracted on the footing that a good title should be shown, & the action must therefore fail.

Semble : the fact that pltf. had not procured from the co. a licence to assign did not entitle deft. to repudiate the contract, as at the date of

already leased.—*SHEPHERD v. AIKEN* (1889), 7 *N. Z. L. R.* 382.—*N. Z.*

PART VIII. SECT. 4, SUB-SECT. 3.—E.

a. Sale for particular purpose—Knowledge of vendors of unfitness for purpose.—Deft. agreed for the purchase of a factory near a small stream, intending to carry on there his occupation of soap & candle manufacture. Afterwards deft. discovered that he would not have a right to throw the

refuse of his factory into the stream, & without this privilege the property would be useless for his intended purpose, of which the vendors were aware when making the contract :—*Held* : the vendee was bound to complete the contract, although the vendors had not pointed out this fact at the time of the sale.—*JAMES v. FREELAND* (1855), 6 *Gr.* 302.—*CAN.*

b. Sale by land syndicate—Non-disclosure of interest purchased through syndicate as interest of syndicate.—

The promoters of a land syndicate held not to have been under an obligation to disclose to one who was purchasing an interest in the syndicate through them the fact that it was their own interest which was being sold to him; & such non-disclosure was held therefore not to be a ground for rescinding the purchaser's contract.—*YOUNG v. CROSS & CO. & O'REILLY*, [1926] 2 *D. L. R.* 374; [1926] 1 *W. R.* 878; 37 *B. C. R.* 188.—*CAN.*

c. Of rights of public authority

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the repudiation the time for producing it had not arrived.—*ELLIS v. ROGERS* (1885), 29 Ch. D. 661; 53 L. T. 377, C. A.

Annotations:—*Refd.* *Hatten v. Russell* (1888), 38 Ch. D. 334; *Day v. Singleton*, [1899] 2 Ch. 320; *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648; *British & Beningtons v. North Western Cachar Tea Co.*, *British & Beningtons v. Baintoorle (Dooars) Tea Co.*, *British & Beningtons v. Mazdahee Tea Co.*, [1923] A. C. 48.

2217. ——*NOTTINGHAM PATENT BRICK & TILE CO. v. BUTLER*, No. 2070, *ante*.

2218. ——*Re DAVIS & CAVEY*, No. 1832, *ante*.

2219. ——*W.* entered into negotiations with deft.'s agent for the purchase of a house for the purpose of carrying on a boys' school, & was induced to enter into a contract to purchase the house by his representing that there was no covenant which would interfere with *W.*'s carrying on his school there. *W.* subsequently discovered that the house was subject to a covenant which, after specially restraining certain trades or businesses from being carried on, provided that there should not be carried on upon the premises any trade or business or offensive occupation whatsoever whereby (*inter alia*) any injurious or disagreeable noise or nuisance should or might be occasioned, caused, or made. He thereupon brought an action for rescission of the contract, & return of the deposit made by him, with interest:—*Held*: the covenant was not limited to trades or businesses *cjusdem generis* as those specifically mentioned, the carrying on of a boys' school would come within the prohibition of the covenant, the agent's representation was as to a fact, & not a mere statement of law, & *pltf.* was entitled to succeed in his action.—*WATSON v. COPPARD*, [1899] 1 Ch. 92; 68 L. J. Ch. 8; 79 L. T. 467; 47 W. R. 72; 43 Sol. Jo. 28.

2220. — As to light.—A purchaser agreed to buy two freehold houses, "subject to right of light with owner of adjoining property being guaranteed." The vendor had previously mutually covenanted with the owner of the adjoining house not to do anything to prejudice the right of light to the windows of each other's premises:—*Held*: this restrictive covenant was a defect in the title.—*PENSEL & WILSON v. TUCKER*, [1907] 2 Ch. 191; 76 L. J. Ch. 621; 97 L. T. 86; 71 J. P. 547.

2221. Sale of building land—Building obligations not disclosed.—*DOUGHERTY v. OATES* (1900), 45 Sol. Jo. 119.

2222. Concealment of party-wall notice.—*CARLISH v. SALT*, No. 2079, *ante*.

2223. Existence of underground watercourse.—An underground watercourse, though proved to be a latent defect, will not entitle the purchaser to rescission of the contract unless it can be shown that he could get something substantially different from what he contracted for if specific performance were decreed. He will, however, be entitled to compensation.—*SHEPHERD v. CROFT*, [1911] 1 Ch. 521; 80 L. J. Ch. 170; 103 L. T. 874.

2224. Right of way.—*SIMPSON v. GILLEY* (1922), 92 L. J. Ch. 194; 128 L. T. 622.

over property.—*COOK v. GRIFFITHS* (1913), 32 N. Z. L. R. 1109.—**N.Z.**

d. Sale of hotel property—Non-disclosure of indorsement on license.—On the sale of a hotel property the vendor did not disclose the fact that a conviction for breach of Licensing Act, 1908, s. 181, had been indorsed upon the license:—*Held*: the non-disclosure did not entitle the purchaser

to rescind his contract, as the indorsement did not amount to a defect in title, the license, although indorsed, being perfectly valid.—*KENNEDY v. BEVAN* (1911), 30 N. Z. L. R. 925.—**N.Z.**

PART VIII. SECT. 4, SUB-SECT. 3.—F.

e. Vendor incumbering the property.—The fact that *pltf.* has in-

F. Vendor Unable to Perform Contract.

2225. Sale of leasehold premises—Lease containing covenant to repair—Part of property pulled down before sale—Part pulled down not described in particulars.—*GRANGER v. WORMS*, No. 2083, *ante*.

2226. Sale of licensed premises—Vendor not able to transfer license.—Upon the sale of a public-house as a going concern, time is of the essence of the contract. In the absence of express stipulation to the contrary, upon the sale of a public-house, the license of the house must be transferred under Alehouse Act, 1828 (c. 61) s. 11, & not under Alehouse Act, 1828 (c. 61), s. 14. Accordingly it being agreed, upon the sale of a public-house as a going concern, that the purchase should be completed on Nov. 21 & the vendors not being in a position to procure a transfer of the license under Alehouse Act, 1828 (c. 61), s. 11, upon that day:—*Held*: the purchaser was entitled to repudiate the contract.—*DAY v. LUIKE* (1868), L. R. 5 Eq. 336; 37 L. J. Ch. 330; 32 J. P. 499; 16 W. R. 717.

Annotations:—*Fold.* *Claydon v. Green*, *Green v. Claydon* (1868), L. R. 3 C. P. 511; *Cowles v. Gale* (1871), 7 Ch. App. 12. *Consd.* *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705. *Refd.* *Weston v. Savage* (1879), 48 L. J. Ch. 239; *Sharpe v. Wakefield* (1888), 21 Q. B. D. 66.

2227. ——*A* contract for the sale & purchase of a licensed public-house, not containing any special undertaking by the vendor that the license shall be renewed at the Brewster sessions, or that he will obtain from the magistrates a transfer of the license to the purchaser's nominee at the next special sessions, or interim authority for that nominee to use the license between the date fixed for completion & the next special sessions, does not bind the vendor to free the purchaser from risks in respect of any of the above-mentioned matters. The vendor is bound only to have a valid & effectual license existing at the date fixed for completion which he can indorse in the usual way, & upon or in respect of which the purchaser can apply at once for interim protection under Licensing Act, 1842 (c. 44), s. 1, at the next special sessions.—*TADCASTER TOWER BREWERY CO. v. WILSON*, [1897] 1 Ch. 705; 66 L. J. Ch. 402; 76 L. T. 459; 61 J. P. 360; 45 W. R. 428; 13 T. L. R. 295; 41 Sol. Jo. 387.

2228. — Vendor unable to sell house as 'free.'—*WARREN v. MOORE* (1898), 14 T. L. R. 497, C. A.

2229. Distress put in for vendor's rent—Whether sufficient inability.—The purchaser of a boarding establishment in leasehold premises took possession by agreement before the date fixed for completion. A distress having been put in for rent due from the vendor, the purchaser gave the boarders notice to quit, & repudiated the contract:—*Held*: this circumstance was not so damaging or destructive to the subject-matter as to entitle the purchaser to repudiate.

The giving notice to quit was wrongful, as it was the purchaser's duty, even if entitled to repudiate, to take the best care of the subject-matter till the vendor had an opportunity of

cumbered the property will not entitle deft. to rescind the contract of sale.—*NIBLOCK v. ROSS* (1908), 8 W. L. R. 792.—**CAN.**

1. Performance rendered impossible by act of purchaser.—*NICOLA VALLEY LUMBER CO. v. MEEKER* (B. C.), [1917] 1 W. W. R. 556.—**CAN.**

g. — Forfeiture for non-payment of taxes by purchaser.—*LEBEL v.*

v. LOCKWOOD, [1917] 2 Ch. 47; 86 L. J. Ch. 556; 117 L. T. 265; 61 Sol. Jo. 525.

SUB-SECT. 5.—DELIVERY UP OF CONTRACT.

See, generally, EQUITY, Vol. XX., pp. 285-288, Nos. 440-465.

2234. Whether ordered—Defective title —Delivery up without prejudice to action for damages.]—Under a bill to have a contract delivered up, on the ground of the defective title of deflt., the vendor, & for compensation for the injury to pltf. by the failure of the contract, the decree was made for delivering up the contract, without prejudice to an action; instead of an inquiry before the master.—*GWILLIM v. STONE* (1807), 14 Ves. 128; 33 E. R. 469.

Annotations: — N.F. Onions v. Cohen (1865), 2 Hem. & M.
354. Refd. Todd v. Geo (1810), 17 Ves. 273; Sainsbury
v. Jones (1839), 5 My. & Cr. 1; Wythes v. Lee (1855), 3
Drew. 396; Aberaman Ironworks v. Wickens (1868),
L. It. 5 Eq. 485; Jolliffe v. Baker (1883), 11 Q. B. D. 255.
Ment. Jenkins v. Parkinson (1833), Coop. Com. Brough-
ton, "Badger" & "Puffin". Federal Coalmining Co. v.
Rubber, Gutta Percha & Telegraph Works Co. (1875), 10
Ch. App. 520, n.

2235. ——— **In absence of fraud.]—**In the absence of fraud a purchaser is not entitled on the ground of want of title, to a decree for delivering up the contract to be cancelled without prejudice to an action at law.—**ONIONS v. COHEN** (1865), 2 Hem. & M. 354; 5 New Rep. 400; 34 L. J. Ch. 338; 12 L. T. 15; 11 Jur. N. S. 198; 13 W. R. 426; 71 E. R. 501.

Annotation :—*Refd.* Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.

2236. Contrasted with resistance to specific performance.—Specific performance; the lapse of time being trifling, & the result of fraud. The relief by delivering up a contract requires a stronger case than to resist a specific performance.—*SAVAGE v. BROCKSOPP, BROCKSOPP v. LUCAS* (1811), 18 Ves. 335; 34 E. R. 344.

2237. Reference as to title ordered—Notwithstanding notice of rescission given by purchaser.]—
WOOD v. MACHU, No. 2180, ante.

2238. Who are proper parties—Persons sharing profits of sale with vendor.]—**ABERAMAN IRON-WORKS v. WICKENS**, No. 2207, *ante*.

2239. Amendment of pleadings—Disclaimer of all interest in contract.]—A condition of sale which refers to a document as affecting the title, & offers an opportunity of inspecting it, is not misleading, unless it so states the document as to lead to the belief that all that is material in it is disclosed. All such amendments in pleadings are to be allowed as may be necessary for enabling the real question at issue to be tried, subject to the limitation that the whole nature of the action may not

given judgment for rescission, repayment of purchase-money with interest, & costs of investigating title.—**HAMANN v. GALBRAITH** (Sask.) (1914), 28 W. L. R. 294.—**CAN.**

held entitled to the costs of a suit to restrain the ejectment, & compel specific performance, notwithstanding that the vendor made a good title when required by the ct.—**HEALEY v. WARD** (1860), 8 Gr. 337.—**CAN.**

PART VIII. SECT. 4, SUB-SECT. 6.

1. *Costs—Objection to title—False allegation of non-payment of purchase-money.*—Where a purchaser objected to the title offered, & refused to pay the balance of the purchase-money, but remained in possession, & the vendor brought ejectment, falsely denying the payment of part of the purchase money, the purchaser was

m. — On order nisi—Application to be made on motion for final order.] —WEATHERHEAD v. SKOTTOWE (Sask.), [1924] 4 D. L. R. 222; [1924] 3 W. W. R. 48.—CAN.

n. — *Waiver of objection at hearing.*—Where a purchaser filed a bill alleging that his vendor could not make a good title, but at the hearing waived a reference as to title, admitting

Sect. 4.—Repudiation by purchaser: Sub-sect. 6.
Sects. 5, 6 & 7: Sub-sects. 1 & 2.]

be changed by amendment. Where, therefore, an action was brought for the rescission of a contract for the sale of land, & one of defts., who had entered into the contract on behalf of others of defts., who were the real vendors, disclaimed by his defence all interest in the contract:—*Held*: such deft.'s defence should be amended by confining the disclaimer to any beneficial interest in the contract, & stating that he only contracted as agent, & such deft. should be added as a pltf. in a counterclaim by the real vendors to compel the specific performance of the contract.—*BLENKHORN v. PENROSE* (1880), 43 L. T. 668; 29 W. R. 237.

Annotation:—*Reid*. *Dougherty v. Oates* (1900), 45 Sol. Jo. 119.

2240. Liberty given to purchaser to sue for recovery of deposit.]—*Re DAVIS & CAVEY*, No. 1832, *ante*.

2241. Costs—Where relief asked not applicable to certain parties—Such parties not content to abide by order of court.]—*ABERAMAN IRONWORKS v. WICKENS*, No. 2207, *ante*.

SECT. 5.—SPECIFIC PERFORMANCE.

See SPECIFIC PERFORMANCE.

SECT. 6.—SPECIFIC PERFORMANCE WITH COMPENSATION.

See SPECIFIC PERFORMANCE.

SECT. 7.—DAMAGES.

SUB-SECT. 1.—IN GENERAL.

See, generally, DAMAGES, Vol. XVII., pp. 78 *et seq.*

2242. Who may recover—Purchaser—Although let into possession—Deposit & interest paid into court.]—Where a purchaser has given notice of his intention to abandon the contract by reason of a defect in the title, he may maintain an action against the vendor to recover damages for breach of the contract, although his deposit money, with interest, has been paid into ct.; & although he had been let into possession, & had not tendered any conveyance for execution by the vendor.—*PEARSON v. UPTON* (1828), 6 L. J. O. S. K. B. 285.

2243. — Executor of purchaser.]—*ORME v. BROUGHTON*, No. 2117, *ante*.

2244. When recoverable—Innocent misrepresentation.]—Deft., being desirous of selling his house, employed for this purpose a firm of house agents, & in advertising the house for sale they

stated that it was in good order throughout. Pltf., relying upon this statement, purchased the house, but on going into possession found that repairs were required. In an action to recover the cost of the repairs on the ground of an innocent misrepresentation as to the condition of the house:—*Held*: though an innocent misrepresentation might justify a purchaser in not going on with the contract, yet, if he went on with it, he could not recover damages unless the innocent misrepresentation amounted to a warranty forming a contractual part of the bargain, & as an advertisement by house agents did not constitute a warranty in this sense, the action failed.—*LAWRENCE v. HULL* (1924), 41 T. L. R. 75.

— *As alternative to specific performance.]—*
See Part VIII., Sect. 6, sub-sect. 2, post.

2245. Condition precedent to action—Tender of draft conveyance.]—Where a purchaser abandons the contract by requiring more title than he ought, or more than he bargained for:—*Semble*: it is not necessary to tender him a draft conveyance previously to bringing an action against him for damages, by reason of his breach of contract.—*WILMOT v. WILKINSON* (1827), 6 B. & C. 506; 9 Dow. & Ry. K. B. 620; 5 L. J. O. S. K. B. 196; 108 E. R. 538.

Annotation:—*Reid*. *Doogood v. Rose* (1850), 9 C. B. 132.

2246. What must be shown—Readiness & willingness to complete.]—Deft. purchased a leasehold estate of pltfs. at a public auction, subject to certain conditions of sale, which were, "that the purchaser should immediately pay down a deposit in part of the purchase-money, & sign an agreement for payment of the remainder within twenty-eight days from the day of sale, when possession should be given of the part in hand; & that the purchaser should have proper conveyances & assignments of the leases, without requiring the lessor's title, on payment of the remainder of the purchase-money." *Assumpsit* was brought by the vendor against the purchaser for the non-performance of the conditions on his part. After a verdict for pltfs., on a motion in arrest of judgment, on the ground that pltfs. had not set out their title or tendered the conveyances to deft.:—*Held*: pltfs. were not bound to set out their title; & allegations, that they were ready & willing to convey, & that they were ready & willing, & actually offered to convey, were equivalent to a performance of the conditions on their parts.—*FERRY v. WILLIAMS* (1817), 8 Taunt. 62; 1 Moore, C. P. 498; 129 E. R. 305.

2247. ——] In a declaration in an action for not completing a purchase of copyhold, it was alleged, that on June 27, pltfs. "were ready & willing, at the office of the steward of the manor of N., to receive the residue of the purchase-money, & then & there to surrender." This was denied by the plea:—*Held*: this allegation was proved by showing that pltfs. were ready & willing to

it to be good, the ct. ordered the pltf. to pay costs.—*TISDALE v. SHORTIS* (1863), 10 Gr. 271.—**CAN.**

c. Who are proper parties—Execution creditors.]—*WEYERHAEUSER v. SCOTT*, [1924] 3 D. L. R. 605; [1924] 2 W. W. R. 605; 18 Sask. L. R. 374.—**CAN.**

p. Application for judgment on admissions—Resale by vendor subject to original agreement.]—*SOLTON v. NORTHERN LOAN & MORTGAGE GUARANTEE CORPN., LTD.* (1919), 25 B. C. R. 529.—**CAN.**

PART VIII. SECT. 7, SUB-SECT. 1.

a. Who may recover—Purchaser.]—Where there has been a breach of

contract for the sale of land by the vendor, the purchaser may be entitled to damages, although it be such as would entitle him to rescind the contract.—*SKINNER v. AUSTRALIAN & BRITISH LAND DEPOSIT & AGENCY CO., LTD.* (1889), 15 V. L. R. 674.—**AUS.**

r. — Vendor.]—*MARGETTS v. KHAN* (1915), 11 Tas. L. R. 147.—**AUS.**

2246 i. What must be shown—Readiness & willingness to complete.]—*SMITH v. DOAN* (1858), 15 U. C. R. 634.—**CAN.**

2246 ii. ——]—*MARVIN v. BLASDELL* (1910), 18 W. L. R. 423; 3 Sask. L. R. 64.—**CAN.**

t. Failure of contract.]—Where a vendor lets a vendee into possession of lands on a contract which afterwards goes off, he cannot recover for use & occupation.—*TEMPLE v. McDONALD* (1866), 6 N. S. R. (2 Old.) 155.—**CAN.**

a. Effect of misrepresentation.]—Representations, which should be considered merely as expressions of opinion not amounting to a warranty, are not grounds for action of damages.—*MEY v. SIMPSON* (1908), 17 Man. L. R. 597; *affd.*, 42 S. C. R. 230.—**CAN.**

b. ——]—*STEWART v. WHITE* (1910), 14 W. L. R. 596.—**CAN.**

c. ——]—*STROME v. CRAIG* (Man.) (1911), 17 W. L. R. 51.—**CAN.**

d. ——]—*WOOLLEY v. GOLDMAN*

have gone to the steward's office on that day to surrender, but did not do so, because on June 25 deft. told the solr., who was concerned for all parties, that he was not ready to complete the purchase on June 27.—*PERRY v. SMITH* (1842), Car. & M. 554; 9 M. & W. 681; 11 L. J. Ex. 269; 152 E. R. 288.

Annotations:—*Refd.* *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648; *British & Beningtons v. N. W. Cachar Tea Co.*, [1923] A. C. 48.

2248. ———.]—*LOVELOCK v. FRANKLYN*, No. 1709, *ante*.

2249. ———.]—*NOBLE v. EDWARDES*, *EDWARDES v. NOBLE*, No. 2269, *post*.

2250. ———.]—Pltf.'s action originally was for specific performance, but the pleadings were afterwards amended, & only damages for breach of the agreement were claimed.

It is settled by a series of cases that in an action of this kind it is an essential averment in pltf.'s pleadings that he was ready & willing to make the assignment (*KAY, J.*).—*ELLIS v. ROGERS* (1884), 29 Ch. D. 661; 50 L. T. 660; *on appeal* (1885), 20 Ch. D. p. 668, C. A.

Annotations:—*Refd.* *Day v. Singleton*, [1899] 2 Ch. 320; *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648; *British & Beningtons v. N. W. Cachar Tea Co.*, [1923] A. C. 48. *Menfd.* *Hatten v. Russell* (1888), 38 Ch. D. 331.

2251. ———.]—*Within reasonable time.*]—*HOWE v. SMITH*, No. 1959, *ante*.

2252. ———.]—*Title.*]—*FERRY v. WILLIAMS*, No. 2246, *ante*.

2253. ———.]—*NOBLE v. EDWARDES*, *EDWARDES v. NOBLE*, No. 2269, *post*.

2254. ———.]—*Tender of conveyance.*]—By arts. under seal, A. agreed to sell & B. to purchase certain premises. B. therein covenanted to pay, on or before a fixed day, as the consideration of such sale & purchase, a certain sum, with interest to the time of the completion of the purchase, A. allowing thereout the same rate of interest for so much of the money as might be paid in the meanwhile; & B. agreed to pay for the conveyance & the stamp:—*Held*: the conveyance was not a condition precedent to, or concurrent with, the payment, & A. might therefore sue for the purchase-money & interest, without previously tendering a conveyance.—*MATTOCK v. KINGLAKE* (1839), 10 Ad. & El. 50; 2 Per. & Dav. 343; 8 L. J. Q. B. 215; 3 Jur. 699; 113 E. R. 19.

Annotations:—*Refd.* *Sibthorp v. Brunel* (1819), 3 Exch. 826; *Anderson v. Baigent* (1856), 26 L. T. O. S. 237; *Workman, Clark v. Lloyd Brazileño*, [1908] 1 K. B. 968.

2255. ———.]—(1) A declaration in covenant by the vendor against the intended purchaser of lands, for non-payment of the purchase-money according to the contract, need not aver that pltf. offered or tendered a conveyance to deft., it is sufficient to allege that pltf. has always been ready & willing to execute a conveyance; inasmuch as, in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, & tender it to the vendor for execution.

Deft. could not have maintained an action for the non-completion of the purchase, without

averring that he had tendered a conveyance (*ABINGER, C.B.*).

(2) By arts. of agreement, reciting that deft. had contracted with J., as the agent of pltf. & the other owners of the property, for the purchase of the lands therein mentioned, deft. covenanted with pltf., & the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day, etc.:—*Held*: this covenant was several, & pltf. might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested.—*POOLE v. HILL* (1840), 6 M. & W. 835; 9 Dowl. 300; 10 L. J. Ex. 81; 151 E. R. 651.

Annotations:—*Is to* (1) *Apld.* *Tennent v. Robinson* (1852), 19 L. T. O. S. 148. *Refd.* *Cobbold v. Peto* (1872), 27 L. T. 130.

2256. ———.]—*Tender of purchase-money.*]—*LOVELOCK v. FRANKLYN*, No. 1709, *ante*.

SUB-SECT. 2.—WHERE SPECIFIC PERFORMANCE CLAIMED.

See, generally, SPECIFIC PERFORMANCE.

2257. *Former law.*]—*ORME v. BROUGHTON*, No. 2117, *ante*.

2258. *Modern rule.*]—Particulars of sale described the property to be sold as "All that well-accustomed inn, with the brewhouse, outbuildings, & premises known as 'The Ship,' . . . now in the occupation of K." A small garden at the back of the inn, but not belonging to the vendors, had been occupied for many years by K., to all appearance as though it formed part of one & the same holding with the inn. In the auction room the auctioneer called attention to two plans which, if carefully examined, would have shown that the garden was not included in the sale. No sale was effected at the auction, but afterwards deft., relying upon his own knowledge of the premises, agreed to purchase according to the same particulars & conditions. In an action by the vendors for specific performance, deft. swore that he had not known of the plans, though he had been present in the auction room, & that he bought in the *bonâ fide* belief that the garden was included in the sale:—*Held*: deft. having been misled solely through relying upon his own knowledge, specific performance could not be resisted.

When specific performance is refused in cases in which, under the old practice, the bill would have been dismissed without prejudice to pltf.'s right to bring an action for damages, the ct. ought now to proceed to consider the question of damages.—*TAMPLIN v. JAMES* (1880), 15 Ch. D. 215; 43 L. T. 520; 29 W. R. 311, C. A.

Annotations:—*Apld.* *Goddard v. Jeffreys* (1881), 51 L. J. Ch. 57. *Consd.* *Van Praagh v. Everidge*, [1902] 2 Ch. 266; *Eastes v. Russ*, [1914] 1 Ch. 468. *Refd.* *Preston v. Luck* (1884), 27 Ch. D. 497; *Aspinalls to Powell & Scholfield*

93; *Hodson v. Thetard* (1907), 51 Sol. Jo. 482; *Holliday v. Lockwood*, [1917] 2 Ch. 47.

(1922), 66 D. L. R. 324; 17 Alta. L. R. 254; [1922] 1 W. W. R. 618.—*CAN.*

e. Loss of profit.]—In the case of an inexcusable breach of contract the party wronged is entitled to every reasonable presumption as to the benefit he might have obtained by the *bonâ fide* performance thereof.—*MORTGAGE & AGREEMENT PURCHASING CO., LTD. v. TOWNSEND*, [1920] 3 W. W. R. 968; 30 Man. L. R. 563.—*CAN.*

f. Completion becoming impossible

without fault of either party—Each party bears own loss.]—*GOULDING v. RABINOVITCH*, [1927] 3 D. L. R. 820; 60 O. L. R. 607.—*CAN.*

g. Defect in title—Knowledge of purchaser.]—*ANKHES-AWAU NAIDU v. GURUKRATHA CHETTI* (1916), 1 L. L. 40 Mad. 338.—*IND.*

PART VIII. SECT. 7, SUB-SECT. 2.

2258 *1. Modern rule.*]—*Manitoba county ct. has no jurisdiction to enter-*

tain an action for specific performance of a contract for the sale of land, nor is it competent to give damages in lieu of specific performance.—*MIQUEZ v. HARRISON* (1914), 30 W. L. R. 39; 25 Man. L. R. 40; 7 W. W. R. 650; 20 D. L. R. 233.—*CAN.*

h. When damages obtainable—Specific performance not obtainable.]—When vendor has put it out of his power to give specific performance, purchaser is not deprived of his right

Sect. 7.—Damages: Sub-sects. 2 & 3.]

2259. When damages obtainable — Plaintiff making specific performance impossible.]—Pltf. by his statement of claim claimed specific performance of a contract by which he agreed to sell & deft. agreed to purchase the lease, goodwill, fixtures, & stock-in-trade of a business; pltf. alleging that he was & always had been able & willing to perform the contract, but that deft. refused to perform the same. The statement of claim in the alternative claimed £100 as liquidated damages fixed by the contract for the refusal to perform the contract. The statement of defence alleged false representations by pltf. as to the character of the business, & denied that pltf. was able & willing to perform the contract. Pltf., after the close of the pleadings, gave notice to deft. that, unless deft. completed the purchase within a week, he should rescind the business, which he accordingly did. No amendment of the pleadings was then asked for by pltf., & the action went on to trial:—*Held*: in the absence of any amendment of the pleadings, which ought not at that stage of the action to be allowed, the action must be treated as one for specific performance with a claim for damages in the alternative as a substitute for specific performance, according to the practice existing before Jud. Act, 1873 (c. 66), in the Ct. of Chancery, & pltf., having by his own act rendered specific performance impossible, was not in such action entitled to damages.—*HIGHGRAVE v. CASE* (1885), 28 Ch. D. 356; 54 L. J. Ch. 399; 52 L. T. 212, C. A.

Annotations:—**Redf.** Gas Light & Coke Co. v. Towse (1887), 35 Ch. D. 519; Nicholson v. Brown (1897), 41 Sol. Jo. 490; *Beiners v. Fleming*, [1925] Ch. 264.

2260. — Liberty to amend pleadings.]—*NICHOLSON v. BROWN* (1897), 41 Sol. Jo. 490.

2261. — Specific performance not obtainable — Statute of Frauds.]—The jurisdiction to give damages in substitution for, or in addition to specific performance, has not been extended to cases where specific performance could not possibly have been directed; &, accordingly, the contract having, from lapse of time, become at the hearing incapable of specific performance, the equitable doctrine of part performance, as avoiding the operation of above Act, did not enable pltf. to obtain relief in damages.

It has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose of obtaining damages on a contract at law (*CHITTY, J.*).—*LAVERY v. PURSELL* (1888), 39 Ch. D. 508; 57

L. J. Ch. 570; 58 L. T. 846; 37 W. R. 163; 4 T. L. R. 353.

Annotation:—**Redf.** *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10.

2262. — Specific performance not insisted on.]—The burial board of Portsmouth, where by Order in Council no new burial ground was to be opened without the previous approval of one of the Secretaries of State, contracted in 1889 with the consent of the vestry for the purchase of a piece of land for the purpose of adding to their existing cemetery. The purchase was not to be completed till June, 1896. In the meantime no interest was to run, & the vendor was to be at liberty to remove the clay & make bricks on the land. In 1895 the property & liabilities of the board were transferred to the corpn. Shortly before the time for completion the corpn. applied to the Home Secretary for his approval of the land as a burial ground, which he refused to give. The corpn. then declined to complete, & the vendor sued for specific performance or damages:—*Held*: Burial Act, 1853 (c. 134), s. 6, did not prohibit the contracting to purchase land with the consent of the vestry for the purpose of a burial ground without the approval of a Secretary of State, & the contract was binding & the vendor entitled to damages for the breach of it, he not insisting on specific performance.—*WARD v. PORTSMOUTH CORPN.*, [1898] 2 Ch. 191; 67 L. J. Ch. 489; 78 L. T. 771; 62 J. P. 820; 46 W. R. 610; 14 T. L. R. 472, C. A.

Annotation:—**Mentd.** *Re Bosworth & Gravesend Corpn.*, [1905] 2 K. B. 426.

2263. — Right to specific performance lost by delay — Not amounting to repudiation.]—*CORNWALL v. HENSON*, No. 1501, *ante*.

2264. Amendment of pleadings.]—*ELLIS v. ROGERS*, No. 2250, *ante*.

SUB-SECT. 3.—BREACH BY PURCHASER.

See, generally, DAMAGES, Vol. XVII., pp. 130 *et seq.*

2265. Measure of damages—Damages actually sustained—Not amount of unpaid purchase-money.]

—In an action upon a contract for the sale of land upon the vendee's declining to complete the purchase, the vendor is entitled to such damages as are sustained from the breach of the contract; but the amount of the purchase-money is not the measure of damages.—*LAIRD v. PIM* (1841), 7

to damages.—*MCINTYRE v. STOCKDALE* (1912), 23 O. W. R. 586; 4 O. W. N. 482; 27 D. L. R. 462.—**CAN.**

k. Repairs by vendor.]—On taking an account of what was due to a pltf. in possession, who claimed under a vendor of real estate in a specific performance suit, the ct. expressed the opinion that the only repairs, made after suit commenced that could be allowed were such as it was pltf.'s duty to make in order to save the premises from deterioration.—*HAWN v. CASHION* (1873), 20 Gr. 518.—**CAN.**

l. Specific performance refused.]—An intending purchaser attended an auction sale of lands & bid off the property, but no memorandum or agreement was signed evidencing the contract. The purchaser having filed a bill for specific performance:—*Held*: not a case in which the ct. would, on refusing specific performance, direct an inquiry as to damages.—*O'DONNELL v. BLACK* (1873), 19 Gr. 620.—**CAN.**

m. Time at which damages assessed.]

—In an action by a purchaser, for specific performance of a contract respecting lands, intended to be held by him for sale, where damages have been decreed instead of specific performance, on account of the sale by the vendor of the lands to a third party, the date of the breach of the contract is the period at which the value of the land in question is to be estimated for the purpose of assessing the damages.—*BOULTBEE v. SHORE* (1883), 1 Man. L. R. 22.—**CAN.**

n. Alternative to specific performance.]—*WEATHERBE v. WHITNEY* (1898), 30 N. S. R. (18 R. & G.) 441.—**CAN.**

o. —.]—*STUART v. MCVICAR* (1898), 18 P. R. 250.—**CAN.**

p. —.]—*O'NEILL v. DRINKLE* (1907), 1 Sask. L. R. 402; 8 W. L. R. 937.—**CAN.**

q. —.]—*WARREN v. ROGERS* (1914), 28 W. L. R. 637; 24 Man. L. R. 492.—**CAN.**

r. —.]—If a vendor agrees to sell land without excepting the coal therein which is not included in his title, the purchaser, in the absence of waiver, is entitled to the coal or its value, & if he cannot ask for rescission by reason of the impossibility of *restitutio in integrum* he is entitled to compensation.—*CRUMP v. McNEILL*, [1919] 1 W. W. R. 52; 14 Alta. L. R. 201.—**CAN.**

t. —.]—*FRANCO-BELGIAN INVESTMENT CO. v. DUGGAN* (Alta.), [1920] 1 W. W. R. 728; 51 D. L. R. 602; 15 Alta. L. R. 243.—**CAN.**

PART VIII. SECT. 7, SUB-SECT. 3.

a. Measure of damages — Damages actually sustained.]—*MALLICK v. PARISH* (1916), 16 S. R. N. S. W. 305; 33 N. S. W. W. N. 94.—**AUS.**

b. —.]—In an action against the vendee for breach of an agreement to purchase land, pltf. cannot recover the amount of the purchase-money agreed to be paid for

1. *Claim for determination—Right to damages.*—In an action for the determination, which is to be distinguished from rescission, of an agreement for the sale of land, the

Sect. 7.—Damages: Sub-sects. 3 & 4, A. (a).]

2272. — Expenses of original sale.—Although the property has not been resold yet certain expenses have been incurred & ascertained as to the first sale, & they can be recovered (LORD COLERIDGE, C.J.).—*ESSEX v. DANIELL, DANIELL v. ESSEX* (1875), L. R. 10 C. P. 538; 32 L. T. 476.

SUB-SECT. 4.—BREACH BY VENDOR.

A. What may be Recovered.

(a) Damages for Loss of Bargain.

2273. General rule—Not recoverable.—Contractor for a purchase of a real estate, to which the title proves, without collusion, defective, is entitled to no satisfaction for the loss of his bargain.

These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest & costs, is all that can be expected (BLACKSTONE, J.).

Upon a contract for a purchase, if the title proves bad, & the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost (DE GREY, C.J.).—*FLUREAU v. THORNHILL* (1776), 2 Wm. Bl. 1078; 96 E. R. 635.

Annotations:—**Distd.** Hopkins v. Grazebrook (1826), 6 B. & C. 31. **Consd.** Walker v. Moore (1829), 10 B. & C. 416; London & Greenwich Ry. v. Goodchild (1844), 13 L. J. Ch. 224. **Distd.** Robinson v. Harman (1848), 1 Exch. 850. **Apld.** Pounsett v. Fuller (1856), 17 C. B. 660; Sikes v. Wild (1863), 4 B. & S. 421. **Distd.** Lock v. Furze (1866), L. R. 1 C. P. 441. **Expld.** Engell v. Fitch (1869), L. R. 4 Q. B. 659. **Consd.** Gray v. Fowler (1873), L. R. 8 Exch. 219. **Apprvd.** Bain v. Fothergill (1874), L. R. 7 H. L. 158. **Consd.** Day v. Singleton, [1899] 2 Ch. 320; Morgan v. Russell, [1909] 1 K. B. 357. **Distd.** Re Daniel, Daniel v. Vassall, [1917] 2 Ch. 405; Braybrooks v. Whaley, [1919] 1 K. B. 435. **Apld.** Keen v. Mear, [1920] 2 Ch. 574. **Refd.** Hodges v. Litchfield (1833), 2 L. J. C. P. 133; Godwin v. Francis (1870), L. R. 5 C. P. 295; Wall v. London City Real Property Co. (1874), L. R. 9 Q. B. 249; Gas Light & Coke Co. v. Towse (1887), 35 Ch. D. 519; Re Great Northern Salt & Chemical Works, *Ex p.* Fenwick (1891), 36 Sol. Jo. 42; Baynes v. Lloyd, [1895] 2 Q. B. 610. **Mentd.** Addis v. Gramophone Co., [1909] A. C. 488.

2274. — — — — ——**BRATT v. ELLIS** (1805), Sugden's Vendors & Purchasers, 14th ed. App. V., p. 812.

Annotations:—**Consd.** Pounsett v. Fuller (1856), 17 C. B. 660; Engell v. Fitch (1868), L. R. 3 Q. B. 314. **Refd.** Gaby v. Driver (1828), 2 Y. & J. 549; Walker v. Moore (1829), 10 B. & C. 416; Sainsbury v. Jones (1839), 5 My. & Cr. 1; Sikes v. Wild (1861), 1 B. & S. 587; Lock v. Furze (1866), L. R. 1 C. P. 441; Abernethy Ironworks v. Wickens (1868), L. R. 5 Eq. 485; Bain v. Fothergill (1874), L. R. 7 H. L. 158.

2275. — — — — ——**A.** having contracted with **B.** for the purchase of a real estate, the vendor acting *bonâ fide*, delivered an abstract, showing a

vendor may claim damages as well as a judicial determination of the agreement, but such damages must be distinct from & have no relation to the purchase price.—*VANCE v. BALDWIN*, [1921] 1 W. W. R. 932; 59 D. L. R. 336.—**CAN.**

g. Value of land.—*McBETH & ALLISON v. GOWER* (1910), 30 N. Z. L. R. 380.—**N.Z.**

PART VIII. SECT. 7, SUB-SECT. 4.—A. (a).

2273 i. General rule—Not recoverable.—**Held**: the measure of damages should be amount of purchase-money paid with interest & should not include the increase at time of breach nor of action brought in value of land over the purchase price.—*McANDIE v.*

JACKSON (Alta.) (1911), 1 W. W. R. 10.—**CAN.**

2273 ii. — — — — ——**MEIGHEN v. COUCH** (Man.) (1913), 23 W. L. R. 523; 4 W. W. R. 64; 9 D. L. R. 829.—**CAN.**

2273 iii. — — — — ——**BESNARD v. ROMAN CATHOLIC EPISCOPAL CORP. OF SASKATCHEWAN** (1916), 34 W. L. R. 721; 10 W. W. R. 806.—**CAN.**

2273 iv. — — — — ——**PITAMBER SUNDARI v. CASSIBAI** (1886), 1 L. R. 11 Bom. 272.—**IND.**

2273 v. — — — — ——**NOLAN v. FEELY** (1899), 33 I. L. T. 132.—**IR.**

2273 vi. — — — — ——**KELLY v. DUFFY**, [1922] 1 I. R. 62.—**IR.**

2273 vii. — — — — ——**Held**: the rule that upon a contract for the sale of real

good title; & **A.** before he examined it with the original deeds, contracted to resell several portions of the property at a considerable profit. Upon a subsequent examination of the abstract with the deeds **A.** discovered that the title was defective, & thereupon the sub-purchasers refused to complete their purchases & he refused to complete his purchase from **B.**, & brought an action, wherein he claimed as damages the expense which he had incurred in the investigation of the title; the profit that would have accrued from the resale of the property; the expense attending the resale; & the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title:—**Held**: he was entitled to recover only the expenses that he had incurred in the investigation of the title, & nominal damages for the breach of contract, as no fraud could be imputed to the vendor.

Here **defts.** undertook to make a good title, & they might honestly think that they should be able to do so. It turned out that they could not, & consequently the contract was broken, & they were liable to an action. **Pltf.**, however, must show that the damages which he seeks to recover arose from the acts of **deft.** & not from his own haste . . . & further: if there were *mala fides* in the original vendor, but not otherwise, I am not prepared to say that the purchaser might not recover the profit which would have arisen from the resale (**BAYLEY, J.**).

In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, & that excludes the claim of damages on account of the supposed goodness of the bargain (**PARKES, J.**).—*WALKER v. MOORE* (1829), 10 B. & C. 416; 8 L. J. O. S. K. B. 159; 109 E. R. 504.

Annotations:—**Consd.** *Tyrer v. King* (1845), 2 Car. & Kir. 149. **Apld.** *Pounsett v. Fuller* (1856), 17 C. B. 660. **Consd.** *Sikes v. Wild* (1861), 1 B. & S. 587; *Lock v. Furze* (1866), L. R. 1 C. P. 441; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158. **Refd.** *Hodges v. Litchfield* (1835), 1 Hodg. 40; *Robinson v. Harman* (1848), 1 Exch. 850; *Engell v. Fitch* (1869), 10 B. & S. 738.

2276. — — — — ——**An auctioneer entered into an agreement on behalf of A. to sell certain premises to B. without having communicated to A. that B. was in treaty for such premises. A. had himself previously sold the premises to another party, & therefore could not fulfil the contract so made with B.; whereupon B. sued A. for non-fulfilment of his contract:—Held: B. was not entitled to recover damages for the loss of his bargain.**—*TYRER v. KING* (1845), 2 Car. & Kir. 149, N. P.

Annotation:—**Refd.** *Duckworth v. Ewart* (1863), 2 H. & C. 129.

2277. — — — — ——**A.** being in debt to **B.** agreed to convey a certain estate to him, & to deliver to him an abstract of title by a certain day:

where the vendor without any default on his part is unable to make a good title, the purchaser is not entitled to recover damages for the loss of his bargain, applied in New Zealand.—*FLEMING v. MUNRO* (1908), 27 N. Z. L. R. 796.—**N.Z.**

h. Whether recoverable.—Where the breach of a contract, for the sale of real estate, does not arise from the inability of the vendor to make a good title, the purchaser is entitled to substantial damages, for the loss of his bargain.—*ROSS v. ROBINSON* (1886), 12 V. L. R. 764.—**AUS.**

k. — — — — ——*SOLOMON v. LITCHFIELD* (1916), 16 S. R. N. S. W. 610; 33 N. S. W. W. N. 173.—**AUS.**

l. — — — — ——In regard to real estate there must always be some degree

—*Held*: in an action against A. for the non-performance of this agreement, that B. was only entitled to nominal damages.

Pltf. is only entitled to nominal damages. He is entitled to sue for his whole debt; & it may be he is now in a better position than he would have been if he had got this estate, which was worth a less sum than the whole debt (*per cur.*).—BRADLEY v. TONGE (1846), 7 L. T. O. S. 231.

2278. ———.—]—POUNSETT v. FULLER, No. 2330, *post*.

2279. ———.—]—SIKES v. WILD, No. 2334, *post*.

2280. ———.—]—The general rule . . . is that when a contract is broken the injured person is so far as money can do it to be placed in the same position with respect to damages as if the contract had been performed. This is the amount of damages where the contract would give the actual enjoyment of a thing & it is immaterial whether the contract is as to real or personal property. But to this rule there is an exception as the law of real property is such that a vendor may well be in doubt whether he has a good title or not & therefore it is prudent for him when he is about to sell to make it part of the bargain that he shall not be liable to full damages but that the bargain may be off on repayment of the money paid & expenses (BLACKBURN, J.).—LOCK v. FURZE (1866), L. R. 1 C. P. 441; Har. & Ruth. 379; 35 L. J. C. P. 141; 15 L. T. 161; 30 J. P. 743; 14 W. R. 403, Ex. Ch.

Annotations:—*Reid*. Wall v. City of London Real Property Co. (1874), 30 L. T. 53; Wiggall v. School for Indigent Blind (1882), 8 Q. B. D. 357; Wallis v. Hands, [1893] 2 Ch. 75; Grosvenor Hotel Co. v. Hamilton, [1894] 2 Q. B. 836. *Mentd.* *Re Gray*, [1901] 1 Ch. 239.

2281. ———.—]—BAIN v. FOTHERGILL, No. 2306, *post*.

2282. ———.—]—The purchaser of a piece of land agreed, as part of the consideration, to grant within a given time to the vendor a right of way, & to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way or to make the road & sewers until long after the time fixed, & the vendor brought an action for specific performance & for damages, as the other land had remained unproductive until the road was made:—*Held*: judgment for specific performance with costs must be given, but no damages, as the contract was for a sale of real estate; there being no distinction between a contract to grant a right of way & make a road & sewers, & a contract to sell real estate.—ROWE v. LONDON SCHOOL BOARD (1887), 36 Ch. D. 619; 57 L. J. Ch. 179; 57 L. T. 182; 3 T. L. R. 672.

Annotation:—*Reid*. Morgan v. Russell, [1909] 1 K. B. 357.

2283. ———.—]—C. an estate agent, described as "agent for S., hereinafter called the vendor, signed a contract as 'agent for vendor'" to sell a house to pltf. for £515 containing provisions for payment of deposit, for completion on a particular day, & for "a good & sufficient title to be given."

S. had instructed C. to sell for £515 & on hearing of the contract ratified it. The house belonged to S. & W. jointly as partners. S. acted *bonâ fide*, but it was not proved that by the practice of the partnership S. had authority to sell, & W. on hearing of the contract repudiated it. In an action against S. & W. for specific performance:—*Held*: as against S., C. had authority to sign an open contract on his behalf but not the particular contract entered into, it being no part of an estate agent's duty to deal with title, but S., having ratified the particular contract, was liable for breach of it, & pltf. was entitled to a return of, & interest on, the deposit, costs of investigation of title, & insurance paid, but not to damages for loss of bargain, nor to any costs of litigation as damages or any interest in respect of balance of purchase-money placed on deposit.—KEEN v. MEAR, [1920] 2 Ch. 574; 89 L. J. Ch. 513; 124 L. T. 19.

2284. Exceptions to rule—Omission to do everything possible to make good title.]—Where the lease of a house was sold by auction, the conditions of sale providing that possession should be given on the completion of the purchase, & the vendors, who were mtgees. of the property & entitled to convey it, failed to give possession because of their unwillingness to incur the expense of an ejectment against the mtgor. who refused to quit the premises:—*Held*: the ordinary rule limiting the damages in sales of real property did not apply, & the purchaser could recover, not only the amount of the deposit & the expense of examining the title but the loss of the profit on a resale of the premises, & the cost of the conveyance to the sub-vendee; the measure of damages was the difference between the contract price & the value at the time of the breach of contract.—ENGELL v. FITCH (1869), L. R. 4 Q. B. 659; 10 B. & S. 738; 38 L. J. Q. B. 304; 17 W. R. 894, Ex. Ch.

Annotations:—*Consd.* Godwin v. Francis (1870), L. R. 5 C. P. 295; Bain v. Fothergill (1874), L. R. 7 H. L. 158; Day v. Singleton, [1899] 2 Ch. 320; Jones v. Gardiner, [1902] 1 Ch. 191. *Appld.* Gohm v. Houlder (1920), 90 L. J. Ch. 488. *Reid.* *Re Daniel*, Daniel v. Vassall, [1917] 2 Ch. 405; Braybrooks v. Whaley, [1919] 1 K. B. 435. *Mentd.* Addis v. Gramophone Co., [1909] A. C. 488; Quirk v. Thomas, [1916] 1 K. B. 516.

2285. ———.—]—F. & four others were joint owners of an estate, which they were desirous of selling, & had advertised for sale. F., representing that he had authority from his co-owners to do so, contracted to sell the estate to pltf. & sent him an abstract of title. The co-owners repudiated the contract, & concluded a sale at a higher price to another person. Pltf. nevertheless, conceiving that the four owners had bound themselves by the terms of the advertisement which they had issued, sued them for breach of contract, & continued his action after they had all sworn in answer to interrogatories that F. had no authority to make the contract, & was nonsuited. In an action against F. for this misrepresentation of authority:—*Held*: the proper measure of damages was the costs of investigating the title; the costs

of uncertainty as to whether a good title can be made by the vendor, & taking the property with that knowledge, the purchaser is not entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title.—BOARDMAN v. McGRATH (1925), Q. W. N. 8.—AUS.

m. ———.—]—VALLIER v. WAISH (1857), 6 C. P. 459.—CAN.

n. ———.—]—A lease of land for ten years provided that on its termina-

tion the lessee could by giving notice, purchase the fee for \$22,000:—*Held*: if the lessor without fault, was unable to give title in fee to the land the lessee was not entitled to damages for loss of his bargain.—ONTARIO ASPHALT BLOCK Co. v. MONTREUIL (1915), 52 S. C. R. 541.—CAN.

o. ———.—]—MAITLAND v. MATHEWS (1915), 31 W. L. R. 163; 8 W. W. R. 274.—CAN.

p. ———.—]—KRAWCZUK v. OSTAPOVITCH, [1921] 1 W. W. R. 450; 13 Man. L. R. 221.—CAN.

q. ———.—]—*Held*: where a vendor

had in bad faith & for his own advantage broken his agreement, the purchaser's damages should not be confined to his expenses for searching the title, etc.; he was entitled to compensation for the loss of his bargain.—PINSONNEAULT v. LESPERANCE, [1926] 1 D. L. R. 1133; 58 O. L. R. 375.—CAN.

r. ———.—]—LITTLEPROUD v. CRAIG, [1927] 2 D. L. R. 287; 60 O. L. R. 182.—CAN.

t. ———.—]—Where a vendor, having agreed to convey, without any

Sect. 7.—Damages: Sub-sect. 4, A. (a) & (b).]

incurred & paid by pltf. in the action against the four, down to the time when the answers to the interrogatories had been received & considered by pltf.'s legal advisers; the difference between the contract price & the market price of the estate, & the sum for which the estate was afterwards sold was *prima facie* evidence of the latter. But pltf. could not recover for the loss on the resale of horses, etc., bought for the purpose of stocking the land, without notice to F., & before the title had been investigated, or possession of the land given.

I am not aware of any decision in which it has been held, that where a man having a good title refuses to convey according to contract, he is not liable to compensate the other party for the loss of his bargain as well as for any expenses he may have actually incurred (BOVILL, C.J.).—GODWIN v. FRANCIS (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121; 22 L. T. 338.

*Annotations:—*Refd. Meek v. Wendt (1888), 21 Q. B. D. 126. *Mentid.* McBlain v. Cross (1871), 25 L. T. 804; Williams v. Biscoe (1882), 22 Ch. D. 441; *Re* National Coffee Palace Co., *Ex p.* Panmure (1883), 24 Ch. D. 367; R. v. Rile, [1896] 1 Q. B. 309; Rosenbaum v. Belson, [1900] 2 Ch. 267.

2286. ———.—]—DAY v. SINGLETON, No. 2087, *ante*.

—].—Where a vendor of real estate, though innocent of wilful default or bad faith, fails to obtain the release of a mtgee. upon it & other property of which he is the owner, owing to the refusal of the mtgee. to release & the pecuniary inability of the vendor to redeem the mtge., he is guilty of a failure to do all that he can to complete his conveyance, & in accordance with the principle of *Engell v. Fitch*, No. 2284, *ante*, becomes liable for general damages for loss of bargain in consequence of his breach of the contract.—*Re* DANIEL, DANIEL v. VASSALL, [1917] 2 Ch. 405; 87 L. J. Ch. 69; 117 L. T. 472; 33 T. L. R. 503; 61 Sol. Jo. 646.

*Annotation:—*Apld. Braybrooks v. Whaley, [1919] 1 K. B. 435.

2288. ———.—]—In 1917 deft., the mtgee. of certain land, but not in possession thereof, put up the same for sale by auction, & pltf. agreed to buy it. Completion was to take place on Oct. 11. Shortly after the auction it was brought to the notice of deft. by the mtgor. that he had not obtained the leave of the ct. under Courts (Emergency Powers) Act, 1914 (c. 78), s. 1 (1), to realise his security, & on Aug. 24 deft. purported to annul the sale on this ground. No application was ever made to the ct. under Courts (Emergency Powers) Act, 1914 (c. 78). In an action by pltf. for specific performance or for damages for the loss of his bargain, the county ct. judge awarded damages beyond the return of the deposit:—*Held*:

reasonable excuse conveys the property to a third party, in order to obtain a higher price, the vendee is entitled by way of damages to the additional price obtained by the sale.—*TRILOKHIA NATH BISWAS v. JOY KALI CHOWDHRAIN* (1882), 11 C. L. R. 454.—*IND.*

a. ———.—]—SLACK v. LOCKHART (1873), 1 N. Z. Jur. App. 1.—*N.Z.*

b. ———.—]—STEWART v. TAYLOR (1904), 24 N. Z. L. R. 785.—*N.Z.*

c. ———.—]—*Necessity for fraud or misrepresentation.*—STOLZENBERG v. McWILLIAMS (1914), 10 Tas. L. R. 74.—*AUS.*

d. ———.—]—Deft. having wilfully broken his agreement by selling to a third party at an increased

price:—*Held*: to make the case an exception to the general principle of fraud being necessary to recover damages for the value of the bargain.—*FURCE v. SMALL* (1860), 10 C. P. 161.—*CAN.*

e. ———.—]—WENTZELL v. ROSS (1897), 30 N. S. R. (18 R. & G.) 136.—*CAN.*

f. ———.—]—Defts. assumed to sell to pltf. land to which they were unable to make title:—*Held*: apart from misrepresentations made by defts., pltf. was entitled to recover the sums paid by him on account of the purchase-money & damages for the loss of his bargain, based on the value of the land in excess of the purchase-money.—*PEACOCK v. WILKINSON*

(1) the sale was only a step towards realising the security; (2) an application to the ct. under Courts (Emergency Powers) Act, 1914 (c. 78), could have been made at any time before the date of completion; (3) deft. not having made that application was in default; & (4) the county ct. judge was entitled to award general damages to pltf. for the loss of his bargain.—*BRAYBROOKS v. WHALEY*, [1919] 1 K. B. 435; 88 L. J. K. B. 577; 120 L. T. 281; 63 Sol. Jo. 373, D. C.

2289. ———.—]—*Vendor having knowledge that title bad.*—Where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, & engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him:—*Held*: a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect.—*HOPKINS v. GRAZEBROOK* (1826), 6 B. & C. 31; 9 Dow. & Ry. K. B. 22; 5 L. J. O. S. K. B. 65; 108 E. R. 364.

*Annotations:—*Distd. Walker v. Moore (1829), 10 B. & C. 416; Tyrer v. King (1845), 2 Car. & Kir. 119. *Apld.* Robinson v. Harman (1818), 1 Exch. 850. *Distd.* Pounsett v. Fuller (1856), 17 C. B. 669; Sikes v. Wild (1863), 4 B. & S. 421. *Consd.* Lock v. Furze (1866), L. R. 1 C. P. 441; Engell v. Fitch (1869), L. R. 4 Q. B. 659; Gray v. Fowler (1873), L. R. 8 Exch. 249. *Overd.* Bain v. Fothergill (1871), L. R. 7 H. L. 158. The decision in *Hopkins v. Grazebrook* cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract (LORD CHELMSFORD). *Consd.* Day v. Singleton, [1899] 2 Ch. 320. *Refd.* Hodges v. Litchfield (1835), 1 Hodg. 40; Osborne v. Eales (2) (1864), 2 Moo. P. C. C. N. S. 125.

2290. ———.—]—DAY v. SINGLETON, No. 2087, *ante*.

2291. ———.—]—*Vendor selling property during currency of option.*—Pltf. having an option from deft. to purchase a freehold house "with furniture for £4,000" agreed to sell the property to S. for £4,500 & then wrote accepting deft.'s offer to sell the house "with furniture & fittings as it stands." In the meantime deft. had sold the property to B. for £4,000:—*Held*: there was a concluded contract between pltf. & deft. & as specific performance was responsible by reason of deft.'s own act pltf. was entitled to recover from deft. as damages £500 the difference between the price at which the property was offered to pltf. & that at which pltf. contracted to sell it.—*GOFFIN v. HOULDER* (1920), 90 L. J. Ch. 488; 124 L. T. 145.

Grant of lease.—See LANDLORD & TENANT, Vol. XXXI., pp. 140, 141, Nos. 2751–2768.

(b) Costs of Investigating Title.

2292. *Whether recoverable.*—CAMFIELD v. GILBERT, No. 2038, *ante*.

(Sask.) (1913), 26 W. L. R. 396.—*CAN.*

PART VIII. SECT. 7, SUB-SECT. 4.—A. (b).

2292 i. Whether recoverable.—Although the general rule is, that a vendor must pay the costs of showing a good title, a different rule may be applied as to the expense of investigating the title in the master's office.—*WARDELL v. TRENOUTH* (1877), 26 Gr. 245.—*CAN.*

2292 ii. ———.—]—*GOUGH v. BENCH* (1882), 9 P. R. 431.—*CAN.*

2292 iii. ———.—]—*McNIVEN v. PIGOTT* (1915), 8 O. W. N. 107; 33 O. L. R. 335.—*CAN.*

2292 iv. ———.—]—*McCUNE v. GOOD*

2293. —[—]—*BRATT v. ELLIS* (1805), Sugden's Vendors & Purchasers, 14th ed., App. V., p. 812.

Annotations :—*Apld.* *Sainsbury v. Jones* (1839), 5 My. & Cr. 1. *Consd.* *Engel v. Fitch* (1868), L. R. 3 Q. B. 314; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158. *Refd.* *Gaby v. Driver* (1828), 2 Y. & J. 549; *Walker v. Moore* (1829), 10 B. & C. 416; *Pounsett v. Fuller* (1856), 17 C. B. 660; *Sikes v. Wild* (1861), 1 B. & S. 587; *Lock v. Furze* (1866), L. R. 1 C. P. 441; *Aberaman Ironworks v. Wickens* (1868), L. R. 5 Eq. 485.

2294. —[—]—*WALKER v. MOORE*, No. 2275, *ante*.

2295. —[—]—*ORME v. BROUGHTON*, No. 2117, *ante*.

2296. —[—]—*HODGES v. LITCHFIELD* (EARL), No. 2317, *post*.

2297. —[—]—*GOSBELL v. ARCHER*, No. 2008, *ante*.

2298. —[—]—In every contract for the sale of leaseholds, there is, in the absence of an express stipulation to the contrary, an implied undertaking on the vendor's part to make out the lessor's title to demise.

The purchaser's solr. wrote to the vendor's solrs., that, unless certain proof of title were adduced, the purchase must go off :—*Held* : this did not preclude the purchaser from maintaining an action for the expenses he had been put to in investigating the title.—*HALL v. BETTY* (1842), 4 Man. & G. 410; 5 Scott, N. R. 508; 11 L. J. C. P. 256; 134 E. R. 168.

Annotations :—*Refd.* *Kintrea v. Preston* (1856), 25 L. J. Ex. 287; *Want v. Stallibrass* (1873), L. R. 8 Exch. 175.

2299. —[—]—Where the declaration for breach of an agreement to assign a lease alleged that pltf. had been "put to great expenses, amounting to a large sum of money," etc., in investigating the title :—*Held* : he might, by way of damage, recover the amount of a bill of costs due to his attorney for investigating the title, though such bill was not paid before action brought.—*RICHARDSON v. CHASEN* (1847), 10 Q. B. 756; 16 L. J. Q. B. 341; 11 Jur. 890; 116 E. R. 287.

2300. —[—]—A. paid a deposit upon a contract for the purchase of the lease, etc., of a public-house. It being afterwards discovered that the house was comprised with another in an original lease, under which the lessor had a right to re-enter for breach of covenants, in respect of either house :—*Held* : A. was not bound to accept the title with an indemnity, but might recover back the deposit, with the expenses incurred in investigating the title.—*BLAKE v. PHINN* (1847), 3 C. B. 976; 16 L. J. C. P. 159; 136 E. R. 391.

2301. —[—]—*POUNSETT v. FULLER*, No. 2330, *post*.

2302. —[—]—*POPPELTON v. BUCHANAN*, *BUCHANAN v. POPPELTON*, No. 2065, *ante*.

2303. —[—]—*SIKES v. WILD*, No. 2334, *post*.

2304. —[—]—*ENGELL v. FITCH*, No. 2284, *ante*.

2305. —[—]—*GODWIN v. FRANCIS*, No. 2285, *ante*.

2306. —[—]—Defts. were lessees of a mining royalty, & proposed to sell their interest therein to pltf. They were under a covenant not to assign without the consent of the lessors. They mentioned as one of the conditions of sale, "the usual covenant for our protection as standing between you & our lessors." Pltfs. paid a deposit, but the lessors, after some negotiations, refused their consent. Pltfs. brought this action to recover the deposit money which they had actually paid, the expenses incident to the investigation of defts.'s

title, & also damages for the loss of their bargain :—*Held* : the case was within the principle of *Flureau v. Thornhill*, No. 2273, *ante*, & they were only entitled to recover their deposit money, & the expenses of investigating the title.

It is recognised on all hands that the purchaser . . . is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title (LORD HATHLEY).—*BAIN v. FOTHERGILL* (1874), L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387; 39 J. P. 228; 23 W. R. 261, H. L.; *affg.* (1870), L. R. 6 Exch. 59.

Annotations :—*Distd.* *Hurrow v. Seammell* (1881), 19 Ch. D. 176. *Fold.* *Re Higgins & Hitchman* (1882), 30 W. R. 705. *Consd.* *Rock Portland Cement Co. v. Wilson* (1882), 52 L. J. Ch. 214. *Apld.* *Coombs v. Cook* (1883), Cab. & Kl. 75; *Gas Light & Coke Co. v. Towse* (1887), 35 Ch. D. 519; *Rowe v. London School Board* (1887), 36 Ch. D. 619. *Distd.* *Royal Bristol Permanent Bldg. Soc. v. Bomash* (1887), 35 Ch. D. 390. *Apld.* *Lee v. Soames* (1888), 36 W. R. 884; *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596. *Consd.* *Day v. Singleton*, [1899] 2 Ch. 320; *Jones v. Gardiner*, [1902] 1 Ch. 191. *Distd.* *Hollwell v. Soncombe*, [1906] 1 Ch. 426. *Apld.* *Morgan v. Russell*, [1909] 1 K. B. 357. *Consd.* *Re Daniel*, *Daniel v. Vassall*, [1917] 2 Ch. 405. *Distd.* *Braybrooks v. Whaley*, [1919] 1 K. B. 435; *Goffin v. Houlder* (1920), 90 L. J. Ch. 488. *Apld.* *Grindell v. Bass*, [1920] 2 Ch. 487; *Keen v. Mear*, [1920] 2 Ch. 571. *Refd.* *Gray v. Fowler* (1873), L. R. 8 Exch. 249; *Wall v. London City Real Property Co.* (1874), L. R. 9 Q. B. 249; *Re Hargreaves & Thompson's Contract* (1886), 32 Ch. J. 454; *Synge v. Synge* (1893), 63 L. J. Q. B. 202; *Re Wilsons & Stevens' Contract*, [1894] 3 Ch. 546; *Baynes v. Lloyd*, [1895] 2 Q. B. 610; *Pease v. Courtney*, [1901] 2 Ch. 503. *Mentd.* *Smith v. Green* (1875), 1 C. P. D. 92; *Addis v. Gramophone Co.*, [1909] A. C. 488.

2307. —[—]—GENERAL MEAT SUPPLY ASSOCN., LTD. *v.* BOUFFLER, No. 2017, *ante*.

2308. —[—]—*Re BRYANT & BARNINGHAM'S CONTRACT*, No. 2018, *ante*.

2309. —[—]—*COMPTON v. BAGLEY*, No. 2178, *ante*.

2310. —[—]—PEARL LIFE ASSURANCE CO. *v.* BUTTENSCHAW, [1893] W. N. 123.

2311. —[—]—*DAY v. SINGLETON*, No. 2087, *ante*.

2312. —[—]—*Re HARE & O'MORE'S CONTRACT*, No. 1811, *ante*.

2313. —[—]—*CARLISH v. SALT*, No. 2079, *ante*.

2314. —[—]—*KEEN v. MEAR*, No. 2283, *ante*.

2315. —[—]—Vendor exercising right of rescission.]

—On Apr. 30, 1920, deft., vendor, agreed with pltf., purchaser, for the sale of a house, the contract providing that the conditions of the London Conditions of Sale should apply. Condition 4 of these conditions provided that if the purchaser should insist on any requisition as to the title which the vendor should be unable or unwilling to comply with, the vendor might, "notwithstanding any negotiation or litigation" in respect thereof, rescind the contract unless the requisition was withdrawn within seven days. The purchaser sent in a requisition that the property was subject to restrictive covenants, not disclosed by the contract, & that he reserved his right to object to the title on this ground. On July 22, 1920, the purchaser issued a vendor & purchaser summons for a declaration that a good title had not been shown & for a return of the deposit paid by him under the contract. On July 29, 1920, the purchaser's solrs. wrote repudiating the contract. In Oct. the vendor's solrs. wrote that she was not disposed to continue the litigation & giving notice of rescission under condition 4. Nothing further

(1915), 8 O. W. N. 367; 34 O. L. R. 51; 23 D. L. R. 662.—CAN.

D. L. R. 397.—CAN.

2292 v. —[—]—*ROSS v. STOVALL*, (Alta.), [1919] 1 W. W. R. 673; 45

2292 vi. —[—]—*Held* : where a vendor had in bad faith or for his own advantage broken his agreement, the

purchaser's damages should not be confined to his expenses for searching the title, etc.—*PINSONNEAULT v. LESPERANCE*, [1926] 1 D. L. R. 1153; 58 O. L. R. 375.—CAN.

SALE OF LAND.

Sect. 7.—Damages: Sub-sect. 4, A. (b) & (c), & B.]

occurred in the litigation, & the vendor paid the purchaser's costs of it. In an action by the purchaser to recover from the vendor the costs & expenses of the investigation of the title:—*Held*: the vendor was entitled to rescind, & the purchaser's claim failed.—*PROCTER v. PUGH*, [1921] 2 Ch. 256; 91 L. J. Ch. 1; 127 L. T. 126.

(c) Other Cases.

2316. Preparation of conveyance.]—A purchaser at an auction cannot recover from the vendor the expenses of preparing the deeds of conveyance of the property, after he has refused to complete the purchase on account of the non-production of certain title deeds, though his attorney prepared the conveyances on the faith of a note written in the margin of the abstract by the vendor's solrs., stating that all the title deeds were examined by them on the original purchase, & that if it should be required, they would apply to the solr. for the original seller, in whose custody they were.—*JARMAIN v. EGELSTONE* (1831), 5 C. & P. 172; 172 E. R. 926.

2317. —.]—Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages, expenses incurred previously to entering into the contract; nor the expense of a survey of the estate; nor the expense of a conveyance drawn in anticipation of a completion of the purchase; nor the extra costs of a Chancery suit touching the purchase, in which the vendor is defeated; nor losses sustained by the purchaser, in the resale of stock prepared for the estate. But he is entitled to recover the expense of comparing deeds, of searching for judgments, & of journeys for that purpose; & interest on his deposit money.—*HODGES v. LITCHFIELD (EARL)* (1835), 1 Bing. N. C. 492; 1 Scott. 443; 1 Hodg. 40; 131 E. R. 1207.

Annotation:—*Consd. Malden v. Fyson* (1847), 11 Q. B. 292.

2318. Loss of interest on purchase-money.]—*ORME v. BROUGHTON*, No. 2317, *ante*.

2319. —.]—*KEEN v. MEAR*, No. 2283, *ante*.

2320. Expenses incurred previously to contract.]—*HODGES v. LITCHFIELD (EARL)*, No. 2317, *ante*.

2321. Cost of survey.]—*HODGES v. LITCHFIELD (EARL)*, No. 2317, *ante*.

2322. Losses on resale of stock prepared for estate.]—*HODGES v. LITCHFIELD (EARL)*, No. 2317, *ante*.

2323. Interest on money borrowed to pay purchase price.]—Interest paid by a purchaser upon money borrowed by him to complete the purchase & kept idle, pending an endeavour by the vendor to clear up the title, may be recovered as damages against the latter in an action for breach of his contract.—*SHERRY v. OKE* (1835), as reported in 3 Dowl. 349.

Annotations:—*Mentd. Platt v. Hall* (1837), 5 Dowl. 583; *It. v. G. W. Ry.* (1844), 1 Dow. & L. 874; *Tilt v. Dickson* (1847), 4 C. B. 736; *Smith v. Whitmore* (1863), 1 Hem. & M. 576.

2324. Costs of previous action.]—*HODGES v. LITCHFIELD (EARL)*, No. 2317, *ante*.

2325. —.]—M. agreed with F. to purchase land of him. On production of F.'s title, M. objected to it. F. insisted that it was good, & gave notice that he should sell at M.'s risk. M. then filed a bill against F. for a specific performance; & the question of title was referred by the Ct. of Ch. to a master, who reported that F.

had not a good title; whereupon the bill was dismissed without costs on either side; that being the practice of the Ct. of Ch. in such cases:—*Held*: M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the Chancery suit.—*MALDEN v. FYSON* (1847), 11 Q. B. 292; 17 L. J. Q. B. 85; 12 Jur. 228; 116 E. R. 486.

Annotations:—*Apld. Thomas v. Rowlands* (1886), 3 T. L. R. 148. *Reid. Swinfen v. Cholmsford* (1860), 5 H. & N. 890; *Onions v. Cohen* (1865), 2 Hem. & M. 354.

2326. —.]—*GODWIN v. FRANCIS*, No. 2285, *ante*.

2327. Costs of negotiating purchase.]—An action for the non-completion of a purchase, the declaration alleging, by way of special damage, the expense of negotiating the purchase, & of investigating the title, was referred to arbn.; & the arbitrator awarded several sums under different heads; amongst others, for investigating the title, £30; but added that in that £30 he included the preparation of an assignment after objection made to the title, & also journeys for the purpose of taking, as well as the taking, of counsel's opinion on the course to be pursued by pltf. with respect to a suit in equity, & a contemplated action of ejectment:—*Held*: pltf. was not entitled to recover any of the charges in & about negotiating the purchase, nor any part of the £30 awarded in respect of the last-mentioned expenses; & the residue being less than the money paid into ct., deft. was entitled to the verdict.—*WRIGHT v. CHATTERIS* (1846), 7 L. T. O. S. 111.

2328. Sum awarded by arbitrator.]—*WRIGHT v. CHATTERIS*, No. 2327, *ante*.

2329. Improvements made by purchaser as lessee.]—It is the duty of a party entering into the possession of land, to ascertain, before he incurs expenses by making alterations & improvements, what the title is: & if he neglects to assure himself on that point, he must bear the consequences.

By agreement between pltf. & deft., certain premises were demised for a term of two years certain to pltf., who was at liberty, at his own expense, to make such alterations & additions to them, as he might think proper, the same being improvements; & pltf. "was to have the right of purchasing the premises, at the end of or at any time during the term, it being understood that deft. was possessed of the premises for his own life, & that, of M. & the survivor of them." Pltf. had possession, & laid out on the premises a large sum of money, & gave notice to deft. of his election to purchase: but deft. could not make good the title he had represented he could. Upon this pltf., at the expiration of his term, gave up possession, & sued deft. for the damage he had sustained, by reason of the non-performance of the contract by deft. At the trial, the judge, to prevent the cause going down again, left two questions to the jury: (a) what was the value of the lease without the improvements, at the time when pltf. gave notice of his election to purchase; (b) what was its value at that particular time with the improvements. The jury found that the value of the lease without the improvements was 40s.; & that it was worth, with the improvements, £100. Verdict was given for pltf. £102 with leave to move to reduce the damages to 40s. if the ct. should be of opinion that pltf. was not entitled to damages, in respect of the improvements. A rule *nisi* to reduce the damages having been obtained:—*Held*: pltf. could not recover the amount he had expended

PART VIII. SECT. 7, SUB-SECT. 4.—A. (c).

23181. Loss of interest on purchase-money.]—*LUNDY v. KNIGHT* (1915), 32 W. L. R. 939; 9 W. W. R. 561; 21 D. L. R. 886.—CAN.

in alterations & improvements.—**WORTHINGTON v. WARRINGTON** (1849), 8 C. B. 134; 18 L. J. C. P. 350; 13 L. T. O. S. 303; 137 E. R. 459.

Annotations.—**Reid**. Pounsett v. Fuller (1856), 17 C. B. 660; **Engel v. Fitch** (1868), L. R. 3 Q. B. 314; **Bain v. Fothergill** (1874), L. R. 7 H. L. 158; **Schreiber v. Dinkel** (1886), 54 L. T. 911.

2330. Expenses of attempt to obtain alternative property.—Where a vendor fails to make a good title pursuant to his contract, the purchaser, in the absence of fraud or misrepresentation on the part of the vendor, is not entitled to damages for the loss of his bargain.

A. agreed to sell to B. the shooting on the manor of C. It being afterwards discovered that A. had a mere equitable title, & C. refusing to confirm it, B. brought an action against A. for the breach of contract.—*Held*: he was only entitled to recover nominal damages & the expenses incurred in the investigation of A.'s title; but not damages for the loss of his bargain, or expenses incurred in obtaining shooting elsewhere, or in fruitless endeavours to substitute a new contract on the failure of the original bargain.—**POUNSETT v. FULLER** (1856), 17 C. B. 660; 25 L. J. C. P. 145; 26 L. T. O. S. 240; 4 W. R. 323; 139 E. R. 1235.

Annotations.—**Apld.** **Sikes v. Wild** (1861), 1 B. & S. 587. **Consd.** **Bain v. Fothergill** (1874), L. R. 7 H. L. 158. **Reid.** **Engel v. Fitch** (1868), L. R. 3 Q. B. 314.

2331. Compensation for delay in completion.—**HYAM v. TERRY** (1881), 25 Sol. Jo. 371, C. A. *Annotations*.—**Reid.** **Rowe v. London School Board** (1887), 36 Ch. D. 619. **Mentd.** **Evans & Taunton v. Hoskins & Sewell** (1904), 21 R. P. C. 675.

2332. ——**ROYAL BRISTOL PERMANENT BUILDING SOCIETY v. BOMASH**, No. 1562, *ante*.

2333. Expenses of attempt to make fresh bargain.—**POUNSETT v. FULLER**, No. 2330, *ante*.

2334. ——A vendor of land, who at the time of sale knows that he cannot then make a good title, but sells *bonâ fide* believing that he will be able to make a good title, is not liable to the purchaser for damages for the loss of his bargain; & where, in an action by the purchaser against the vendor for such damages, the latter paid into ct. a sum sufficient to cover pltf.'s deposit & expenses of investigating the title, the verdict was entered for debt.

Expenses attendant upon an attempt made after such bargain is off, to make a fresh arrangement, are not proximately connected with the breach of

contract, & are irrecoverable.—**SIKES v. WILD** (1863), 4 B. & S. 421; 32 L. J. Q. B. 375; 8 L. T. 642; 11 W. R. 954; 122 E. R. 517; *sub nom.* **SYKES v. WILD**, 2 New Rep. 456, Ex. Ch.

Annotations.—**Consd.** **Engel v. Fitch** (1868), L. R. 3 Q. B. 314. **Reid.** **Lock v. Farze** (1866), L. R. 1 C. P. 441; **Godwin v. Francis** (1870), L. R. 5 C. P. 295; **Bain v. Fothergill** (1874), L. R. 7 H. L. 158.

2335. Loss of profit on resale.—**ENGELL v. FITCH**, No. 2284, *ante*.

2336. Cost of conveyance to sub-vendee.—**ENGELL v. FITCH**, No. 2284, *ante*.

2337. Damages for deterioration.—**ROYAL BRISTOL PERMANENT BUILDING SOCIETY v. BOMASH**, No. 1562, *ante*.

2338. Costs of action.—**PEARL LIFE ASSURANCE CO. v. BUTENSHAW**, [1893] W. N. 123.

2339. ——**KEEN v. MEAR**, No. 2283, *ante*.

2340. Costs of arbitration to fix price.—**BAYLEY v. BIRCH**, No. 2350, *post*.

2341. Insurance.—**KEEN v. MEAR**, No. 2283, *ante*.

B. Measure of Damages.

See, generally, DAMAGES, Vol. XVII., pp. 130 *et seq.*

2342. Damages actually sustained.—**ENGELL v. FITCH**, No. 2284, *ante*.

2343. — Delay in completion.—On a contract for the sale of real estate with possession, subject to a condition that if from any cause whatever the purchase is not completed on the date fixed for completion "the purchaser in default" is to pay interest from that date on the balance of the purchase-money, a deposit having been paid, until completion, & the purchase is not completed for upwards of four months from the fixed date, not in consequence of any defect in title or conveyancing difficulties, but entirely owing to the default of the vendor in not having taken reasonable care to fulfil his contract, the purchaser is not "in default" within the condition, & the vendor is not entitled to interest.

In such a case the vendor, although acting in good faith, is liable to the purchaser for such damages as may reasonably be said to have arisen through delay & non-delivery of possession, or as may reasonably be supposed to have been in the contemplation of the parties as likely to arise from

2331 i. Compensation for delay in completion.—**MURHEAD v. McDougall** (1838), 5 O. S. 642.—**CAN.**

2331 ii. ——**BARBER v. BARBER** (1885), 11 P. R. 137.—**CAN.**

2331 iii. ——Damages can be recovered by a purchaser from his vendor for delay in completing the purchase, where the delay has been occasioned by default of vendor, not in consequence of want of, or defect in title or in consequence of conveyancing difficulties, but by reason of vendor not having used reasonable diligence to perform his contract.—**LOBEL v. WILLIAMS** (1915), 30 W. L. R. 352; 7 W. W. R. 1042; 25 Man. L. R. 161.—**CAN.**

2335 i. Loss of profit on resale.—There is no understanding that a contract for the sale of real estate may fall because the vendor does not choose to go to the trouble or expense of obtaining title, & in such case the usual rule as to the measure of damages, does not apply; & if the purchaser has entered into an agreement to resell he may recover the loss of profit on such resale & the reasonable costs of defending his purchaser's action for rescission.—**MORCHREY v. COREY** (Alta.) (1916), 34 W. L. R. 1196.—**CAN.**

g. Cost of fencing.—**M., knowing**

he had a seriously defective title, contracted to sell land to P., who was ignorant of the defect. P. took possession, & fenced at a cost of £30. M. failing to complete, P. brought an action for breach of contract, & recovered the cost of the fencing.—*Held*: as the fencing was not in the contemplation of both parties when the contract was made, pltf. could not recover these damages.—**PICKHILLS v. MATTHEWS** (1881), 2 N. S. W. L. R. 79.—**AUS.**

h. ——Where vendors by mistake agreed to sell land to which they held no title, the damages recoverable by the purchaser for breach of contract were limited to his expenses incurred; such expenses included fencing done by purchaser before learning of the want of vendors' title.—**KREZUL v. ANGLO CANADIAN LANDS** (1912), LTD. (Alta.), [1919] 3 W. W. R. 747.—**CAN.**

k. Loss of crops.—**MOORE v. MERRITT** (1858), 6 Gr. 550.—**CAN.**

l. ——**GOODISON v. CROW** (1920), 48 O. L. R. 552; 68 D. L. R. 347, 19 O. W. N. 326.—**CAN.**

m. ——**MATJEKA v. KING**, [1921] 1 W. W. R. 1068.—**CAN.**

n. Purchaser having knowledge of misdescription.—Whether entitled to abatement.—**CARMICHAEL v. FERRIS**

(1880), 8 P. R. 289.—**CAN.**

o. Cost of improvements.—**MITCHELL v. WILSON** (Sask.) (1912), 20 W. L. R. 671; 2 W. W. R. 121, 2 D. L. R. 714.—**CAN.**

p. ——**ROJECK v. SINCLAIR** (Man.), [1924] 1 W. W. R. 1067.—**CAN.**

q. Cost of replacing party wall.—**GALT v. YORKSHIRE INS. CO.** (1913), 20 R. L. N. S. 321.—**CAN.**

PART VIII. SECT. 7, SUB-SECT. 4.—B.

2342 i. Damages actually sustained.—**BLOMQUIST v. TYMCHORAK** (Man.) (1912), 22 W. L. R. 205; 6 D. L. R. 337; *affd.* (1913), 27 W. L. R. 662.—**CAN.**

2342 ii. ——**MORROW v. LANGTON** (Alta.), [1919] 3 W. W. R. 897.—**CAN.**

2342 iii. ——**STOVER v. GOLD**, [1920] 3 W. W. R. 429.—**CAN.**

2342 iv. ——**BLACKADAR v. HART** (1920), 52 N. S. R. 505.—**CAN.**

2342 v. ——**PASEIKA v. FOX**, [1921] 1 W. W. R. 1104.—**CAN.**

2342 vi. ——**DREDGE v. SHAW**, [1927] 1 D. L. R. 811; [1927] 1 W. W. R. 338; 21 Sask. L. R. 401.—**CAN.**

2342 vii. ——**FARLEY v. PEERS** (1910), 29 N. Z. L. R. 459.—**N.Z.**

Part IX.—The Conveyance.

SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), s. 52.

Necessity for conveyance—Compulsory purchase.]

—See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 108, Nos. 452–453.

2352. Preparation & tender of conveyance—Whether on vendor or purchaser.]—FOSTER v. FRANK (1592), 1 And. 300; 123 E. R. 483.

Annotation:—**Reld**. Hallings v. Connard (1596), Cro. Eliz. 517.

2353. ———.]—On a covenant to assure land at the charge of the covenantee, the covenantor ought to notify what assurance he will make before the covenantee need tender the charges. —HALLINGS v. CONNARD (1596), Cro. Eliz. 517; Owen, 157; 78 E. R. 766; *sub nom.* HOLLINS v. CONNARD, Moore, K. B. 454; *sub nom.* HALLING'S CASE, 5 Co. Rep. 22 b.

Annotation:—**Consd.** Doe d. Clarke v. Stillwell (1838), 8 Ad. & El. 645.

2354. ———.]—GIBBONS v. PREWD (1657), Hard. 102; 145 E. R. 402.

2355. ———.]—A. agreed to sell B. his estate for a certain sum before a particular day, in consideration whereof B. agreed to pay that sum on the day, & on failure to pay £21:—**Held**: they were dependent covenants; & A. could not recover the £21 without showing a conveyance on his part, or a tender of one.—GOODISSON v. NUNN (1792), 4 Term Rep. 761; 100 E. R. 1288.

Annotation:—**Distd.** Mattock v. Kinglake (1839), 10 Ad. & El. 50.

2356. ———.]—It is incumbent on the purchaser of an estate to prepare, & tender a conveyance.—BAXTER v. LEWIS (1801), For. 61; 145 E. R. 1113.

2357. ———.]—A declaration in covenant stated that by a deed made between B. of the first part, D. & A. of the second part, O. of the third part, & a railway co. of the fourth part, after reciting that J. E. on behalf of the co., agreed to purchase certain premises, it was witnessed that in consideration of a certain sum B. agreed with the co. to sell them certain premises, & that B. would deduce a good title to the hereditaments, & the co. agreed with B. to pay the sum. Averment that B. became bkpt., & plffs. were his assignees; that both they & he were willing to deduce a good

title; that B. & all necessary parties were ready & willing to execute a proper conveyance of the hereditaments to the co., & would have deduced a good title & have executed a proper conveyance, but that the co. discharged them from deducing such title & executing such conveyance. Breach, that the co. would not prepare such proper conveyance for execution, or pay the sum of, etc.:—**Held**: profert by plffs., below as assignees was unnecessary. The breach which charged that the co. did not prepare the conveyance or pay the purchase-money, was, on general demurrer, well assigned; yet as the covenant provided that the conveyance should be at the costs & charges of the co., it lay on them to prepare it, such being the general course between vendor & purchaser.—THAMES HAVEN DOCK CO. v. BRYMER (1850), 5 Exch. 696; 19 L. J. Ex. 321; 15 L. T. O. S. 366; 155 E. R. 305, Ex. Ch.; *affq.* S. C. *sub nom.* BRYMER v. THAMES HAVEN DOCK & RY. CO. (1848), 2 Exch. 540.

Annotations:—**Mentd.** Cort v. Ambergate, etc. Rty. (1851), 17 Q. B. 127; Foster v. Crabb (1852), 12 C. B. 136; Solvency Mutual Guarantee Co. v. Froane (1861), 7 H. & N. 5; Thames Iron Works & Ship Building Co. v. Royal Mail Steam-Packet Co. (1862), 13 C. B. N. S. 358; Young v. Austen (1869), L. R. 4 C. P. 553.

2358. ———.]—Observations on an alleged local custom, that, on the occasion of a sale, one of the usual conditions is, that the vendor's solr. is to prepare the conveyance at the purchaser's expense.—BARTLETT v. WOOD (1859), 2 L. T. 144; *on appeal* (1861), 30 L. J. Ch. 614, L. C.

Annotations:—**Mentd.** Croggan v. Allen (1882), 22 Ch. D. 101; *Re* Cope, D'Angelier v. Cope (1885), 1 T. L. R. 611; Plumb v. Craker (1885), 16 Q. B. D. 40; *Re* Ormston, Goldring v. Lancaster (1887), 58 L. T. 74; Power v. Parker (1887), 4 T. L. R. 143.

SECT. 2.—SALE OF INCUMBERED LAND.

See Law of Property Act, 1925 (c. 20), s. 50.

2359. Conveyancing & Law of Property Act, 1881 (c. 41), s. 5—Object of Statute.]—Where land subject to a capital charge, such as a term to secure portions, is sold free from incumbrances & without the assent of the incumbrancers, & an application is made to the ct. under above sect., for an order for payment into ct. of an amount

PART IX. SECT. 1.

2352 i. Preparation & tender of conveyance—Whether on vendor or purchaser.]—It is the duty of the seller of land to prepare the conveyance.—SWEENEY v. GODARD (1859), 9 N. B. R. (4 All.) 300.—**CAN.**

2352 ii. ———.]—Where a purchaser sued to recover back his purchase-money, alleging, but not showing, that the vendor could not make a title, & the question arose whether the vendor or purchaser should prepare the conveyance, the proceedings at law in this case were enjoined until the hearing, it being the practice in England to have the conveyance prepared by the purchaser.—WATT v. PARKER (1860), 2 Ch. Ch. 33.—**CAN.**

2352 iii. ———.]—MOODY v. PREVOST (1873), 20 Gr. 418.—**CAN.**

2352 iv. ———.]—It is the duty of the vendor of lands to prepare & tender the conveyance.—TAYLOR v. WETMORE'S EXECUTORS (1880), 20 N. B. R. (4 P. & B.) 165.—**CAN.**

2352 v. ———.]—In this Province, on a sale of land, unless it is otherwise provided in the agreement, it is the

duty of the vendor to prepare & execute the conveyance at his own expense.—DYSART v. DRUMMOND (1890), 7 Man. L. R. 68.—**CAN.**

2352 vi. ———.]—A provision that the purchase-money is to be paid as soon as the conveyance is ready for delivery, does not alter the rule that the conveyance should be prepared by the purchaser.—STEVENSON v. DAVIS (1893), 23 S. C. R. 629.—**CAN.**

2352 vii. ———.]—Where a vendor under an agreement of sale is given the deed at his own expense it is his duty to prepare the same & tender a draft thereof.—KNIBB v. McCONVEY (1913), 24 O. W. R. 731; 4 O. W. N. 1417; 11 D. L. R. 777.—**CAN.**

2352 viii. ———.]—SNELL v. BRICKLES (Ont.), [1917] 1 W. W. R. 1059, P. C.—**CAN.**

2352 ix. ———.]—The purchaser shall prepare the conveyance at his own expense.—SNELL v. BRICKLES (1913), 28 O. L. R. 358; 4 O. W. N. 951; 12 D. L. R. 753.—**CAN.**

2352 x. ———.]—TENNETT v. ROBINSON (1852), 19 L. T. O. S. 148.—**IR.**

PART IX. SECT. 2.

1. Conveyancing & Law of Property Act, 1881 (c. 41), s. 5—Right of vendor to show mortgage statute barred.]

A vendor on a sale of lands paid into ct. a sum of money under the above sect. to free the lands from an incumbrance which on the search in the registry of deeds appeared to affect the lands, & an order under the said sect. was duly made freeing the lands from the incumbrance:—**Held**: the vendor was not estopped from proving subsequently that the incumbrance was statute-barred.—*Re* M'SWINEY & HARTNETT'S CONTRACT, [1921] 1 I. R. 178.—**IR.**

m. Insurance as charge on property.]—MONTGOMERY v. GORE DISTRICT MUTUAL INSURANCE CO. (1864), 10 Gr. 501.—**CAN.**

n. Right of purchaser or vendor to indemnify against mortgage or to compel removal.]—The rule of equity that a purchaser is bound to indemnify his vendor against the payment of encumbrances upon the estate which by the terms of the purchase the purchaser assumes & the amount of which is

Sect. 2.—Sale of incumbered land. Sect. 3: Sub-sects. 1, 2 & 3.]

sufficient to meet the incumbrances & interest thereon & the additional amount to meet the contingencies referred to in the sect., the amount to be paid in to meet the incumbrance is not necessarily merely the bare amount of the capital charge, but the ct. may direct payment into ct. of such amount as, when invested in govt. securities, it considers will be sufficient to meet the capital charge & interest thereon.

The object of above sect. is not to disturb any rights more than is necessary, but to enable a sale to be carried through notwithstanding there is an incumbrance which, but for the sect., would prevent a sale free from incumbrances. Although the purchaser gets the property unincumbered, the money paid into ct. is not substituted, as between the incumbrancer & the vendor, for the incumbered land as the sole security for the incumbrancer's money. The incumbrancer has an additional security on the purchase-money received by the vendor, who, in case of a depreciation in value of the govt. securities in which the money is invested, is bound to make good the depreciation to the incumbrancer, whereas any appreciation in value belongs to the vendor.—*Re WILBERFORCE'S TRUSTS, WILBERFORCE v. WILBERFORCE*, [1915] 1 Ch. 94; 84 L. J. Ch. 252; 111 L. T. 797; 58 Sol. Jo. 797.

Annotation: Refd. *Re Staples, Owen v. Owen* (1916), 114 L. T. 682.

2360. — Discharge of incumbrances by payment into court—Form of order.]—Under above sect., an order for the sale of land free from an incumbrance, the incumbrancer not being a party to the action, should follow the words of above Act, which are to be interpreted strictly, & after directing payment into ct. of the purchase-money, & setting apart a sufficient amount to meet the claims of the incumbrancer, proceed to declare that thereupon any person interested should be at liberty to apply in chambers for a declaration that the land is freed from the incumbrance. — *DICKIN v. DICKIN* (1882), 30 W. R. 887.

2361. — Payment inflicting hardship on vendor.]—A railway co. contracted to sell superfluous land, free from incumbrances, for £868. It turned out that the land was subject to a perpetual rentcharge for £63, which was unknown to the co.'s solrs. at the time of the contract. The purchaser insisted that the co. should make application to the ct., under above Act, for payment into ct. of a sum sufficient, out of the dividends to pay the rentcharge, with a further sum to meet contingencies, so that the ct. might declare the land free from incumbrances. The co. offered an indemnity, & stated that, if not accepted, they should rescind the contract. The amount which

would have to be paid in was £2,300:—*Held*: the co. could rescind, the indemnity being refused.

The ct. will not compel a vendor to make payment into ct. under above sect., where the result would be to inflict hardship on the vendor.—*Re GREAT NORTHERN RY. CO. & SANDERSON* (1884), 25 Ch. D. 788; 53 L. J. Ch. 445; 50 L. T. 87; 32 W. R. 519.

Annotations:—Refd. *Re Monckton & Gilzean* (1884), 27 Ch. D. 555; *Re Simpson & Moy's Contract* (1909), 53 Sol. Jo. 376.

2362. — Jurisdiction to decide question of construction of will.]—Upon the sale of certain real estate a summons was taken out, under above sect., for leave to pay into ct. a sum of money in order to make provision for certain charges upon the property by the will of deceased testator:—*Held*: the ct. could ascertain, upon the construction of the will, what was the amount of the charges upon the property, notwithstanding that it involved the determination of interests *in futuro*.—*Re FREME'S CONTRACT*, [1895] 2 Ch. 256; *sub nom. Re FREME'S ESTATE, Re FREME'S CONTRACT, FREME v. HALL*, 64 L. J. Ch. 534; 72 L. T. 486; 43 W. R. 473; 13 R. 469; *affd.*, 64 L. J. Ch. 862, C. A.

Annotation:—Refd. *Re Staples, Owen v. Owen*, [1916] 1 Ch. 322.

2363. — Discharge of annuities & legacies.]—Testator by his will charged his estate with the payment of certain annuities & legacies. In an administration action it was ordered (*inter alia*) that the trustees of the will should transfer certain sums in consols into ct. to answer the annuities & legacies, & liberty was given to the annuitants, in case the income of the fund should be at any time insufficient to meet the annuities, to resort to the capital of the fund to make good the deficiency. The residuary estate was directed to be conveyed to the parties entitled to it. These parties proposed to sell part of the real estate to certain purchasers, who, however, objected to the title shown, on the ground that the property, as forming part of the residuary estate of testator, was still, notwithstanding the order, subject to the annuities & legacies given by the will:—*Held*: the land comprised in the contract was still, despite the administration, subject to a charge in favour of the annuitants as legatees in the will mentioned, & the only way of getting over the difficulty would be by paying the money into ct. in the administration action & applying in that action for an order as provided by above sect.—*Re EVANS & BETTELL'S CONTRACT*, [1910] 2 Ch. 438; 79 L. J. Ch. 669; 103 L. T. 181; 54 Sol. Jo. 680.

2364. — What payment necessary.]—*Re WILBERFORCE'S TRUSTS, WILBERFORCE v. WILBERFORCE*, No. 2359, *ante*.

—*Ser. now, Law of Property Act, 1925 (c. 20), s. 50.*

deducted from the consideration, does not apply against a purchaser in favour of a person who, although he actually made the conveyance, was not the vendor.—*PETERSON v. WICKSON (Man.)*, [1918] 2 W. W. R. 259.—**CAN.**

o. ——Although at law the right to dower is, during the life of the vendor, a nominal incumbrance only, the purchaser has a right in equity to compel its removal.—*KENDREW v. SHEWAN* (1854), 4 Gr. 578.—**CAN.**

p. ——The ct. refused to enforce a contract for the sale of land, which was subject to an outstanding claim for dower, until the title to dower was removed.—*GAMBLE v. GUMMERSON* (1862), 9 Gr. 193.—**CAN.**

q. ——The acceptance of a

deed reciting that the property is conveyed subject to a mtge. or other incumbrance implies an agreement to indemnify the grantor, but does not enure as an undertaking to pay the debt, unless the amount is included in the consideration & retained by the vendee as so much money belonging to the incumbrancer.—*Re COZIER, PARKER v. GLOVER* (1877), 24 Gr. 537.—**CAN.**

r. ——*MORICE v. KERNIGHAN* (1908), 18 Man. L. R. 360; 9 W. L. R. 307.—**CAN.**

t. ——In the absence of evidence that it was the intention of the parties to a sale of land subject to a mtge. that the purchaser should not be obliged to pay off the mtge. or indemnify

the vendor in case the latter should be forced under his covenant to pay it, the purchaser will be held to have impliedly agreed to indemnify the vendor.—*HERLE v. LESSMEISTER*, [1925] 3 W. W. R. 609.—**CAN.**

a. ——On a conveyance for value of lands subject to a mtge., & expressed to be so conveyed, there is, in the absence of express agreement, an undertaking implied by law on the part of the purchaser to indemnify the vendor against personal liability on foot of the mtge.—*ADAIR v. CARDEN* (1892), 29 L. R. Ir. 469.—**IR.**

b. Payment of incumbrance out of purchase-money—When refused.]—Payment of an incumbrance out of the purchase-money in ct. refused, the

Mortgaged property — Sale generally.—See MORTGAGE, Vol. XXXV., pp. 489–520.
— Merger.—See MORTGAGE, Vol. XXXV., pp. 618–628, Nos. 3552–3626.

SECT. 3.—PARTIES TO MAKE THE CONVEYANCE.

SUB-SECT. 1.—IN GENERAL.

2365. General rule—All necessary parties must convey.—By a marriage settlement, reciting only the intended marriage, & that it had been agreed that the lady's property should be settled & assured to the uses after mentioned, freeholds were conveyed to the use of the wife for life, remainder to the husband for life, remainder to such uses & upon such trusts as the wife should appoint, & in default of appointment to uses in favour of the issue of the marriage. The wife covenanted to surrender her copyholds "to the uses hereinbefore expressed" concerning the freeholds. An appointee under the power was admitted to the copyholds & obtained an enfranchisement to himself:—*Held*: the concurrence of the customary heir of the settlor was a question of conveyance, & not of title, for that the heir clearly had no beneficial interest.

In a decree for specific performance, a direction that the vendor shall convey has the same effect as a direction that the vendor & all other necessary parties shall convey.—MINTON v. KIRWOOD (1868), 3 Ch. App. 614; 37 L. J. Ch. 606; 18 L. T. 781; 16 W. R. 991, L. J.

Annotation:—*Mentd.* Heasman v. Pearse (1871), L. R. 11 Eq. 522.

2366. Duty of vendor—Concurrence of parties—Whether confined to necessary or proper parties—Special agreement.—It being one of the terms of a contract between vendor & purchaser, that certain parties were to join in the conveyance, the ct. would not enter into the question, whether they were necessary or proper parties.—BENSON v. LAMB (1846), 9 Beav. 502; 15 L. J. Ch. 218; 7 L. T. O. S. 385; 50 E. R. 438.

Annotation:—*Mentd.* Wells v. Maxwell (No. 1) (1863), 32 Beav. 408.

2367. — — — Parties whose concurrence can be enforced.—*Semble*: where the breach of the contract arises not from the vendor's inability, that is, not upon a question of title, but upon a question of conveyancing, as from his own refusal on the ground of expense, or from whatever other motive, to perform the contract himself, or to compel others whom he can compel to concur in conveying or in giving up possession, the proper remedy is by bill in equity to enforce him to complete, & to compel the completion of the contract.

Whenever it is a matter of conveyancing, & not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, & also by force of the interest of others, whom he can compel to concur in the conveyance (LORD HATHERLEY).—BAIN v. FOTHERGILL (1874), L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387; 39 J. P. 228; 23 W. R. 261, H. L.; *affg.* (1870), L. R. 6 Exch. 59.

Annotations:—*Consd.* Rowe v. London School Board (1887), 36 Ch. D. 619; Day v. Singleton, [1899] 2 Ch. 320. *Apld.* Re Daniel, Daniel v. Vassall, [1917] 2 Ch. 405. *Refd.* Gray v. Fowler (1873), L. R. 8 Exch. 249; Re Higgins & Hitchman (1882), 30 W. R. 700; Coombs v. Cook (1883),

Cab. & El. 75; Re Hargreaves & Thompson's Contract (1886), 32 Ch. D. 454; Gas Light & Coke Co. v. Towse (1887), 35 Ch. D. 519; Royal Bristol Permanent Bldg. Soc. v. Bomash (1887), 35 Ch. D. 390; Lee v. Soames (1888), 36 W. R. 884; Re Wilsons & Stevens' Contract, [1894] 3 Ch. 546; Re Scott & Alvarez's Contract, Scott v. Alvarez, [1895] 1 Ch. 596; Jones v. Gardiner, [1902] 1 Ch. 191; Pease v. Courtney, [1904] 2 Ch. 503; Holliwel v. Seacombe, [1906] 1 Ch. 426; Morgan v. Russell, [1909] 1 K. B. 357; Braybrooks v. Whaley, [1919] 1 K. B. 435; Giffin v. Houlder (1920), 90 L. J. Ch. 488; Grindell v. Bass, [1920] 2 Ch. 487; Keen v. Mear, [1920] 2 Ch. 574. *Mentd.* Wall v. London City Real Property Co. (1874), L. R. 9 Q. B. 249; Smith v. Green (1875), 1 C. P. D. 92; Burrow v. Scammell (1881), 19 Ch. D. 175; Rock Portland Cement Co. v. Wilson (1882), 52 L. J. Ch. 214; Syngo v. Syngo (1893), 63 L. J. Q. B. 202; Baynes v. Lloyd, [1895] 2 Q. B. 610; Addis v. Gramophone Co., [1909] A. C. 488.

Concurrence of parties having equitable interests in property conveyed.—See, *now*, Law of Property Act, 1925 (c. 20), ss. 42, 43.

2368. Duty of mortgagee vendor—Concurrence of mortgagee.—A mtge. had been paid off more than thirteen years, but no reconveyance executed:—*Held*: a purchaser could not require the concurrence of the mtgee., on the ground that the mtgor. had become tenant at will to the mtgee.—SANDS TO THOMPSON (1883), 22 Ch. D. 614; 52 L. J. Ch. 406; 48 L. T. 210; 31 W. R. 397.

Annotations:—*Refd.* Warren v. Murray, [1894] 2 Q. B. 648. *Mentd.* Charles v. Jones (1887), 35 Ch. D. 541.

2369. — — ——*Re* WILLETT & ARGENTI, No. 2493, *post*.

2370. Duty of mortgagee vendor—Concurrence of mortgagee & second mortgagee.—Mtgees. sold under their power, without formal notice to the second mtgees. or to the trustee in bkpcy. of the mtgor., subject to conditions which stated that the vendors were mtgees. selling under a power of sale, & that the assignment was to be accepted from them under such power, without the concurrence of other persons. The purchaser repudiated the contract, on the ground of the absence of the three months' notice required by section 20 of the Conveyancing & Law of Property Act, 1881 (c. 41). Subsequently the vendors offered to procure the concurrence of the second mtgees. & the trustee in bkpcy. of the mtgor.:—*Held*: the concurrence of the other parties did not prevent the title from being a title under a mtgee.'s power of sale; & the purchaser was bound to complete, notwithstanding the variation in the title offered.—*Re* THOMPSON & HOLT (1890), 44 Ch. D. 492; 59 L. J. Ch. 651; 62 L. T. 651; 38 W. R. 521.

See MORTGAGE, Vol. XXXV., pp. 489, 561, Nos. 2211–2214, 2922; Law of Property Act, 1925 (c. 20), ss. 88, 89, 104.

SUB-SECT. 2.—SALE BY ORDER OF COURT.

See Part III.

SUB-SECT. 3.—TRUSTEES.

See, generally, TRUSTS & TRUSTEES.

Sale under trust for sale.—See Law of Property Act, 1925 (c. 20), ss. 26, 27, 42 (1) (a).

Sale as "statutory owner."—See Settled Land Act, 1925 (c. 18), ss. 23, 72, 117 (1) xxvi.

2371. Intermediate trustee—Sale by head trustees & beneficiaries.—If the trustees of a term &

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d. *Person out of possession.*—A person out of possession cannot convey anything to a stranger, he can only give a release to one in possession.—UNDERWOOD v. COURTOWN (LORD) (1804), 2 Sol. & Lef. 41.—IR.

purchaser having accepted a vesting order.—KINCAID v. KINCAID (1873), 6 P. R. 93.—CAN.

PART IX. SECT. 3, SUB-SECT. 1.

c. Power of attorney & contract for

sale—*Acknowledged before attorney.*—A power of attorney & contract of sale acknowledged before a notary in Lower Canada (an instrument not under seal), will not authorise a conveyance of lands in this Province.—DOE d. SHELDON v. ARMSTRONG (1826), Tay.

Act, 1925 (c. 20), s. 170; Settled Land Act, 1925 (c. 18), s. 25; HUSBAND & WIFE, Vol. XXVII., pp. 133-134, Nos. 1091-1092.

Married woman mortgagee.—*See* MORTGAGE, Vol. XXXV., p. 613, Nos. 3513, 3514.

SUB-SECT. 5.—COMPANY IN LIQUIDATION.

See BUILDING SOCIETIES, Vol. VII., pp. 509, 510, Nos. 337, 342; COMPANIES, Vol. X., pp. 864-865, 1045, Nos. 5829-5841, 7271, 7272.

SUB-SECT. 6.—JOINT TENANTS.

2381. Conveyance by one of three joint-tenants—Validity.—*A.*, one of three trustees, executed an assignment of leasehold property held jointly by them, to a purchaser, & forged the signatures of his two co-trustees, & also the requisite assent of the *cestui que trust* to the sale. *A.* was a solr., & acted as such on behalf of the purchaser:—*Held*: the execution by one of the three joint tenants was a valid assignment of the legal interest in one-third to the purchaser, but the actual & constructive notice of the trust disentitled him to the beneficial interest, & a reconveyance ordered.—*BOURSOT v. SAVAGE* (1866), L. R. 2 Eq. 134; 35 L. J. Ch. 627; 14 L. T. 299; 30 J. P. 484; 14 W. R. 565.

Annotations:—*Refd.* Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231. *Mentd.* *Re* Halifax Sugar Refining Co. (1890), 7 T. L. R. 163; *Berwick v. Price*, [1905] 1 Ch. 632.

See, now, Law of Property Act, 1925 (c. 20), s. 36.

SUB-SECT. 7.—CHARITIES.

2382. Necessity for consent of Charity Commissioners.—*Pltfs.* were incorporated by a private Act for the purposes of promoting the permanent preservation "for the benefit of the nation" of lands & tenements, including buildings, of beauty or historic interest, & as regards lands for the preservation, so far as possible, of their natural aspect, features, & animal & plant life. Sect. 3 [of private Act] incorporated *pltfs.* for the above purposes, with power to purchase, take, hold, deal with, & dispose of lands & other property without licence in mortmain:—*Held*: this sect. merely gave the *pltfs.* a licence in mortmain, with possibly a power of sale without the consent of the Charity Comrs. under Charitable Trusts Amendment Act, 1855 (c. 124).—*Re VERRALL, NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY v. A.-G.*, [1916] 1 Ch. 100; 85 L. J. Ch. 115; 113 L. T. 1208; 80 J. P. 89; 60 Sol. Jo. 141; 14 L. G. R. 171.

Annotation:—*Mentd.* *I. R. Comrs. v. Yorkshire Agricultural Soc.* (1927), 44 T. L. R. 59.

2383. —[Land within the registered area was conveyed to a charity which at the time, although possessed of other income bearing land, was not also maintained by any voluntary subscriptions. After the application for registration & pending the determination of the question of

exemption by the ct., voluntary subscriptions were received & the charity became a mixed charity:—*Held*: the land not having been given to a charity which at the date of gift was a mixed charity, was not exempt from the jurisdiction or control of the Charity Comrs., & a restriction must be entered on the register against a disposition of the land without their consent.—*Re CHILD VILLIERS' APPLICATION, VILLIERS v. A.-G.*, [1922] 1 Ch. 394; 91 L. J. Ch. 473; *sub nom.* *VILLIERS v. A.-G.*, 126 L. T. 555; 38 T. L. R. 291; 66 Sol. Jo. 266, C. A.

Annotation:—*Apld.* *Re Shakespeare Memorial Trust, Lytton v. A.-G.*, [1923] 2 Ch. 398.

2384. —[The Shakespeare Memorial Trust was established to erect & endow a Shakespeare Memorial National Theatre, with the object of performing Shakespeare's plays, reviving English classical drama, & stimulating the art of acting.

At the time when a donation of £70,000 was made to the charity, part of which was applied by the charity in the purchase of a site for the theatre, no annual subscription had been received, but within only nine days of that time the first annual subscription was received. On the subsequent sale of the site, the question arose whether, in those circumstances, the consent of the Charity Comrs. was required to the sale by the charity:—*Held*: notwithstanding that in the inception of its formation it was contemplated that the charity should be supported by annual subscriptions as well as by income from endowment, & notwithstanding that there was an interval of nine days only between the donation & the first of the annual subscriptions, the charity was not at the time when the donation was received a mixed charity within Charitable Trusts Act, 1853 (c. 137), s. 62, & as it was, therefore, not exempted from the jurisdiction of the Charity Comrs., their consent to the sale by the charity was required.—*Re SHAKESPEARE MEMORIAL TRUST, LYTTON (EARL) v. A.-G.*, [1923] 2 Ch. 398; 92 L. J. Ch. 551; 130 L. T. 56; 39 T. L. R. 676; 67 Sol. Jo. 809.

—[*See* CHARITIES, Vol. VIII., pp. 356-359, Nos. 1512-1557.

SUB-SECT. 8.—OTHER CASES.

Sale in bankruptcy.—*See* BANKRUPTCY, Vol. V., pp. 968, 969, Nos. 7930-7935.

2385. Whether concurrence of judgment creditors necessary.—If judgment creditors, not parties to a suit, neglect or refuse when served with notice, to come in under a decree for the sale of a mtged. estate:—*Held*: in their absence a good title could not be made to a purchaser.—*KNIGHT v. POCOCK* (1857), 24 Beav. 436; 27 L. J. Ch. 297; 30 L. T. O. S. 126; 4 Jur. N. S. 197; 53 E. R. 426.

2386. —*Sale by mortgagee without notice of judgment.*—A mtgee. took on the execution of his mtge. in 1844 an assignment of a term to a trustee & relying on it, forbore to search for judgments. A judgment had been registered in Nov. 1843. The mtgee. sold in 1846 under a power of sale in his mtge.; & on the purchaser objecting to complete without the concurrence of the judgment creditor the mtgee., & his solr. & the mtgor. to

PART IX. SECT. 3, SUB-SECT. 8.
k. Sheriff.—*SHENSTON v. BAKER* (1854), 12 U. C. R. 175.—*CAN.*

1. Heir-at-law.—Where there is an adverse possession of land, an heir-at-law who has never entered cannot make a conveyance so as to enable his vendee to recover in ejectment.—

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—*DOE d. DIXON v. GRANT* (1834), 3 O. S. 511.—*CAN.*

m. —[*RowSELL v. HAYDEN* (1851), 2 Gr. 557.—*CAN.*

n. —[In a suit for a sale of testator's freehold estate, instituted by a judgment creditor, the heir-at-law of testator is a necessary party,

although the latter had devised away all his freehold property by his will. —*HILL v. AVERELL* (1835), 4 Ir. L. Rec. N. S. 49.—*IR.*

o. Tenant for life.—The mother applying for the sale of real estate settled upon infants, was required to join in the conveyance for the purpose

Sect. 3.—Parties to make the conveyance: Sub-sect. 8. Sects. 4 & 5: Sub-sect. 1, A., B., C., D. & E. (a).]

obviate the objection, made a statutory declaration that at the time of the mtg., neither the mtg., nor the solr. had any notice of the judgment. The purchaser still insisted on his requisition &, in Mar. 1848, the vendor filed a bill for specific performance. During the proceedings in the master's office the five years from the registration of the judgment expired & it was not re-registered till 1850:—*Held*: at the hearing, on further directions in 1853 the purchaser could not be compelled to complete without the concurrence of the judgment creditor. *Semble*: a title depending on the fact of the vendor having been a purchaser without notice of a registered judgment cannot be forced upon a purchaser.—*FREER v. HESSE* (1853), 4 De G. M. & G. 495; 2 Eq. Rep. 13; 22 L. J. Ch. 597; 21 L. T. O. S. 333; 17 Jur. 703; 1 W. R. 499; 43 E. R. 600, L. J.J.

Annotations:—*Apld.* *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599. *Refd.* *Beavan v. Oxford* (1855), 1 Jur. N. S. 1121; *Shaw v. Neale* (1858), 6 H. L. Cas. 581.

2387. — Judgment creditors paid off before execution of conveyance.]—In conveyances subsequent to Apr. 26, 1855, to purchasers & mtgees. of lands, tenements & hereditaments, which are mortgaged, the judgment creditors of the mtgees. of the property, who are paid off prior to or at the time of the execution of the conveyance, need not concur.—*GREAVES v. WILSON* (No. 2) (1858), 25 Beav. 434; 28 L. J. Ch. 103; 4 Jur. N. S. 802; 53 E. R. 702.

See, now, Law of Property Act, 1925 (c. 20), s. 195 (3), iv; Land Charges Act, 1925 (c. 22), s. 7.

Sale by executor.]—*See, generally*, EXECUTORS, Vol. XXIV., pp. 576 *et seq.*

Conveyance of settled lands.]—*See* SETTLEMENTS.

SECT. 4.—PARTIES TO WHOM CONVEYANCE MADE.

2388. Purchaser's nominee.]—Another way might have been this—he might have contracted with any person to whom he was indebted that he would pay the purchase-money remaining unpaid, & that then, the purchase-money being thus paid, & the time for assignment having arrived, he would authorise & require the vendor to assign, not to him, but to the person to whom he was indebted (*LORD CAIRNS*).—*SHAW v. FOSTER* (1872), L. R. 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907, H. L.

Annotations:—*Refd.* *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *Cave v. Mackenzie* (1877), 46 L. J. Ch. 564; *Egmont v. Smith, Smith v. Egmont* (1877), 6 Ch. D. 469; *London & County Banking Co. v. Ratcliffe* (1881), 6 App. Cas. 722; *Beddington v. Atlee* (1887), 35 Ch. D. 317; *Rafferty v. Schofield*, [1897] 1 Ch. 937; *Ridout v. Fowler*, [1904] 1 Ch. 658; *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67; *Golden Broad Co. v. Hemmings*, [1922] 1 Ch. 162. *Mentd.* *Glyn Mills Currie v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Re Thackwray & Young's Contract* (1888), 40 Ch. D. 34; *Levy v. Stogdon*, [1898] 68 L. J. Ch. 19; *United Realization Co. v. I. L. R. Comrs.*, [1899] 1 Q. B. 361.

of surrendering the life interest vested in her under the settlement.—*Re KENNEDY* (1859), 1 Ch. Ch. 97.—**CAN.**

p. — & remainderman.]—*Re SIBRETT & NELSON* (1908), 17 O. L. R. 50; 12 O. W. R. 339.—**CAN.**

q. Administrator durante minore aetate.]—*Re ROBINSON & SORDS* (1879), 3 L. R. 1r. 429.—**IR.**

PART IX. SECT. 4.

r. Conveyance of land to dead person

"his heirs & assigns."—*M.* died on Jan. 4, 1879, having previously agreed to purchase land from S. & having gone into possession. On Apr. 24, 1879, S. executed a conveyance of the land, with the intention no doubt of conveying it to the heirs of M.; but, by mistake, the deed was so drawn & executed as to convey to M., his heirs & assigns:—*Held*: the deed was wholly inoperative to convey any estate, either retroactively to M. in his lifetime or directly to his heirs.—*Re DONNELL & NICHOLSON* (1920),

2389. —.]—(1) A vendor cannot object to convey to a purchaser in parcels by separate conveyances at one & the same time if the purchase requires him to do so & pays him the additional expense he thereby incurs; but *qu.*: whether in the absence of any stipulation, the vendor cannot object so to convey if the purchaser requires the conveyances to be made at different times.

(2) An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct (*JESSEL, M.R.*).—*EGMONT (EARL) v. SMITH, SMITH v. EGDMONT (EARL)* (1877) 6 Ch. D. 469; 46 L. J. Ch. 356.

Annotations:—*As to* (1) *Consd.* *Re London School Board & Foster* (1902), 87 L. T. 700. *Refd.* *Re Read*, [1894] 3 Ch. 238. *Generally*, *Refd.* *Royal Bristol Permanent Bldg Soc. v. Bomash* (1887), 35 Ch. D. 390; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Clarke v. Ramuz*, [1891] 2 Q. B. 456; *Leppington v. Freeman* (1891), 65 L. T. 145.

2390. — Nominee trustee-vendor—Breach of trust.]—Though a purchaser may, as a general rule, require a conveyance to a nominee, he cannot require a conveyance to one of the vendors under circumstances which may expose them to the risk of being parties to a breach of trust.—*DELVES v. GRAY*, [1902] 2 Ch. 606; 71 L. J. Ch. 808; 87 L. T. 425; 51 W. R. 56.

Conveyance to husband & wife.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 96, No. 747; & Law of Property Act, 1925 (c. 20), sched. I., Part VI.

Position of persons not parties.]—*See* Law of Property Act, 1925 (c. 20), s. 56 (1).

Purchase of property out of partnership assets—Conveyance to one partner only.]—*See* PARTNERSHIP, Vol. XXXVI., p. 431, No. 981.

Resulting trusts.]—*See* Law of Property Act, 1925 (c. 20), s. 60 (3); & *generally*, GIFTS, Vol. XXV., pp. 510–512, Nos. 67–85.

Surrender of copyholds.]—*See* COPYHOLDS, Vol. XIII., pp. 115, 129, 134, Nos. 1453, 1606, 1683.

SECT. 5.—FORM OF CONVEYANCE.

SUB-SECT. 1.—FREEHOLDS.

A. In General.

See, now, Law of Property Act, 1925 (c. 20), ss. 51–75.

Necessity for deed.]—*See* Law of Property Act, 1925 (c. 20), s. 52.

2391. Quantum of interest conveyed—Presumption of whole of vendor's interest—When arising.]—An agreement to sell land, not expressing what interest in it, is construed to mean the whole of the interest of the vendor in the land.—*BOWER v. COOPER* (1843), as reported in 2 Hare, 408; 67 E. R. 168.

2392. Separate conveyances—Right of purchaser to.]—Pltf. by one contract purchased an estate & a judgment for £1,000:—*Held*: he was entitled to apportion the purchase-money between the estate & the judgment, & to have separate conveyances of each.—*CLARK v. MAY* (1852), 16 Beav. 273; 22 L. J. Ch. 302; 20 L. T. O. S. 164; 1 W. R. 69; 51 E. R. 783.

48 O. L. R. 187; 54 D. L. R. 701; 19 O. W. N. 22.—**CAN.**

PART IX. SECT. 5, SUB-SECT. 1.—A.

2391 i. Quantum of interest conveyed—Presumption of whole of vendor's interest—When arising.]—In the absence of any reservation in the conveyance everything attached to the freehold passes to the purchaser.—*MINNINICK v. JOLLY* (1898), 29 O. R. 238.—**CAN.**

t. — Wattle bark.]—Wattle

2393. ——— On payment of additional expense.]—EGMONT (EARL) v. SMITH, SMITH v. EGMONT (EARL), No. 2389, *ante*.

2394. Right of vendor to object to form.]—Where it is simply a question of convenience to the purchaser, not involving any matter of substance affecting the vendor, it is idle for the vendor to raise objections to the form of the conveyance: & even in the abstract case which I have put I am of opinion that he would not be entitled to do so (PAGE-WOOD, V.-C.).—COOPER v. CARTWRIGHT (1860), John. 679; 70 E. R. 592.

2395. Conveyance under statute—Sections of statute impliedly incorporated.]—(1) A deed of conveyance made under the authority of an Act of Parliament must be read as if the sects. of the Act were incorporated in it.

(2) A conveyance granting land for a special purpose must be construed as conveying all the rights necessarily incident to the due execution of that purpose.—ELLIOT v. NORTH EASTERN RY. Co. (1863), 10 H. L. Cas. 333; 2 New Rep. 87; 32 L. J. Ch. 402; 8 L. T. 337; 27 J. P. 564; 9 Jur. N. S. 555; 11 W. R. 604; 11 E. R. 1055, H. L.; *affd.* S. C. *sub nom.* NORTH EASTERN RY. Co. v. ELLIOT (1860), 2 De G. F. & J. 423, L. C.

Annotations:—As to (1) *Apld.* L. & N. W. Ry. v. Walker, [1903] A. C. 289; Manchester Corpn. v. New Moss Colliery, [1906] 1 Ch. 278. *Refd.* Stourbridge Navigation Co. v. Dudley (1860), 3 E. & E. 409; Goold v. Great Western Deep Coal Co., Great Western Deep Coal Co. v. Goold (1865), 6 New Rep. 86; G. W. Ry. v. Bennett (1867), L. R. 2 H. L. 27; R. v. L. & N. W. Ry., [1899] 1 Q. B. 921. As to (2) *Apld.* L. & N. W. Ry. v. Evans, [1893] 1 Ch. 16; Aldin v. Latimer Clark, Muirhead, [1894] 2 Ch. 437. *Refd.* N. E. Ry. v. Crosland (1863), 7 L. T. 765; Richards v. Jenkins (1868), 18 L. T. 437; Popplewell v. Hodgkinson (1869), L. R. 4 Exch. 248; Colebeck v. Girdlers' Co. (1876), 45 L. J. Q. B. 225; Grosvenor Hotel Co. v. Hamilton, [1894] 2 Q. B. 836; Glamorgan & Swansea Canal Navigation Co. v. Nixon's Navigation Co. (1901), 85 L. T. 53. *Generally, Refd.* Mid. Ry. v. Checkley (1867), L. R. 4 Eq. 19; Mid. Ry. v. Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Pountney v. Clayton (1882), 47 L. T. 731; L. & N. W. Ry. v. Howley Park Coal & Cannel Co. (1911) 2 Ch. 97. *Mentd.* Bradford Corpn. v. Pickles (1894), 64 L. J. Ch. 101.

2396. Conveyance for special purpose—Conveyance of rights necessary thereto.]—ELLIOT v. NORTH EASTERN RY. Co., No. 2395, *ante*.

Rules of construction of deeds.]—See DEEDS, Vol. XVII., pp. 246-302; CONSTITUTIONAL LAW, Vol. XI., pp. 565-568.

Meaning of words.]—See DEEDS, Vol. XVII., pp. 264-271.

Admission of extrinsic evidence.]—See, generally, DEEDS, Vol. XVII., pp. 302-348.

Admission of intrinsic evidence.]—See, generally, DEEDS, Vol. XVII., pp. 348-357.

Deed void for uncertainty.]—See, generally, DEEDS, Vol. XVII., pp. 359-362.

Receipt clause.]—See DEEDS, Vol. XVII., pp. 370-373.

Compulsory purchase.]—See COMPULSORY PURCHASER OF LAND, Vol. XI., p. 234, Nos. 1237, 1238.

Creation of easements.]—See EASEMENTS, Vol. XIX., pp. 22-38.

Sale distinguished from mortgage.]—See MORTGAGE, Vol. XXXV., pp. 241-244, 247, Nos. 21-45, 51-71.

B. Recitals.

Recitals generally.]—See DEEDS, Vol. XVII., pp. 198, 362-370, Nos. 88-89, 1737-1806.

Recitals in Royal grants.]—See CONSTITUTIONAL LAW, Vol. XI., pp. 558-560, Nos. 590-601.

Recitals operating as estoppel.] See ESTOPPEL, Vol. XXI., pp. 249-250, 252-261, Nos. 713-752, 769-830.

C. Consideration.

Consideration generally.]—See DEEDS, Vol. XVII., pp. 190-191, Nos. 9-23.

Admission of extrinsic evidence to prove consideration.]—See DEEDS, Vol. XVII., pp. 335-337, Nos. 1467-1495.

D. Operative Words.

See, now, Law of Property Act, 1925 (c. 20), s. 51.

E. The Property Conveyed.

(a) Description and Plan.

2397. Whether plan or description prevails—Discrepancy between plan & description.]—*Qu.*: if a conveyance be made of lands of A. from a given bound in Red-Close, containing 20 acres, & a plan be annexed describing the lands conveyed as bounded on the other side by lands of B. in Green-Close, whether all Red-Close between the two bounds passes, though the same extend over 21 acres.—DOE d. HYDE v. MANCHESTER CORPN. (1851), 17 L. T. O. S. 288, N. P.

2398. ———.]—The words of the grant must be looked at & not the plan in the margin (HUDDLESTON, B.).—SUMNER v. SCHOFIELD (1880), 13 L. T. 763, D. C.

2399. ———.]—By the parcels in a conveyance, a freehold house & the yards, etc., therewith, occupied or enjoyed, & delineated, & coloured on a plan annexed to the deed were granted to a purchaser. Among the general words was the word "yards." On the plan a yard, which had always been enjoyed with the house, was not coloured:—*Held*: the deed passed the fee simple in the yard to the purchaser.—WILLIS v. WATNEY (1881), 51 L. J. Ch. 181; 45 L. T. 739; 30 W. R. 424.

2400. ———.]—M. & others were owners in fee of a house fronting a street, & also of a yard & premises in rear of the house. A covered passage or gateway led from the street through the house to the premises in the rear. They conveyed the premises in the rear "together with the exclusive use of the gateway," which was described by its dimensions, to W. in fee:—*Held*: W. was entitled not merely to a right of way through the gateway, but to the use of the gateway for all lawful purposes.—REILLY v. BOOTH (1890), 44 Ch. D. 12; 62 L. T. 378; 38 W. R. 484, C. A.

Annotations:—*Refd.* Phelps v. London Corpn., [1916] 2 Ch. 255; Taff Vale Ry. v. Cardiff Ry., [1917] 1 Ch. 299. *Mentd.* Met. Ry. v. Fowler, [1893] A. C. 416.

2401. ———.]—In a grant of land with certain specified boundaries "as will further appear by the diagram framed by the surveyor":—*Held*: as a matter of construction, where the

deeds.]—A description of land in a deed by reference to other conveyances for a fuller description is sufficient.—*Re* TRELEVEN & HORNER (1881), 28 Gr. 621.—CAN.

e. Lot designated by number with reference to inventory.]—Where the description in a deed designated the lot by number, & referred to an inventory, which was not produced:—*Held*: there being sufficient evidence from the other

bark when stripped from tree is personality & does not vest in purchaser of the land.—GRAHAM v. CRAWFORD (1905), 7 W. A. L. R. 251.—AUS.

a. Precious metals.]—Where the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals, although not especially mentioned.—*Re* ST. EUGENE MINING Co. (1900), 20 C. L. T. 362; 7

B. C. R. 288.—CAN.

b. Whether hay scales included.]—MARKLE v. HOUCK (1859), 19 U. C. R. 164.—CAN.

c. Quit claim deed.]—NICHOLSON v. DILLABOUGH (1862), 21 U. C. R. 591.—CAN.

PART IX. SECT. 5, SUB-SECT. 1.—E. (a).

d. Description by reference to former

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diagram is repugnant to the terms of the grant, the latter will prevail.—*HORNE v. STRUBEN*, [1902] A. C. 454; 71 L. J. P. C. 88; 87 L. T. 1, P. C.

Annotations:—Reld, Mellor v. Walmesley, [1904] 2 Ch. 525; *Watcham v. A.-G. for East Africa Protectorate*, [1919] A. C. 533.

2402. ———. ———.]—By contract of Feb. 21, 1905 W. agreed to sell to P. "land situate in & fronting 133 feet upon" W. road, having a "depth next O. H. grove of 124 feet," more particularly delineated, together with the abutments, boundaries, & dimensions thereof, be the last named little more or less, upon the plan thereto. The plan showed a piece of land with a slightly rounded corner at the junction of W. road & O. H. grove with frontage lines, marked respectively 133 feet & 124 feet produced in a straight line so as almost to meet at the corner. On a vendor & purchaser summons:—*Held*: the purchaser, according to the representations in the contract, was entitled to a conveyance of land having 257 feet frontage, measured round the bend of the corner of W. road & O. H. grove, the vendor not being entitled to have the lines of frontage produced in straight lines to their point of intersection, outside the bend in measuring the 133 feet & 124 feet respectively. —*Re WELLINGS & PARSONS' CONTRACT* (1906), 97 L. T. 105.

2403. ———. ———.]—Particulars of sale comprised lot 1, pasture land as shown on plan, & lots 2 to 8, seven lots as shown on plan, all having frontages of 30 feet each to the road. T. agreed to purchase a piece of land, lots 2 to 8, & to complete the purchase according to the conditions. None of the lots had been marked out at the date of the contract, but the plan was that of an oblong field abutting on the road, P. lane, with eight oblong spaces of substantially equal widths marked off by straight lines parallel to each other & to the northern & southern boundary lines of the field, except that part of the northern boundary of the field & lot 1 inclined to the south west showing a narrower frontage where that lot abutted on P. lane than the frontages of the other seven lots. Each lot was marked with its number & "30 feet" & a note on the plan stated that it was for the purpose of delineation only. Condition 6 stated that the property should be taken to be correctly described & that the vendor should not be required to account for any discrepancies in the quantities. The total frontage of the field upon P. lane was in fact more than eight frontages of 30 feet & the vendor was willing to convey a frontage of 210 feet as stumped out by his agent in respect of the seven lots bought by T., but the purchaser claimed that as shown on the plan he was entitled to seven-eighths of the entire frontage: —*Held*: seven lots "as shown on plan" when read in conjunction with the sixth condition meant that the purchaser must take the lots as he found them whether having frontages more or less than 30 feet & the lines of the plan must be taken to be correct; the purchaser, therefore, being entitled to a conveyance of that proportion of the land which the seven lots bore to the property described in the plan.—*Re FREEMAN & TAYLOR'S CONTRACT* (1907), 97 L. T. 39.

2404. ———. ———.]—Where an estate is sold as

shown upon a plan & there is no dispute as to the validity of the contract, the plan decides what is the extent of the estate sold; & this is so although the particulars given & taken as being particulars of what is comprised in the plan erroneously contained particulars which were not contained in the plan. Such erroneous misstatements may afford the buyer good ground for a reduction of the contract, but in the absence of any action for this purpose he cannot found on the misrepresentation with the object of obtaining an estate larger than that delineated on the plan.—*GORDON-CUMMING v. HOULDSWORTH*, [1910] A. C. 537; 80 L. J. P. C. 47, H. L.

2405. ———. ———.]—*EASTWOOD v. ASHTON*, No. 2834, *post*.

2406. ———. ———.]—*Plan annexed to particulars—Statement that accuracy not guaranteed.*—L. put up for sale by auction a piece of land in four lots, which were described in the particulars as having each a frontage of 22 feet & a depth of 98 feet. The particulars stated, "a right of way will be granted to each purchaser over the path at the back." The conditions provided that the conveyance to each purchaser should contain a covenant that he would pay a fair proportion of the cost of maintaining the path at the rear of each lot. A plan was annexed to the particulars, intitled "Plan of four plots of land to be submitted by auction at the W. Hotel Margate" & upon the plan was printed a note "This plan is simply prepared as a guide to intending purchasers, & its accuracy in regard to area, measurements, abutments, or otherwise is in no way guaranteed." The plan showed four lots extending from a road called Northdown road to a line representing the boundary wall of the vendor's property, with figures showing depth & frontage, as stated in the particulars. A cross line was drawn across the lots 4 feet from the wall, but the space between this line & the wall was coloured with the rest of the lots, & the division lines of the lots were carried through this space to the wall. There was no express reference to the plan in the particulars or conditions. There was no actual path in existence, & nothing to show what the references to a path in the particulars & conditions meant, except the cross line on the plan. The whole four lots were purchased by two purchasers, who agreed that they did not wish for any right of way over each other's lots. The purchaser of two lots tendered a conveyance of the whole plots shown on the plan, including the space beyond the cross line. The vendor claimed to convey the land only up to the cross line, & to give a right of way over the strip beyond:—*Held*: notwithstanding the note on the plan, it formed part of the contract, & the purchasers were entitled to the conveyance of the whole plots coloured without the reservation of any right of way.—*Re LINDSAY & FORDER'S CONTRACT* (1895), 72 L. T. 832; 39 Sol. Jo. 449.

2407. ———. ———.]—Land was put up for sale by auction under particulars & conditions to which a plan was attached. The plan was a copy of the ordnance map, & upon it was a printed statement to the effect that it was for reference only & that there was no guarantee of its accuracy, but that it was believed to be accurate. The draft conveyance described the property by reference to a plan, which was a copy of the plan attached

part of the description of the identity of the lot to go to the jury, the deed was sufficient.—*McEACHREN v. FERGUSON* (1846), 5 N. B. R. (3 Kerr) 242.—*CAN.*

1. Sufficiency of description.—A certificate given for a portion of a lot sold for taxes on Nov. 12, 1867, under 29 & 30 Vict. c. 53, stated it to be the "one-twenty-seventh part,"

without further describing it. The deed given on Apr. 19, 1871, described the land by metes & bounds:—*Held*: the deed was void.—*WILLIAMS v. McCOLL* (1873), 23 C. P. 189.—*CAN.*

to the particulars & conditions. The vendor proposed to insert the words "by way of elucidation & not of warranty," to qualify the reference to the plan:—*Held*: he was not entitled to do so, as the description of the property in the draft conveyance was insufficient or unsatisfactory without reference to the plan, in which no material error could be pointed out.—*RE SPARROW & JAMES' CONTRACT* (1902), [1910] 2 Ch. 60; 79 L. J. Ch. 491, n.

Annotation:—*Consd.* *Re Sanson & Narbeth's Contract* [1910] 1 Ch. 741.

2408. — No reference to plan in contract for sale.—Deft. agreed to purchase a wharf, which was described as abutting on a towing path, & lately in the occupation of A. B. The contract did not refer to any plan, but at the time of signing the agreement, a memorandum referring to the agreement for sale was written on a plan of the property, which showed that a strip of the wharf was to be taken off & added to the towing path:—*Held*: this plan was made part of the agreement, so as to satisfy Stat. Frauds; & it controlled the description in the agreement.—*NENE VALLEY DRAINAGE COMRS. v. DUNKLEY* (1876), 4 Ch. D. 1; 41 J. P. 101, C. A.

2409. Exhibition of plan—Plan showing new street—Whether warranty that street will be made.]

—The mere exhibition of a plan of a new street, at the time of the sale of a piece of ground on which to build a house in the line of the intended street, does not of itself amount to a warranty or engagement that all that is exhibited on the plan shall be done, more especially where the purchaser has a distinct contract put into the solemn form of a charter, in which nothing is said about that which he claims merely on the foundation of its having been exhibited on the plan.—*HERIOT'S HOSPITAL FEOFFES v. GIBSON* (1814), 2 Dow, 301; 3 E. R. 873.

Annotations:—*Consd.* *Gordon v. Marjoribanks* (1818), 6 Dow, 87. *Apld.* *N. B. Ry. v. Tod* (1846), 12 Cl. & Fin. 722; *Beardmer v. L. & N. W. Ry.* (1849), 1 Mac. & G. 112. *Refd.* *Squire v. Campbell* (1836), 1 My. & Cr. 459; *Brynton v. L. & N. W. Ry.* (1816), 2 Coop. temp. Cott. 108; *Tulk v. Moxhay* (1848), 1 H. & Tw. 105; *Woods v. North Staffordshire Ry.* (1849), 14 L. T. O. S. 123; *A.-G. v. G. E. Ry.* (1872), 41 L. J. Ch. 202; *Whitehouse v. Hugh*, [1906] 1 Ch. 253.

2410. — Whether warranty that land will be divided & laid out as shown.]—*GORDON v. MARJORIBANKS* (1818), 6 Dow, 87; 3 E. R. 1408, H. L.

2411. — — — — —.]—Where the vendor of land in lots for the purpose of buildings, accompanies his description, particulars, & conditions of sale, with a map delineating the intended divisions of the property by new roads, he must be understood to hold out expectations that the lots will be so divided, & it would not be competent to him to divide the land in a different manner, so as to attract an occupancy & population entirely different from that which would have been produced by acting on the plan proposed & held out at the sale.—*PEACOCK v. PENSON* (1848), 11 Beav. 355; 18 L. J. Ch. 57; 12 L. T. O. S. 329; 12 Jur. 954; 50 E. R. 854.

Annotations:—*Refd.* *Sidney v. Clarkson* (1865), 14 W. R. 157; *Furness Ry. v. Cumberland Co-op. Bldg. Soc.* (1884), 52 L. T. 144; *Re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 342. *Mentd.* *Ramsden v. Hirst* (1858), 4 Jur. N. S. 200.

2412. Conclusiveness of description & plan.]—A deed purported to convey "all that messuage or farm house, etc., & several closes, etc., of land thereto belonging, called Gotton Farm, in the occupation of J., & containing, etc., & consisting of the several particulars specified in the first division of a schedule thereunder written, & more

particularly delineated in a map or plan thereof drawn in the margin of the said schedule." There were no general words. In an action brought to try the right to a slip of land, which was not mentioned either in the schedule or in the plan above referred to, evidence was offered on the part of deft. to show that the *locus in quo* had always been occupied with the closes mentioned & delineated in the schedule & plan, & treated as part of Gotton Farm:—*Held*: this evidence was not admissible, & that the deed was conclusive.—*BARTON v. DAWES* (1850), 10 C. B. 261; 19 L. J. C. P. 302; 138 E. R. 106.

Annotations:—*Mentd.* *Wood v. Rowcliffe* (1851), 6 Exch. 407; *Re Brockett, Dawes v. Miller*, [1908] 1 Ch. 185.

2413. Whether purchaser entitled to insist on plan.]—*RE SANSOM & NARBETH'S CONTRACT*, No. 2415, *post*.

Admissibility of maps & plans.]—*See EVIDENCE*, Vol. XXII., pp. 381–383.

Admissibility of extrinsic evidence—To identify property conveyed.]—*See DEEDS*, Vol. XVII., pp. 323–325, Nos. 1340–1355.

Matters prior to contract.]—*See DEEDS*, Vol. XVII., pp. 341, 342, Nos. 1519–1527.

Falsa demonstratio non nocet.]—*See DEEDS*, Vol. XVII., pp. 277–283.

(b) *Parcels.*

See, generally, *DEEDS*, Vol. XVII., p. 374, Nos. 1833–1836.

Parcels or no parcels—Function of judge & jury.]—*See DEEDS*, Vol. XVII., p. 374, Nos. 1833–1835.

What passes—Conveyance of copyholds.]—*See COPYHOLDS*, Vol. XIII., pp. 13–16, Nos. 50–79 & *Law of Property Act*, 1922 (c. 16), s. 128.

Conveyance of land adjoining highway.]—*See HIGHWAYS*, Vol. XXVI., pp. 321, 322.

Conveyance of land adjoining river.]—*See WATERS & WATERCOURSES*.

Mines & minerals.]—*See MINES*, Vol. XXXIV., pp. 606–610, 666–668.

Royal grants.]—*See CONSTITUTIONAL LAW*, Vol. XI., pp. 568–573.

2414. Description of parcels—Right of purchaser to frame description—Subject to description giving effect to contract.]—A purchaser is entitled to say by what description he wishes to have the subject-matter of a purchase vested in him, but the description must give effect to the contract entered into. Under Michael Angelo Taylor's Act, 1817 (c. xxix), a borough council contracted to purchase from its owner a piece of land for street widening. The piece was coloured pink on a plan annexed to the notice to treat, & appeared to project into a street some 10 feet beyond a proposed new line of frontage of the street indicated by a red line. There were no figures on the plan, except a scale of feet, showing any dimensions. The vendor in his claim set out the length & breadth of the piece & its area in feet & inches, & required those dimensions to be inserted in the conveyance, whereas the council only proposed to describe the piece by reference to the plan:—*Held*: the dimensions as set out by the vendor must be inserted in the conveyance.—*MONIGHETTI v. WANDSWORTH BOROUGH COUNCIL* (1908), 73 J. P. 91.

2415. — — — — —.]—In simple cases a purchaser is entitled to have land conveyed to him by reference to a plan on his conveyance.

The purchaser is entitled to have an appropriate description of the property as at the date of the conveyance to himself, & it is a convenient practice, & one which I think the purchaser is entitled to insist upon, that the modern description shall be

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connected with the old description so that there shall be a continuous description of the property (SWINFEN EADY, J.).—*Re SANSOM & NARBETH'S CONTRACT*, [1910] 1 Ch. 741; 79 L. J. Ch. 374; 102 L. T. 677; 54 Sol. Jo. 475.

2416. Whether conclusive of property conveyed.—Small portion of additional land.—In vendor's possession.—Pltf. owned property A. over which an artificial watercourse or mill-race ran in open wooden troughs leading to a mill lower down on property B. belonging to defts. For a great number of years there had been & still were a fell-monger's yard & a stonemason's yard on property A., the tenants of both of which had in fact been accustomed to use water from the trough for the purpose of their respective businesses. Other acts of ownership of the watercourse had been exercised by the occupiers of the mill on property B. who were responsible for the repair of the troughs. For over a hundred years prior to 1907 property A. & property B. had been in common ownership, & it was during this time that the artificial watercourse had been made. In 1907 property A. was conveyed to pltf. without any mention of the water. Property B. was at the same time conveyed to defts. "together with full right of passage & running of water to the mill & premises as now & heretofore used & enjoyed therewith:—*Held*: on a conveyance of land, stated to contain 1542 square yards & said to be coloured on a sale plan, the conveyance would pass, as between the vendor & the purchaser, land of which the vendor was in fact in possession, but which was not apparently coloured on the plan & which included 140 square yards more than the 1,542 square yards specified in the parcels.—*LEWIS v. MEREDITH*, [1913] 1 Ch. 571; 82 L. J. Ch. 255; 108 L. T. 549.

Estoppel by deed.—*See* *ESTOPPEL*, Vol. XXI., pp. 262, 263.

(c) *General Words.*

See Law of Property Act, 1925 (c. 20), s. 62, & generally, *DEEDS*, Vol. XVII., pp. 375–380.

2417. What passes by conveyance.—Whether fixtures pass.—The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, & possession given to the purchaser, the fixtures still remaining in the house:—*Held*: (1) they passed by the conveyance of the freehold; & even if they did not, the vendor, after giving up the possession, could not maintain trover for them.

(2) A few articles, which were not fixtures, were also left in the house; the demand described them together with the other articles, as fixtures, & the refusal was of the fixtures demanded:—*Held*: upon this evidence pltf. could not recover them in this action.—*COLEGRAVE v. DIAS SANTOS* (1823), 2 B. & C. 76; 3 Dow. & Ry. K. B. 255; 1 L. J. O. S. K. B. 239; 107 E. R. 311.

Annotations:—*As to* (1) *Consd.* R. v. St. Dunstan, Kent (1825), 7 Dow. & Ry. K. B. 178. *Apld.* Longstaff v. Meagoe (1834), 2 Ad. & El. 167. *Consd.* Hitchman v. Walton (1838), 4 M. & W. 409; *Re Garvan, Ex p. Barclay* (1855), 5 De G. M. & G. 403; *Wilde v. Waters* (1855), 16 C. B. 637; *Walsley v. Milne* (1859), 7 C. B. N. S. 115. *Refd.* McKintosh v. Trotter (1838), 1 Horn & H. 20; *Sheen & Evans v. Riddle* (1839), 7 Dow. 337; *Elliott v. Bishop* (1854), 10 Exch. 496; *Mather v. Fraser* (1856), 2 K. & J. 536; *Gough v. Wood*, [1894] 1 Q. B. 713. *Generally, Refd.* *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443.

2418. — — — Reversionary Interest.—Parol agreement.—A reversionary interest in trade

fixtures will pass to a purchaser under a parol agreement.—*PETRIE v. DAWSON* (1845), 2 Car. & Kir. 138, N. P.

2419. — — — Granary.—Under a conveyance of land, a farm house & fixtures:—*Held*: (1) rick straddles, which consisted of stone pillars mortised to a brick foundation let into the earth & stone caps mortared on the pillars passed either as part of the land or as fixtures; (2) a threshing machine fixed by bolts & screws to posts let into the ground, so that the machine could not be got out without disturbing some of the soil, also passed under the deed; (3) a granary which rested upon a wooden foundation, supported by straddles, & capable of being lifted by sufficient power from the straddles without disturbing them, was a mere chattel; & even if under the circumstances of the case it would pass as a chattel, the word "fixtures" being large enough to include movable chattels, still the removal of it during an outstanding term could not be made the subject of a count for injury to pltf.'s reversionary interest, or a count in trover, the possession being in the tenant.—*WILTSEAR v. COTTRELL* (1853), 1 E. & B. 674; 22 L. J. Q. B. 177; 20 L. T. O. S. 259; 17 Jur. 758; 118 E. R. 589.

Annotations:—*As to* (2) *Apld.* *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Hobson v. Gorringe*, [1897] 1 Ch. 182. *As to* (3) *Distd.* *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97. *Refd.* *Childley v. West Ham* (1874), 32 L. T. 486; *Monti v. Barnes*, [1901] 1 K. B. 205; *Vaudeville Electric Chuema v. Muriset*, [1923] 2 Ch. 74. *Generally, Refd.* *Elliott v. Bishop* (1851), 10 Exch. 496.

2420. — — — Rick straddles.—*WILTSEAR v. COTTRELL*, No. 2419, *ante*.

2421. — — — Machinery — Threshing machine.—*WILTSEAR v. COTTRELL*, No. 2419, *ante*.

2422. — — — Looms.—Looms in a mill were not fixed, but were merely steadied, by having their four iron legs let into four loom-foots dropped into the floor:—*Held*: they did not pass by a mtge. of the mill & the machinery belonging to the mill, nor by a contract for sale in similar terms.—*HUTCHINSON v. KAY* (1857), 23 Beav. 413; 26 L. J. Ch. 457; 29 L. T. O. S. 138; 3 Jur. N. S. 652; 5 W. R. 341; 53 E. R. 163.

Annotations:—*Distd.* *Cort v. Sagar* (1858), 3 H. & N. 370. *Apld.* *Metropolitan Counties, etc. Soc. v. Brown* (1859), 26 Beav. 454. *Distd.* *Boyd v. Shorroek* (1867), L. R. 5 Eq. 72.

2423. — — — — — Power v. Wells (1889), 6 T. L. R. 32, D. C.

2424. — — — Timber.—Testator, after devising specific real estate, devised all the residue of his estate to trustees for ninety-nine years, without impeachment of waste; & subject thereto, to his son W. for life, without impeachment of waste; remainder to his granddaughter C. for life, without impeachment of waste; remainder to her issue in strict settlement. The trusts of the term were to raise money by mtge. or sale of the premises comprised therein. The will contained a proviso that no part of the timber upon the residue of his real estate should be cut until his granddaughter attained twenty-one, at which time his trustees were to cut such timber as they should think fit, & pay the proceeds to his granddaughter for her sole use. In 1835 W. died, & in 1836 the granddaughter attained twenty-one, & died in 1842, leaving an only child & her husband surviving her, the trustees not having exercised the power of cutting timber. In 1843 the term was sold for the purposes of the trust:—*Held*: the purchaser was entitled to the timber standing upon the estate at the time of the sale.—*WATLINGTON v. WALDRON* (1853), 4 De G. M. & G. 259; 23 L. J. Ch. 713; 22

L. T. O. S. 207; 18 Jur. 317; 2 W. R. 120; 43 E. R. 506, L. C. & L. J.

All estate clause.—See Law of Property Act, 1925 (c. 20), s. 63, & DEEDS, Vol. XVII., pp. 383-385.

Grant of easements.—See EASEMENTS, Vol. XIX., pp. 32-35.

Royal grants.—See CONSTITUTIONAL LAW, Vol. XI., pp. 568, 569.

Estoppel.—See ESTOPPEL, Vol. XXI., p. 267, Nos. 870, 871.

(d) *Interpretation of Particular Expressions.*

Meaning of words generally.—See DEEDS, Vol. XVII., pp. 264-273, Nos. 773-881.

2425. "More or less."—As to the expression "more or less" I do not say those words in a contract will not include a few additional acres; but if the parties are contending about 3 acres, it would be very singular upon those words to add 24 map acres (LORD ELDON, C.).—TOWNSHEND (MARQUIS) v. STANGROOM (1801), 6 Ves. 328; 31 E. R. 1076, L. C.

Annotations:—**Reid.** Clowes v. Higginson (1813), 1 Ves. & B. 521; Beaumont v. Branley (1822), Turn. & R. 41; Manser v. Back (1848), 6 Harc. 413; Smithson v. Powell, Powell v. Smithson (1852), 20 L. T. O. S. 105; Richardson v. Smith (1870), 39 L. J. Ch. 877; Craddock v. Hunt, [1923] 2 Ch. 136. **Mentd.** Morlock v. Buller (1801), 10 Ves. 292; Squire v. Campbell (1836), 1 My. & Cr. 459; London & Birmingham Ry. v. Winter (1840), Cr. & Ph. 57; Wood v. Scarth (1855), 2 K. & J. 33; Voulton v. States (1856), 25 L. J. Ch. 875; Fowler v. Fowler (1859), 4 De G. & J. 250; Wharram v. Wharram (1861), 4 New Rep. 117; Carroll v. Keays, Keays v. Carroll (1873), 22 W. R. 243; *Re* Marlborough, Davis v. Whitehead, [1894] 2 Ch. 133; Fowler v. Sugden (1916), 115 L. T. 51.

2426.—Purchaser not entitled to an abatement for a deficiency in quantity; the particulars describing the estate as containing by estimation 41 acres, be the same more or less. *Qu.*: as to the effect of the words "be the same more or less" in a particular of sale.

The effect of the words "more or less" added to the statement of quantity has never been yet absolutely fixed by decision, being considered sometimes as extending only to cover a small difference the one way or the other, sometimes as leaving the quantity altogether uncertain & throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance the description is rendered still more loose by the addition of the words "by estimation" (GRANT, M.R.).—WINCH v. WINCHESTER (1812), 1 Ves. & B. 375; 35 E. R. 146.

Annotations:—**Apld.** Denny v. Hancock (1870), 18 W. R. 566. **Consd.** Jolliffe v. Baker (1883), 11 Q. B. D. 255. **Reid.** Huddersfield Corpn. v. Jacomb (1874), 30 L. T. 78.

2427.—**Interpretation not affected by subsequent conveyance—To third person.**—The conveyance to deft. described the land as containing the dimensions shown & delineated on a plan in the margin, "be the same a little more or less," & purported to convey it as it was then held & enjoyed by the vendor. The plan specified the dimensions in feet & inches, & the measurement corresponded with the actual measurement to a few inches:—**Held:** the description could not be controlled or affected by the fact that 6 feet of the part of the passage purporting to be conveyed to deft. was also included in the subsequent conveyance to pltf., & had been treated as part of No. 1 by being covered in & included in the curtilage.—**Dodd v. Burchell** (1862), 1 H. & C. 113; 31 L. J. Ex. 364; 8 Jur. N. S. 1180; 158 E. R. 822. **Annotation:**—**Mentd.** Hall v. Lund (1863), 1 H. & C. 676.

—**See** DEEDS, Vol. XVII., pp. 378, 379, Nos. 1877-1882.

2428. "Clear yearly value"—What outgoings

etc. excluded.—From what charges the estate settled ought to be exempt? That depends on the words "clear yearly value."

... I am of opinion the words in this case do not extend to land tax. The word "clear" should be construed in the power, as it would in an agreement between buyer & seller: that is, clear of all outgoings, incumbrances, & extraordinary charges, not according to the custom of the country, as tithes, poor rates, church rates, etc., which are natural charges on the tenant (LORD HARDWICKE, C.).—TYRCONNELL (LORD) v. ANCASTER (DUKE) (1754), Amb. 237; 27 E. R. 159; *sub nom.* TYRCONNELL (EARL) v. ANCASTER (DUKE), ANCASTER (DUKE) v. SHERRARD (LADY), 2 Ves. Sen. 499, L. C.

Annotation:—**Mentd.** Saunders v. Shaffo, [1905] 1 Ch. 126.

2429. "Month"—Whether calendar or lunar.—The word month may mean lunar or calendar month, according to the intention of the contracting parties; therefore where upon a sale of land on Jan. 24 it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date & that a draft of the conveyance should be delivered within three months from the said date, to be redelivered within four months from said date and the purchase to be completed on June 24, making a period of precisely five calendar months from the date of the sale & conditions the word months was held to mean calendar & not lunar months, by reference to the whole period fixed for the completion of the contract. The condition for delivery of the draft of the conveyance within three months, was not a condition precedent with respect to its delivery within the precise time.—LANG v. GALE (1813), 1 M. & S. 111; 105 E. R. 42.

Annotations:—**Distd.** *Re* Swinford & Horn (1817), 6 M. & S. 226. **Apld.** Cockell v. Gray (1822), 6 Moore, C. P. 483. **Consd.** Helsham-Jones v. Hennen (1914), 81 L. J. Ch. 569. **Reid.** Simpson v. Margitson (1847), 11 Q. B. 23; Bruner v. Moore, [1904] 1 Ch. 305; Erith Engineering Co. v. Sanford Riley Stoker Co. & Babcock & Wilcox (1920), 37 R. P. C. 217; Schiller v. Petersen, [1924] 1 Ch. 394.

—**See, generally,** TIME.

2430. "Error or misstatement"—Intentional misrepresentation not covered.—No compensation in a case of great intentional misrepresentation, although so provided by the conditions of sale in case of "any error or misstatement" in the particulars.—STEWART v. ALLISTON (1815), 1 Mer. 26; 35 E. R. 587, L. C.

Annotations:—**Consd.** Flight v. Booth (1834), 1 Bing. N. C. 370; Taylor v. Martindale (1842), 1 Y. & C. Ch. Cas. 658. **Apld.** Gibson v. D'Este (1843), 2 Y. & C. Ch. Cas. 542. **Consd.** Brooke v. Routhwaite (1846), 5 Harc. 298. **Apld.** Leyland v. Illingworth (1860), 2 De G. F. & J. 248. **Distd.** Denny v. Hancock (1870), 18 W. R. 566. **Reid.** Scott v. Hanson (1826), 1 Sim. 13; Price v. Macaulay (1852), 2 De G. M. & G. 339; *Re* Davis & Cavey (1888), 40 Ch. D. 601.

2431. "Ground rent."—STEWART v. ALLISTON, No. 2430, *ante*.

2432.—**See** BARTLETT v. SALMON, No. 2907, *post*.

2433. "Derivative lease"—"Underlease"—Whether convertible terms.—*Qu.*: whether "derivative lease" & "underlease" are convertible terms.—BRUMFIT v. MORTON (1857), 30 L. T. O. S. 98; 3 Jur. N. S. 1198.

2434. "Rents & profits." The conditions of sale stated that the purchaser would upon completion, be let into receipt of "the rents & profits":—**Held:** this, unexplained, meant ordinary rents & profits, & not the merely nominal rents & profits reserved upon leases for lives.—HUGHES v. JONES (1861), 3 De G. F. & J. 307;

Secl. 5.—Form of conveyance: Sub-secl. 1, E. (d) & (e), F. & G. (a) & (b) i.]

31 L. J. Ch. 83; 5 L. T. 408; 8 Jur. N. S. 309; 10 W. R. 139; 45 E. R. 897, L. J. J.

Annotations:—Mentd. Carroll v. Keays, Keays v. Carroll (1873), 22 W. R. 243; Phillips v. Miller (1875), L. R. 10 C. P. 420; Royal Bristol Permanent Bldg. Soc. v. Bomash (1887), 35 Ch. D. 390.

(c) *Exceptions and Reservations.*

Sec. generally, DEEDS, Vol. XVII., pp. 380-382.

Reservations & exceptions of easements.]—See EASEMENTS, Vol. XIX., pp. 25, 26.

Exception of mines from conveyance.]—See MINES, Vol. XXXIV., pp. 667, 668.

Reservation of legal estates.]—See Law of Property Act, 1925 (c. 20), s. 65.

Reservation of rights over game.]—See GAME, Vol. XXV., pp. 353-355.

Reservations in conveyances of copyholds.]—See COPYHOLDS, Vol. XIII., pp. 15, 16.

F. Habendum.

Sec. generally, DEEDS, Vol. XVII., pp. 385-389.

2435. Proper office of habendum.—To restrain generality of premises.]—In deeds, the proper office of the *habendum* is to restrain the generality of the premises.—BURTON v. BARCLAY (1831), 7 Bing. 745; 5 Moo. & P. 785; 9 L. J. O. S. C. P. 231; 131 E. R. 288.

2436. What may be inserted in habendum — Saving clause in general terms—Sale subject to undefined conditions.]—Trustees for sale who sold under a condition that “the property is sold & will be conveyed subject to all free rents, quit rents, & incidents of tenure, & to all rights of way, water, & other easements, if any . . . without any obligation on the vendors to define any such rights or claims”:—*Held*: entitled to have a saving in general terms inserted in the *habendum* of the conveyance, although it was not shown or asserted that the property was subject to any of the liabilities so specified.—GALE v. SQUIER (1877), 5 Ch. D. 625; 46 L. J. Ch. 672; 36 L. T. 632, C. A.

2437. — Whether restrictive covenants not mentioned in abstract.]—Contract for purchase of lands, which afterwards proved to be subject to covenants, of which there was no notice on the face of the contract. Specific performance of such a contract refused as against the purchaser, on the ground that he could not be compelled to enter into similar covenants, or to have them recited in the deed of conveyance, but that he might elect either to rescind the contract or to accept a conveyance with the covenants.—LUKEY v. HIGGS (1855), 3 Eq. Rep. 510; 24 L. J. Ch. 495; 25 L. T. O. S. 7; 1 Jur. N. S. 200; 3 W. R. 306.

2438. — — —.]—A contract for sale of a freehold house provided that all objections & requisitions in respect of the title or the abstract or the particulars or anything appearing therein should be made within fourteen days from the delivery of the abstract, & by condition (a) that if any objection or requisition should be made which the vendors should be unable or unwilling to comply with, the vendors should be at liberty to rescind. The purchaser accepted the title as shown by the abstract, & forwarded draft conveyance to the vendors, which the vendors altered so as to show that the conveyance was made subject to certain restrictive covenants contained in a deed of earlier date than the commencement of the title. The purchaser, who was willing to take the property notwithstanding the restrictive covenants, of which she had had no previous notice, asked to see a copy of the restrictive

covenants, & objected to the conveyance in the altered form, on which the vendors gave notice to rescind:—*Held*: the purchaser had not made any objection or requisition entitling the vendors to rescind within condition (a) & she was entitled to a conveyance according to the abstract delivered without reference to the restrictive covenants.—*RE MONCKTON & GILZEAN* (1884), 27 Ch. D. 555; 54 L. J. Ch. 257; 51 L. T. 320; 32 W. R. 973.

Annotation:—Mentd. Re Riley to Streatfield (1886), 34 Ch. D. 386.

2439. — Whether restrictive covenant mentioned in abstract—Not mentioned in particulars or conditions.]—A contract for the sale of some freehold land provided, by one of the conditions, that if any objection or requisition as to, *inter alia*, title or abstract, or evidence of title or conveyance, should be insisted on, & the vendors should be unable or unwilling to remove or comply therewith, they should be at liberty, by notice in writing, to annul the sale. When the abstract was delivered to the purchaser, it appeared that the conveyance to vendors' testator was of the land together with a wall fence on the east side of it, “which wall fence was to be for ever thereafter repaired & kept in repair” by testator, his heirs & assigns. This obligation was not mentioned in the particulars & conditions of sale, & the purchaser did not know of it until the delivery of the abstract. The purchaser accepted the title as shown by the abstract, & tendered to the vendors a draft conveyance which made no reference to the obligation to repair the wall fence. The vendors inserted the words “subject to & with the liability for ever to repair the wall fence” by the purchaser, his heirs & assigns. The purchaser objected to the conveyance in the altered form, whereupon the vendors gave notice to rescind the contract. The purchaser then brought an action for specific performance of the contract, claiming the right to a conveyance without the additional words:—*Held*: as (a) if the obligation to repair the wall ran with the land, it would bind the purchaser whether there was any reference to it in the conveyance to him or not, & (b) if it did not run with the land, the vendors, not having mentioned this obligation in the particulars, had no right to insert any words in the conveyance imposing it on the purchaser, they were not entitled to rescind the contract.—*HARDMAN v. CHILD* (1885), 28 Ch. D. 712; 54 L. J. Ch. 695; 52 L. T. 465; *sub nom. Re HARDMAN & CHILD*, 33 W. R. 544.

Annotation:—Consd. Re Glenton & Saunders to Haden (1885), 53 L. T. 434.

2440. — Whether restrictive covenant not mentioned in contract—Omission rendering vendor liable to action.]—Under a contract with a purchaser for the sale of land in fee simple free from incumbrances, with the exception of one specified restrictive covenant, the vendor is not entitled to insert in the conveyance a further restrictive covenant on the ground that he has entered into a prior contract with another which would render him liable to an action unless the further restrictive covenant was inserted, though the prior contract might be a good defence to an action for specific performance.

This [to purchaser's] liability, if any, under the covenant depends, not on its inclusion in the conveyance, but on his notice of its existence (*KEKEWICK, J.*).—*Re WALLIS & BARNARD'S CONTRACT*, [1899] 2 Ch. 515; 68 L. J. Ch. 753; 81 L. T. 382; 48 W. R. 57.

Annotation:—Refd. Re Hughes & Ashley's Contract, [1900] 2 Ch. 595.

Words of limitation.—See Law of Property Act, 1925 (c. 20), s. 60; & generally, REAL PROPERTY, pp. 668 *et seq.*

Estoppel by habendum.—See ESTOPPEL, Vol. XXI., p. 267, No. 868.

G. Covenants.

(a) In General.

Covenants & provisos generally.—See DEEDS, Vol. XVII., pp. 389–408.

Enforcement.—See Part XI., Sect. 3, *post*.

Covenants as estoppel.—See ESTOPPEL, Vol. XXI., p. 263–266.

(b) Covenants for Title.

i. In General.

See, now, Law of Property Act, 1925 (c. 20), s. 76.

2441. Extent of liability of vendor—Whether absolute warranty.—A. after granting certain premises in fee to B., & after warranting the same against himself & his heirs, covenanted, that notwithstanding any act by him done to the contrary he was seised of the premises in fee, & that he had full power, etc. to convey the same; he then covenanted for himself, his heirs, exors. & administrators, to make a cartway, & that B. should quietly enjoy without interruption from himself, or any person claiming under him; & lastly, that he, his heirs, & assigns, & all persons claiming under him, should make further assurance:—**Held:** the intervening general words, “full power, etc. to convey,” were either part of the preceding special covenant; or, if not, that they were qualified by all the other special covenants against the acts of himself & his heirs.

If a man purchase an estate of inheritance & afterwards sell it, it is to be understood *prima facie* that he sells the estate as he received it: & the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts & those of his ancestor; & if by devise, it is not unusual for him to covenant against the acts of the deviser as well as his own. . . . If he has bought an estate in fee, & at the time of the resale has but an estate for life, it must have been reduced to that estate by his own act, & in that case the purchaser will be protected by the vendor's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, & he honestly but ignorantly proposes to another person to stand in his situation, neither hardship nor injustice can ensue (LORD ELDON, C.J.).

The covenant would then stand thus: The grantor covenants that notwithstanding any act done by him, he is seised of the estate, & hath good title to convey. The two clauses are synonymous (BULLER, J.).—BROWNING v. WRIGHT (1799), 2 Bos. & P. 13; 126 E. R. 1128.

Annotations:—**Consd.** Hesse v. Stevenson (1803), 3 Bos. & P. 565; Barton v. Fitzgerald (1812), 15 East, 530. **Apld.** Sicklemore v. Thistleton (1817), 6 M. & S. 9. **Fold.** Foord v. Wilson (1818), 8 Taunt. 543. **Distd.** Nind v. Marshall (1819), 1 Brod. & Bing. 319. **Apld.** Milner v. Horton (1824), 1 Mcle. 647. **Consd.** Seward v. Anstey (1825), 10 Moore, C. P. 55. **Apld.** Stannard v. Forbes (1837), 6 Ad. & El. 572. **Consd.** Thackeray v. Wood

(1864), 5 B. & S. 325. **Refd.** Howell v. Richards (1809), 11 East, 633; Smith v. Compton (1831), 3 B. & Ad. 189; Teulon v. Curtis (1832), You. 610; Young v. Raincock (1849), 7 C. B. 310; Farrall v. Hilditch (1859), 28 L. J. C. P. 221; David v. Sabin, [1893] 1 Ch. 523. **Mentd.** Budd v. Fairmaner (1831), 8 Bing. 48.

2442. ———.—(1) Conveyance by lease & release & fine set aside upon great inadequacy of consideration, combined with misrepresentation & surprise upon parties in extreme distress, ignorant of their interests, & not properly protected. **Qu:** as to the effect of inadequacy alone.

(2) According to the usual course upon the conveyance of an estate, derived by descent, the covenants are against the acts of the ancestor, from whom it is descended. . . . & the acts of the party conveying; & if there should have been an intermediate heir, supposed to be dead, it is reasonable that the covenants should extend to his acts; but, if the sale takes place under such circumstances, that it is not known, whether there was an intermediate heir, & the consideration is reduced in proportion to the doubt upon the title in that respect, no one would think of making the party covenant against the acts of such intermediate heir, if there happened to be one; as then the conveyance would be all wrong; & whether the covenant is by a rich or a poor man cannot be taken into consideration (LORD ELDON, C.).—PICKETT v. LOGGON (1807), 14 Ves. 215; 33 E. R. 503, L. C.

Annotations:—**Generally.** Hicks v. Sallitt (1854), 3 De G. M. & G. 782; Houstoun v. Sligo (1885), 29 Ch. D. 448.

2443. ———.—The assignor of a term covenanted that he had not at any time done any act whereby the premises assigned could be incumbered & that, notwithstanding any such act, the lease was a good subsisting lease & that deft., at the time of executing the assignment, had in himself a good right to assign the premises in manner aforesaid:—**Held:** the covenant that the assignor had good right to assign was qualified & restrained to his own acts only.—FOORD v. WILSON (1818), 8 Taunt. 543; 2 Moore, C. P. 592; 129 E. R. 494.

Annotation:—**Distd.** Nind v. Marshall (1819), 1 Brod. & Bing. 319.

2444. ———.—If a man covenants to sell a fee simple estate, free from all incumbrances, & says no more, it is clear that covenant carries *in gremio*, & in the bosom of it, the right to proper covenants. Why? Because that sort of engagement has in all time been carried into execution in a form & mode, which alter most materially, substantially & importantly, the effect of the mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants (LORD ELDON, C.).—CHURCH v. BROWN (1808), 15 Ves. 258; 33 E. R. 752, L. C.

Annotations:—**Reid.** Browne v. Itaban (1809), 15 Ves. 528; Blakesley v. Whieldon (1811), 1 Hare, 176; Buckland v. Papillon (1866), 15 W. R. 92; Bartlett v. Greene (1874), 30 L. T. 553; Wall v. City of London Real Property Co. (1871), 30 L. T. 53; Hodgkinson v. Crowe (1875), 10 Ch. App. 622; Hampshire v. Wickens (1878), 7 Ch. D. 555; McKay v. McNally (1879), 41 L. T. 230; *Re* Lander & Bagley's Contract, [1892] 3 Ch. 41; David v. Sabin, [1893] 1 Ch. 523; West Ham Central Charity Board v. East London Waterworks Co., [1900] 1 Ch. 624; Grove v. Portal, [1902] 1 Ch. 727; Jackson v. Simons, [1923] 1 Ch. 373; Keeves v. Dean, Nunn v. Pellegrini, [1924] 1 K. B. 685; Russell v. Beecham, [1924] 1 K. B. 525; Abrahams v. MacFishes, [1925] 2 K. B. 18.

PART IX. SECT. 5, SUB-SECT. 1.— G. (b) i.

2441 i. Extent of liability of vendor—Whether absolute warranty.—The provision of the Conveyancing Ordinance in reference to the implication of

absolute covenants for title in a conveyance on sale does not affect the operation of a contract for the sale of real estate, & a vendor who is himself a purchaser for value is not bound, unless the contract of sale so provides, to give a purchaser absolute

covenants for title, but may restrict the covenants for title to the acts & deeds of himself & those claiming under him.—CAMERON v. TUTCHEN (1883), 1 N. Z. L. R. 392 (S. C.).—**N.Z.**

Sect. 5.—Form of conveyance: Sub-sect 1, G. (b) i. & ii.]

2445. ———.]—Covenants in an indenture of sale, that the covenantors were seised of a good estate in fee simple & good right, etc., to convey, held to be qualified & restricted by a subsequent covenant for quiet enjoyment without any let, etc., by them, their heirs or other persons claiming under them.—*MILNER v. HORTON* (1824), *M'Cle.* 647.

Annotations:—N.F. Smith v. Compton (1831), 3 B. & Ad. 189. *Refd.* *Linc v. Stephenson* (1838), 6 Scott, 447.

2446. ———.]—By indenture reciting power vested in A. to dispose of certain premises & that C. had contracted to purchase them, A. appointed & conveyed them to the use of C., his heirs, etc., & covenanted that the power in A. was then in force & not executed, & also that he, A., then had in himself good right, title, power & authority to limit & appoint & to grant, bargain, sell, etc., the premises to the said uses, & further that the premises should be held & enjoyed to the said uses without let or interruption of A. or any claiming under or in trust for him & also for further assurance by H. & all so claiming:—*Held*: the second covenant was absolute for good title against all persons & not to be qualified by reference to the other covenants inasmuch as there were no words either in the second covenant itself or in preceding or subsequent ones to connect it with them.—*SMITH v. COMPTON* (1831), 3 B. & Ad. 189; 1 L. J. K. B. 43; 110 E. R. 71; *subsequent proceedings* (1832), 3 B. & Ad. 407.

Annotations:—Refd. *Linc v. Stephenson* (1838), 4 Bing. N. C. 678; *Young v. Raincock* (1849), 7 C. B. 310.

2447. ———.]—By deed dated Sept. 9, 1861, reciting that deft. had contracted with pltf. for the absolute sale to him of a messuage & hereditaments, & the inheritance thereof, free from all incumbrances, deft. conveyed to pltf. & his heirs the messuage, etc., together with (*inter alia*) all lights, liberties, privileges, easements, profits & appurtenances to the messuage, etc., belonging or in anywise appertaining, or usually held, occupied or enjoyed therewith, or deemed or taken as part, parcel, or member thereof, or any part thereof, to the uses & upon the trusts mentioned; & deft. covenanted that notwithstanding any act, deed, matter or thing whatsoever made, done or permitted to the contrary by deft. or any person or persons claiming through, under, or in trust for him, he then had in himself good right & absolute authority by the deed to convey the messuage, etc., with their appurtenances. On June 22, 1842, deft. then being the owner in fee of the messuage, etc., by an agreement in writing with the owners in fee of an adjoining building agreed that a certain cornice & certain spouts & pipes conducting the water into a spout belonging to the building, & the dripping of water from the eaves of the messuage, & the three windows on the east side of the messuage overlooking the building, were encroachments by deft. & should & might be used by him so long as the other parties to the agreement should consent thereto; & deft. paid to the other parties 5s. as an acknowledgment, & agreed to pay 5s. per annum so long as the cornice, spouts, pipes or windows should be used by him. At that time deft. had not acquired any easement in respect of the cornice, spouts, pipes or windows by the lapse of twenty years. Pltf., having been interfered with in the enjoyment of the easement by the owners of the adjoining building, brought an action against deft. for breach of covenant:—*Held*: deft. had conveyed the premises described so far as he possessed or could grant them; but

the covenant for title was limited to that which he actually had, or but for his own act would have had, & the acknowledgment & payments were not an act within that covenant.—*THACKERAY v. WOOD* (1865), 6 B. & S. 766; 6 New Rep. 305; 34 L. J. Q. B. 226; 13 W. R. 996; 122 E. R. 1376, *Ex. Ch.*

2448. ———.]—*DAVID v. SABIN*, No. 2455, *post*.

2449. ——— *Defects appearing on conveyance—Or otherwise known to purchaser.*—Covenants for title & quiet enjoyment do not extend to protect a purchaser against defects of title, which the recitals in his own purchase deed are sufficient to disclose.

Therefore, where a vendor who, under a will, had only a fee subject to an executory devise over, which ultimately took effect, sold & conveyed to a purchaser as if absolutely entitled, though the covenant for quiet enjoyment by the vendor extended to meet adverse claims by persons claiming under the vendor's testator, & incumbrances, estates, etc., created by such testator, yet as the will was recited in the purchaser's conveyance:—*Held*: there was no breach of the covenant, which could not protect the purchaser against his own misconstruction of the written instrument under which he took.—*HUNT v. WHITE* (1868), 37 L. J. Ch. 326; 19 L. T. 141; 16 W. R. 478.

Annotation:—Overd. *Page v. Mid. Ry.*, [1894] 1 Ch. 11.

2450. ———.]—A. P. agreed with a railway co. for the sale to them in fee of land to which she derived title under the will of X., & whether she could make a good title depended on the construction of that will. The sale was completed by a deed which fully recited the will of X., & by which she conveyed the land in the same way as an owner in fee would have done, & entered into the usual covenants for title extending to the acts of X., as well as of herself. The purchase-money was paid to her. After her death her children claiming under the will of X. obtained judgment against the railway co. for payment to them of the purchase-money, which had been paid to her. The co. then sued the representatives of A. P. under her covenant for title:—*Held*: (1) defects of title to the estate expressed to be conveyed by a purchase deed, if they come within the terms of the covenants for title, are not to be excluded from their operation on the ground that they appear on the face of the conveyance or are otherwise known to the purchaser; (2) the co. were entitled to recover on the covenants.—*PAGE v. MIDLAND RY. CO.*, [1894] 1 Ch. 11; 63 L. J. Ch. 126; 70 L. T. 14; 42 W. R. 116; 38 Sol. Jo. 41; 7 R. 24, C. A.

Annotations:—As to (1) *Consd.* *May v. Platt*, [1900] 1 Ch. 616; *G. W. Ry. v. Fisher*, [1905] 1 Ch. 316. *Appl.* *Wise v. Whitburn*, [1924] 1 Ch. 460. *Refd.* *Marten v. Whale*, [1917] 1 K. B. 544.

2451. Who may be required to give—Tenant for life—Sale by trustees on direction of tenant for life.—

(1) Estates were devised to A. for life remainder to B. for life remainder to his sons successively in tail male. A. & B. during the infancy of B.'s eldest son obtained an Act of Parliament vesting the estates in trustees in trust to sell:—*Held*: A. & B. must covenant with the purchaser for title. If settled estates are sold under a power to sell them with the consent of the tenant for life he must covenant for the title.

(2) A. being tenant for life of an estate, with remainder to his sons, successively, in tail male, entered into an agreement with B., by which it was stipulated that A. should procure an Act of Parliament to enable him to sell the estate to B.;

& that B. should bear all the expenses incident to & consequent upon his proposal to purchase the estate, together with the expense of obtaining the Act, of preparing the abstract, & showing a title to the estate & of & about making & completing the sale & conveyance to him, together with the expense of the agreement, & all other expenses whatsoever of A., in consequence of the sale, or arising out of or in anywise relating thereto, or to the proposal of B. A. accordingly obtained an Act for the sale of the estate to B., which directed the purchase-money to be invested in lands to be settled to the same uses as the estate stood limited to:—*Held*: B. was not bound to pay the expenses of the investment.—*Re LONDON BRIDGE ACTS, Re WITTS' ESTATE ACT, Ex p. CLOTHWORKERS' CO.* (1842), 13 Sim. 176; 60 E. R. 68; *sub nom. Ex p. WITTS, Ex p. CLOTHWORKERS' CO.*, 6 Jur. 936.

Annotation:—*As to (1) Follid. Re Sawyer & Baring's Contract* (1884), 53 L. J. Ch. 1104.

2452. ———.—[Where trustees of a settlement of real estate are empowered to sell by the direction of the tenant for life upon a sale in pursuance of the power the tenant for life must enter into the ordinary covenants for title.—*POULETT (EARL) v. HOOD* (1868), L. R. 5 Eq. 115; 37 L. J. Ch. 224; 17 L. T. 486; 16 W. R. 323.

Annotation:—*Reidf. Re Sawyer & Baring's Contract* (1884), 53 L. J. Ch. 1104.

2453. ———.—[Trustees in whom lands were vested upon trust for one for life & with power to sell on his request sold the same under a condition that the vendors being trustees were to be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees:—*Held*: the purchasers were entitled to require that the equitable tenant for life should enter into the usual covenants for title.—*Re SAWYER & BARING'S CONTRACT* (1884), 53 L. J. Ch. 1104; 51 L. T. 356; 33 W. R. 26.

Remedies for breach.—*See* Part XI., Sect. 3, sub-sect. 5, B. (d), C. (d), D. (c).

ii. Particular Covenants.

See, now, Law of Property Act, 1925 (c. 20), s. 76, sched. II., Parts I. & II.

2454. "Free from Incumbrance"—Lease to third party.—Whether breach.—[Of a covenant to enfeoff at Easter free from all former incumbrances, leases, etc. excepted, a lease made after the date, but before the delivery of the deed, is no breach.—*HUNTINGDON (EARL) v. CLINTON (LORD)* (1556), 2 Dyer, 139a; 73 E. R. 303.

2455. Conveyance as "beneficial owner"—Extent of implied covenants.—[Deft. granted a lease of land to B. for 99 years, & afterwards B. granted certain sub-leases by way of mtge. He then, for value, surrendered the term to deft., without disclosing the existence of the sub-leases. By a subsequent deed deft., for value, conveyed the fee simple, "as beneficial owner," to B., under whom pltf. claimed. Some time afterwards pltf. & deft. discovered the existence of the mtge. sub-leases; & pltf. then brought an action against deft. for damages for the breach of the implied covenant contained in his conveyance, as "beneficial owner," to B.:—*Held*: (1) the grant of the lease for 99 years to B., which was still outstanding for the benefit of the mtge. sub-lessees,

was an act "done by deft." within the meaning of the implied covenant for right to convey; the creation of the mtge. sub-leases by B. was an incumbrance "made by a person rightfully claiming through deft." within the meaning of the implied covenants for quiet enjoyment & freedom from incumbrances; & pltf. was entitled to claim damages against deft. for breach of those covenants; (2) although deft. would have had a good defence against B. if he had brought an action for breach of the covenant, on the ground of B.'s fraud, he had no such defence against pltf., who had purchased without notice of the fraud, & was not affected by B.'s disability. (3) *Semble*: inasmuch as deft. was ignorant of the existence of the sub-leases, his omission to get them in was not in itself an act "omitted" by him within the meaning of the implied covenant for right to convey.

Although a vendor's covenant for title is not an absolute warranty of title, it is very wide. The acts & omissions covenanted against are reducible to four heads, viz. (a) the acts & omissions of the vendor himself; (b) the acts & omissions of persons through whom he claims otherwise than by purchase for value; (c) the acts & omissions of persons claiming through him; (d) the acts & omissions of persons claiming in trust for him (*LINDLEY, L.J.*).—*DAVID v. SABIN*, [1893] 1 Ch. 523; 62 L. J. Ch. 347; 68 L. T. 237; 41 W. R. 398; 9 T. L. R. 240; 37 Sol. Jo. 248; 2 R. 342, C. A.

Annotations:—*As to (1) Consd. Stoney v. Eastbourne R. C.*, [1927] 1 Ch. 367. *Generally, Mentd. Davis v. Town Properties Investment Corp.*, [1902] 2 Ch. 635.

2456. ———.—[If a vendor purport to convey land to a purchaser free from a right of way belonging to a third person, which in fact still exists & is not extinguished, this existence of the right of way is a breach of the covenant for good right to convey implied by the use of the words "as beneficial owner."

The proper measure of damages in such a case is the difference between the purchase price & the value of the land as the vendor had power to convey it.—*TURNER v. MOON*, [1901] 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90; 50 W. R. 237.

Annotations:—*Follid. U. W. Ry. v. Fisher*, [1905] 1 Ch. 316. *Appld. Eastwood v. Ashton*, [1913] 2 Ch. 39.

2457. ———.—Purchaser with notice of prior rights.—[Deft. conveyed part of a building estate in fee simple as beneficial owner to pltf. Pltf. had notice both on the face of & outside the conveyance that previous purchasers of parts of the estate had rights of way over a road. As between pltf. & deft., however, the former were to take the land discharged from those rights. The conveyance contained no express covenants for title nor any qualification of the implied covenants. Pltf. entered on the land & blocked up the road & a previous purchaser claimed £5,000 damages from them for doing so. Pltf. gave notice to deft. & under protest went to arbn. An award was made giving the previous purchaser £510. Pltf. still disputed his right, & he brought an action in which, on a special case, pltf. were held liable to pay him the £510 & interest, & the cost of the arbn. proceedings & of the action. They paid these sums, & brought this action claiming from deft. repayment of the money thus paid & of their own costs of the arbn. & action:

PART IX. SECT. 5, SUB-SECT. 1.—G. (b) ii.

g. Conveyance as "beneficial owner."—[The vendor agreed with the pur-

chaser for the sale of lands formerly held under lease, dated 1873, & now held under a judicial tenancy. S., the lessee in the lease of 1873, devised the

lands to his son, J. S., & in the event of J. S. dying without issue, over. In 1910 J. S., as beneficial owner, assigned the lands to the vendor.

Sect. 5.—Form of conveyance: Sub-sect. 1, G. (b) ii., (c) & (d).]

—*Held*: plffs. were entitled to bring an action for damages under deft.'s implied covenants for title; their knowledge of the previous purchaser's rights did not prevent them from making this claim; deft. was liable to indemnify them, & must repay the £510 & interest & the costs which they had paid to the previous purchaser; & must also pay to them subsequent interest on the £510 & their costs of the arbn. proceedings as between solr. & client; but he need not pay their costs of the special case.

It was decided in *Turner v. Moon*, No. 2456, *ante*, that in an action for damages for breach of the covenant for title implied by Conveyancing & Law of Property Act, 1881 (c. 41), s. 7, which is the case, damages may be recovered for defect of title by reason of the existence of an undisclosed right of way (BUCKLEY, J.).—*GREAT WESTERN RY. Co. v. FISHER*, [1905] 1 Ch. 316; 74 L. J. Ch. 241; 92 L. T. 104; 53 W. R. 279.

Annotation.—*Apld.* *Stoney v. Eastbourne R. C.*, [1927] 1 Ch. 367.

2458. ———.]—A vendor sold land as beneficial owner subject to rights of way, but in reply to a requisition as to whether there were in fact any rights of way, his solrs. replied "not to our knowledge." A public right of way having been successfully claimed, the purchaser sued him for damages by reason of the breach of his implied covenants for title under Conveyancing & Law of Property Act, 1881 (c. 41), s. 7, & the covenants for title being qualified, the question was whether the presumed dedication was prior or subsequent to 1782, the date of the last purchase for value by those for whose acts or omissions the vendor was liable. The purchaser produced two tithe maps dated 1802 & 1840, upon neither of which was the right of way indicated, as evidence that the dedication must have been subsequent to those dates.—*Held*: the tithe maps were made for a special purpose, & not for the purpose of showing public or private rights of way, or otherwise. They were therefore not *prima facie* evidence enabling the purchaser to contend that the dedication was at a later date, so as to shift the *onus* of proving that dedication was prior to 1782 on to the vendor.—*STONEV. R. EASTBOURNE RURAL COUNCIL*, [1927] 1 Ch. 367; 95 L. J. Ch. 312; 135 L. T. 281; 90 J. P. 173; 70 Sol. Jo. 690; 24 L. G. R. 333, C. A.

2459. ———.] (1) A vendor, who was entitled under an agreement to a lease of the lands therein described & coloured red on the plan annexed thereto, contracted to sell & subsequently as "beneficial owner" assigned to the purchaser all his "estate, term, & interest" under the agreement of & in the land coloured red on the plan annexed thereto. After completion it was discovered that previously to the contract for sale a small portion of the land coloured red had with the privity of the vendor been demised to a third party, & that consequently the vendor could not make a title to such portion. In an action by the purchaser for damages for breach of the vendor's implied covenants for title:—*Held*: there had been a breach by the vendor of such covenants, & he was liable for damages in respect thereof.

(2) In such an action the vendor is not entitled to adduce evidence to prove that the purchaser

at the date of the contract knew of the diminution of the land, nor can the vendor, if counterclaiming for rectification, adduce evidence to prove mistake. Rectification in such circumstances would be in reality a transgression of the well settled practice that pltf. seeking specific performance cannot have specific performance with a parol variation.

(3) In order to obtain rectification there must be a mistake common to both parties, & if mistake is only unilateral, there must be fraud or misrepresentation amounting to fraud (FARWELL, J.).

(4) Rescission after conveyance of land can only be obtained on the ground of unfair dealing (FARWELL, J.).—*MAY v. PLATT*, [1900] 1 Ch. 616; 69 L. J. Ch. 357; 83 L. T. 123; 48 W. R. 617.

Annotations.—*As to* (2) *Consd.* *Thompson v. Hickman*, [1907] 1 Ch. 550; *Fowler v. Sugden* (1916), 85 L. J. K. R. 1090. *Refd.* *Forgione v. Lewis*, [1920] 2 Ch. 326; *Craddock v. Hunt*, [1923] 2 Ch. 136.

2460. Conveyance as personal representative.—Extent of implied covenants.—In 1922 defts. as exors. contracted to sell to plffs. a London leasehold house with stabling held by testator for the unexpired residue of a term of eighty years. By his will testator bequeathed these premises to defts. as his exors. & trustees upon trust to permit his wife to occupy the same during her life, she paying the rent, rates, & taxes & performing the covenants of the lease, & after her death to hold same upon the same trusts for the benefit of his son, deft., who was one of the exors., & his children & other issue as were therein declared of his son's share in the residuary estate. The exors. permitted the widow of testator to continue residing in the house for ten years until her death in Dec. 1921, she paying the rent & performing the covenants of the lease. The purchasers made a requisition on title to the effect that they knew that the house & premises had been occupied since testator's death by his widow, according to the trusts of the specific bequest, "which had been assented to," & the exors. could not sell until the death of the tenant for life; but the purchasers were willing to accept the title from the tenant for life under Settled Land Act. To this the reply was made that the tenant for life had died. Both parties acted on the assumption that the leasehold had fallen into the residue, & completed the purchase in 1922. Plffs. subsequently agreed to sell the stabling to a sub-purchaser, who took the objection that the exors. had no power to sell in 1922: no written or verbal consent to the specific bequest had been in fact given by the exors.

In an action by plffs. for damages for breach of an implied covenant for title by defts.:—*Held*: (1) plffs., as purchasers from the exors. in 1922, had actual notice of this assent by means of the requisition & answer, & were not therefore in the position of purchasers for value without notice of the defect; (2) the case came within s. 7 (1) (F), of Conveyancing & Law of Property Act, 1881 (c. 41), s. 7 (1) (F), & plffs. were entitled to an inquiry as to damages for breach of the implied covenant for title.—*WISE v. WHITBURN*, [1924] 1 Ch. 460; 93 L. J. Ch. 235; 130 L. T. 655; 68 Sol. Jo. 302.

—*See, now*, Law of Property Act, 1925 (c. 20), s. 76 (1) F., sched. II., Part VI.

Conveyance as trustee.—*See* Law of Property Act, 1925 (c. 20), s. 76 (1) F., sched. II., Part VI.; & *generally*, TRUSTS & TRUSTEES.

J. S. was at present living. The purchaser having decided to accept the defective title:—*Held*: the pur-

chaser was entitled to have the conveyance made to him by the vendor as beneficial owner, without any words

limiting the covenants therein implied.—*Re GERAGHTY & LYONS' CONTRACT* (1919), 53 L. L. T. 57.—*IR.*

Conveyance as committee of lunatic.—See Law of Property Act, 1925 (c. 20), s. 76 (1) F. sched. II., Part VI.; & LUNATICS, Vol. XXXIII., p. 227, No. 1376.

Conveyance as tenant for life.—See SETTLEMENTS.

(c) *Other Covenants.*

2461. Right of vendor to include—Building covenants affecting sold & unsold lots. Where, on a conveyance of building land, put up for sale in lots, the vendor takes a separate deed of covenant, the object of so doing is not to keep the notice of the covenant off the face of the title, but to obviate the necessity of executing the conveyance in duplicate. Where building land was put up for sale in several lots, two of which were purchased by defts., pltf., vendor, was, having regard to the conditions of sale:—*Held*: entitled to have it stated in the conveyances to defts. that they were bound, but he was not bound, by certain building covenants affecting the unsold, as well as the purchased, lots.—*SIDNEY v. CLARKSON* (1865), 35 Beav. 118; 14 W. R. 157; 55 E. R. 839; *sub nom. SYDNEY v. CLARKSON*, 13 L. T. 659.

Annotation:—*Reid. re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 342.

2462. — — — Covenant to erect & maintain fences.—The object of having a deed of conveyance is not merely to vest the property the subject of it in the purchaser, but to embody covenants as to what must be done under the contract of sale after completion of the purchase. Therefore where a purchaser bought under a contract which made him liable to erect & for ever after maintain fences, as marked on the plan of property sold by public auction, the vendor was held entitled to have the obligations of the purchaser expressed in the conveyance to him of his lot.—*Re COOPER & CRONDALE'S CONTRACT* (1904), 90 L. T. 258; 52 W. R. 441; 48 Sol. Jo. 312.

Covenants as to unpaid consideration.—Compare RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 117, 118, 120, Nos. 116, 119, 136.

— Sale of Crown Lands.—See Crown Lands Act, 1927 (c. 23), s. 3 (4) (i).

Liability of vendor's solicitor—Execution of onerous covenant.—See SOLICITORS.

Notice of restrictive covenants.—See Law of Property Act, 1925 (c. 20), s. 200.

(d) *Indemnity in respect of Restrictive Covenants.*

See, now, Law of Property Act, 1925 (c. 20), s. 77, & Sched. II., Parts VII., VIII., IX. & X.; & compare LANDLORD & TENANT, Vol. XXXI., pp. 412–418.

2463. Right of vendor—Sale of land subject to restrictive covenants—Indemnifying covenant by purchaser.—A vendor of freehold property, who, on his own purchase of it, had entered into a covenant to observe the covenants entered into with a former vendor, & which prohibited building on the land, put it up for sale, pursuant to particulars & conditions, noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance, filed by the purchaser:—*Held*: (1) pltf. was not entitled to a conveyance, unless on the terms of giving or providing for the vendor a sufficient indemnity

against any breach of the covenant on the part of pltf., his heirs, appointees or assigns; (2) a covenant on the part of pltf., his heirs, exors., administrators, appointees & assigns, with deft., his heirs, exors. & administrators, to the same effect, *mutatis mutandis*, as the covenant entered into by the vendor, on his own purchase, ought to be considered as a sufficient indemnity.—*MOXHAY v. Inderwick* (1847), 1 De G. & Sm. 708; 63 E. R. 1261.

Annotation:—*As to* (1) *Reid. Lukey v. Higgs* (1855), 3 Eq. Rep. 510.

2464. — — — In an agreement for the sale of freehold land it was stated that the property was subject to restrictive covenants. The vendor had covenanted with his vendor to observe & perform those covenants & to indemnify his vendor:—*Held*: the purchaser ought to enter into a similar covenant with the vendor, but the covenant should be prefaced with the words "with the object & intention of affording to [the vendor], his heirs, exors., & administrators, a full & sufficient indemnity in respect of [the restrictive covenants], but not further or otherwise."—*Re POOLE & CLARKE'S CONTRACT*, [1904] 2 Ch. 173; 73 L. J. Ch. 612; 91 L. T. 275; 53 W. R. 122; 20 T. L. R. 604; 48 Sol. Jo. 588, C. A.

Annotations:—*Apld. Harris v. Boots, Cash Chemists' (Southern)*, [1904] 2 Ch. 376. *Follid. Reekitt v. Cody*, [1920] 2 Ch. 452.

2465. — — — Qualifying proviso.—The order of a judge settling the form of a conveyance is subject to appeal.

In a sale by the ct. the particulars of sale contained certain reservations & stipulations as to the property, & one of the conditions of sale provided that the conveyances should contain covenants by the purchasers for securing the liabilities & rights under such reservations & stipulations, the form of such covenants, in case of dispute, to be settled by the judge. A dispute having arisen between a purchaser & a vendor concerning the form of the covenant, the judge settled the covenant, adding a proviso that if the purchaser assigned his purchase, & the assignee entered into a similar covenant, the purchaser should be freed from further liability:—*Held*: the vendor was entitled to an unqualified covenant, & the proviso must be struck out.—*POLLOCK v. RABBITS* (1882), 21 Ch. D. 466; 47 L. T. 637; 31 W. R. 150, C. A.

2466. — — — When cause of action arises.—By a deed of Feb. 23, 1911, a parcel of freehold land forming part of a larger estate was conveyed to pltf. as purchaser & he covenanted with his vendor to observe & perform the stipulations in relation to the assured hereditaments contained in a schedule to the deed. Two of such stipulations were that no house to be erected on the land conveyed should be used for any purpose other than that of a private dwelling-house, & that no detached dwelling-house which should be built should be of less value than £800. By a deed of July 17, 1919, pltf. conveyed to deft. in fee a parcel of land being part of that conveyed by the deed of 1911, & subject to the restrictive covenants & stipulations contained in that deed so far as the same were subsisting & capable of taking effect, & deft., for herself, her heirs & assigns, with intent to bind the hereditaments thereby conveyed & all persons in whom the same should for the time be vested, but not so as to be personally liable

PART IX. SECT. 5, SUB-SECT. 1.—
G. (c).

h. Absence of covenant by purchaser to pay purchase-money—Covenant implied.—Where, although an agreement for the sale of land did not

contain an express covenant to pay the purchase-money, it described one of the parties as the purchaser, recited that "the vendor has agreed to sell & the purchaser has agreed to purchase" the land at a price stated payable in stated instalments, & also

contained an attornment clause:—*Held*: a covenant on the part of the purchaser to pay the purchase-money should be implied.—*BAXTER v. DENCASZ (Sask.)*, [1925] 4 D. L. R. 801; [1925] 3 W. W. R. 593.—*CAN.*

Sect. 5.—Form of conveyance: Sub-sect. 1, G. (d), & H.; sub-sects. 2 & 3, A., B. & C.]

under the covenant after she had parted with the same, did covenant with pltf., his heirs & assigns, that she would thenceforth observe & perform the restrictive covenants & stipulations so far as aforesaid. Deft. erected on the land conveyed to her a detached building or shed of a less value than £800, to be used as a classroom for boys. In an action by pltf. for a mandatory injunction to restrain the continuance of this building in breach of the restrictive covenants:—*Held*: the covenant in the deed of July 17, 1919, by deft. was a covenant to indemnify & nothing more, & in the absence of any proceedings taken or threatened against pltf. on the part of the original vendor to enforce the restrictive covenants in the deed of 1911, pltf. had no cause of action against deft. The rule of construction as to covenants of this character in reference to assignments of leaseholds applies also to similar covenants on a conveyance of freeholds.—*RECKITT v. CODY*, [1920] 2 Ch. 452; 90 L. J. Ch. 27; 124 L. T. 141; 64 Sol. Jo. 699.

—*Sale of equity of redemption.*—See *MORTGAGE*, Vol. XXXV., p. 359, Nos. 1018–1020.

—*Sale of share in partnership.*—See *PARTNERSHIP*, Vol. XXXVI., p. 441, No. 1085.

Notice of restrictive covenants.—See *Law of Property Act*, 1925 (c. 20), s. 200.

H. Production of Documents.

See, now, *Law of Property Act*, 1925 (c. 20), s. 64.

2467. By vendor—Under covenant for future assurance.—If a vendor retains the title deeds, & covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of the deeds.—*FAIN v. AYERS* (1826), 2 Sim. & St. 533; 57 E. R. 450; *sub nom.* *FAIR v. AYRES*, 4 L. J. O. S. Ch. 166.

2468. By purchaser—Sufficiency of covenant.—*ONSLOW v. LONDESBOROUGH (LORD)*, No. 2586, *post*.

2469. By third parties—Title deeds common to two estates.—*Qu.*: whether where one is in possession of title deeds relating to his own lands as well as to the lands of another person, who has no covenant for the production of the title deeds, such other person has a general right in equity to compel the production of the deeds.—*BARCLAY v. RAINE* (1823), 1 Sim. & St. 449; 57 E. R. 179.

2470. — Right of purchaser of one estate.—Where there were certain title deeds common to two estates & held by third parties with no title to the properties, & one of the estates had been sold & an acknowledgment of the right to production, etc., given to the purchaser by each third parties, on a sale of the other estate by open contract:—*Held*: the purchaser could not insist that all the title deeds should be handed over on completion, but that the equitable right to production of the deeds was adequate under the circumstances.—*Re JENKINS & COMMERCIAL ELECTRIC THEATRE CO.'S CONTRACT* (1917), 61 Sol. Jo. 283.

Copyholds.—See *COPYHOLDS*, Vol. XIII., pp. 38–39, Nos. 444–445.

SUB-SECT. 2.—COPYHOLDS.

Sale of copyholds.—See *COPYHOLDS*, Vol. XIII., pp. 110–114, Nos. 1402–1442.

Right of admittance—Purchaser.—See *COPYHOLDS*, Vol. XIII., p. 135, Nos. 1685–1690.

Fines.—See *COPYHOLDS*, Vol. XIII., p. 93, Nos. 1153, 1154, 1158–1160.

Compulsory purchase of copyholds.—See *COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 273, 271, Nos. 2000–2016.

SUB-SECT. 3.—LEASEHOLDS.

A. Licence to Assign.

See, generally, *LANDLORD & TENANT*, Vol. XXXI., pp. 368–398.

2471. Duty of vendor to obtain consent.—It is incumbent on the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment.—*MASON v. CORDER* (1816), 7 Taunt. 9; 2 Marsh. 332; 129 E. R. 4.

Annotation:—*Consd. Ferry v. Williams* (1817), 1 Moore, C. P. 498.

2472. ——A lease contained a covenant not to assign without the licence of the lessor, with a proviso for re-entry on breach. The lessee became bkpt., & the assignees assigned to deft., who contracted to sell the term to pltf. Pltf. required deft. to obtain the licence of the lessor, which deft. failed to do:—*Held*: deft. was bound to obtain the landlord's licence to assign, as the assignment by the assignees was no breach of the covenant.—*WINTER v. DUMERQUE* (1866), 12 Jur. N. S. 726; 14 W. R. 699, Ex. Ch.

2473. — Whether vendor bound to take legal proceedings to obtain licence.—Where in a lease the lessee has covenanted not to assign without the previous consent in writing of the lessor, but it is expressly agreed that such consent shall not be withheld unreasonably or vexatiously, & the lessee enters into an agreement to assign "subject to the landlord's approval," & the landlord, being himself desirous of buying up the leases of his property, refuses his consent to an assignment upon that & no other ground, the lessee is bound only to show that he has *bonâ fide* pressed for the consent, & done all he could to procure it, & he is not bound to take legal proceedings to compel the landlord to grant it.—*LEHMANN v. MCARTHUR* (1868), 3 Ch. App. 496; 37 L. J. Ch. 625; 32 J. P. 669; 16 W. R. 877; *sub nom.* *LECHMANN v. MCARTHUR*, 18 L. T. 806, 1. J. J.

Annotations:—*Refd. Evans v. Davis* (1878), 10 Ch. D. 747; *Day v. Singleton*, [1899] 2 Ch. 320.

2474. — Repudiation by purchaser before time for obtaining licence.—A railway co. agreed to demise to E. for building purposes certain lands which they had acquired under their compulsory powers. E. was restrained from assigning without licence. The property had formerly belonged to a building society which had sold it in lots, each purchaser entering into restrictive covenants for the benefit of the owners of the other lots & the conveyance to the co. was expressly made subject to these covenants. E. agreed to sell his interest under the contract to R. R. at the time of the contract knew of the restrictive covenants but believed that the compulsory purchase by the railway co. had extinguished them. E. did not know of their existence. R.'s solrs. having discovered the existence of the covenants objected to the title. E.'s solrs. replied that the compulsory purchase had extinguished them. R. then refused to proceed with the purchase. E. brought a bill for specific performance but having afterwards resumed possession & built in order to avoid a forfeiture the action came on as an action for damages. E. had never obtained a licence to

assign. *Semble*: R.'s objection on the ground that a licence to assign had not been obtained was not valid inasmuch as he had repudiated the contract before the time had arrived at which it was necessary for the vendor to produce a licence.—*ELLIS v. ROGERS* (1885), 29 Ch. D. 661; 53 L. T. 377, C. A.

Annotations:—*Refd.* *Hatten v. Russell* (1888), 38 Ch. D. 334; *Day v. Singleton*, [1899] 2 Ch. 320; *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648; *British & Beningtons v. North Western Cachar Tea Co.*; *British & Beningtons v. Baintoorie (Dooars) Tea Co.*; *British & Beningtons v. Mazdahee Tea Co.*, [1923] A. C. 48.

2475. —.]—A purchaser of leasehold property, which the vendor cannot assign without a licence from his lessor, is entitled to damages, beyond return of the deposit, with interest & expenses, for loss of his bargain by reason of the vendor's omission to do his best to procure such licence.

A vendor agreed with a purchaser for the sale of a leasehold hotel, subject to the consent of the lessor being obtained to the assignment of the lease, & the purchaser paid a deposit on his purchase-money. The vendor died without having completed his contract, & the purchaser then brought an action against his legal personal representative for specific performance. *Deft.*, being desirous of freeing the vendor's estate from the action, induced the lessor to refuse his consent to the assignment, which the lessor accordingly did, & the purchaser thus lost his bargain. Thereupon the purchaser amended his action by claiming damages & return of the deposit:—*Held*: *pltf.* was entitled, not only to the return of his deposit, with interest & costs of investigating title, but also to the damages he had sustained by the loss of his bargain through the omission of *deft.* to obtain the lessor's consent.—*DAY v. SINGLETON*, [1899] 2 Ch. 320; 68 L. J. Ch. 593; 81 L. T. 306; 48 W. R. 18; 43 Sol. Jo. 671, C. A.

Annotations:—*Distd.* *Pease v. Courtney*, [1904] 2 Ch. 503. *Consd.* *Re Daniel, Daniel v. Vassall*, [1917] 2 Ch. 405. *Apld.* *Braybrooks v. Whaley*, [1919] 1 K. B. 435. *Refd.* *Smith v. Butler* (1900), 48 W. R. 583.

B. Covenants.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 415–418.

See Law of Property Act, 1925 (c. 20), ss. 76 (1) B., 77, Sched. II., Parts II., VIII., & IX.

2476. Covenant for payment of rent & performance of covenants—*Sale in lots at apportioned rent.*—*Exors.* sell by auction, in nine lots, sundry houses, which testator, during his life, held by lease under the Crown, & of which they, after his death, obtained a new lease, subject to one entire rent of £243; the printed particulars mention that the sale is by *exors.*, & that the nine lots are all held under one lease, & at one entire reserved rent: Decreed, upon a bill filed by the vendors, & an answer, submitting to perform the contract upon an indemnity being given, that the purchaser of one lot, with respect to which the particulars stated that the apportioned rent for it was £52, was entitled to have an indemnity from the *exors.* against his liability for the whole reserved rent, & the breach of any of the covenants in the original lease. In such a case *deft.* is entitled to have his costs, up to & including the hearing.—*WEST v. WILD* (1824), 3 L. J. O. S. Ch. 15.

2477. — *Sale by executor.*—Under a contract for the assignment of a term, whether from the original lessee, or a mesne assignee, the purchaser must covenant for indemnity against payment of rent & performance of covenants; though he cannot have a covenant for the title from the assignor; as being an *exor.*; & also by express

stipulation.—*STAINES v. MORRIS* (1812), 1 Ves. & B. 8; 35 E. R. 4, L. C.

Annotations:—*Refd.* *Steward v. Wolveridge* (1832), 9 Bing. 60. *Mentd.* *Wilkins v. Fry* (1816), 1 Mer. 244.

2478. — *Sale by trustees for creditors.*—The owner of leasehold premises covenanted to assign them to trustees, or as they should direct, upon trust to sell, & apply the proceeds for the benefit of his creditors. Upon a sale by the trustees:—*Held*: the owner was entitled to the usual covenant of the purchaser for payment of the rent & performance of the covenants during the continuance of the lease.—*MORLEY v. CLAVERING* (1861), 30 Beav. 108; 7 Jur. N. S. 904; 9 W. R. 801; 54 E. R. 830.

2479. — *Sale by mortgagee.*—*Re NATIONAL PROVINCIAL & UNION BANK OF ENGLAND & MAY'S CONTRACT* (1920), 150 L. T. Jo. 262.

2480. — *Joining party to secure covenant.*—Upon a contract for a sale of the sub-lease, the objection to the title, arising from the possibility of a future breach of the covenant by the representative of the original lessee, may be cured, either by an insurance, in the name of that representative, for the whole residue of the term created by the sub-lease, or by making that representative join in a covenant, that the purchaser shall be at liberty to insure in his name, & to deduct the annual premiums out of the rent.—*MONTRESOR v. WILLIAMS* (1823), 1 L. J. O. S. Ch. 151.

C. Sale in Lots.

2481. Some lots unsold—*Vendors granting underleases in place of purchaser of largest lot.*—Under the usual clause in conditions of sale by auction that "if any of the lots remain unsold, the vendors shall stand in the place of the purchaser of the largest part in value" to grant underleases. Some of the lots were unsold at the close of the auction, but were afterwards sold:—*Held*: this clause having come into operation the purchaser of each lot had a right to have this condition personally performed by the vendors: & it was not competent for them to assign their estates to any one of the purchasers & to compel the other purchasers to take their underleases from such purchasers.—*BROWNE v. PAULL* (1856), 26 L. T. O. S. 232; 2 Jur. N. S. 317.

2482. — *Sale by trustees for sale.*—Trustees for sale put up for auction five leasehold houses, held under one lease, in five separate lots, subject to a condition that if all the lots were sold at the present sale, the purchaser of the largest lot in value should execute an underlease for the whole of the term, less one day, to the respective purchasers of the other lots at an apportioned rent; but that if any of the lots remained unsold, which happened, "the vendors will grant to the purchaser or respective purchasers of the lot or lots sold such an underlease as aforesaid of each of the lots sold":—*Held*: a valid exercise of the trust for sale.—*Re JUDD & POLAND & SKELCHER'S CONTRACT*, [1906] 1 Ch. 684; 75 L. J. Ch. 403; 94 L. T. 595; 54 W. R. 513; 50 Sol. Jo. 389, C. A.

2483. — *Consolidation of actions against separate purchasers.*—Where different lots are sold at an auction for different sums the contracts are separate, both in law & fact. In a special action for refusing to adhere to the conditions of sale, *pltf.* cannot consolidate the two contracts.—*JAMES & CHAPMAN v. SHORE* (1816), 1 Stark. 426; 171 E. R. 518, N. P.

Annotation:—*Refd.* *Casemajor v. Strode* (1834), 2 My. & K. 708.

SECT. 6.—VESTING ORDER.

SUB-SECT. 1.—FREEHOLDS.

See, generally, Trustee Act, 1925 (c. 19), ss. 47-49; TRUSTS.

2484. What persons declared trustees for purposes of order—Infant.]—Sale under decree for sale, for the purpose of paying costs, of certain real estate, to which infants were beneficially entitled in case they survived their mother & attained twenty-one:—*Held*: the infants were not constructive trustees, & a vesting order in favour of the purchaser could not be made under Trustee Act, 1850 (c. 60).—*WESTON v. FILER* (1852), 5 De G. & Sm. 608; 19 L. T. O. S. 243; 16 Jur. 1010; 64 E. R. 1264.

2485. ——— Tenant in tail.]—Where testator had, in his lifetime, agreed to give an option to his lessee to purchase the fee, & the lessee did not declare for the option until after testator's decease, an infant tenant in tail of the legal estate under testator's will is not a trustee for the lessee desirous of purchasing, within Trustee Act, 1850 (c. 60); but a claim for specific performance was directed to be filed.—*Re WEEDING'S ESTATE* (1858), 4 Jur. N. S. 707.

2486. ——— Deceased rector.]—A rector contracted to sell the rectory house, but died before completion of the purchase. No successor to the living had been appointed, & none was likely to be appointed. The purchasers had accepted the title:—*Held*: the ct. had power to declare that the late rector was at the time of his death a trustee & to make a vesting order.—*Re PEEK'S CONTRACT* (1920), 65 Sol. Jo. 220.

2487. Effect of order—Barring estate tail.]—Where under Trustee Act, 1893 (c. 53), an order is made vesting, or appointing a person to convey, the estate of an infant tenant in tail in possession, the effect is to bar the estate tail & remainders over.—*Re MONTAGU, FABER v. MONTAGU*, [1896] 1 Ch. 549; 65 L. J. Ch. 372; 74 L. T. 346; 44 W. R. 583.

Annotation:—Reffd. Re Hambrough's Estate, Hambrough v. Hambrough, [1909] 2 Ch. 620.

Effect of order for rectification.]—*See* MISTAKE, Vol. XXXV., p. 144, No. 428.

SUB-SECT. 2.—COPYHOLDS.

When order made.]—*See* COPYHOLDS, Vol. XIII., pp. 78, 79, Nos. 989-1002.

Completion of sale by vesting order.] *See* COPYHOLDS, Vol. XIII., pp. 112-114, Nos. 1425-1440.

On enfranchisement.]—*See* COPYHOLDS, Vol. XIII., p. 152, No. 1981.

Sale by assignee in bankruptcy.]—*See* BANKRUPTCY, Vol. V., p. 967, No. 7917.

PART IX. SECT. 6, SUB-SECT. 1.

k. When vesting order will be granted ex parte.]—Where a party to a suit is directed by decree or order to execute a conveyance to another party, but cannot be found after due diligence, & the deed therefore cannot be tendered for execution, a vesting order will be granted *ex p.*—*McNAIR v. SIMPSON* (1859), 1 Ch. Ch. 299.—*CAN.*

PART IX. SECT. 7, SUB-SECT. 1.

2490 i. Provision for payment by purchaser—Liability for expenses—Expenses of perusal & execution.]—A stipulation in a contract for the sale of land that the purchaser shall pay to the vendor or his solr. the costs of perusal of the conveyance or of

obtaining the execution thereof is illegal, & is not binding on the purchaser.—*Re STEWART & McLEOD, Ex p. PARK*, [1906] V. L. R. 31.—*AUS.*

2490 ii. ———.]—A provision in a contract made at the sale of land by auction "that the purchaser shall pay the vendor's costs & expenses of & incidental to the transfer exclusive of perusal & of obtaining the execution of the transfer" is not void under Conveyancing Act, 1904, No. 1593, s. 4 (6).—*Re SUTTON & FEDERAL BUILDING SOCIETY'S CONTRACT*, [1909] V. L. R. 473.—*AUS.*

2490 iii. ———.]—The purchaser is not bound to pay the expense of procuring the execution of the conveyance, unless there be an express

SECT. 7.—COSTS.

SUB-SECT. 1.—IN GENERAL.

2488. Where no special provision.]—Expense of conveyance falls on the purchaser, if no particular stipulation.—*BOLTON (DUKE) v. WILLIAMS* (1793), as reported in 2 Ves. 138; 30 E. R. 561, L. C.

Annotations:—Menid. Clayton v. Adams (1796), 6 Term Rep. 604; *Dalmer v. Barnard* (1797), 7 Term Rep. 248; *Glasse v. Mount* (1797), 7 Term Rep. 390; *Jones v. Harris* (1804), 9 Ves. 486; *Angell v. Hadden* (1809), 16 Ves. 202; *Ex p. Wright* (1812), 19 Ves. 255; *Browne v. Rose* (1815), 6 Taunt. 124; *Angell v. Hadden* (1817), 2 Mer. 164; *Aguilar v. Aguilar, Lousada, etc.* (1820), 5 Madd. 414; *Gorton v. Champneys* (1823), 1 Bing. 287; *Storton v. Tomlins* (1825), 10 Moore, C. P. 172; *Murray v. Barlee* (1831), 4 Sim. 82; *Swift v. Nash* (1837), 1 Jur. 557; *Moody v. Hebbard* (1848), 7 Harc. 182; *Tidd v. Lister* (1854), 3 De G. M. & G. 874; *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *Nelson v. Barter* (1864), 2 Hem. & M. 334.

2489. ———.]—In a contract for the sale of land, it is the duty of the vendee to prepare the conveyance, unless there is an express stipulation to the contrary; therefore in an action against him for non-payment of the purchase-money, the declaration need not allege a tender or offer to convey, but it is sufficient to state that pltf. was ready & willing to convey.

By arts. of agreement for the sale of certain premises deft. covenanted with pltf. & with the several other parties beneficially interested in the premises:—*Held*: their interest was several, & pltf. might sue alone.—*POOLE v. HILL*, (1840), 6 M. & W. 835; 9 Dowl. 300; 10 L. J. Ex. 81; 151 E. R. 651.

Annotations:—Apld. Tennent v. Robinson (1852), 19 L. T. O. S. 148. *Reffd. Cobbold v. Peto* (1872), 27 L. T. 130.

2490. Provision for payment by purchaser—Liability for expenses—Expenses of perusal & execution.]—*JOHNSON v. GEORGE* (1838), 2 Jur. 886.

2491. ——— Re-investment of purchase-money in real estate.]—*Re LONDON BRIDGE ACTS, Re WITTS' ESTATE ACT, Ex p. (LOTHWORKERS' Co., No. 2451, ante.*

2492. ——— Expense of fine on new admittance—Occasioned by death of trustee for sale.]—Where, between the date of the contract & conveyance, any deterioration to the property occurs from accident, without the fault of either party, the loss falls on the purchaser. But where, without any improper neglect or delay, a purchase could not be completed for three years, & the death of a trustee for sale occasioned the expense of a fine on a new admittance, although by the contract the conveyance was to be at the expense of the purchaser:—*Held*: the extraordinary expense of the fine should be borne by the trust estate.—*PARAMORE v. GREENSLADE* (1853), 1 Sm. & G. 541; 23 L. J. Ch. 34; 22 L. T. O. S. 182; 17 Jur. 1064; 65 E. R. 237.

condition to that effect.—*WEISS v. CRAFTS* (1874), 6 P. R. 151.—*CAN.*

1. ——— Costs of deed & mortgage.]—Where in an administration suit property was sold upon credit, part of the purchase-money to be paid down & the balance secured by mtge., the sale being under the ordinary condition that the purchaser should prepare the conveyance at his own expense:—*Held*: the purchaser must bear the expense of both deed & mtge.—*FAHNER v. RAN*, 1 Ch. Ch. 246.—*CAN.*

m. Guardian's costs.]—The ct. will direct the costs of a guardian to be paid before granting a vesting order to the purchaser.—*THORNE v. CHUTE* (1867), 2 Ch. Ch. 221.—*CAN.*

2493. — Mortgagee concurring in conveyance—Production of deeds in mortgagee's possession.]—A vendor agreed to sell to a purchaser a certain house " & the inheritance thereof in fee simple in possession, free from incumbrances," except certain restrictive covenants; & the contract provided that the vendor, & "all other necessary parties if any," should make & execute to the purchaser a proper assurance, & that "such assurance, & every other act & thing required by the purchaser for perfecting or completing the vendor's title or otherwise," should be "prepared, obtained, made, & done at the expense of the purchaser." When the abstract of title was delivered, it appeared that the property was subject to a mtge. effected by the vendor. A summons was taken out by the vendor, under Vendor & Purchaser Act, 1874 (c. 78), claiming, first, that the expenses of the production & inspection required by the purchaser for the verification of the abstract, of the deeds & documents in the abstract, referred to, which were in the possession of the vendor's mtgee., should be borne by the purchaser, pursuant to Conveyancing & Law of Property Act, 1881 (c. 41), s. 3 (6); & secondly, that the expenses of the concurrence of the vendor's mtgee. in the conveyance to the purchaser, should be borne by the purchaser, pursuant to the terms of the contract:—*Held*: (1) under Conveyancing & Law of Property Act, 1881 (c. 41), s. 3 (6), the costs in question were expressly thrown upon the purchaser; & there was nothing in the terms of the contract to bring the case within the exception contained in Conveyancing & Law of Property Act, 1881 (c. 41), s. 3 (9); (2) the costs of obtaining the concurrence of the mtgee. were clearly within the terms of the contract.—*Re WILLET & ARGENTI* (1889), 60 L. T. 735; 5 T. L. R. 476.

Annotation:—As to (2) Distd. Re Sander & Walford's Contract (1900), 83 L. T. 316.

2494. — Perusal & execution on behalf of mortgagee.]—A condition in a contract for sale of land that the assurance & every instrument required for completing the vendor's title or for any other purpose is to be "prepared" by & at the expense of the purchaser is not sufficiently wide to throw the costs of perusing & executing the conveyance on behalf of a mtgee. who concurred in the conveyance on the purchaser.—*Re SANDER & WALFORD'S CONTRACT* (1900), 83 L. T. 316.

2495. — Expenses of confirmation deed.]—With regard to the costs of the confirmation deed, it appears to me that they are clearly provided for by clause 9 of the contract & must be paid by the purchaser (*ROMER, J.*).—*Re WOODS & LEWIS' CONTRACT*, [1898] 1 Ch. 433; 67 L. J. Ch. 475; 78 L. T. 250; 46 W. R. 373; 42 Sol. Jo. 325; *on appeal*, [1898] 2 Ch. 211, C. A.

Annotations:—Mentd. North v. Percival, [1898] 2 Ch. 128; *Bennett v. Stone*, [1903] 1 Ch. 509.

2496. — Taxation.]—Where it has been agreed that the vendor's costs of a sale of land shall be borne by the purchaser, & all matters relating to the sale, except the engrossing & execution of the conveyance, have been performed before the General Order under Solicitors' Remuneration Act, 1881 (c. 44), came into operation, the costs shall be taxed according to the rules in force prior to the time when the General Order came into operation.

Where a vendor refuses to complete a sale unless his solr.'s bill of costs is paid, the purchaser is entitled to taxation of the bill after payment.—*Re PARKER TO GEORGE* (1883), 32 W. R. 222.

2497. Under covenant to convey.]—If a man

covenant to convey lands, it ought to be done at the charge of him that covenanteth to do it, except the contrary be agreed (*per CUR.*).—*SHANN v. BILBY* (1651), Sty. 280; 82 E. R. 710.

2498. Property sold subject to tenancies—Stamping of tenancy agreement.]—An agreement for the sale of freehold property provided that the property was sold subject to all tenancies, & also for apportionment of outgoings. Upon investigation of the title the purchaser discovered that an agreement with a yearly tenant of part of the property was unstamped, & required the vendor to stamp it before completion of the purchase. The vendor refused, & commenced proceedings for specific performance against the purchaser:—*Held*: the purchaser was entitled to have the agreement stamped at the vendor's expense.—*COLEMAN v. COLEMAN* (1898), 79 L. T. 66.

2499. Recovery by purchaser—Refusal to complete—Non-production of deeds promised to be produced.]—A purchaser at an auction cannot recover from the vendor the expenses of preparing the deeds of conveyance of the property, after he has refused to complete the purchase on account of the non-production of certain title deeds, though his attorney prepared the conveyances on the faith of a note written in the margin of the abstract by the vendor's solrs., stating that all the title deeds were examined by them on the original purchase, & that if it should be required, they would apply to the solr. for the original seller, in whose custody they were.—*JARMAN v. EGELSTONE* (1831), 5 C. & P. 172; 172 E. R. 926.

SUB-SECT. 2.—GETTING IN LEGAL ESTATE.

2500. Liability for costs—Costs of assignment from trustees.]—On the sale of an estate under an order of ct., one of the conditions provided that if the purchaser should require the conveyance of any outstanding legal estate which should not have been referred to or noticed in any of the abstracted deeds or documents, dated within the last thirty years, or of any outstanding term, all the expenses attending the getting in & conveyance of such estate should be borne by the purchaser. The estate in question had been assigned to trustees for a term of one thousand years, to secure the payment of a sum of money, the payment of which was afterwards provided for by order of ct. The person in whom the term was vested was a party to the deed of sale:—*Held*: the purchaser was entitled to have an assignment of the term; by the costs of which, not having been provided for by the conditions, were to be borne by the vendors.—*STRONGE v. HAWKES* (1856), 27 L. T. O. S. 150; 2 Jur. N. S. 388.

Annotation:—Refd. Re Moore & Hulme's Contract (1911), 106 L. T. 330.

2501. — Duty of vendor to assist in getting in.]—By the conditions of sale of the property of a co. in the course of being wound up it was stipulated that the purchaser should accept a conveyance from the official manager under the powers of Winding-up Acts, 1848 & 1849, or one of them, without requiring the concurrence of any of the shareholders or any other person; but that, if the purchaser should consider the legal estate outstanding & should require a conveyance thereof, he should bear the expenses of obtaining such conveyance or conveyances as he might require & all other expenses incident to getting in such legal estate:—*Held*: on the general scope of the conditions, the purchaser was to be at the risk of getting in the legal estate, & the vendor was

Sect. 7.—Costs: Sub-sects. 2, 3 & 4. Sect. 8: Sub-sects. 1 & 2, A., B. & C.; sub-sect. 3, A.]

entitled to a specific performance on executing a conveyance of the equitable interest & undertaking, at the expense of the purchaser, to obtain all such conveyances & render all such assistance to the getting in of the legal estate as the purchaser should require & as the vendor was able to obtain or give.—*SHEERNESS WATERWORKS CO. (OFFICIAL MANAGER) v. POLSON* (1861), 3 De G. F. & J. 36; 4 L. T. 568; 45 E. R. 791, L. C.

2502. — *Costs of deducing title to outstanding estate.*—The condition of sale provided that every deed or instrument which should be necessary for getting in any outstanding estate or interest or for completing the vendors' title should be prepared by & at the expense of the purchaser, who should also bear the expense of the doing of every act needed for perfecting the assurance by all parties other than the vendors:—*Held*: this condition did not relieve the vendors from the expense of deducing the title to the outstanding legal estate.—*Re ADAMS' TRUSTEES' & FROST'S CONTRACT*, [1907] 1 Ch. 695; 76 L. J. Ch. 408; 96 L. T. 833; 51 Sol. Jo. 427.

Annotation:—Mentd. Re Mackenzie, Bain v. Mackenzie, [1916] 1 Ch. 125.

SUB-SECT. 3.—COMPULSORY PURCHASE.

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 253-272.

SUB-SECT. 4.—COPYHOLDS.

See COPYHOLDS, Vol. XIII., pp. 113, 114, Nos. 1439, 1440.

SECT. 8.—COMPLETION.

SUB-SECT. 1.—TIME FOR COMPLETION.

Special conditions as to time for completion.—*See Part IV., Sect. 2, sub-sect. 10, A., ante.*

2503. No time agreed—Reasonable time allowed.—*SOUTHWELL v. NICHOLAS & ABDY* (1732), 1 Madd. 9, n.; 56 E. R. 4.

Annotation:—Mentd. Falcke v. Gray (1859), 4 Drew. 651.

2504. — *—*—*—*—A purchaser cannot declare off a contract, on the ground of the vendor not having perfected the title within a reasonable time, where the former who was in possession had been aware, from an early period of the treaty, that there was some objection to the abstract, but has nevertheless continued to negotiate with the latter down to a recent period, & then on a sudden, a fortnight after the last act of negotiation, tells him, that he abandons the contract.—*WARDE v. JEFFERY* (1817), 4 Price, 294; 146 E. R. 469.

2505. — *—*—*—*—There is no time fixed for completion, but that is not uncommon on the sale of real estate; & if no time is fixed, the inference is that the completion will be within a reasonable time (*LINDLEY, L.J.*).—*SIMPSON v. HUGHES* (1897), 66 L. J. Ch. 334; 76 L. T. 237; 13 T. L. R. 271; 41 Sol. Jo. 330, C. A.

2506. — *—*—*—*—When a person employs a house agent to sell the lease of a house of which he is in occupation & nothing is said about going out of possession there is an implied promise to do so

within a reasonable time.—*NOSOTTI v. AUERBACH* (1899), 15 T. L. R. 140, C. A.

2507. — *—*—*Time not of the essence of the contract.*—In ordinary contracts of purchase, both parties are at once bound, & unless there be some special stipulation, or some peculiar circumstances, the time for payment of the purchase-money, or for conveyance of the estate, is not deemed of the essence of the contract (*LORD WESTBURY, C.*).—*WESTON v. COLLINS* (1805), 5 New Rep. 345; 34 L. J. Ch. 353; 12 L. T. 4; 29 J. P. 409; 11 Jur. N. S. 190; 13 W. R. 510, L. C.

2508. — *—*—*—*—It is no answer to an action at law for non-payment of the remainder of purchase-money agreed to be paid to the vendor on his executing a bond conditioned to cause the title to be completed & the premises to be conveyed to the vendee, that he, the vendor, purchased the estate sold at a sale of the property of a bkpt., whose assignee he was. Time is not of the essence of such a contract, nor is it an objection to the action that the bond was not tendered to the obligee till two years after the time when the money was to be paid by him.—*WILLETT v. CLARKE* (1822), 10 Price, 207; 147 E. R. 290.

——*—*—*Compulsory purchase.*—*See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 164, Nos. 424-427.*

SUB-SECT. 2.—EXECUTION OF CONVEYANCE.

A. In General.

2509. Vendor must procure execution by all necessary parties.—The person selling is bound to procure the execution of the conveyance by all necessary parties, & if any of them refuse to execute the contract may be considered as rescinded (*HOLROYD, J.*).—*ESDAILE v. OXENHAM* (1824), 3 B. & C. 225; 5 Dow. & Ry. K. B. 49; 107 E. R. 717.

Annotation:—Mentd. Goode v. Burton (1847), 1 Exch. 189.

Execution of deeds.—*See, generally, DEEDS, Vol. XVII., pp. 190-226; Law of Property Act, 1925 (c. 20), s. 74.*

By corporation.—*See Law of Property Act, 1925 (c. 20), s. 74.*

Right of purchaser to attestation.—*See Law of Property Act, 1925 (c. 20), s. 75.*

Surrender of copyholds.—*See COPYHOLDS, Vol. XIII., pp. 126-128.*

B. Under Power of Attorney.

See, generally, AGENCY, Vol. I., pp. 688 et seq.

See, now, Law of Property Act, 1925 (c. 20), ss. 123-129.

2510. Revocation of power of attorney—Principal himself performing act.—*SMITH & JENNING'S CASE* (1610), Lane, 97; 145 E. R. 329.

2511. Mental incapacity of principal.—A demurrer will not lie to a bill for specific performance of an agreement to buy land on the ground that the present mental incapacity of a necessary party to the conveyance, to join therein or to concur in a parol variation of the original written contract, appears on the face of the bill.

Qu.: whether an attorney can act under a power of attorney during the mental incapacity of the principal.—*BEAUFORT (DUKE) v. GLYNN* (1858), 3 Sm. & G. 213; 25 L. T. O. S. 171; 1 Jur. N. S. 888; 3 W. R. 463; 65 E. R. 630; *affd.*, 3 W. R. 502, L. J.

PART IX. SECT. 8, SUB-SECT. 1.
n. "Immediately upon such sale."
—*Equity Act* (17 Vict. c. 18), directs

that on sales by a barrister, he shall execute a conveyance of the land "Immediately upon such sale":
—*Held*: this meant without any

improper delay; & three weeks after the sale was not an unreasonable time.—*DOE d. JARDINE v. COGLEY* (1863), 10 N. B. R. (5 All.) 661.—*CAN.*

2512. — Bankruptcy of principal.]—M. & J. were carrying on business in partnership. In Sept. 1869, J. gave to A. a power of attorney, authorising him to sell certain property of J., including a particular ship which was in fact partnership property, & then went abroad. In Nov. a mtge. deed was executed, by which, after reciting that the partners & each of them were indebted to S. in an amount not ascertained, M. & J. purported to convey to S. property which formed nearly the whole assets of the partnership, to secure all moneys which then were or might thereafter become due to S. from the partners or either of them. At the same time a bill of sale was executed, by which J., with the concurrence of M., purported to assign the ship to S. absolutely at a certain price, subject to the incumbrances thereon. These deeds were executed by M. & A. as attorney for J. In Apr. 1870, M. & J. were adjudged bkpts.; the act of bkpcy. by J. being his leaving England in Sept. 1869, with intent to defeat or delay his creditors:—*Held*: (1) the mtge. was wholly void as against the trustee, for that by it M., knowing the firm to be insolvent, attempted to make the partnership property a security for separate debts of himself & J., which was a fraud on the creditors of the partnership & an act of bkpcy.; (2) although a power of attorney is not for all purposes revoked by an act of bkpcy., & a sale under it to a purchaser who had no notice of an act of bkpcy. would be good as against the trustee under a subsequent adjudication, the bill of sale was void, for that S. knew facts which were sufficient to inform him that J. had committed an act of bkpcy., & he could not escape the consequence by saying that he had not drawn this inference from them.—*Re DOUGLAS, Ex p. SNOWBALL* (1872), 7 Ch. App. 534; 41 L. J. Bey. 49; 26 L. T. 894; 20 W. R. 786, L. J.J.

Annotations:—*As to* (2) *Apld.* *Elliott v. Turquand* (1881), 7 App. Cas. 79. *Reid.* *Re Boocock*, [1916] 1 K. B. 816; *Horbert's Trustee v. Higgins*, [1926] Ch. 791. *Generally*, *Mentd.* *Vane v. Vane* (1873), 28 L. T. 320.

2513. — Principal becoming alien enemy—Subsequent to execution of power.]—The fact that the principal is an alien enemy does not avoid a contract for the sale of land made by his attorney appointed by an irrevocable power of attorney before he had assumed enemy character.

Deft., who was of German nationality, had carried on business & owned a leasehold house in England. On May 20, 1915, under a power of attorney declared to be irrevocable for twelve months, he appointed a solr. to be his attorney to sell the leasehold house & execute the necessary deeds. On May 27, under a permit, he left England for Germany. On June 2, the house was bought by pltf. without knowledge of *deft.*'s nationality. On discovering the facts, he brought an action for a declaration that the contract was dissolved or void, & for a return of his deposit:—*Held*: although the inference should be drawn from the facts that *deft.* had returned to Germany, & was an alien enemy on June 2, neither the making nor the completion of the contract involved any intercourse with the enemy, as the irrevocable power of attorney to the solr. empowered him to convey the property & receive the purchase-money without communicating further with *deft.*—*TINGLEY v. MÜLLER*, [1917] 2 Ch. 144; 86 L. J. Ch. 625; 116 L. T. 482; 33 T. L. R. 369; 61 Sol. Jo. 478, C. A.

Annotations:—*Mentd.* *Naylor, Benzon v. Kralnische Industrie Gesellschaft*, [1918] 1 K. B. 331; *Rodriguez v. Speyer*, [1918] A. C. 59; *Re Sutherland, Bechoff v. Bubna* 1921, 65 Sol. Jo. 513.

2514. Surrender of copyholds by attorney—

Custom for personal surrender—Validity of custom.]—Purchaser of copyhold not obliged to accept of surrender by letter of attorney. A custom, that it must be in person, is not contrary to law.—*MITCHEL v. NEALE* (1755), 2 Ves. Sen. 679; 28 E. R. 433, L. C.

2515. — To satisfy debt of attorney—Power coupled with interest.]—A power of attorney authorising a surrender of copyhold premises for the purposes of sale, in order that the person authorised may be satisfied a debt, is a power coupled with an interest & therefore cannot be revoked.—*GAUSSEN v. MORTON* (1830), 10 B. & C. 731; 5 Man. & Ry. K. B. 613; 8 L. J. O. S. K. B. 313; 109 E. R. 622.

Annotations:—*Mentd.* *Smart v. Sandars* (1848), 5 C. B. 895; *Re Hannan's Empress Gold Mining & Developing Co.*, *Ex p. Michael* (1896), 65 L. J. Ch. 902.

C. Non-Execution by One Party.

See, generally, DEEDS, Vol. XVII., pp. 221 *et seq.*

2516. Deed binds party executing.]—If one party executes an indenture it shall be his deed though the other party does not execute it.—*FOSTER v. MAPES* (1590), Cro. Eliz. 212; Owen, 100; 78 E. R. 468.

Annotations:—*Mentd.* *Tisdale v. Essex* (1613), Hob. 31; *Hayes v. Bickerstaff* (1669), Vaugh. 118; *Nash v. Palmer* (1816), 5 M. & S. 374; *Fowle v. Welch* (1822), 2 Dow. & Ry. K. B. 133.

2517. Whether deed binds party not executing—Assignee of leaseholds accepting benefit of assignment.]—Assignee of leaseholds accepting the benefit of an assignment held, in equity, liable to the covenants on his part contained in the assignment, though he did not execute it.—*WILSON v. LEONARD* (1840), 3 Beav. 373; 49 E. R. 146.

Annotations:—*Mentd.* *Nokes v. Fish* (1857), 3 Drew. 735; *Coope v. Cresswell* (1866), 14 L. T. 262.

2518. — Declaration against dower.]—Where upon a purchase of freehold estate the conveyance deed contained a declaration, "that no widow of the purchaser should be dowable out of the hereditaments":—*Held*: to be unnecessary, for the validity of the declaration, that the deed should be executed by the purchaser.—*FAIRLEY v. TUCK* (1857), 27 L. J. Ch. 28; 30 L. T. O. S. 126; 3 Jur. N. S. 1089; 6 W. R. 9.

2519. — Reservation of right of way.]—From 1867 to 1902 farms called "White Lodge" & "Coxhill" had been owned by the same person, & during all this time the tenants of Coxhill had by leave, either asked for or not, used a way over White Lodge. In 1902 the owner of the farms agreed to sell White Lodge, the agreement stating that there were reserved "to the vendor, his heirs & assigns, the owners & occupiers for the time being of" Coxhill, "& their servants & others authorised by them, all rights of way hitherto exercised by them in respect of" Coxhill "over any portion of" White Lodge. The conveyance contained a similar reservation, but was not executed by the purchaser, who, however, took possession of White Lodge:—*Held*: the purchaser & his successors in title, taking with notice, were bound to give effect to the reservation.—*MAY v. BELLEVILLE*, [1905] 2 Ch. 605; 74 L. J. Ch. 678; 93 L. T. 241; 54 W. R. 12; 49 Sol. Jo. 651.

SUB-SECT. 3.—PURCHASE-MONEY.

A. In General.

2520. What is "purchase-money"—Whether bonus payable under Act of Parliament included.]—

Sect. 8.—Completion: Sub-sect. 3, A. & B. (a), (b) & (c) i. & ii.]

"Purchase-money" is the money which a purchaser pays to the vendor for the estate which he is buying, & does not include money paid by a third party to the vendor in order to induce him to sell to the purchaser at a certain price. Therefore the percentage or bonus payable out of the Irish Land Purchase Fund under Irish Land Act, 1903 (c. 37), s. 42, in certain cases, to a vendor of land in Ireland does not form part of the "purchase-money" of that land in the ordinary sense of that term.—*Re OLIVER, RAMSDEN v. RAMSDEN* (1910), 103 L. T. 422; 55 Sol. Jo. 12.

2521. Part left unpaid for many years—Lands in possession of third parties.]—*HUNTON v. DAVIES* (1670), 2 Rep. Ch. 44; 21 E. R. 611.

2522. Covenant to pay several persons beneficially entitled—Several covenant.]—*POOLE v. HILL*, No. 2489, *ante*.

B. Payment of Purchase-Money.

(a) In General.

2523. Payment to trustees—Personal attendance of trustees at completion—Or payment into joint account.]—On a sale of land by trustees for sale, the purchaser made a requisition, which was in accordance with the usual practice of conveyancers, that the vendors should, on completion, either attend personally to receive the purchase-money, or should give the purchasers a written authority to pay the purchase-money into some bank to their joint account; but the vendors' solrs. claimed to have the purchase-money paid to them on production of the executed conveyance with a receipt indorsed:—*Held*: as a general rule, under ordinary circumstances, trustees are not justified in authorising their solr., or other agent to receive purchase-money which ought to be paid to them personally; & therefore, the purchasers were entitled, as a matter of prudence, to insist on the requisition.—*Re BELLAMY & METROPOLITAN BOARD OF WORKS* (1883), 24 Ch. D. 387; 52 L. J. Ch. 870; 48 L. T. 801; 47 J. P. 550; 31 W. R. 900, C. A.

Annotations:—Fold. Re Flower & Metropolitan Board of Works (1884), 27 Ch. D. 592. *Consd. Day v. Woolwich Equitable Bldg. Soc.* (1888), 40 Ch. D. 491. *Reff. Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259; *Re Hetling & Merton's Contract*, [1893] 3 Ch. 269.

2524. ———.]—On a sale of land by trustees with power of sale the purchasers made a requisition that either the vendors should attend personally to receive the purchase-money, or the purchase-money should be paid into a bank to the joint account of the vendors under a written direction to be signed by them & given to the purchasers. The vendors refused to comply with the requisition, alleging that it was inconvenient so to do, & proposed that one of them

should attend & receive the purchase-money under a written direction to that effect to be signed by them all:—*Held*: the purchasers were entitled to insist upon their requisition.—*Re FLOWER & METROPOLITAN BOARD OF WORKS* (1884), 27 Ch. D. 592; 53 L. J. Ch. 955; 51 L. T. 257; 32 W. R. 1011.

2525. Set-off—Purchase-money & costs of specific performance action—Due in different rights.]—A purchaser obtained judgment for specific performance of a contract of sale against his vendor with costs. The vendor could only make title as administratrix of intestate. The vendor was entitled beneficially as next of kin of intestate to a portion of the proceeds of sale. On motion to retain the costs of the action out of the vendor's beneficial interest in the purchase-money:—*Held*: the ct., having no power in this case to administer the estate of intestate, pltf. purchaser could not bring into account all, or any part of an unascertained sum to which deft. might be beneficially entitled in the administration of intestate's estate as against the purchase-money which was due to deft. in her representative capacity.—*PHILLIPS v. HOWELL*, [1901] 2 Ch. 773; 71 L. J. Ch. 13; 85 L. T. 777; 50 W. R. 73; 46 Sol. Jo. 12.

Illegal agreement.]—*See CONTRACT*, Vol. XII., p. 277, No. 2272.

Payment by promissory note—Due on intended date of completion.]—*See BILLS OF EXCHANGE*, Vol. VI., p. 150, No. 987.

Compulsory purchase.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 226-236.

(b) Payment by Cheque.

2526. When payment made—Cheque stopped—Order to stop subsequently withdrawn.]—T. being possessed of a leasehold messuage & premises, on which he had created several charges, contracted to sell the same to O., & by a deed dated Aug. 4, 1855, the premises were assigned to O. for the residue of the term subject to a mtge. thereon to L. Besides L.'s mtge., there were equitable charges in the hands of a second & third incumbrancer. On the same day, Saturday Aug. 4, O. handed to T. a cheque, drawn by the firm of which he was partner, upon their private bankers, for the amount of the purchase. Afterwards, fearing that the insurance might not have been paid, or that interest on L.'s mtge. might be in arrear, O. stopped payment of the cheque before the following Monday morning. On Aug. 8, however, O. was induced to withdraw his countermand, & the money was paid on the same day. On the day before, Aug. 7, O. had been made acquainted with the existence of the second & third incumbrances. The bill was filed by the third incumbrancer, praying to be allowed to redeem the first & second, & that O. might redeem him. Pltf. contended that the purchase was not

PART IX. SECT. 8, SUB-SECT. 3.—A.

*o. What amounts to good payment.]—*Payment in "good notes" does not necessarily mean "good negotiable notes."—*MCARTHUR v. WINSLOW* (1849), 6 U. C. R. 144.—CAN.

*p. Action for foreclosure on non-payment of purchase-money.]—*In an action by vendor against purchaser to recover payment overdue under an agreement for sale of land, & to have a time fixed for making such payments, & in default, foreclosure; & in the alternative, for the fixing of a time for payment of amount, & in default, for a declaration that pltf. was entitled to a lien therefor & enforcement thereof by a sale of the land:—*Held*: a personal judgment for amount due

& foreclosure should not be ordered at same time, the rights of the parties under an agreement for sale being quite different from rights under a mtge., & this action was not similar to an action for specific performance, nor to a mtge. action.—*HARGREAVES v. SECURITY INVESTMENT CO.* (1914), 29 W. L. R. 317; 7 W. W. R. 1; 19 D. L. R. 677; 7 Sask. L. R. 125.—CAN.

*q. Right to conveyance—Before payment of last instalment of purchase-money.]—*Where under an agreement for the sale of land the purchase-money is payable by instalments, although the agreement contemplates that the purchaser is to have immediate possession the purchaser is not entitled to a transfer before the whole of the

purchase-money has been paid, in the absence of provision to that effect.—*HILL v. KEENE* (1904), 23 N. Z. L. R. 404.—N.Z.

PART IX. SECT. 8, SUB-SECT. 3.—B. (a).

*r. Construction of receipt—Whether purchase-money should be paid in cash.]—**ANDERSON v. FAWCETT* (1879), 19 N. B. R. (3 P. & B.) 34.—CAN.

PART IX. SECT. 8, SUB-SECT. 3.—B. (b).

*t. When payment made—Cheque stopped.]—*A contract for the purchase & sale of property is completed when the purchaser receives an executed conveyance & then gives a cheque for

completed on Aug. 4 by delivery of the cheque, & before Aug. 8, O. had notice of the second & third charges. O. contended that the purchase was complete on Aug. 4, & asserted his right to redeem L. in priority to pltf.:—*Held*: the purchase was not completed on Aug. 4 by delivery of the cheque, considering the circumstances that took place afterwards, & decree made in conformity with the prayer of the bill.—*TILDESLEY v. LODGE* (1857), 3 Sm. & G. 543; 30 L. T. O. S. 29; 3 Jur. N. S. 1000; 65 E. R. 772.

Whether amounting to payment.—*See* CONTRACT, Vol. XII., pp. 462, 463, Nos. 3755–3765.

(c) *Payment to Persons Other than Actual Vendor.*
i. *In General.*

See Law of Property Act, 1925 (c. 20), s. 124.

Authority of agent to receive payment.—*See, generally,* AGENCY, Vol. I., pp. 361 *et seq.*

2527. Right of purchaser to apply part of purchase-money—In discharge of mortgage—Where some of parties infants.—Purchaser not permitted to apply part of his purchase-money in discharge of a mtge. on the estate, though some of the parties consented, others being infants; & that there was such incumbrance, not appearing on the report. *Qu.*: could it be done, if all were competent, & consented.—*v. STRETTON* (1791), 1 Ves. 266; 30 E. R. 335, L. C.

2528. Right of incumbrancer—to restrain payment—to heir of vendor.—Injunction against purchaser on behalf of creditor to restrain payment to heir.—*GREEN v. LOWES* (1791), 3 Bro. C. C. 217; 29 E. R. 499.

Annotation:—*Refd.* *Re Moon*, *Holmes v. Holmes*, [1907] 2 Ch. 304.

2529. ——— To vendor—Unsecured debt.—*ANON.* (1875), 1 Char. Cham. Cas. 17.

2530. ——— To payment of unpaid purchase-money—No appropriation of debt due by vendor—Equitable mortgagee without notice.—In 1815 deft. P. became the purchaser from N. of a piece of land, the purchase-money to be paid in the years 1852 & 1855, as mentioned in the agreement. N. retained the title deeds of the land, & in 1851 deposited them with pltf. to secure the payment of a sum then advanced. Between deft., P. & N. there were various cash dealings, & in 1848 the amount due by P. in respect of the purchase-money, etc., was, by means of the money due to him, reduced. The accounts between the parties continued unsettled, & no appropriation of the balance due to P. was made by him by way of satisfaction of the residue of the purchase-money due to N., who in Dec. 1855, was adjudicated bkpt. The evidence as to when P. received notice of pltf.'s equitable mtge. was conflicting:—*Held*: pltf. was entitled to a decree against P. to the extent of the equitable interest which N. had in the land, no appropriation of the debt due to P. having been made before he had notice of the equitable lien of pltf.—*RAYNE v. BAKER* (1859), 1 Giff. 241; 6 Jur. N. S. 366; 65 E. R. 903.

2531. Remedy of purchaser—On failure of consideration—Payment to vendor's assignee by common consent.—Under a contract of sale money due to the vendor was by common consent paid by the purchaser to a third person to whom the vendor executed an assignment of the contract. Periodical payments were also made by the

purchaser to the assignee to be applied for a specific purpose. There was a failure of consideration on the part of the vendor which would have entitled the purchaser to repayment from him:—*Held*: the purchaser was not entitled to repayment from the assignee of the money paid by common consent or of the periodical payments in so far as they were in fact appropriated to the specified purpose.—*MACKUSICK v. FLEMING* (1904), 73 L. J. Ch. 826; 90 L. T. 101; 20 T. L. R. 263, H. L.

Against vendor's agent.—*See* AGENCY, Vol. I., pp. 667–668, Nos. 2808–2814.

Payment of mortgage debt.—*See, generally,* MORTGAGE, Vol. XXXV., pp. 603 *et seq.*

ii. *Solicitors.*

See Law of Property Act, 1925 (c. 20), s. 69; & *generally,* SOLICITORS.

2532. Authority to receive purchase-money.—It is well settled that it is not within the ordinary business of a solr. to receive purchase-money belonging to his client, or money due to him on mtge., nor to receive money from him for the purpose of investment generally, & one partner is not liable for the misapplication of money so received by another without his privity.

Secus, where the money is received for the purpose of being invested on a particular security.—*BOURDILLON v. ROCHE* (1858), 27 L. J. Ch. 681; 31 L. T. O. S. 264; 6 W. R. 618.

Annotations:—*Consd.* *Eager v. Barnes & Bridger* (1862), 7 L. T. 408. *Distd.* *St. Aubyn v. Smart* (1868), 3 Ch. App. 646. *Consd.* *Plumer v. Gregory* (1871), L. R. 18 Eq. 621. *Refd.* *Biggs v. Bree* (1881), 51 L. J. Ch. 61.

2533. ——— On production of conveyance containing receipt.—A solr. is not, by virtue of his office, entitled to receive purchase-money, even though he has possession, of the deed of conveyance duly executed, with indorsed receipt duly signed.—*VINEY v. CHAPLIN* (1858), 2 De G. & J. 468; 27 L. J. Ch. 434; 31 L. T. O. S. 143; 4 Jur. N. S. 619; 6 W. R. 562; 44 E. R. 1071, L. C. & L. J.J.

Annotations:—*Apld.* *Bourdillon v. Roche* (1858), 27 L. J. Ch. 681. *Distd.* *St. Aubyn v. Smart* (1867), L. R. 5 Eq. 183. *Consd.* *Dundonald v. Masterman* (1869), L. R. 7 Eq. 504. *Apld.* *Re Shanks, Ex p. Swinbanks* (1879), 11 Ch. D. 525. *Consd.* *Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387. *Refd.* *Plumer v. Gregory* (1874), L. R. 18 Eq. 621; *Essex v. Danicell, Danicell v. Essex* (1875), L. R. 10 C. P. 538; *Gordon v. James* (1885), 53 L. T. 641; *Re Helling & Merton's Contract*, [1893] 3 Ch. 269.

2534. ——— Where vendor a trustee.—*Conveyancing & Law of Property Act*, 1881 (c. 41), s. 56, does not authorise vendors who are trustees with a power of sale to require the purchaser to pay the purchase-money to their solr. on production of the deed of conveyance duly executed in cases where before the Act they could not have required the purchaser to pay the purchase-money to their solr. under a special authority. Trustees of real estate with a power to sell & give receipts, sold the estate. The purchasers required that the vendors should attend in person to receive the purchase-money, or should authorise the purchaser to pay it into a bank to the joint account of the vendors. The vendors insisted that the money should be paid to their solr. on his producing the conveyance duly executed. They gave no special reason why the money should be paid to the solr., but relied

the purchase-price which the vendor accepts as cash though payment by the bank is stopped before it is presented.—*REDICAN v. NESBITT*, [1924] 1 D. L. R. 536; [1924] S. C. R. 135; [1924] 1 W. W. R. 305.—*CAN.*

PART IX. SECT. 8, SUB-SECT. 3.—
B. (c) i.

a. *Money paid to mortgagee by purchaser—Request of mortgagor.*—*BRANIGAN v. CARTWRIGHT* (1864), 23 U. C. R. 264.—*CAN.*

b. *Payment of money to agent—Failure to obtain title to part of lands purchased—Responsibility of alleged principal—Return of money.*—*SMITH v. BOND* (Man.) (1914), 28 W. L. R. 163.—*CAN.*

Sec. 8.—Completion: Sub-sect. 3, B. (c) ii., & (d), & C. (a) & (b) i. & ii.]

on Conveyancing & Law of Property Act, 1881 (c. 41), s. 56. A summons having been taken out under Vendor & Purchaser Act, 1874 (c. 78):—*Held*: Conveyancing & Law of Property Act, 1881 (c. 41), s. 56, had no application, & the purchasers had a right to insist on their requisition.—*Re BELLAMY & METROPOLITAN BOARD OF WORKS* (1883), 24 Ch. D. 387; 52 L. J. Ch. 870; 48 L. T. 801; 47 J. P. 550; 31 W. R. 900, C. A.

Annotations:—Apld. Re Flower & Metropolitan Board of Works, Re Flower & Same (1884), 27 Ch. D. 592. *Consd. Day v. Woolwich Equitable Bldg. Soc.* (1888), 40 Ch. D. 491; *Re Hetling & Merton's Contract*, [1893] 3 Ch. 269. *Refd. Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259.

See, now, Trustee Act, 1925 (c. 19), s. 23 (3).

2535. ——— *What amounts to production — Having deed in office not sufficient.*—A solr. producing a deed containing a receipt must, in order to discharge a person paying him, be acting for the person sought to be charged, & having the deed in his office is not equivalent to production of it.

In my opinion that refers to a solr. acting in some way for the party sought to be charged, & does not mean that where a mtgor. has no solr. acting for him, the solr. of the mtgee. can, by producing the deed to the mtgee., give a discharge on the mtgors.' behalf (*NORTH, J.*).—*DAY v. WOOLWICH EQUITABLE BUILDING SOCIETY* (1888), 40 Ch. D. 491; 58 L. J. Ch. 280; 60 L. T. 752; 37 W. R. 461.

Annotations:—Consd. Re Hetling & Merton's Contract, [1893] 3 Ch. 269; *King v. Smith*, [1900] 2 Ch. 425.

2536. ——— *Solicitor must be acting for party sought to be charged.*—*DAY v. WOOLWICH EQUITABLE BUILDING SOCIETY*, No. 2535, *ante*.

2537. ——— *Presumption in regard to solicitor producing deed.*—I observe Messrs. Hood & Challis, in their note on s. 56, say (*Hood & Challis on the Conveyancing Acts*, 5th ed. p. 138): "In the absence of anything to suggest the contrary, it seems that the person paying the money may, & indeed, is bound to, assume that the solr. producing the deed is acting as solr. for the person having power to give a discharge." That proposition seems to be sound, for, if it were not so, it is obvious that the person to whom the deed is produced might be put in the very awkward position of having to choose between the risk of losing his money, & the risk of having to pay the costs of an action for specific performance, if the ct. should hold that he ought to have accepted the deed produced by the solr. as giving authority for payment to the solr. (*FARWELL, J.*).—*KING v. SMITH*, [1900] 2 Ch. 425; 69 L. J. Ch. 598; 82 L. T. 815; 16 T. L. R. 410.

Annotation:—Refd. Howatson v. Webb, [1907] 1 Ch. 537.

2538. ——— *Under power of attorney—On behalf of trustee.*—On Sept. 14, 1892, vendors contracted to sell a piece of freehold land subject to the condition, that "if from any cause whatever other than the wilful default of the vendors" the purchase should not be completed by the day fixed for completion, the purchaser should pay interest on the purchase-money until completion. The property was subject to a mortgage to two trustees, one of whom, P., a solr., had gone abroad before the date of the contract, having given to his partner a general power of attorney, authorising

him to execute deeds & transfer any property held by P. as trustee or mtgee. The vendors knew that it would be difficult to communicate with P., but, relying on the sufficiency of the power of attorney, they fixed Nov. 10, 1892, for the completion of the purchase. The purchaser, however, declined to complete without a conveyance from P. himself, alleging that, notwithstanding Trustee Act, 1888 (c. 59), s. 2, there was no person to whom the mortgage money could safely be paid. A conveyance from P. was ultimately obtained; but owing to the delay thus caused the purchase was not completed until Mar. 1, 1893, & the vendors claimed interest on the purchase-money from Nov. 10, 1892:—*Held*: (1) the case was not within Trustee Act, 1888 (c. 59), s. 2, & the purchaser was justified in refusing to complete without a release from P.; & (2), the delay in completion was attributable to the wilful default of the vendors, & they were not entitled to any interest on the purchase-money.

I have no doubt myself that a trustee can execute a deed by an attorney & can empower that attorney to receive, or join in receiving trust money, & that s. 2 of Trustee Act, 1888 (c. 59), s. 2, will protect a purchaser in paying money to a person so authorised to act. But the power of attorney executed by P. in 1890 had no reference whatever to this particular transaction & was as regards all trust matters, a delegation of his duty to his various *cestuis que trust* (*LINDLEY, L.J.*).—*Re HETLING & MERTON'S CONTRACT*, [1893] 3 Ch. 269; 62 L. J. Ch. 783; 69 L. T. 266; 42 W. R. 19; 9 T. L. R. 553; 37 Sol. Jo. 617; 2 R. 543, C. A.

Annotations:—As to (2) Distd. Re London Corp'n. & Tubbs' Contract, [1894] 2 Ch. 524. *Consd. Re Wilsons & Stevens' Contract*, [1894] 3 Ch. 546. *Apld. Re Strafford & Maples*, [1896] 1 Ch. 235. *Consd. Re Woods & Lewis's Contract* (1898), 67 L. J. Ch. 475. *Apld. Re Pelly & Jacob's Contract* (1899), 80 L. T. 45. *Consd. Bennett v. Stone*, [1903] 1 Ch. 509; *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648.

Authority to receive mortgage money.—*See MORTGAGE*, Vol. XXXV., pp. 384, 604, 605, Nos. 1272, 3431–3436.

(d) *Payment into Court.*

2539. When ordered—*Specific performance action — Purchaser in possession—Expenditure on alteration & improvements.*—Purchaser in possession, who has made alterations & improvements on the estate, ordered to pay the purchase-money into ct.—*BRAMLEY v. TEAL* (1818), 3 Madd. 219; 56 E. R. 490.

2540. ——— *— A purchaser in possession making improvements, etc., but objecting to the title, not obliged to pay purchase-money into ct.*—*GELL v. WATSON* (1818), 3 Madd. 225; 56 E. R. 492.

2541. ——— *Area sold in dispute.*—According to the bill a parol agreement was for sale, & possession had been given of, 5 acres. According to the answer, of 3 acres only. Motion that the purchase-money for 5 acres, or otherwise for 3 acres, might be brought into ct., refused.—*BENSON v. GLASTONBURY CANAL CO.* (1837), 1 Coop. temp. Cott. 350; Coop. Pr. Cas. 42; 47 E. R. 890, L. C.

2542. ——— *Mortgagees refusing to concur.*—A sale having been made by a party claiming as

PART IX. SECT. 8, SUB-SECT. 3.— B. (d).

c. *When ordered — Whether pending proceedings.*—Where there was a controversy as to whether a purchaser bought subject to or free from a mtge. which was on the property, & there was

no suggestion of danger in respect of the purchase-money, the ct. in a very special case refused to order payment of the amount into ct. pending proceedings, though a conveyance had been executed & the purchaser had gone into possession.—*MULHOLLAND v. HAMILTON* (1868), 15

Gr. 53.—CAN.

d. ——— *Whether before title accepted.*—*ELLWOOD v. PEIRCE* (1878), 7 P. R. 427.—CAN.

e. *Default of plaintiff's solicitor — Non-payment into court of deposit.*—Where plt's solr. made default in

administrator *cum testamento annexo*, certain mtgees. on the property sold refused to give an account of the moneys due to them, or to concur in the conveyance to the purchaser on being paid, whereupon a bill was filed by the vendor & purchaser, as co-pltfs., against the mtgees. to redeem. The defence set up by the mtgees. being that the administrator had no right to redeem, on the ground that the original exor. had assented to a bequest made by testator of the property, the administrator refused to prosecute the suit, or to permit the purchaser to do so. A bill was then filed by the purchaser against the administrator to compel him to put him, the purchaser, in a situation to prosecute the suit against the mtgees., & it was ordered, on the application of pltf. for leave to prosecute that suit, etc., that pltf. should be at liberty to pay his purchase-money into ct.; & that deft. should concur in paying the deposit into ct., & should execute an assignment to pltf.; & that deft. should dismiss the bill in the suit to redeem, at his own expense; & pltf. should be at liberty to institute a suit against the mtgees. to redeem them.—*BIRCH v. DAVIES* (1841), 5 Jur. 909.

2543. — Charge on lot purchased—Objection to proposed application of purchase-money.—An order being made by consent in an administration suit for sale, out of ct., of the real estate, which was made subject to debts, & after discharging all debts & liabilities thereon, to pay the surplus into ct., & a purchaser of one lot, on which there was a contingent charge, objecting to the application of the moneys as directed, but being willing to pay the whole into ct., an order was made, on affidavit stating the ground of departure from the decree, without a petition, that the purchaser should pay all his purchase-money into ct.—*BELLAMY v. BELLAMY* (1847), 10 L. T. O. S. 262.

2544. — Trustees unable to give discharge.—Testatrix, by her will, declared that every person thereby made tenant for life should have such & the like powers of leasing, selling, & exchanging any part of the devised estate as were by her father's will given to the tenants for life & in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of leasing, selling, or exchanging; but gave trustees full power to sell & exchange the hereditaments therein comprised, & to give receipts for the purchase-money:—*Held*: tenant for life in possession of the estate devised by testatrix had the same powers of selling & exchanging that estate as were by the father's will given to the trustees, but such powers did not extend to giving receipts.

Semble, the difficulties which might be met with in exercising such power of sale in the absence of a power to give receipts, might be removed by paying the money into ct. under 10 & 11 Vict. c. 96; & upon such payment, the purchaser might safely complete.—*Cox v. Cox* (1855), 1 K. & J. 251; 69 E. R. 451.

—*See, further*, TRUSTS.

Remains property of vendor.—*See* Part VI., Sect. 4, *ante*.

C. Receipt for Purchase-Money.

(a) In General.

See, now, Law of Property Act, 1925 (c. 20), ss. 67–69.

payment into ct. of the 10 per cent. paid to him at the time of sale, under the conditions of sale:—*Held*: the other parties entitled to the purchase-money should not suffer thereby, but pltf.'s share should be charged with

the deficiency.—*MULRINS v. CLARKE* (1886), 11 P. R. 350.—*CAN.*

PART IX. SECT. 8, SUB-SECT. 3.—C. (a).

f. Persons to give receipt—Devises

Receipt clause in body of deed.—*See* DEEDS, Vol. XVII., pp. 370–373, Nos. 1807–1832.

2545. Person to give receipt—Land contracted to be sold by testator.—Testator devised his estates to trustees in trust to sell, & declared their receipts to be sufficient discharges; & he directed his trustees to complete any contracts for the sale of his estates, entered into during his lifetime & remaining incomplete at his death:—*Held*: his exor. was the proper party to give receipts for the purchase-moneys of the estates contracted to be sold by testator.—*EATON v. SANXTER* (1834), 6 Sim. 517; 3 L. J. Ch. 197; 58 E. R. 688.

Annotation:—*Mentd.* *Sceles v. Sherley* (1836), Donnelly, 127.

—*See, generally*, EXECUTORS, Vol. XXIV., pp. 623, 624, Nos. 6527–6531.

—**Sale by executor.**—*See* EXECUTORS, Vol. XXIV., pp. 680, 681, Nos. 7069, 7070.

—**Sale by joint mortgagees.**—*See* MORTGAGE, Vol. XXXV., p. 606, Nos. 3438, 3439.

—**Sale of settled land.**—*See* SETTLEMENTS, p. 757, Nos. 2854–2863, *post*.

—**Sale by trustees.**—*See* Sub-sect. 3, C. (b), *post*.

(b) Trustees.

i. In General.

See, generally, TRUSTS & TRUSTEES.

2546. Stipulation that trustee shall give receipt.—On a sale by a trustee, he stipulated that his receipt should be deemed an effectual & conclusive discharge, & that the purchaser should not require the concurrence of the heir or *cestui que trust*. A decree was made for specific performance & reference as to title. The master found in favour of the trustee; & upon exceptions, the purchaser contended that the rule as to the concurrence of the *cestuis que trust* being one for their protection, it was a breach of trust to stipulate that they should not concur; but the ct. held the point concluded by the decree.—*WILKINSON v. HARTLEY* (1852), 15 Beav. 183; 51 E. R. 507.

Annotation:—*Mentd.* *Lyle v. Yarborough* (1859), John. 70.

ii. Trust for Sale.

See, generally, TRUSTS & TRUSTEES.

2547. Trustees alone can give receipt.—*RUTLAND (DUCHESS) v. WAKEMAN*, No. 2375, *ante*.

2548. ——On demurrer:—*Held*: a power given to trustees to sell lands, & divide the profits amongst *cestui que trusts*, who were infants, enables the trustees alone to give effectual receipts to a purchaser.—*SOWARBY v. LACY* (1810), 4 Madd. 142; 56 E. R. 660.

2549. ——Testator having a power to appoint realty among children devised & bequeathed “all my real & personal estate whatsoever whereof I have power to dispose,” upon trust to sell the realty & give valid discharges to purchasers & to apply the proceeds of the realty & the personalty in payment of his debts, funeral & testamentary expenses & then among his children in certain specified shares:—*Held*: the trustees could make a good title & give effectual receipts.—*COWX v. FOSTER* (1860), 1 John. & H. 30; 29 L. J. Ch. 886; 2 L. T. 797; 6 Jur. N. S. 1051; 70 E. R. 649.

Annotations:—*Mentd.* *Ferrier v. Jay* (1870), L. R. 10 Eq. 550; *Maunsell v. Maunsell* (1871), 24 L. T. 698; *Re Teape's Trust* (1873), L. R. 16 Eq. 442; *Busk v. Aldam* (1874), L. R. 19 Eq. 16; *Thornton v. Thornton* (1875), L. R. 20 Eq. 599; *Scotney v. Lomer* (1885), 29 Ch. D.

in trust for sale.—Devises in trust for sale of real estate must jointly receive or unite in receipts for the purchase-money, unless the will provides otherwise.—*EWART v. SNYDER* (1867), 13 Gr. 55.—*CAN.*

had been made to him, the estate was sold & conveyed to a purchaser, & the purchase-money was paid to the old & new trustees:—*Held*: the purchaser had obtained a good discharge for the purchase-money.—*WELSTEAD v. COLVILLE* (1860), 28 Beav. 537; 54 E. R. 472.

2559. Receipt of one trustee only.]—Lands devised to three trustees, upon trust for sale, were sold & the purchase-money paid to one of them, who was a solr., & acted in the matter of the sale as solr. for himself & the other trustees. The money having been retained by him & lost after his decease:—*Held*: it must be taken to have been received by him not in his capacity of solr., it being no part of his duty in that capacity to receive it, but in his capacity of trustee; & the survivor of the three could not, upon a common decree for an account, be held liable for its loss.—*Re FRYER, MARTINDALE v. PICQUOT* (1857), 3 K. & J. 317; 26 L. J. Ch. 398; 29 L. T. O. S. 86; 3 Jur. N. S. 485; 5 W. R. 552; 69 E. R. 1129.

Annotations:—*Mentd.* *St. Aubyns v. Smart* (1867), L. R. 5 Eq. 183; *Hale v. Adams* (1873), 21 W. R. 400.

2560.—*J*.—A firm of solrs. having been employed by the trustees of a will to receive the proceeds of testator's real estate, which had been taken by a railway co., paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency & death of the trustee to whom it was paid:—*Held*: the receipt of one trustee only, though also an exor., was not a sufficient discharge to the solrs. for the money which they had received by the authority of the two, & they were personally liable to make good the loss which had resulted to the trust estate from such improper payment.—*LEE v. SANKEY* (1873), L. R. 15 Eq. 204; 21 W. R. 286; *sub nom.* *LEE v. SANKEY, GINDER v. SANKEY*, 27 L. T. 809.

Annotations:—*Reid.* *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Re Eyre-Williams, Williams v. Williams*, [1923] 2 Ch. 533. *Mentd.* *Wilson v. Bury* (1880), 5 Q. B. D. 518; *Re Barney, Barney v. Barney*, [1892] 2 Ch. 265; *Mara v. Browne* (1895), 72 L. T. 765.

2561. Receipt by all—Payment to one.]—Trustees with a power to sell, & to invest the proceeds in Govt. or real securities, sold the estate, & received only part of the purchase-money, but executed a conveyance to the purchaser, on the back of which was indorsed a receipt for the whole sum, which was signed by them all. This deed, & the other title-deeds, they retained as a security for the unpaid purchase-money with interest, & they entered into a written agreement with the purchaser that the deeds should remain with them as such security, & that he should, if required, execute a proper mtge. This agreement was signed by the purchaser, & by the trustee in whose custody the deeds were placed. Eight years afterwards the purchaser paid the principal & interest of his debt to this trustee, & received from

him the deeds, including the conveyance with the receipt indorsed:—*Held*: by such payment the purchaser did not discharge himself of his liability incurred by participation in the breach of trust, & the trustee who received the money having misapplied it & absconded, the purchaser was made to pay it over again.—*WEBB v. LEDSAM* (1855), 1 K. & J. 385; 1 Jur. N. S. 775; 69 E. R. 508.

Annotations:—*Reid.* *Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387; *Re Flower & Metropolitan Board of Works* (1884), 27 Ch. D. 592.

D. Application of Purchase-Money.

(a) In General.

2562. Whether vendor bound to apply in payment of incumbrances.]—It is not a rule of equity that, upon the purchase of property, subject to incumbrances, for its full value, the vendor is bound to apply the purchase-money in payment of the incumbrances according to their priorities. Such a duty can only be the result of express agreement, or of a contract to be implied from the circumstances of the case.—*A.-G. v. COX, PEARCE v. A.-G.* (1850), 3 H. L. Cas. 240; 10 E. R. 93, H. L.; *reusg.* *S. C. sub nom. GREENWOOD v. TAYLOR* (1845), 14 Sim. 505.

Annotations:—*Mentd.* *Re Oriental Commercial Bank, Ex p. Maxoudoff* (1868), L. R. 6 Eq. 582; *Re Barnard's Banking Co., Forwoods' Claim* (1869), 5 Ch. App. 18; *Re Morrish, Ex p. Hart Dyke* (1882), 22 Ch. D. 410; *Lybbe v. Hart* (1885), 29 Ch. D. 8; *Shaw v. Lomas* (1888), 59 L. T. 177; *Revill v. Bethell*, [1918] 1 K. B. 638; *Richmond v. Savill*, [1926] 2 K. B. 530.

Sale under order in Lunacy.]—*See LUNATICS*, Vol. XXXIII., p. 165, No. 498.

(b) Trustees.

See, now, Trustee Act, 1925 (c. 19), s. 11.

SUB-SECT. 4.—COVENANT FOR PRODUCTION OF TITLE DEEDS.

See Part X., Sect. 4, *post*.

SECT. 9.—OTHER FORMALITIES.

SUB-SECT. 1.—ENROLMENT.

See R. S. C., Ord. 61, r. 9.

2563. Disentailing assurance—Right of purchaser to retain purchase-money—Until deed enrolled.]—Upon exceptions to the master's report of a good title:—*Held*: vendor, tenant in tail, can make a good title, without first barring the entail under the Fines & Recoveries Act, 1833 (c. 74); but the purchaser was allowed to retain the purchase-money till enrolment of the conveyance.—*CATTELL*

k. —*J*.—*Re LEWIS & THORNE* (1887), 14 O. R. 133.—*CAN.*

l. —*J*.—*FERNIE v. MAGUIRE* (1844), 6 I. Eq. R. 137.—*IR.*

m. *Appropriation of payments by vendor.*—A purchaser of land made a payment to his vendor on account without appropriating his payment. At the time payment was made it was immaterial to both parties how the appropriation was made; subsequently it became a matter of importance:—*Held*: the vendor might retrospectively appropriate & was not bound to apply the payments in discharge of interest rather than of principal.—*PHILLIPS v. UNITED INVESTORS, LTD.*, [1917] 1 W. W. R. 1348; 34 D. L. R. 283; 27 Man. L. R. 411.—*CAN.*

PART IX. SECT. 8, SUB-SECT. 3.—D. (a).

2562i. Whether vendor bound to apply in payment of incumbrances.]—*LYE v. ARMSTRONG* (1900), 1 Cout. Dig. 1379.—*CAN.*

2562ii. —*J*.—*Re MACDONALD, CRAIG & CO.*, [1924] 2 D. L. R. 587; [1924] 2 W. W. R. 219; 34 Man. L. R. 611.—*CAN.*

g. *Setting aside portion of purchase-money—As indemnity against dower claim.]*—Where in a suit for specific performance the wife of the vendor refuses to join in the conveyance for the purpose of barring her dower, the proper mode of protecting the purchaser is to set aside a sufficient portion of the purchase money to

indemnify him against the claim for dower in the event of the wife subsequently becoming entitled thereto by surviving her husband; the interest during the joint lives of the vendor & his wife to be paid to him, & also the principal so set aside on her decease.—*SKINNER v. AINSWORTH*, 24 Gr. 148.—*CAN.*

h. *Failure to complete purchase—Agreement to apply money paid on account of purchase to rent—Recovery back of money paid on purchase in excess of rent.]*—*HOLMES v. DAVIDSON* (1881), 15 N. S. R. (3 R. & G.), 61.—*CAN.*

j. *Duty of purchaser to see to application of purchase-money.]*—*Re TRELVEN & HORNER* (1881), 28 Gr. 624.—*CAN.*

Sect. 9.—Other formalities: Sub-sects. 1, 2, 3 & 4.
Part X. Sects. 1 & 2: Sub-sect. 1.]

v. CORRALL (1840), 4 Y. & C. Ex. 228; 9 L. J. Ex. Eq. 37; 160 E. R. 989.

Annotation:—Refd. Re Marshall & Salt's Contract, [1900] 2 Ch. 202.

—Of copyholds.]—See COPYHOLDS, Vol. XIII., p. 62, Nos. 761-766.

See, now, Law of Property Act, 1925 (c. 20), ss. 128 (1), 133.

Purchase of land for charitable purposes.]—See CHARITIES, Vol. VIII., pp. 280, 281, Nos. 534-553.

See, now, Settled Land Act, 1925 (c. 18), s. 29 (4).

SUB-SECT. 2.—REGISTRATION OF DEEDS.

See Law of Property Act, 1925 (c. 20), ss. 11, 197; REAL PROPERTY, Vol. XXXVIII., pp. 741 et seq.

2584. What must be registered—Vendor's lien.]

—A vendor of land in a register county, part of whose purchase-money remains unpaid, is under no obligation to register a memorial of the vendor's lien, but is entitled to rely on his equitable lien against sub-purchasers who have notice of it actual or constructive. Land belonging to the trustees of a charity, situated in the West Riding of Yorkshire, was sold by the trustees to R. & W., who were estate agents, & bought the land with the intention of selling it in lots for building purposes. Part of the purchase-money remained unpaid, & the vendors retained the deed of conveyance in their possession, but, at the request of the purchasers, the vendors' solr. registered a memorial of it in the West Riding registry. The vendors took no written security for their unpaid purchase-money, but relied on their equitable lien. R. & W. sold the land again in lots. P., one of the sub-purchasers, who took a mtge. on a small lot, made no inquiries himself, but left it, as he said, to R. & W. to "manage the business" for him, & they prepared the conveyance to him. The original vendors having brought an action to enforce their lien for the unpaid purchase-money against some of the sub-purchasers:—*Held*: there was no obligation on the original vendors to register a memorial of the vendor's lien.—*KETTLEWELL v. WATSON (1884)*, 26 Ch. D. 501; 53 L. J. Ch. 717; 51 L. T. 135; 32 W. R. 865, C. A.

Annotations:—Refd. Manks v. Whiteley, [1912] 1 Ch. 735.

Mentd. National Provincial Bank of England v. Jackson (1886), 33 Ch. D. 1; Farrand v. Yorkshire Banking Co. (1888), 40 Ch. D. 182; Re David Payne, Young v. David Payne, [1904] 2 Ch. 608; Berwick v. Price, [1905] 1 Ch. 632; Barker v. Stickney, [1919] 1 K. B. 121.

—Enfranchisement of copyholds in Middlesex.]

—*See COPYHOLDS, Vol. XIII., p. 155, No. 2005.*

2565. What assurance is capable of registration—Conditional agreement for sale of land—Yorkshire Registries Act, 1884 (c. 54), s. 14.]—An agreement in writing, whereby, in consideration of £200 then paid to the vendor by the purchaser, the vendor agreed to complete certain buildings

on a certain piece of land, & the purchaser agreed to purchase the buildings, when completed, for £750, the sum of £200 to be considered as in so much reduction of the purchase-money, is not an "assurance" which is entitled to be registered within Yorkshire Registries Act, 1884 (c. 54), s. 14.—*RODGER v. HARRISON, [1893] 1 Q. B. 161; 62 L. J. Q. B. 213; 68 L. T. 66; 41 W. R. 291; 9 T. L. R. 120; 37 Sol. Jo. 99; 4 R. 171, C. A.*

Annotation:—Mentd. Whitbread v. Watt, [1901] 1 Ch. 911.

2566. Effect of non-registration—Priority of subsequent registered conveyance.]—A registered conveyance of premises in Middlesex for valuable consideration established against a prior devise not registered; the evidence of notice, which ought to amount to actual fraud, not being sufficient.—*JOLLAND v. STAINBRIDGE (1797)*, 3 Ves. 478; 30 E. R. 1114.

Annotation:—Refd. Rolland v. Hart (1871), 6 Ch. App. 678.

2567. —Where notice of prior conveyance.]—In a case between two purchasers of lands in Yorkshire, where the second purchaser having notice of the first purchase, but that it was not registered, went on & purchased the same estate, & got his purchase registered; yet it was decreed, that having notice of the first purchase, though it was not registered, bound him, & that his getting his own purchase first registered was a fraud, the design of those Acts being only to give parties notice, who might otherwise, without such registry, be in danger of being imposed on by a prior purchase or mtge., which they are in no danger of when they have notice thereof in any manner, though not by the registry.—*BLADES v. BLADES (1727)*, 1 Eq. Cas. Abr. 358, pl. 12; cited in 3 Atk. at p. 654; 21 E. R. 1100, L. C.

Annotations:—Consd. Le Neve v. Le Neve (1748), 3 Atk. 646. Refd. Hine v. Dodd (1741), 2 Atk. 275; Agra Bank v. Barry (1874), L. R. 7 H. L. 135.

—Mortgages.]—See MORTGAGE, Vol. XXXV., pp. 453-458, Nos. 1942-1978.

Registration of judgments.]—See EXECUTION, Vol. XXI., pp. 567-571, Nos. 1423-1452.

Registration of charges on land.]—See MORTGAGE, Vol. XXXV., pp. 268-270, Nos. 265-274.

—Rentcharges & annuities.]—See RENT-CHARGES & ANNUITIES, Vol. XXXIX., pp. 118, 119, 124.

SUB-SECT. 3.—NOTICES.

See, generally, EQUITY, Vol. XX., pp. 310 et seq.

On purchase of equitable estate.]—See, generally, EQUITY, Vol. XX., pp. 296 et seq.

On sale by tenant for life.]—See SETTLEMENTS, pp. 744, 745, post.

On purchase by lessee under option.]—See LANDLORD & TENANT, Vol. XXX., p. 476, Nos. 1383-1385.

SUB-SECT. 4.—STAMPS.

See, generally, REVENUE, Vol. XXXIX., pp. 252-297.

PART IX. SECT. 9, SUB-SECT. 2.

2566 i. Effect of non-registration—Priority of subsequent registered conveyance.]—*Re DENNIS & LINDSAY, [1927] 4 D. L. R. 848; 61 O. L. R. 228.—CAN.*

2566 ii. —.]—*KNOWLING v. MCFAITHRIDGE (1900)*, 8 Nfld. L. R. 426.—NFLD.

n. —On easements acquired subsequently.]—*GODDARD v. SLINGERLAND (1911)*, 18 W. L. R. 324; 16

B. C. R. 329.—CAN.

o. What must be registered—Deed of bargain & sale.]—A deed poll will operate as a bargain & sale; & 4 Will. 4, c. 1, s. 47, has retrospective operation so as to make deeds of bargain & sale executed before the Act valid, without registry.—*ROGERS v. BARNUM (1836)*, 5 O. S. 252.—CAN.

p. Effect of registration—Cloud on title.]—Although the prior registration of a deed executed without consideration confers no title as against a bona

*fide purchaser for value, still, as such a deed being upon record will create a cloud upon the title, the ct. will decree its removal.—*ROSS v. HARVEY (1853)*, 3 Gr. 649.—CAN.*

q. Unregistered agreement for sale of land—Transfer of wrong lot by mistake—Subsequent purchase of lot covered by agreement—Knowledge of vendor & second purchaser—Fraud.]—*SYDIE v. SASKATCHEWAN & BATTLE RIVER LAND & DEVELOPMENT Co. (1913)*, 25 W. L. R. 570.—CAN.

Part X.—Title Deeds.

SECT. 1.—DELIVERY OF TITLE DEEDS.

2568. Form of action—Specific performance—Detinue.]—HARVEY v. SOUCHON (1922), 154 L. T. Jo. 452.

Conditions as to title deeds.]—See Part IV., Sect. 2, sub-sect. 12, *ante*.

SECT. 2.—CUSTODY OF TITLE DEEDS.

SUB-SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 47 (9).

2569. Whether right to deeds follows right to estate.]—ANON. (1365), Y. B. 39 Edw. 3, fo. 17.

*Annotation:—***Apld.** Buckhurst v. Fenner (1598), 1 Co. Rep. 1 a.

2570. —.]—ANON. (1370), Y. B. 44 Edw. 3, fo. 1, pl. 3.

*Annotation:—***Apld.** Buckhurst v. Fenner (1598), 1 Co. Rep. 1 a.

2571. —.]—Title deeds are incident to the possession under a freehold title.—STROBE v. BLACKBURN (1796), 3 Ves. 222; 30 E. R. 979, L. C.

*Annotation:—***Mentd.** Ogilvie v. Jeaffreson (1860), 2 Giff. 353.

2572. —.]—If a man seised in fee conveys land to another & his heirs without warranty all the title deeds belong to the purchaser as incident to the land though not granted by express words.—BUCKHURST (LORD) v. FENNER (1598), 1 Co. Rep. 1 a; 76 E. R. 1.

*Annotations:—***Consd.** Goode v. Burton (1847), 1 Exch. 189. **Refd.** Allwood v. Heywood (1863), 1 H. & C. 745. **Mentd.** Nokes's Case (1599), 4 Co. Rep. 80 b; Andrew v. Motley (1862), 12 C. B. N. S. 514.

2573. —.]—The person who is entitled to the inheritance has a right to the possession of the title-deeds; & it is no answer to an action founded on his right to the possession of the deeds to show that another person has a term of a thousand years vested in him to attend the inheritance.—AUSTIN v. CROOME (1842), Car. & M. 653.

2574. —.]—He who has occasion to use a deed is legally entitled to the custody of it; & where several are equally interested in it, either having possession may retain it against the others, consequently one cannot maintain detinue against a person in whose hands the party who first obtains possession of it has deposited it, to be redelivered to him on request. In detinue for an indenture, deft. pleaded that the indenture in the declaration mentioned was the grant of an annuity to pltf. for the life of B., secured upon certain freehold property of B., & the conveyance of that freehold by B. to S., as trustee for pltf. to secure the annuity; & that, after the making of the deed, & before pltf. had obtained or had possession of it, & before the detention, & before the commencement of the suit, S. had obtained possession of the deed, & delivered it to deft. to be kept, & redelivered to S. To this plea, pltf. replied, that S. did not obtain, nor had he possession of, the deed before pltf. had obtained possession of the same *modo et formâ*.—**Held:** this did not amount to a negative pregnant.—FOSTER v. CRABB (1852), 12 C. B. 136; 21 L. J. C. P. 189; 16 Jur. 835; 138 E. R. 853; *subsequent proceedings*, 12 C. B. 379.

*Annotations:—***Consd.** Taylor v. Sparrow (1863), 4 Giff. 703. **Apld.** Leathes v. Leathes (1877), 36 L. T. 646. **Distd.** Wright v. Rowbotham (1886), 33 Ch. D. 106.

2575. —.]—*Re* WILLIAMS & NEWCASTLE'S (DUCHESS) CONTRACT, No. 2588, *post*.

2576. — Vendor suffered to retain title deeds—Mortgage of estate—Right of purchaser as against mortgagee.]—The right to title deeds of an estate follows the right to the estate, & where the purchaser of an estate, in the absence of any fraudulent motive, suffered the vendor to retain the title deeds, & the latter mortgaged the estate, & delivered over the title deeds to the mtgee:—**Held:** the mtgee. was equally guilty of negligence, in not ascertaining who was in possession of the estate to which the deeds related, as the purchaser was in not getting possession of the deeds; & there was nothing to deprive the latter of the right, which, by the above proposition of law, he had; therefore, he might maintain trover for the deeds against the mtgee.—HARRINGTON v. PRICE (1832), 3 B. & Ad. 170; 110 E. R. 63; *sub nom.* HARRINGTON v. GLENN & PRICE, 1 L. J. K. B. 122.

2577. — Deeds merely collateral to title—Inspection by purchaser—Delivery of attested copies.]—(1) E. K., a tenant for life under a settlement, had a power to release the settled estates from charges, & to substitute other lands, & subject them to the charges, with the consent of the two trustees of the settlement, "to be signified by some deed to be duly executed by them respectively, & not otherwise." E. K. contracted to sell part of the settled estates called M. to O., & he conveyed the same to him by deed, to which the two trustees were made parties, for the purpose of signifying their consent to the charges being transferred to other lands in exoneration of M. In fact, this deed was executed by one trustee, under a power of attorney, dated six weeks after the date of the deed, & by the other trustee nine months after the same date. O. contracted to sell the land called M. to H., who objected to the title on the ground that the power of substitution in the settlement was not well exercised. O. filed a bill to enforce specific performance, & produced an affidavit showing that both the trustees had seen the draft of the deed before its execution, & were acquainted with & had consented to its contents:—**Held:** the due execution of the power had been sufficiently shown, & the purchaser must accept the title.

(2) H., the purchaser, also objected that the vendor did not hand over three of the title-deeds, nor offer to covenant to produce them, but the ct. held that, as in this case the deeds in question were only collateral to the title, & as the purchaser had inspected the three deeds, & had been furnished with attested copies of two of them, & had had an undertaking that an attested copy of the third should be produced, he must complete the purchase.—OFFEN v. HARMAN (1859), 1 De G. F. & J. 253; 29 L. J. Ch. 307; 1 L. T. 315; 6 Jur. N. S. 487; 8 W. R. 129; 45 E. R. 355, L. JJ.

2578. — Trouble & expense to vendor not considered.]—Conveyancing & Law of Property Act, 1881 (c. 41), s. 3 (6), does not affect the ordinary right of a purchaser to have the title deeds handed over to him on completion, & the mere fact that obtaining the deeds for this purpose may cause the vendor trouble & expense is no answer to the purchaser's demand.

On an open contract the vendor must bear the expense of obtaining title deeds required by the

Sect. 2.—Custody of title deeds: Sub-sects. 1, 2 & 3.
Sects. 3, 4 & 5.]

purchaser to be handed over on completion, although such title deeds are not in the vendor's possession, & are not referred to in the abstract.—*Re DUTHY & JESSON'S CONTRACT*, [1898] 1 Ch. 419; 67 L. J. Ch. 218; 78 L. T. 223; 46 W. R. 300; 42 Sol. Jo. 269.

2579. Agreement for sale by trustees—Refusal by one trustee to deliver deeds—Action of detinue by purchaser—Pleading.]—*MASON v. FARNELL* (1844), 12 M. & W. 674; 1 Dow. & L. 576; 13 L. J. Ex. 142; 2 L. T. O. S. 424; 152 E. R. 1369.

Annotations:—*Apld. Barnewall v. Williams* (1844), 7 Man. & G. 403; *Whitehead v. Harrison* (1844), 6 Q. B. 423. **Consd. Clossman v. White** (1849), 7 C. B. 43. **Distd. Morgan v. Marquis** (1853), 9 Exch. 145. **Refd. Clements v. Flight** (1846), 16 M. & W. 42.

2580. Deeds common to two estates—Sale of one property—Purchaser obtaining acknowledgment of right to production—Not entitled to custody.]—*Re JENKINS & COMMERCIAL ELECTRIC THEATRE CO.'S CONTRACT*, No. 2470, *ante*.

Enforcement of lien by custody of title deeds.]—*See LIEN*, Vol. XXXII., p. 291, No. 678.

Custody of title deeds of settled property.]—*See SETTLEMENTS*, pp. 701–704, *post*.

Custody & delivery of deeds in mortgage cases.]—*See MORTGAGE*, Vol. XXXV., pp. 410–416, 610–612, Nos. 1502–1560, 3474–3494.

SUB-SECT. 2.—PROPERTY SOLD IN LOTS.

2581. Delivery to owner of largest lot—On covenant for production—Suit to obtain covenant—Necessary parties.]—Deeds which relate to two distinct properties will not be delivered to the owner of the largest property, unless he exonerates the previous holder by an unqualified covenant to produce them. The original covenantee not a necessary party to a suit for the purpose of obtaining such a covenant.—*RUSCOE v. RICHARDS* (1837), 1 Jur. 304.

2582. ——— Meaning of “largest lot.”]—On a sale by auction of land in lots the purchaser of the lot largest in value, in the absence of any condition respecting them, is entitled to the custody of the title deeds relating to all the property; but if there be a condition that the purchaser of the “largest lot” shall have them, that must mean largest in superficial area.—*GRIFFITHS v. HATCHARD* (1854), 1 K. & J. 17; 23 L. J. Ch. 957; 23 L. T. O. S. 295; 18 Jur. 649; 2 W. R. 672; 69 E. R. 350.

2583. ———.]—By the conditions of sale, the title deeds were to be delivered to “the purchaser of the largest lot.” A. purchased the largest lot in value & extent, but B. purchased several lots, whose aggregate value & extent exceeded those of A.'s lot:—*Held*: A. was entitled to the custody of the deeds.—*SCOTT v. JACKMAN* (1855), 21 Beav. 110; 52 E. R. 800.

2584. ———.]—*KENNAIRD (LORD) v. CHRISTIE* (circa 1817), 21 Beav. 111, n.; 52 E. R. 801.

2585. Successive sales—Last purchaser entitled.]—*Re LOWE, CAPEL v. LOWE* (1901), 36 L. Jo. 73.

Right of purchaser to attested copy of title deeds.]—*See Sect. 3, post*.

SUB-SECT. 3.—VENDOR RETAINING PART OF ESTATE TO WHICH DEEDS RELATE.

See Law of Property Act, 1925 (c. 20), s. 45 (9).

2586. Agreement to deliver to purchaser—Covenant for production—“Proper” & “sufficient” production.]—An agreement on the sale of an estate that the title deeds should be delivered to the purchaser on the completion of the contract; but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper & sufficient covenant or covenants with the vendors for the production & delivery of copies of such deeds. The purchasers were trustees, & entered into the contract in pursuance of the directions in the will of their testator for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainder over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator:—*Held*: the agreement to enter into a proper & sufficient covenant for the production of the deeds did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times & under all circumstances; the word “sufficient” was connected with the word “proper”; the extent & sufficiency of the covenant must in a great degree depend on the mode in which the conveyance was taken; releasees to uses do not stand in a worse position than trustees, who, according to the ordinary rule of the ct., are required to covenant for their own acts only; & the ct. would not compel the purchasers, who were only releasees to uses, especially after the uses were executed by the statute, to enter into such covenants.—*ONSLow v. LONDESBOURGH (LORD)* (1852), 10 Hare, 67; 68 E. R. 812.

2587. Right of vendor to retain deeds—Vendor & Purchaser Act, 1874 (c. 78), s. 2, r. 5.]—*Re LOWE, CAPEL v. LOWE* (1901), 36 L. Jo. 73.

2588. ——— Meaning of “part of estate”—Estate in land.]—Above rule that “where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents”:—*Held*: to apply only to land, including leaseholds.

When a mtge. comprised land & policies of insurance on the life of the mtgor.:—*Held*: on a sale of the land by the mtgee., he retaining the policies, the purchaser was entitled to have the mtge. deed delivered to him.

Apart from above Act, it is clear that the right to the deed would go with the land. . . . Above rule when it speaks of the vendor retaining part of an estate clearly refers to part of an estate in land, that is, land with the enlarged meaning given to the word by Interpretation Act, 1889 (c. 63), s. 3, namely a freehold, copyhold or leasehold estate in land. In the present case the vendor does not retain any part of such an estate, & therefore he is not entitled to retain the mtge. deed. The deed must be delivered to the purchaser, & she must give the vendor the acknowledgment prescribed by Conveyancing & Law of Property Act, 1881 (c. 41), s. 9 (NORTH, J.).—*Re WILLIAMS & NEWCASTLE'S (DUCHESS) CONTRACT*, [1897] 2 Ch. 144; *sub nom. Re FULLER & LEATHLEY'S CONTRACT*, 66 L. J. Ch. 543; 76 L. T. 646; 61

PART X. SECT. 2, SUB-SECT. 2.
r. Delivery to owner of largest lot
—On covenant for production.]—When an estate is sold under a decree in

several lots, the purchaser of the largest lot is to have custody of the title deeds common to all the lots, on the terms of giving to the purchasers of the smaller lots, attested & compared copies, & a

covenant for their safe custody, & the production of them, when necessary.—*CUNNINGHAM v. HUME* (1839), 1 L. Eq. R. 150.—**IR.**

J. P. 454; 45 W. R. 627; 13 T. L. R. 412; 41 Sol. Jo. 529.

2589. — Retention of servient tenement—Deeds showing extinguishment of easement.]—Documents of title showing the title to, & the extinguishment of, an easement formerly appurtenant to the land sold, over a servient tenement retained by the vendor, relate to the servient tenement, & the vendor has a right to retain them under above sect.—*Re LEHMANN & WALKER'S CONTRACT*, [1906] 2 Ch. 640; 75 L. J. Ch. 768; 95 L. T. 259.

See, now, Law of Property Act, 1925 (c. 20), s. 45 (9).

SECT. 3.—RIGHT TO ATTESTED COPY.

2590. Right of purchaser—Sale in lots.]—A purchaser, who cannot have the original title deeds, the estate being sold in a great number of lots, is entitled to attested copies at the expense of the vendor, notwithstanding the inconvenience & expense.—*DARE v. TUCKER* (1801), 6 Ves. 460; 31 E. R. 1144, L. C.

2591. ——Purchaser of small lots entitled to attested copies of the title deeds, accompanying the principal purchase, at the expense of the vendor: no stipulation having been made upon the subject.—*BOUGHTON v. JEWELL* (1808), 15 Ves. 176; 33 E. R. 720, L. C.
Annotation:—Distd Cotton v. Scudamore (1855), 1 K. & J. 321.

2592. — Title deeds not deliverable.]—*Re LEICESTER, Ex p. STUART*, No. 2593, *post*.

SECT. 4.—COVENANT FOR PRODUCTION.

See Law of Property Act, 1925 (c. 20), s. 64.

2593. Right of purchaser—Sale by assignees of bankrupt—Limited to continuance as assignees.]—Where title deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate; but their covenant, for the production of the deeds, should be confined to the time of their continuance as assignees (*LORD ELDON, C.*).—*Re LEICESTER, Ex p. STUART* (1815), 2 Rose, 215, L. C.

2594. — Deeds not in possession or power of vendor.]—(1) The right of a purchaser to a covenant for the production of documents constituting part of his title does not extend to copies of court rolls or indentures of bargain & sale enrolled,

unless they are in the possession or power of the vendor.

(2) A purchaser is not entitled as a matter of course to a covenant for the production of all documents contained in the abstract of title, which are not delivered to him, but only of those which are necessary to make out a good sixty years' title.—*COOPER v. EMERY* (1844), 1 Ph. 388; 13 L. J. Ch. 275; 2 L. T. O. S. 437; 8 Jur. 181; 41 E. R. 679, L. C.

2595. ——By conditions of a sale of land, it was stipulated that the vendors should within ten days deliver an abstract of title, & should not be required to produce any deeds not in their possession; & that all deeds of covenant for production of any deed, etc., whether referred to in the abstract or not, which the purchaser should require for verifying the abstract, or for any other purpose, & other evidence which, but for the condition, might be required to prove anything whatsoever, also all searches & inquiries for the purpose of ascertaining where such deed, etc., or evidence was to be found, & expenses incidental thereto, should "be respectively paid, made, searched for & obtained by & at the expense of the purchaser requiring the same":—*Held*: the vendor was not bound to procure covenants for production from parties holding deeds referred to in the abstract & not in the hands of the vendors.—*GABRIEL v. SMITH* (1851), 16 Q. B. 847; 20 L. J. Q. B. 386; 17 L. T. O. S. 61; 15 Jur. 1124; 117 E. R. 1107.

2596. — Restricted to documents necessary to make title.]—*COOPER v. EMERY*, No. 2594, *ante*.

2597. Costs of procuring covenant.]—The costs of covenants to produce title deeds which cannot be delivered up fall, by the practice of conveyancers, on vendors; yet where, by the conditions of sale of property, in lots, under an order of the ct., provision was made for the largest purchaser to have the deeds, & to covenant to produce them, or give copies thereof, to the purchasers of smaller lots, without reference to the manner in which the costs were to be paid, each purchaser, & not the estate, was ordered to bear his own costs of such covenants.—*STRONG v. STRONG* (1858), 4 Jur. N. S. 943; 6 W. R. 455.

SECT. 5.—RESTRICTIVE COVENANTS AND EASEMENTS.

See Law of Property Act, 1925 (c. 20), s. 200.

Restrictive covenants.]—*See* Part XI., Sect. 2, sub-sect. 4, *post*.

PART X. SECT. 3.

t. Right of purchaser—Deeds registered by memorials.]—A purchaser is entitled to copies of title deeds registered by memorials, but not of deeds registered under Registry Act, 1867.—*Re CHARLES* (1872), 4 Ch. (Ch. 19.—*CAN.*

Part XI.—Position of Parties after Completion.

SECT. 1.—RIGHT TO RENTS AND PROFITS.

SUB-SECT. 1.—IN GENERAL.

2598. Covenant for enjoyment of rents—What amounts to breach—Quit rents in arrear before conveyance.]—The seller covenants to the purchaser of an estate that he shall enjoy & receive the rents, etc., without any action, etc., or interruption by the seller or those claiming from him, or by, through, or with his or their acts, means, default, etc.:—*Held*: a breach was well assigned in respect of certain quitrents in arrear before & at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises.—*HOWES v. BRUSHFIELD* (1803), 3 East, 491; 102 E. R. 685.

Right of assignee of reversion to rent.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 237, 238, 284, Nos. 3765–3779, 4293, 4294.

Rights pending completion.]—*See* Part VI., Sect. 1, sub-sect. 4, *ante*.

SUB-SECT. 2.—NOTICE OF TENANT'S INTERESTS.

2599. Notice of tenancy notice of tenant's interest.]—A purchaser knowing that there is a tenant on the property, has notice of the terms on which he holds, & as they [the purchasers, *pltf.s.*] have not given him the usual six months' notice to quit, he has a right to hold on till the tenancy expires by proper notice, & upon the same terms under which he had hitherto held (*LANGDALE, M.R.*).—*GREENWOOD v. BARKSLOW* (1836), Donnelly, 12; 5 L. J. Ch. 170; 47 E. R. 194.

—*J.*—*See* EQUITY, Vol. XX., pp. 327–329, Nos. 719–739; LANDLORD & TENANT, Vol. XXXI., p. 431, Nos. 5763, 5764.

SECT. 2.—RIGHTS AND LIABILITIES IN RELATION TO COVENANTS.

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), ss. 76 (6), (7), 77 (5), 78–80.

2600. Covenants relating to matters not dependent on passing of estate—How far good.]—In a deed for the conveyance of an estate all covenants relative to matters not dependent on the passing of the estate are good, though the estate does not pass.—*NORTHCOTT v. UNDERHILL* (1698), 1 Ld. Raym. 387; 1 Salk. 199; Holt, K. B. 176; 91 E. R. 1157.

Annotation.—*Refd.* *Johnson v. Wilson* (1740), Willes, 248.

2601. Whether running with land—Necessity for privity of estate.]—If mtgor. & mtgee. make a lease, in which the covenants for the rent & repairs are

only with the mtgor. & his assigns, the assignee of the mtgee. cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, & therefore do not run with it.

If tenant for a term of years lease for a less term, & assign his reversion, & the assignee take a conveyance of the fee by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished.

It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties (*KENYON, C.J.*).—*WEBB v. RUSSELL* (1789), 3 Term Rep. 393; 100 E. R. 639.

Annotations.—*Refd.* *Vernon v. Smith* (1821), 5 B. & Ald. 1; *Baker v. Gostling* (1834), 1 Bing. N. C. 19; *Keppell v. Bailey* (1834), 2 My. & K. 517; *Sturgeon v. Wingfield* (1846), 15 L. J. Ex. 212; *Wakefield v. Brown* (1846), 9 Q. B. 209; *Bickford v. Parson* (1848), 5 C. B. 920; *Magnay v. Edwards* (1853), 1 C. L. R. 141; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Manchester Brewery Co. v. Combs*, [1901] 2 Ch. 608. *Mentd.* *Gibson & Johnson v. Minet & Fector* (1791), 1 Hy. Bl. 569; *Eccle. Comrs. of England & Wales v. Rowe* (1880), 5 App. Cas. 736.

2602. Covenantee must be interested in neighbouring land.]—An owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, which covenant does not run with the land at law, is not bound in equity by the covenant even if he took the land with notice of its existence, if the covenantee is not in possession of or interested in land for the benefit of which the covenant was entered into.

The owner of certain land in the county of London applied to *pltf.s.*, the London County Council, under London Building Act, 1891 (c. cexiii), s. 7, for their sanction to his laying out a new street on the land. *Pltf.s.* agreed to give their sanction on condition that the owner entered into a covenant not to build on a plot of land which lay across the end of the proposed street, so as to afford facilities for the continuation of the proposed street. The owner accordingly executed a deed whereby he covenanted with *pltf.s.* for himself, his heirs & assigns, & other the persons claiming under him, & so far as practicable to bind the land into whosoever hands same might come, not to erect or cause or permit to be erected upon the plot any building, structure, or other erection without the *pltf.s.*' consent. *Pltf.s.* did not possess nor were they interested in any neighbouring land for the benefit of which the covenant was imposed. It was admitted that the covenant did not run with the land at law. The owner subsequently sold the plot to *deft.* who had notice of the restrictive covenant. *Deft.* proceeded to build houses upon the land without *pltf.s.*' consent:—*Held*: *pltf.s.*' were not entitled

PART XI. SECT. 1, SUB-SECT. 1.

a. General rule—Purchaser entitled.]—A purchaser is entitled to all the rents & profits arising from the estate purchased which accrue due subsequent to the time when he became such purchaser.—*BRADY v. KEENAN* (1875), 6 P. R. 262.—*CAN.*

b. — — —.]—*MILLER v. NICHOLLS* (1892), 23 C. L. T. 176.—*CAN.*

c. — — —.]—*HILL v. SMITH* (1919), 52 N. S. R. 245; 50 D. L. R. 272.—*CAN.*

d. — — —.]—*Re FRENCH & CO.* (1821), 2 Mol 453.—*IR.*

e. — — —.]—Parties who pay the purchase-money on the day of sale are entitled to the rents due next day.—*ANON.* (1850), 15 L. T. O. S. 236.—*IR.*

f. — — —.]—*BOTH'S EXECUTOR v. DU PLOOY* (1897), 14 S. C. 414.—*S. AF.*

g. Sale on "cash against transfer."]—Where immovable property has been sold on the terms of "cash against transfer," the purchaser is entitled to the rents accruing therefrom between the date of sale & date of transfer.—*DE KOCK v. FINCHAM* (1902), 19 S. C. 136.—*S. AF.*

PART XI. SECT. 1, SUB-SECT. 2.

2599 i. Notice of tenancy notice of tenant's interest.]—*CARROLL v. KEAYES, KEAYES v. CARROLL* (1873), 8 I. R. Eq. 97.—*IR.*

PART XI. SECT. 2, SUB-SECT. 1.

2602 i. Whether running with land—Covenantee must be interested in neighbouring land.]—Owners of land in a subdivision who purchased with notice of a restrictive covenant as to building entered into with the original vendor of such land cannot be sued by such original vendor in respect of such

to enforce the covenant against deft., who was the assignee of the covenantor.—**LONDON COUNTY COUNCIL v. ALLEN**, [1914] 3 K. B. 642; 83 L. J. K. B. 1695; 111 L. T. 610; 78 J. P. 449; 12 L. G. R. 1003, C. A.

Annotations :—**Apld.** **Chambers v. Randall**, [1923] 1 Ch. 149. **Refd.** **Northbourne v. Johnston**, [1922] 2 Ch. 309; **The Lord Strathcona**, [1925] P. 143; **Lord Strathcona S.S. Co. v. Dominion Coal Co.**, [1926] A. C. 108. **Mentd.** **Barker v. Stickney**, [1919] 1 K. B. 121.

2603. ——— **Whether retention of part of land sufficient.**—**IVES v. BROWN**, No. 2728, *post*.

2604. ——— **—** **—** **—** **FORMBY v. BARKER**, No. 2626, *post*.

2605. ——— **Whole interest parted with.**—Where a restrictive covenant has been entered into by a purchaser of land for the protection of the vendor's immediately adjoining land, but not so as to annex the benefit of the covenant to that land, the covenant is not enforceable against an assign of the covenantor by the exors. of the covenantee if he had disposed of the whole of the adjoining property before his death. It can make no difference even when the exors. are persons to whom part of the covenantee's property had previously been assigned without an express assignment of the benefit of the covenant:—*Semble*: the covenantee himself could not enforce the covenant against an assign of the covenantor after he had parted with all the adjoining property.—**CHAMBERS v. RANDALL**, [1923] 1 Ch. 149; 92 L. J. Ch. 227; 128 L. T. 507; 39 T. L. R. 6; 67 Sol. Jo. 61.

Annotation :—**Refd.** **Torbay Hotel v. Jenkins**, [1927] 2 Ch. 225.

2606. ——— **Whether ownership of road sufficient interest.**—The benefit of restrictive covenants relating to the mode of building on an estate through which a road runs can be validly annexed to the site & soil of the road so as to run with it, even after it has been dedicated to the public; but if the road is subsequently taken over by a local authority, whether under Metropolis Management Act, 1855 (c. 120), or Public Health Act, 1875 (c. 55), a successor in title of the original owner of the road ceases to have such an interest in it as will entitle him to enforce the covenants. The surface of the road is no longer vested in him & the restrictions do not touch or concern such an interest in the road as he retains.—**KELLY v. BARRETT**, [1924] 2 Ch. 379; 94 L. J. Ch. 1; 132 L. T. 117; 40 T. L. R. 650; 68 Sol. Jo. 664, C. A.

2607. **Who may be liable for breach—Assignee—Breach committed before assignment.**—**BRITTIN v. VAUX** (1700), 1 Lut. 360; 125 E. R. 189.

covenant if he does not retain any land for the benefit of which the restrictive covenant was entered into.—**PAGE v. CAMPBELL**, [1921] 2 W. W. R. 552; 59 D. L. R. 215; 61 S. C. R. 633.—**CAN.**

h. ——— **—** **Deft.** conveyed with absolute covenants to pltf., who before action conveyed to one D.:—*Held*: the covenants ran with the land, & pltf. could not sue, though they were broken as soon as made.—**SCRIVER v. MYERS** (1858), 9 C. P. 255.—**CAN.**

k. ——— **—** **CAMPBELL v. BURLEY** (1860), 19 U. C. R. 204.—**CAN.**

l. ——— **—** **FLOWER v. DUNCAN** (1867), 13 Gr. 242.—**CAN.**

m. ——— **—** **CLEWOW v. BOOTH** (1879), 27 Gr. 15.—**CAN.**

n. ——— **—** **MILLETTE v. SABOURIN** (1886), 12 O. R. 248.—**CAN.**

o. ——— **—** **GLENIR v. SCOTT** (1898), 2 Terr. L. R. 339.—**CAN.**

p. ——— **—** **GILBERT v. NESTOR** (Alta.), [1923] 3 D. L. R. 409; [1923] 3 W. W. R. 15.—**CAN.**

q. ——— **—** **ANDERSON v. MORAN** (Alta.), [1927] 4 D. L. R. 1110; [1927] 3 W. W. R. 607.—**CAN.**

r. ——— **—** **PARBHU NARAIN SINGH v. RAMZAN** (1919), 1 L. R. 41 All. 417.—**IND.**

t. **Absolute covenant together with bond—To be void on payment of mortgage—Liability—No legal proceedings taken.**—*Held*: a party giving an absolute covenant in a conveyance of real estate, & a bond conditioned that it should be void upon payment of a certain mtge. for £75 upon the land conveyed, is liable thereon, although no legal proceedings may have been taken upon the mtge. by which the party is damaged.—**CALLISLE v. ORDE** (1858), 7 C. P. 456.—**CAN.**

u. **Covenant by purchaser to pay—Covenant by vendor to convey good title—Whether independent.**—*Held*: under the agreement for the sale of land set out in this case, the covenants by deft. to pay & by pltf. to convey a good title, on receiving payment, were inde-

2608. Covenant to pay off supposed incumbrance.—*Deft.* having covenanted, on purchasing an estate, to discharge a legacy mistakenly supposed to be a charge on the estate:—*Held*: to be liable in an action on his covenant to pltf. for not paying the amount covenanted to the representatives of the supposed legatee, whose interest had never vested, although pltf. could not become liable in respect of the legacy.—**HODGSON v. WOOD** (1863), 2 H. & C. 649; 33 L. J. Ex. 76; 11 L. T. 180; 10 Jur. N. S. 591; 159 E. R. 269.

Annotations :—**Refd.** **Wigzell v. School for Indigent Blind** (1882), 8 Q. B. D. 357; *Re Perkins*, **Poyser v. Beyfus** (1898), 67 L. J. Ch. 454.

SUB-SECT. 2.—COVENANTS IN LEASES.

See, generally, **LANDLORD & TENANT**, Vol. XXXI., pp. 115 *et seq.*

Rights & liabilities of purchaser of reversion.—*See* **LANDLORD & TENANT**, Vol. XXXI., pp. 423 *et seq.*

Rights & liabilities of assignee of lease.—*See* **LANDLORD & TENANT**, Vol. XXXI., pp. 399 *et seq.*

SUB-SECT. 3.—COVENANTS RELATING TO USER.

A. Positive Covenants.

2609. Whether runs with land—Covenants concerning railways—To stop trains at station.—*Pltfs.* had constructed a railway which joined defts.' railway & also the G. W. Ry.: & by their Act, if they abandoned any part of the railway, or if after its completion it ceased to be used for three years, then the land purchased under the Act was to revert to the owners of the adjoining lands. An agreement was entered into between *pltfs.* & the G. W. Ry. co., by which the latter covenanted to construct a station at the point of junction of the two railways, & to stop their trains at this station. An Act of Parliament was obtained, which empowered *pltfs.* to lease to defts. their railway, stations, etc., & all their rights, powers, & privileges in relation thereto. A lease was accordingly executed, in which there was a covenant that defts. should "efficiently work & repair the railway & works demised, & indemnify *pltfs.* against all liabilities, loss, charges & expenses, claims & demands, whether incurred or sustained in consequence of not working, or in any manner connected with the working of the said railway & works." An action was brought upon this covenant, in which the issue raised was, whether

pendent of each other, & deft. was responsible on his covenant, notwithstanding *pltfs.* inability to perform his.—**TISDALE v. DALLAS** (1861), 11 C. P. 238.—**CAN.**

b. **Vendor also one of purchasers.**—**BURDICK v. MILLS**, [1923] 1 D. L. R. 830; 16 Sask. L. R. 355; [1923] 1 W. W. R. 283.—**CAN.**

PART XI. SECT. 2, SUB-SECT. 3.—A.

c. **Whether runs with land—Use of water.**—**BREWSTER v. CANADA CO.** (1854), 4 Gr. 443.—**CAN.**

d. ——— **—** **BISHOP v. MERKLEY** (1860), 8 Gr. 335.—**CAN.**

e. ——— **—** *A vendor agreed that the purchaser should have sufficient water to drive a saw mill & other machinery. In a suit by the vendor against the purchaser, the ct. decreed specific performance of the contract, treating the water & the use of the dams & booms as sold with the land.*

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defts. had efficiently worked the railway or not :—*Held* : rights of plffs., under the agreement with the G. W. Ry. co., were vested in defts., & defts. had power to compel a performance of the covenant to stop trains by the G. W. Ry. co., that being a covenant running with the estate in pltf.'s railway. —*WEST LONDON RY. CO. v. LONDON & NORTH WESTERN RY. CO.* (1853), 11 C. B. 327; 7 Ry. & Can. Cas. 477; 22 L. J. C. P. 117; 17 Jur. 301; 138 E. R. 499, Ex. Ch.

2610. — — — — —.]—A "first class station" means a station at which all trains other than express, mail, or special trains are in the habit of stopping.

Where, therefore, a railway co. had taken land with respect to which there was a covenant existing "that the land should for ever thereafter be used as a goods depôt, & as a first class station for taking up & setting down passengers travelling along the co.'s line of railway"; & the co. had only allowed third class or merely local trains to be advertised to stop at the station built on the land, & there was no goods depôt provided :—*Held* : the co. was bound by the covenant; & an injunction granted to restrain them from allowing the ordinary fast trains to pass the station.—*FLOOD v. NORTH EASTERN RY. CO.* (1869), 21 L. T. 258.

2611. — — — — — *Reservation of theatre box.*]—W., the lessee of her Majesty's Theatre, by deed in 1821 sold his interest therein to C., subject to a reservation to & right of possession by W., his exors., administrators & assigns, or his or their nominees, of a box numbered 124 therein, during the continuance of the term. By a deed in 1823 W. assigned all his interest in the box to trustees for the benefit of his creditors, & pltf. was the present trustee under that deed. A subsequent assignee of the lease, deft. L., took a renewal lease, settled by one of the masters in a suit, of the theatre in 1845, & the new lease empowered L. to dispose absolutely of forty-one boxes, to be selected by him, but it contained no reservation of the box 124. The lease contained a power of re-entry by the lessor, if L. disposed of more than forty-one boxes. L. accordingly selected & disposed of forty-one boxes, not including No. 124. In 1856 L. assigned the lease to the other deft., but he retained some interest therein & continued to conduct the theatre. Pltf. filed his bill, asserting his right to the box in question, or to a compensation in money; defts. resisted the claim, on the ground that having already disposed of forty-one boxes, they should, by appropriating another, forfeit their lease. The judge decided that pltf. was entitled to the decree asked, & granted an injunction to restrain defts. from preventing pltf.'s enjoyment of the box. Both defts. appealed from this decree :—*Held* : the pltf. was entitled to the relief prayed, & a declaration was made that he was entitled in equity to the reservation mentioned.—*HELLING v. LUMLEY* (1858), 3 De G. & J. 493; 28 L. J. Ch. 249; 33 L. T. O. S. 18; 23

J. P. 356; 5 Jur. N. S. 301; 7 W. R. 152; 44 E. R. 1358, L. J.J.

Annotation :—*Refd.* *Willmott v. Barber* (1880), 15 Ch. D. 96.

2612. — — — — — *Maintenance of fences—Between land & roadway.*]—Where a former purchaser of lands had entered into a covenant to make & maintain the boundary fences between the lands & a road afterwards made, which became vested in the local board of health, & a question was raised whether this covenant ran with the land, & was binding upon a future purchaser, it was held that the question was too doubtful to admit of the title being forced upon a purchaser.—*POTTER v. PERRY* (1859), 23 J. P. 644; 7 W. R. 182.

2613. — — — — — *Erection & maintenance of sea wall.*]

—Lands situated below the level of the sea in Broomhill Level, Guildford Level, & Walland Marsh, were, previously to 1794, held in undivided shares. In that year these lands were partitioned by a deed containing a covenant that the expense of keeping & maintaining the walls & gutts of & belonging to the lands thereby divided, should be borne by the owners thereof & should be payable out of the said lands by an acre-scut. Declaration that defts. were liable to contribute to the repair of a sea wall along the sea boundary of Broomhill Level, with consequential relief, although defts. were also liable to contribute to the maintenance of sea walls along the boundaries of the levels in which their lands were situated. *Seemle* : the covenant was one which would run with the land, although the assigns of the covenantors were not named.—*MORLAND v. COOK* (1868), L. R. 6 Eq. 252; 37 L. J. Ch. 825; 18 L. T. 496; 16 W. R. 777.

Annotations :—*Distd.* *Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403. *Expld.* *Austerberry v. Oldham Corpn.* (1885), 29 Ch. D. 750. *Mentd.* *Hudson v. Tabor* (1876), 45 L. J. Q. B. 190; *Allen v. Seckham* (1879), 11 Ch. D. 790.

2614. — — — — — *Erection of pump & supply of water.*]

—A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump & reservoir, & to supply water from the well to all houses built on the vendor's land :—*Held* : both the benefit & the burden of the covenant ran with the land.—*COOKE v. CHILCOTT* (1876), 3 Ch. D. 694; 34 L. T. 207.

Annotations :—*Distd.* *Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403. *Overd.* *Austerberry v. Oldham Corpn.* (1885), 29 Ch. D. 750. *Refd.* *Andrew v. Aitken* (1882), 22 Ch. D. 218; & *S. W. Ry. v. Gomm* (1882), 20 Ch. D. 562; *Hall v. Ewin* (1887), 37 Ch. D. 74.

2615. — — — — — *Improvement of land.*]—Where land has been granted in fee in consideration of a rentcharge & a covenant to build & repair buildings, the assignee of the grantee of the land is not liable, either at law or in equity, on the ground of notice, to the assignee of the grantee of the rentcharge on the covenant to repair.

I think that a mere covenant that land shall be improved does not run with the land . . . so as to give pltf. a right to sue at law. I also think that pltf. has no remedy in equity . . . The covenant to repair can only be enforced by

HINCKES v. MCKAY (1868), 14 Gr. 233.—CAN.

1. — — — — — *Maintenance & repair of dyke.*]—*ROACH v. RIPLEY* (1901), 34 N. S. R. 352.—CAN.

g. — — — — — *Covenant to supply coal.*]—Pltf. sold certain lands in fee simple to A., from whom defts. bought. The conveyance contained a covenant that A., his successors & assigns, would give 60 loads of slack coal annually :—*Held* : not a covenant running with land.—

CARROLL v. DOMINION COAL CO. (1910), 8 E. L. R. 54.—CAN.

h. — — — — — *Covenant to pay purchase-money by instalments.*]—An assignee of the interest of the purchaser under an agreement for the sale of land cannot be held liable in equity for the purchase-money because he took the assignment with notice that the instalments of purchase-money provided for in the original agreement had not been paid.—*COTE v. OLSON* (1912), 20

W. L. R. 690; 2 W. W. R. 54; 5 Sask. L. R. 219; 2 D. L. R. 392.—CAN.

k. — — — — — *Covenant to fence.*]—*PARSHALL v. NATIONAL FINANCE CO.* (1908), 9 W. L. R. 497.—CAN.

l. — — — — — *Remedies—Specific performance.*]—*ELLIS v. ZILLIAX* (1913), 24 O. W. R. 48; 4 O. W. N. 744; 10 D. L. R. 358.—CAN.

m. — — — — — *Covenant to build culvert.*]—*WHITCOURT v. ST. JOHN & QUEBEC RY. CO.* (1914), 14 E. L. R. 281.—CAN.

making the owner put his hand to his pocket, & there is nothing which would justify us in going that length (COTTON, L.J.).—**HAYWOOD v. BRUNSWICK BUILDING SOCIETY** (1881), 8 Q. B. D. 403; 51 L. J. Q. B. 73; 45 L. T. 699; 46 J. P. 356; 30 W. R. 299, C. A.

Annotations :—**Fold**, L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562. **Consd.** Austerberry v. Oldham Corp'n. (1885), 29 Ch. D. 750. **Distd.** Hall v. Ewin (1887), 37 Ch. D. 74. **Clegg v. Hands** (1890), 44 Ch. D. 503. **Apld.** L. C. C. v. Allen, [1914] 3 K. B. 642. **Fold**, Smith v. Colbourne, [1914] 2 Ch. 533. **Refd.** Andrew v. Aitken (1882), 31 W. R. 425; *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; *Barker v. Stickney*, [1919] 1 K. B. 121; *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108; *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225.

2616. — **Building & repairing buildings.**—**HAYWOOD v. BRUNSWICK BUILDING SOCIETY** No. 2615, *ante*.

2617. — **Covenant to reconvey.**—By a deed dated in Aug. 1865, which recited that pltf. co. were seised in fee simple of certain land which was no longer required for the purposes of their railway, the co. conveyed the land to G. P. in fee for £100, & G. P. covenanted with the co. that he, his heirs or assigns, would at any time thereafter whenever the land might be required for the railway or works of the co., & whenever thereunto requested by the co. on a six calendar months' notice, & upon receiving £100, reconvey the land to the co. In 1879 deft. purchased the land from G. P.'s heir, with notice of the above covenant. In 1880 the co. gave deft. notice to reconvey the land, & upon his refusal to do so this action was brought for specific performance of the covenant. The co. had power in 1865 by their special Act to purchase land by agreement, though not compulsorily, & that power was extended to the present time by subsequent Acts :—**Held** : (1) the covenant in the deed of 1865 reserved to the co. an interest in the land, & the sale was *ultra vires* & void, for under Lands Clauses Consolidation Act, 1845 (c. 18), s. 127, land sold by a co. as superfluous land must be sold absolutely without reserving any interest to the co.; (2) as the covenant gave to the co. an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid on the ground of remoteness; (3) the doctrine of *Tulk v. Moxhay*, No. 2667, *post*, only applies to restrictive covenants & not to covenants to do acts relating to the land.—**LONDON & SOUTH WESTERN RY. CO. v. GOMM** (1882), 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620.

Annotations :—*As to* (1) **Consd.** *Re Thackwray & Young's Contract* (1888), 40 Ch. D. 34. **Distd.** Ray v. Walker, [1892] 2 Q. B. 88. *As to* (2) **Apld.** Trevelyan v. Trevelyan (1885), 53 L. T. 853. **Expld.** Mackenzie v. Childers (1889), 43 Ch. D. 265. **Consd.** Woodall v. Clifton, [1905] 2 Ch. 257; *Worthing Corp'n. v. Heather*, [1906] 2 Ch. 532. **Distd.** S. E. Ry. v. Associated Portland Cement Manufacturers 1900, Ltd., [1910] 1 Ch. 12. **Refd.** Dunn v. Flood (1883), 25 Ch. D. 629; *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Borland's Trustee v. Steel*, [1901] 1 Ch. 279; *Savill v. Bethell*, [1902] 2 Ch. 523; *Thomas v. Thomas* (1902), 87 L. T. 58; *Edwards v. Edwards*, [1909] A. C. 275; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Smith v. Colbourne*, [1914] 2 Ch. 533. *As to* (3) **Consd.** *Rogers v. Hosegood*, [1900] 2 Ch. 398; *Re Nisbet & Pott's Contract*, [1908] 1 Ch. 386; *L. C. C. v. Allen*, [1914] 3 K. B. 642. **Refd.** Austerberry v. Oldham Corp'n. (1885), 29 Ch. D. 750; *Formby v. Barker*, [1903] 2 Ch. 539; *Woodall v. Clifton*, [1905] 2 Ch. 257. **Generally, Refd.** *Rice v. Noakes*, [1900] 1 Ch. 213; *Osborne v. Bradley*, [1903] 2 Ch. 446; *Mason v. Fulham Corp'n.* (1910), 102 L. T. 188; *Long v. Gray* (1913), 58 Sol. Jo. 46; *Kelly v. Barrett*, [1924] 2 Ch. 379. **Mentd.** *Re Harvey, Peek v. Savory* (1888), 39 Ch. D. 289; *Re Hargreaves, Midgley v. Tatley* (1890), 59 L. J. Ch. 384; *Re Bowen, Lloyd Phillips v. Davis*, [1893] 2 Ch. 491; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Barker v. Stickney*, [1919] 1 K. B. 121; *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108.

2618. — **Repair of roads.**—A piece of land

was conveyed to trustees for valuable consideration for the purposes of making a road, & the trustees covenanted with the vendor, his heirs & assigns that they, their heirs & assigns, would make the road, & at all times keep it in good repair, & allow the public to use it on payment of tolls :—**Held** : this covenant did not run with the land, either with regard to the burden or benefit, & could not be enforced by the purchaser from the vendor against a purchaser from the trustees, both parties taking with notice of the covenant to repair.—**AUSTERBERRY v. OLDHAM CORPN.** (1885), 29 Ch. D. 750; 55 L. J. Ch. 633; 53 L. T. 543; 49 J. P. 532; 33 W. R. 807; 1 T. L. R. 473, C. A.

Annotations :—**Refd.** Hall v. Ewin (1887), 57 L. T. 831; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Nathan v. Rouse* (1904), 2 L. J. L. 1301; *Hubbard v. Weldon* (1909), 25 T. L. R. 356; *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 427; *L. C. C. v. Allen*, [1911] 3 K. B. 642; *Palliser v. Dover Corp'n. & Dover Harbour Board* (1914), 58 Sol. Jo. 379; *Smith v. Colbourne*, [1914] 2 Ch. 533; *Re Woking U. C. (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300. **Mentd.** *Mid. Ry. v. Watton* (1886), 17 Q. B. D. 30; *A.-G. v. Simpson*, [1901] 2 Ch. 671; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 110.

2619. — **Erection of bridges.**—An agreement under seal dated Mar. 24, 1903, & made between defts. & the British Firelighter co., after reciting the negotiations which had taken place between pltf. & defts. for the sale to the latter of certain land for the purpose of constructing a wharf & laying down a railway, which negotiations were carried out on the following day, & that defts. intended to construct the railway, provided that the British Firelighter co., as owners of adjoining land, & as such entitled to a certain right of way, should make no objection to the construction of the railway, & that defts. would, on demand being made by that co., erect a footbridge over the railway. It was further provided that the expression "Firelighter co." should, where the context so admitted, include their assigns. In Jan. 1905, the Firelighter co. passed a winding-up resolution, & appointed a liquidator, & thereafter the whole assets of that co., including the benefit of the covenants in the agreement of Mar. 24, 1903, were assigned to Quicklit, Ltd. The Firelighter co. had not been dissolved. In 1908 the interests of Quicklit, Ltd., in the covenant passed to the Brith Oil co. Quicklit, Ltd., had been dissolved. The footbridge had not been erected :—**Held** : the covenant in the agreement of March 24, 1903, to erect a footbridge was a covenant which ran with the land & the benefit of it was assignable.—**HUBBARD v. WELDON** (1909), 25 T. L. R. 356.

2620. — — —.—In 1777 an Act of Parliament was passed for making a canal. It incorporated a co. by name of the co. of Proprietors of the Basingstoke Canal Navigation, authorised them to construct the canal, & make bye-laws, demand tolls, & acquire land. All persons were to have the right to use the canal on payment of tolls. The co. were to make & maintain bridges. Throughout the Act in conferring rights or imposing obligations on the co. the words "their successors & assigns" were added. The canal was made & navigation carried on till 1866, when a winding-up order was made. In 1874 the liquidator with the sanction of the judge sold the canal to S. A. The word "undertaking" was not used in the conveyance, but possession was taken, & tolls levied & received. In 1878 the co. was dissolved by an order of the ct. S. A. sold various portions of the land, & the last purchaser of the canal & undertaking was the L. & S. W. Canal, Ltd., which executed a mortgage thereof to W. Carter. The canal bridges fell into disrepair, &

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the Woking Urban District Council obtained an Act of Parliament in 1911 which authorised them to do the repairs & recover the costs from "the co." :—*Held*: the co. had no power to assign their undertaking; nothing passed to S. A. by the conveyance of 1874, on the dissolution the land of the co. reverted to the original grantors, & they having made no claim to it their right of entry had been barred by Stat. Limitations; S. A. had thus acquired the legal fee simple in the canal free from any of the obligations or rights of the co.; the L. & S. W. Canal, Ltd., were owners of the canal, but were not bound to keep it up or do repairs, & could not demand tolls; the Act of 1911 did not impose any fresh liability; & no liability attached upon either the L. & S. W. Canal, Ltd., or Carter.—*Re WOKING URBAN COUNCIL (BASINGSTOKE CANAL) ACT, 1911, [1914] 1 Ch. 300; 83 L. J. Ch. 201; 110 L. T. 40; 78 J. P. 81; 30 T. L. R. 135; 12 L. G. R. 214, C. A.*

Annotations:—Mentd. A. G. v. N. E. Ry., [1915] 1 Ch. 905; It. v. Bedfordshire County Council, Ex p. Sear, [1920] 2 K. B. 465; Morris v. Harris, [1927] A. C. 252.

2621. Remedies—Ejectment—Against purchaser of lessee's interest.—*Deft., mtgee. of a term, purchased the mtgor.'s whole interest in the premises, in consequence of the lessor's advice, "to take to the premises, & finish the buildings," given after a right of re-entry had accrued for the non-completion of the buildings:—Held*: the lessor might maintain an ejectment for the forfeiture against *deft.*, the buildings never having been completed, & a sufficient time having elapsed since the purchase for the completion.—*Doe d. SORRE v. EKINS (1824), 1 C. & P. 154; Ry. & M. 29; 171 E. R. 932, N. P.*

2622. — Specific performance—Defined contract.—*Though the ct. will not, as a rule, specifically enforce contracts to build or repair, it will do so in cases where the contract for building is in its nature defined.*—*HEPBURN v. LEATHER (1884), 50 L. T. 660.*

2623. — — — Against assignee of purchaser.—*In 1873, the L. Ry. co., in a conveyance of land from ptff.'s predecessor in title, covenanted to execute certain works, including the making & maintenance of a road, & to perform certain services, such as to convey & deposit on wharves connected with the railway timber & other produce from a wood belonging to the vendor. L. Railway Act, 1892, transferred the undertaking of the L. co. to the C. co., "subject to the contracts, obligations, debts, & liabilities" of the L. co. By the same Act provision was made for the dissolution of the L. co., & "claims & demands" not made within a certain time, & unknown to them, were to be barred. Ptff. made no claim under this sect., but sued both cos. for specific performance of the covenants which remained unperformed, & damages:—Held*: ptff. was entitled to specific performance of all the covenants against the C. co.—*FORTESCUE v. LOSTWITHIEL & FOWEY RY. CO., [1894] 3 Ch. 621; 64 L. J. Ch. 37; 71 L. T. 423; 43 W. R. 138; 8 R. 664.*

Annotation:—Mentd. Kennard v. Cory, [1922] 2 Ch. 1.

B. Personal Covenants.

2624. On whom binding—Covenant by vendor in relation to adjoining land.—*Two vendors, in*

1883, sold Verulam House for use as a fever hospital, & each of them, for herself & himself, covenanted with the purchaser that she or he would not, either alone or jointly with any other persons, commence or prosecute any proceedings for the purpose of preventing the house from being used by convalescent fever or other patients. Verulam House was accordingly opened as a fever hospital. Afterwards, in 1884, the same vendors sold the adjoining property to ptff. who, though aware that Verulam House was then opened as a fever hospital, had no notice of the covenant. In an action to rescind the contract on the ground that ptff. would be bound by the covenant:—*Held*: the covenant was a personal covenant on the part of the vendors only, & would not in any way affect ptff. & specific performance was decreed.—*GROVES v. LOOMES (1885), 55 L. J. Ch. 52; 53 L. T. 592; 34 W. R. 94.*

2625. — Covenant restricting right of building — Not expressed as binding on assignees.—*Certain freehold property, described as all that messuage or dwelling-house, with the buildings, yards, & premises, late in the occupation of F., & containing 1,372 square yards, was put up for sale by auction subject to conditions of sale, one of which provided that if any error or misstatement or omission in the posters, plans, or particulars should be discovered, the same should not annul the sale, but, if pointed out before completion of the purchase, compensation should be allowed. The particulars & conditions contained no notice of the property being subject to any restrictive covenants. The purchaser objected to the title on two grounds: First, that the conveyance of the property to a predecessor in title of the vendors contained a restrictive covenant by him against building. This covenant in the conveyance was not expressed as binding on his assigns, whereas other covenants entered into by him were so expressed. Secondly, that the particulars had misdescribed the property in stating that it contained 1,372 square yards, whereas in fact it only contained 1,033:—Held*: the restrictive covenant was a personal covenant, & did not run with the land, & would not prevent the purchaser from building as he liked.—*Re FAWCETT & HOLMES' CONTRACT (1889), 42 Ch. D. 150; 58 L. J. Ch. 763; 61 L. T. 105; 5 T. L. R. 515, C. A.*

Annotation:—Mentd. Jacobs v. Revell, [1900] 2 Ch. 858.

2626. — Disposal of whole of vendor's interest.—*When on the sale of the whole of a vendor's land the purchaser enters into a covenant restricting the user of the land, the exor. of the vendor cannot maintain an action for an injunction against an assign of the purchaser in respect of a breach of the covenant committed after the vendor's death. Such a covenant is merely personal & collateral, & the principle of *Tulk v. Moxhay*, No. 2667, *post*, does not apply to it.—*FORMBY v. BARKER, [1903] 2 Ch. 539; 72 L. J. Ch. 716; 89 L. T. 249; 51 W. R. 646; 47 Sol. Jo. 690, C. A.**

Annotations:—Apld. L. C. C. v. Allen, [1914] 3 K. B. 642. Distd. Ives v. Brown, [1919] 2 Ch. 314; Northbourne v. Johnston, [1922] 2 Ch. 309. Apld. Chambers v. Randall, [1923] 1 Ch. 149. Reifd. Briggs v. Thornton, [1904] 1 Ch. 386; It. Nisbet & Potts' Contract (1906), 75 L. J. Ch. 238; Lord Strathcona S.S. Co. v. Dominion Coal Co., [1926] A. C. 108; Price v. Corp'n. d'Energie de Montmagny, [1927] A. C. 363. Mentd. Elliston v. Reacher, [1908] 2 Ch. 665; L. C. C. v. Cannon Brewery Co., [1911] 1 K. B. 235.

n. — — ——*FERRIS v. ELLIS (1920), 48 O. L. R. 374; 19 O. W. N. 537.—CAN.*

c. Covenant to enjoy free from incumbrances.—*SHERWOOD v. JOHNS (1825), Tay. 232.—CAN.*

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26241. On whom binding—Covenant by vendor in relation to adjoining land.—*PEARSON v. ADAMS (1912), 22 O. W. R. 909; 3 O. W. N. 1660; 27*

O. L. R. 87; 7 D. L. R. 139.—CAN.

2624 II. — — ——*ROSS v. BEN-JAMISON CONSTRUCTION CO. (Man.), [1927] 2 D. L. R. 830; [1927] 1 W. W. R. 985.—CAN.*

*C. Covenants Imposed in Building Scheme.**(a) In General.*

2627. Enforcement—Parties.]—*EASTWOOD v. LEVER*, No. 2672, *post*.

2628. Benefit & burden of covenants.]—An estate was sold in plots for building purposes, according to a scheme. The conveyances contained restrictive covenants as to the buildings to be erected, entered into by the several purchasers with the vendors, their heirs & assigns:—*Held*: the successor in title of the purchaser of one of such plots was entitled to enforce such restrictive covenants against the successor in title of an earlier purchaser of an adjacent plot.—*BROWN v. INSKIP* (1884), 1 Cab. & El. 231.

2629. Who may be bound—Vendor.]—*R. v. BRIGHTON CORPN.* (1885), 1 T. L. R. 576, D. C.

2630. ————*Pltfs.*, in 1867, bought part of a building estate from trustees for sale, subject to certain restrictive conditions as to building, which provided that all the plots were sold subject to the general stipulations contained in a deed poll which had been, or was intended to be, executed by the trustees & would be executed by each of the purchasers. The deed poll was executed by the trustees & *pltfs.*, & some sixty-six purchasers in all, from time to time down to 1889. It recited that it was intended to be a part of all future contracts for sale that the purchasers respectively should execute the deed & should thereby be severally bound by the stipulations thereof, & it witnessed that each of the purchasers covenanted with the other purchasers & the trustees to build only one house or two semi-detached houses on each lot. The trustees had recently divided fifteen lots remaining unsold into 101 lots, & offered them for sale for the erection of continuous rows of artisans' cottages, & *pltfs.* brought this action to restrain them from so doing:—*Held*: the trustees were bound either by actual covenant or by implied agreement not to deal with the land in violation of the scheme, & an injunction was granted restraining them from authorising any purchaser from them to build more than one house or two semi-detached houses contrary to the terms of the scheme.—*MACKENZIE v. CHILDERS* (1889), 43 Ch. D. 265; 59 L. J. Ch. 188; 62 L. T. 98; 38 W. R. 243.

Annotations:—*Consd.* *Rowell v. Satchell*, [1903] 2 Ch. 212. *Refd.* *Davis v. Leicester Corpn.*, [1894] 2 Ch. 208.

2631. ———— **Purchaser's right to have covenants inserted in conveyances.]**—Where a vendor puts up building land for sale in lots subject to restrictive covenants, it is a question of fact to be deduced from all the circumstances of the case whether the restrictions are merely matters of agreement between him & his vendees, imposed for his own benefit & protection, or are meant by him & understood by the buyers to be for the common advantage of the several purchasers; & the retainer by the vendor of some part of the property is only an element, though an important one, to be taken into consideration with other circumstances in ascertaining the intention; for though the vendor may not part with his whole estate, there may be circumstances which show that the intention was that each purchaser should be entitled to enforce the restriction against the vendor himself as well as against purchasers.

A land co. put up freehold building sites for sale by auction in lots, subject to particulars & conditions of sale which, in the view of the ct., constituted an invitation to the public to come in & purchase on the footing that the whole of the property offered for sale was to be bound by one general

law affecting the character of the buildings to be erected thereon. At the auction some of the lots were sold & some were not, & after the sale the vendors claimed the right to sell the unsold lots free from the restrictive covenants in case they desired to do so:—*Held*: a purchaser who had bought one of the lots sold at the auction, but had not completed his purchase, was entitled to the benefit of a contract by the vendors implied in the conditions of sale, that the vendors would, as to the lots unsold at the auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound to covenant to observe; & the purchaser was entitled to have such obligations of the vendors expressed in the conveyance to him of his lot.—*Re BIRMINGHAM & DISTRICT LAND CO. & ALLDAY*, [1893] 1 Ch. 342; 62 L. J. Ch. 90; 67 L. T. 850; 41 W. R. 189; 9 T. L. R. 31; 3 R. 84.

Annotations:—*Refd.* *Tucker v. Vowles* (1892), 62 L. J. Ch. 172; *Davis v. Leicester Corpn.*, [1891] 2 Ch. 208; *Held v. Bickerstaff*, [1909] 2 Ch. 305.

2632. ———— **Corporation selling with sanction of Treasury.]**—In Mar. 1888, a municipal corpn. offered for sale by auction, in lots, some of their corporate land, subject to special conditions restricting the right of each purchaser to build on his lot. At the auction none of the lots were sold. In June, 1888, *pltf.* entered into a contract to purchase two of the lots, subject to the conditions. The proper steps were taken to obtain the approval of the Treasury, which is required by Municipal Corporations Act, 1882 (c. 30), ss. 108, 109, to enable a municipal corpn. to sell their corporate land; & that approval was given in the ordinary way by two Lords of the Treasury joining in the conveyance to *pltf.* The conveyance contained a covenant by *pltf.* in the terms of the restrictive conditions, but there was no reference to those conditions, or to the previous abortive sale. There was no covenant by the corporation binding them by the conditions as regarded the unsold lots, & the Treasury were not, before they gave their approval, informed that the corpn. would be liable to any such restriction. The corpn. afterwards contracted with the trustees of a church to sell to them two others of the lots, & authorised them to build on those lots in a manner inconsistent with the conditions:—*Held*: if the corpn. had been ordinary individuals, they would have been bound by the original building scheme, & they, & the trustees, who had purchased with notice of the scheme, must have been restrained from building or permitting building on the lots purchased by the trustees, in a manner inconsistent with the conditions, but the Treasury had only given their approval to what was to be found in the conveyance, & they had not sanctioned the disposition by the corpn. in favour of *pltf.* of any right over other land than that which was conveyed to him, & consequently that neither the corpn. nor the trustees could be restrained from violating the conditions.—*DAVIS v. LEICESTER CORPN.*, [1894] 2 Ch. 208; 63 L. J. Ch. 410; 70 L. T. 599; 42 W. R. 610; 10 T. L. R. 385; 38 Sol. Jo. 362; 7 R. 609, C. A.

Annotations:—*Distd.* *Lambeth Corpn. v. South London Electric Supply Corpn.* (1907), 96 L. T. 440. *Refd.* *Holford v. Acton U. C.*, [1898] 2 Ch. 240. *Mentd.* *Canterbury Corpn. v. Cooper* (1908), 99 L. T. 612.

2633. Existence of scheme—Whether to be implied.]—If a vendor prepares a plan of a building estate showing lots with houses marked on them, & an intending purchaser is shown that plan, & his agreement with regard to a plot purchased by him happens to be on a printed form with written alterations, the purchaser is not entitled to assume

Secl. 2.—Rights and liabilities in relation to covenants: Sub-secl. 3, C. (a) & (b).]

that the whole estate is governed by a building scheme that each plot shall, without variation, be built on strictly in accordance with the indications on the plan, & shall of necessity be governed by the printed portions of the agreement.

V. & S. offered a landed estate, belonging to them, in plots as building sites at fee-farm rents. A plan, prepared originally for the approval of the local sanitary authority, showed the estate cut up into plots of even size, on each of which the ground plan of one house, & no other building, was delineated.

During negotiations for a conveyance of some of the plots, H. was shown a tracing of the plan, by reference to which he selected his plots, & was informed by the vendors that the houses were to be of a superior class, & worth at least £800 each, & that on certain plots pointed out the erection of stables would also be permitted.

H. signed an agreement to take conveyances of four plots the principal parts of which agreement were printed; & one of the printed clauses provided that the grantee should not erect on any plot any dwelling-house or building, other than a dwelling-house worth £800, except a greenhouse of a specified description.

H. erected a dwelling-house of the required value on each of his plots, & took a conveyance of each plot, by which he covenanted not to alter the external elevation of his buildings, & not to erect any other building except a greenhouse.

V. subsequently acquired the interest of S. in other plots, facing those of H., & erected thereon a billiard-room, conservatory, & stables as adjuncts to his own house; but his conveyance contained no restrictive covenant except that he would not erect any building without the approval of S., which he obtained before proceeding to build:—*Held*: H. had no cause of action in respect of the erection of the buildings of V.—*TUCKER v. VOWLES*, [1893] 1 Ch. 195; 62 L. J. Ch. 172; 67 L. T. 763; 41 W. R. 156; 3 R. 107.

Annotation:—*Reid*. *Whitcheuse v. Hugh*, [1906] 1 Ch. 253.

2634. — Admissibility of evidence.—A vendor, the owner in fee of an estate, conveyed part of it to D., who, for himself, his exors., administrators, & assigns, entered into certain restrictive covenants with the vendor, his heirs & assigns. About the same time the vendor conveyed two other portions of the estate to two other purchasers, subject to restrictive covenants similar to D.'s covenants. The vendor subsequently sold the remainder of the estate in lots by auction subject to restrictive stipulations binding on each purchaser, similar to D.'s covenants. The auction sale plan showed the whole estate sold & unsold. An action was brought by the assigns of purchasers at the auction sale to enforce against a lessee of an assign of D. the covenants entered into by D. with the vendor. The benefit of these covenants had never been expressly assigned to the purchasers at the auction sale:—*Held*: there was a general building scheme affecting the whole estate; D. was not bound by it for want of reciprocity; but the plan & particulars of the auction sale raised an irresistible inference that the vendor intended the purchasers at that sale to have the benefit of D.'s covenants so that the purchasers at that sale could enforce D.'s covenants as assigns of the vendor.

Where a vendor sells land & retains other land & imposes on the purchaser a covenant, it becomes a question of fact what the effect of that is. That being a question of fact, it must be decided by the

light of evidence as are all other questions of fact. But if you find that a building scheme exists, proof of that building scheme may be given. It is only a matter of evidence, & it is perfectly competent to prove by other evidence, if you can find it, whether or not the building scheme applies (*COLLINS, L.J.*).—*NALDER & COLLYER'S BREWERY CO., LTD. v. HARMAN* (1900), 83 L. T. 257, C. A.

2635. Subsequent addition of land to estate—Inclusion in scheme.—*TINDALL v. CASTLE*, No. 2703, *post*.

2636. Obligations must be defined.—*ROWELL v. SATCHELL*, No. 2806, *post*.

2637. ——*REID v. BICKERSTAFF*, No. 2665, *post*.

2638. Area must be defined.—*OSBORNE v. BRADLEY*, No. 2780, *post*.

2639. ——*REID v. BICKERSTAFF*, No. 2665, *post*.

2640. Persons must be defined.—*OSBORNE v. BRADLEY*, No. 2780, *post*.

2641. Rights of purchasers inter se.—S. purchased from comrs. by several conveyances the fee simple of several houses forming one block of buildings upon a site laid out in accordance with a building scheme, each conveyance containing a covenant by S. not to carry on or permit to be carried on upon the premises conveyed any trade or business, but to keep the house as a private dwelling-house only, & not to do or suffer to be done upon the premises conveyed anything which might grow to the annoyance of any person who might be or become the owner, tenant, or occupier of any part of the premises then or later belonging to the comrs. S. afterwards granted to resp. a lease of one of the houses containing a restrictive covenant of the same nature & a block plan of the houses. During the negotiations for the lease statements were made by S.'s solrs. to resp. whereby he became aware that similar restrictive covenants were contained in all the leases granted by S. of houses in that block & also became aware of the terms of the conveyances of resp.'s house from the comrs. to S.:—*Held*: although the statements made to resp. did not amount to a collateral contract with him as to the future management of the estate, resp. was from the nature of the transaction entitled to an injunction restraining S. from authorising any of the other houses in the block to be used for the purpose of trade.

This restriction was obviously for the benefit of all the lessees on the estate; they all had a common interest in maintaining the restriction. This community of interest necessarily, I think, requires & imports reciprocity of obligation (*LORD MACNAGHTEN*).—*SPICER v. MARTIN* (1888), 14 App. Cas. 12; 58 L. J. Ch. 309; 60 L. T. 546; 53 J. P. 516; 37 W. R. 689, H. L.; *affg.* on other grounds, S. C. *sub nom.* *MARTIN v. SPICER* (1886), 34 Ch. D. 1, C. A.

Annotations:—*Apld.* *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 342; *Hudson v. Cripps*, [1896] 1 Ch. 265. *Consd.* *Osborne v. Bradley*, [1903] 2 Ch. 446. *Apld.* *Elliston v. Reacher*, [1908] 2 Ch. 374. *Distd.* *Reid v. Bickerstaff*, [1909] 2 Ch. 305. *Consd.* *Kelly v. Barrett*, [1924] 2 Ch. 379. *Reid*. *Davis v. Leicester Corp.*, [1894] 2 Ch. 208; *Knight v. Simmonds* (1896), 65 L. J. Ch. 583; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Jaeger v. Mansions Consolidated* (1902), 87 L. T. 690; *Formby v. Barker*, [1903] 89 L. T. 249; *Willé v. St. John*, [1910] 1 Ch. 84; *Browne v. Flower*, [1911] 1 Ch. 219; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Swan v. Sinclair*, [1925] A. C. 227; *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225.

2642. ——*WILLÉ v. ST. JOHN*, No. 2708, *post*. **Loss of right to relief.**—*See* Nos. 2672, 2790, *post*.

(b) *Reservation of Power to Vary.***2643. Effect of reservation on liability of vendor.]**

—Building land was sold in a number of lots, subject to certain conditions as to fencing, repairing the roads, & to restrictions as to the class of houses to be built. The conditions also provided that statements to this effect should be inserted in the conveyances. By condition 15, the vendor reserved the right of selling the unsold lots under different arrangements, “& either subject to or not subject to the stipulations as to fencing & other stipulations contained in the particulars or the conditions”:—*Held*: as to the unsold lots the vendor was subject to none of the restrictions.—*SIDNEY v. CLARKSON* (1865), 35 Beav. 118; 14 W. R. 157; 55 E. R. 839; *sub nom. SYDNEY v. CLARKSON*, 13 L. T. 659.

Annotation:—*Relf. Re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 342.

2644. —.—A corpn. having acquired land to widen a street sold surplus land by auction under conditions requiring the purchasers to observe the bye-laws as to building.

The corpn. reserved the right to waive or alter any stipulations as to any land not sold at the sale or, with the consent of the purchaser, as to any land so sold. The corpn. consented to alter the plans of a purchaser so that the air space required by the byelaws was provided out of a square, & not out of land sold at the sale. The square was a cul de sac, but not separated by any bar from the highway. It had never been paved or repaired by the local authority:—*Held*: there was under the circumstances no building scheme which the corpn. was not at liberty to alter, & although a cul de sac may be a highway, no dedication of the square to the public had been proved, & the user proved was only that of private rights of way to the houses in the square.—*A.-G. & LONDON PROPERTY INVESTMENT TRUST, LTD. v. RICHMOND CORPN. & GOSLING & SONS* (1903), 89 L. T. 700; 68 J. P. 73; 20 T. L. R. 131; 2 L. G. R. 628.

Annotations:—*Relf. A.-G. v. Antrobus*, [1905] 2 Ch. 188; *Josselson v. Weiler* (1911), 75 J. P. 513.

2645. —.—Pltf. was the owner of a house built on a plot which formed part of an estate laid out by a building society in accordance with a scheme. On the sale of this plot by the society to pltf.'s predecessor in title, it was shown on a plan of the estate as bounded on one side by a vacant space, which, though not named in the plan as a road, had been in fact roughly made up by the society as a road. This road ran from a street on which pltf.'s house fronted to a level crossing on a railway over which there was a private right of way for the benefit of the owners of a field on the opposite side of the line. The building society having acquired the field & released the right of way, fenced, off the road & sold the site to deft.'s predecessor in title. All the plots on the building estate were conveyed subject to a condition reserving to the building society the power of allowing variation in the plans & conditions. In an action to restrain deft. from digging up the road on the ground that it was a violation of the building scheme, & that the road had been dedicated to the public by user:—*Held*: under the conditions the society had an absolute power to alter the building scheme by closing the road, & there was no sufficient evidence of user or dedication to entitle pltf. to succeed.—*WHITEHOUSE v. HUGH*, [1906] 2 Ch. 283; 75 L. J. Ch. 677; 95 L. T. 175; 22 T. L. R. 679; 50 Sol. Jo. 615, C. A.

2646. —.—A building society purchased the F. estate in 1860. A sale plan was then prepared, on which the estate was plotted out into lots, &

the conditions which were to affect the different lots were printed. Among these were conditions that each purchaser should execute a deed of covenant for regulating building on his lot & securing performance of the conditions therein contained; & that no hotel should be built on any lot & no building used as such without the vendors' consent. At the end was a proviso that the vendors should have power to deal with any part of the estate not disposed of without reference to the restrictions. In Jan. 1861, the estate was conveyed to trustees for the building society.

A deed was then prepared, purporting to be made between the purchasers whose names were set out in the second schedule of the first part & the trustees of the second part. It contained covenants by the purchasers with each other & the trustees to observe the restrictions contained in the first schedule. These restrictions were the same as those on the sale plan. This document was engrossed, dated Jan. 16, 1861, & stamped, but it was never executed either by the trustees or any purchaser. A printed form of conveyance was prepared for the society which contained a covenant by the purchaser to observe & perform the restrictions & covenants contained in an indenture dated Jan. 16, 1861, & expressed to be made between the persons whose names were subscribed in the second schedule of the first part & the vendors of the second part. Defts. were owners of two lots conveyed to their predecessors in title by deeds in the printed form on Dec. 27, 1861, & Apr. 19, 1866, on which they had recently erected a building which they were using as an hotel. Pltfs. were the owners of three plots conveyed to their predecessor in title on Dec. 27, 1861, & brought this action to restrain defts. from carrying on the hotel. The several conveyances under which pltfs. & defts. claimed were executed by the vendors only, not by the purchasers:—*Held*: notwithstanding the reservation of a dispensing power to the vendors & the non-execution of the deed of covenant, there was a general building scheme for the benefit of the purchasers *inter se* as well as of the vendors, & the covenants could be enforced at the suit of pltfs.—*ELLISTON v. REACHER*, [1908] 2 Ch. 665; 78 L. J. Ch. 87; 99 L. T. 701, C. A.

Annotations:—*Consd. Willé v. St. John*, [1910] 1 Ch. 81; *Apd. Kelly v. Barrett*, [1924] 2 Ch. 379. *Relf. Bickerstaff*, [1909] 2 Ch. 305; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Westboughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159; *Sharp v. Harrison*, [1922] 1 Ch. 502; *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225.

2647. —.—W., the owner of an estate, laid it out for building subject to seventeen stipulations, of which the eighth provided that the houses to be erected on the estate should be of uniform elevation in accordance with drawings to be approved by “the vendor's” surveyor; the eleventh provided that no trade or business of any kind should be carried on upon any lot except those marked “shop lots”; & the sixteenth reserved to “the vendor” the right of allowing a departure from the stipulations in any one or more cases.

In 1895 W. sold & conveyed several lots of the estate, none of which were “shop lots,” to pltf. subject to seventeen scheduled stipulations, which were identical with the original stipulations, & pltf. covenanted to perform & observe the scheduled stipulations. In 1898 pltf. sold & conveyed six of the lots he had purchased to G. subject to seventeen stipulations scheduled to G.'s conveyance which were identical with the original stipulations, & G. covenanted to observe & perform the scheduled stipulations. In 1910 G.'s successors in title sold & conveyed one of the

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six lots to the predecessors in title of P. subject to the stipulations scheduled to the deeds of 1895 & 1898 so far as then subsisting.

W. was a party to the deed of 1910, & for valuable consideration released the lot thereby conveyed from the eighth stipulation with liberty to build on it as if it were a "shop lot," & in 1913 this lot was sold & conveyed to P., who with W.'s approval, built a motor garage upon it & his tenant commenced to carry on business there. In an action by pltf. against P. & his tenant, alleging that the word "vendor" in the stipulations scheduled to the conveyance of 1898 meant pltf. & not W., that defts. had without his, pltf.'s, consent committed a breach of the eighth & eleventh stipulations, & claiming an injunction:—*Held*: the word "vendor" in the stipulations scheduled to the conveyance of 1898 meant W. & not pltf.; & W. having under the sixteenth stipulation released defts.' land from the eleventh stipulation, pltf. had no cause of action.—*MAYNER v. PAYNE*, [1914] 2 Ch. 555; 83 L. J. Ch. 897; 111 L. T. 375; 58 Sol. Jo. 740.

D. Restrictive Covenants.

See Sub-sect. 4, post.

SUB-SECT. 4.—RESTRICTIVE COVENANTS.

A. In General.

2648. Covenant must be precise in terms.—Land was sold by the mtgees. of B., consisting of a circular plot, surrounded by a ring called the Park Drive. It was stipulated that if used for building, villas of a certain size were to be built; that the ground between the villas & the Park Drive should be laid out in lawn or pleasure grounds down to the Park Drive; that a footpath of the width of 15 feet should be laid out round the whole of the northern, southern & western boundaries of the land. The Park Drive round the circular piece belonged to B., the part outside had originally been his, but, with a small exception had been sold by him:—*Held*: the condition about the footpath was too vague to be enforced, & the purchaser was not bound to make it & could not be restrained from using the land in any way inconsistent with making it.—*TAYLOR v. GILBERTSON* (1854), 2 Drew. 391; 61 E. R. 770.

2649. —.]—An agreement not to erect "unseemly" buildings is too vague & indefinite to be capable of being enforced by the ct. as a permanent restraint upon the use of land.—*MURRAY v. DUNN*, [1907] A. C. 283; 97 L. T. 112, H. L.

2650. —.]—Land was conveyed to J., resp.'s predecessors in title, by a deed which contained the following clause: "under the declaration that it shall not be lawful to J. or his foresaids to sell or feu any part of the ground occupied as the lawn between the ground feued by me to W."—applt.'s predecessor in title, "& the present mansion house of E. park excepting" under certain conditions as to building on the land therein set out," which restriction shall also be a real burden affecting the lands. & shall operate as a servitude in favour of the W. & his foresaids in all time coming":—*Held*: the clause did not operate

to prevent any singular successor from building as he pleased on any part of the ground, & in any case it was not sufficiently precise to create a real burden.—*ANDERSON v. DICKIE* (1915), 84 L. J. P. C. 219, H. L.

2651. —.]—When a landowner purports to impose restrictive obligations on the use of various portions of his land, after alienation, for the common benefit of himself & of the various purchasers *inter se*, there need be no mutual covenants if mutual obligations are clearly intended &, provided that the geographical area within which the mutual obligations are intended to operate can be ascertained with reasonable definiteness, a ct. of equity will in such a case give effect to the common intention. If no such geographical area is ascertainable, such restrictions will be unenforceable.—*TORBAY HOTEL, LTD. v. JENKINS*, [1927] 2 Ch. 225; 96 L. J. Ch. 415; 137 L. T. 248; 71 Sol. Jo. 471.

2652. Covenant must not be ultra vires—Purchaser covenanting to recovery—Sale of superfluous land.—*LONDON & SOUTH WESTERN RY. CO. v. GOMM*, No. 2617, *ante*.

2653. —.]—Covenant to use land for railway station only.—By a special Act a railway co. were authorised to acquire certain land for the purpose of enlarging their stations " & for other purposes of & connected with their undertaking." Under this power the railway co. acquired the land by voluntary agreement & covenanted in their conveyance that they & their assigns would at all times hereafter use the land for a passenger station " & for no other purpose." Afterwards the railway co. contracted to sell part of the land that they did not require, & the purchaser required the covenant to be released:—*Held*: the covenant was *ultra vires* the railway co., & they could sell free from the restrictions contained in it.—*Re SOUTH EASTERN RY. CO. & WIFFIN'S CONTRACT*, [1907] 2 Ch. 366; 76 L. J. Ch. 481; 97 L. T. 576.

Annotations:—Consd. & Expld. Stourcliffe Estates Co. v. Bournemouth Corpn., [1910] 2 Ch. 12. *Reid. County Hotel & Wine Co. v. L. & N. W. Ity.*, [1918] 2 K. B. 251.

2654. Whether void for remoteness.—*LONDON & SOUTH WESTERN RY. CO. v. GOMM*, No. 2617, *ante*.

2655. Whether implied.—Grant to defts. of a piece of foreshore "to be by them used for the benefit of the public only for purposes of recreation & health":—*Held*: certain buildings contemplated would be a breach of such covenant.—*WILLIAMSON v. SUNDERLAND CORPN.* (1892), 9 T. L. R. 143.

2656. —.]—Building land described as adapted for shops & business premises was put up for sale by auction subject to a condition that the purchasers of certain specified lots should respectively covenant with the vendors to erect within a given time on each of the lots respectively purchased by them a shop & dwelling-house of a given minimum value, but the lots in question remained unsold:—*Held*: having regard to the absence of any express provision as to the maintenance of the contemplated buildings when erected as shops & dwelling-houses, no negative stipulation ought to be implied that nothing but shops & dwelling-houses should be erected on the lots in question; the vendors could not be restrained, at the instance of the purchaser of an adjoining lot, from erecting on the unsold lots a fire engine station of a value exceeding the aggregate value

PART XI. SECT. 2, SUB-SECT. 4.—A.

p. Duration of covenant.—*ROAF v. G. T. P. TOWN & DEVELOPMENT CO., LTD.* (1915), 31 W. L. R. 893; 24 D. L. R. 750; 8 Sask. L. R. 272.—*CAN.*

of the contemplated buildings, there being no such departure from the condition as to render the whole transaction futile.—*HOLFORD v. ACTON URBAN COUNCIL*, [1898] 2 Ch. 240; 67 L. J. Ch. 636; 78 L. T. 829; 14 T. L. R. 476.

Annotations.—*Reid. Foster & Dicksee v. Hastings Corp.* (1903), 87 L. T. 736; *Reid v. Bickerstaff*, [1909] 2 Ch. 305.

2657. Construction—Must be construed strictly.]—A restrictive covenant as to the letting or user of property will be construed strictly, & not so as to create a wider obligation than is imported by the actual words.—*BRIGG v. THORNTON*, [1904] 1 Ch. 386; 73 L. J. Ch. 301; 90 L. T. 327; 52 W. R. 276, C. A.

Annotation.—*Reid. Palliser v. Dover Corp. & Dover Harbour Board* (1914), 58 Sol. Jo. 379.

2658. Mutually dependent covenants.]—The owner of certain marsh lands sold them in lots by auction, the conditions of sale providing that the purchaser of lot 19, on which there was a steam mill, should be bound for ever to keep the mill in an efficient state for draining the other lots, & that the purchasers of those lots should enter into covenants to pay a rentcharge of 4s. an acre, & to keep their ditches, dykes, & drains properly cleansed & scoured. Deft. purchased lot 19, & pltf.'s predecessor in title & other persons purchased the other lots. The purchasers executed a drainage deed, by which deft. covenanted that "while & so long as" pltf.'s predecessor in title should perform his covenants he would keep the mill in good condition & would, when requisite, work it for the purpose of drainage; & pltf.'s predecessor in title covenanted to keep his ditches, dykes, & drains properly cleansed & scoured & to pay the rentcharge to deft. Pltf. did not keep his ditches, etc., properly cleansed & scoured, & deft. did not work his mill for the purpose of keeping pltf.'s marshes from being flooded, when it was requisite that he should do so. In an action for damages for breach of deft.'s covenant to work the mill:—*Held*: the intention of the parties was that the covenants should be dependent covenants, & pltf. could not recover.—*KIDNER v. STIMPSON* (1918), 35 T. L. R. 63, C. A.

As to restrictive covenants in leases.]—See *LANDLORD & TENANT*, Vol. XXXI., pp. 149 *et seq.*

B. Burden and Benefit of Covenants.

2659. Whether running with land—In favour of assignee.]—*COPARCENER'S CASE* (undated), cited in *Y. B. 42 Edw. 3, fo. 3, pl. 14*; 2 Co. Litt. 384 b.

Annotations.—*Consd. Spencer's Case* (1583), 5 Co. Rep. 16 a. *Reid. Forster v. Elvet Colliery Co., Quin v. Same, Seed v. Same, Morgan v. Same*, [1908] 1 K. B. 629.

2660. ———.]—*PAKENHAM v. PRIOR OF —* (1368), *Y. B. 42 Edw. 3, fo. 3, pl. 14*; *sub nom. PAKENHAM'S CASE*, Co. Litt. 385 a.

Annotations.—*Consd. Spencer's Case* (1583), 5 Co. Rep. 16 a. *Apld. Vyvyan v. Arthur* (1823), 2 Dow. & Ry. K. B. 670. *Consd. Keppell v. Bailey* (1834), 2 My. & K. 517; *Forster v. Elvet Colliery Co., Quin v. Same, Seed v. Same, Morgan v. Same*, [1908] 1 K. B. 629. *Reid. Rogers v. Hosegood*, [1900] 2 Ch. 388.

2661. ———.]—Land was limited under a settlement to the joint appointment of two persons; & in default of such joint appointment upon certain trusts. A power of sale was also contained in the settlement to be exercised by

the trustees, with consent of the tenant for life. The land was laid out for building purposes upon a scheme, with a condition that no building should be erected within 6 feet of a certain road. A. purchased a piece of the land in 1816, under the power of appointment, the agreement containing a stipulation against building within the prescribed limit, although in the conveyance actually executed the space was left in blank. B. purchased a piece of the land in 1853, under the power of sale, & covenanted against erecting any building within the prescribed limit. A. had in 1847, commenced building a wall, 5 feet high, within the limit, which he was now proceeding to carry higher:—*Held*: B. was entitled to an injunction to restrain A. from building this wall, the covenant entered into by A. with the donees of the power operating for the benefit of those in remainder & their assigns.—*CHILD v. DOUGLAS* (1854), *Kay*, 560; 23 L. T. O. S. 140; 2 W. R. 461; 69 E. R. 237; *on appeal*, 5 De G. M. & G. 739; 23 L. T. O. S. 283; 2 W. R. 701, L. J.J.; *subsequent proceedings* (1856), 2 Jur. N. S. 950.

Annotations.—*Expld. Keates v. Lyon* (1869), 4 Ch. App. 218. *Consd. Bowes v. Law* (1870), L. R. 9 Eq. 636; *Renals v. Cowlshaw* (1878), 9 Ch. D. 125. *Apld. Rogers v. Hosegood*, [1900] 2 Ch. 388. *Reid. Master v. Hansard* (1876), 46 L. J. Ch. 506, n.; *Russell v. Watts* (1885), 55 L. J. Ch. 158; *Foster v. Fraser*, [1893] 3 Ch. 158; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74; *Long v. Gray* (1913), 58 Sol. Jo. 46. *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Westhoughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159.

2662. ———.]—G. & C. having a power to appoint in fee simple over lands near a town, which stood limited, subject to such power of appointment, to G. & C. successively & in strict settlement, & there being also a power of sale over all the property, to be exercised at the request of G. & C. & the survivor, G. & C. appointed in 1845 a plot of land to deft. in fee, with a covenant by deft., his heirs & assigns, with G. & C., their heirs & assigns, not to build within — feet of a particular line. In the contract for sale, which preceded the conveyance, the distance was stated to be 6 feet. In 1853, C. having died, an adjoining plot, in a line with the first, from which it was separated by a narrow street, was conveyed, under the power of sale, by the direction of G., to pltf. in fee, under a like covenant not to build within 6 feet of the front line. In 1855 pltf. opened a window into the street which separated his plot from deft.'s plot, thereby commanding deft.'s front door. Deft. thereupon commenced raising a wall which he had already, before 1853, built to the height of 5 feet, intending now to raise it to 15 feet. It appeared that pltf. had built his own house so that the foundations, to the height of a foot from the ground, encroached on the distance of 6 feet mentioned in his own conveyance, & the ornamental work at his main door encroached 1 foot on the 6 feet. On a bill by pltf. to restrain the further raising the wall in question to 15 feet:—*Held*: the right to enforce in equity the benefit of a covenant affecting the enjoyment of land will pass to the alienee of that land, without being specifically mentioned in the instrument of alienation.—*CHILD v. DOUGLAS* (1856), 2 Jur. N. S. 950.

Annotations.—*Distd. Keates v. Lyon* (1869), 4 Ch. App. 218. *Reid. Renals v. Cowlshaw* (1879), 11 Ch. D. 806.

PART XI. SECT. 2, SUB-SECT. 4.—B.

2659 i. Whether running with land—In favour of assignee.]—Pltf. declared that deft., by his deed, covenanted not to commit waste, not stating with whom:—*Held*: pltf. could not show that he was suing as assignee of the reversion, but must prove a covenant

with himself.—*BRENNAN v. WHITLEY* (1857), 15 U. C. R. 277.—*CAN.*

2659 ii. ———.]—Where D., the owner of certain lands, on selling part to B., inserted this clause in the conveyance, "A. square is private property but is always to remain unbuild upon, except one residence with the necessary

outbuildings, including porter's lodge." & the purchaser, covenanted not to allow any business of a certain kind to be carried on on the part conveyed:—*Held*: the benefit of the restriction passed to the assignee of the purchaser.—*VANKOUGHNET v. DENISON* (1885), 11 A. R. 699.—*CAN.*

Sect. 2.—Rights and liabilities in relation to covenants: Sub-sect. 4, B.]

2663. ——— **Meaning of "assign."**—Deft.'s predecessor in title purchased certain land, & covenanted for himself, his heirs, exors., administrators, & assigns, with the vendors & their assigns, & with the owners of adjoining lots, their heirs & assigns, not to carry on a certain trade. Pltf. was lessee of one of such owners, & brought this action for an injunction to restrain deft. from committing a breach of the covenant:—**Held:** pltf. was an "assign" within the meaning of the covenant, & was entitled to the injunction.—**TAITE v. GOSLING** (1869), 11 Ch. D. 273; 48 L. J. Ch. 397; 40 L. T. 251; 43 J. P. 508; 27 W. R. 394.

Annotations:—**Consd.** *Bryant v. Hancock*, [1898] 1 Q. B. 716; *Holloway v. Hill*, [1902] 2 Ch. 612; *Westhoughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159. **Refd.** *Villiers v. Oldcorn* (1903), 20 T. L. R. 11.

2664. ——— **]**—When the benefit of a restrictive covenant has been once clearly annexed to one piece of land, there is a presumption that it passes by an assignment of that land, & it may be said to run with the land in equity as well as at law, without proof of special bargain or representation on the assignment of the land. The covenant in such a case runs with the land because the assignee has purchased something which inhered in or was annexed to the land which he bought. The purchaser's ignorance of the existence of the covenant does not defeat the presumption, though it may be rebutted by proof of facts inconsistent with it.

The owners of building land & their mtgees. conveyed a plot of the land in fee to a purchaser, who entered into a covenant with the mtgors., but not with the mtgees., that no more than one messuage or dwelling-house should at any one time be erected or be standing on the plot, & that such messuage should be adapted for & used as & for a private residence only. The conveyance stated that the covenant was entered into with intent that it might so far as possible bind the premises thereby conveyed & every part thereof, into whosoever hands the same might come, & might enure to the benefit of the mtgees., their heirs & assigns, & others claiming under them to all or any of their lands adjoining or near to the premises.

The mtgors. afterwards conveyed another plot of land near to the first in fee to a purchaser who had no knowledge of the covenant entered into by the purchaser of the first plot:—**Held:** (1) assigns of the second plot could enforce the restrictive covenant against an assign of the first plot; (2) the erection on the first plot of a large block of buildings, which were to be occupied as residential flats, would be a breach of the covenant.

The covenant having been released by the mtgors., so far as they lawfully could, as regarded the number of houses to be erected, the purchaser's devisee covenanted with the mtgors. that every messuage to be erected on the land should be adapted for & used as & for a private residence only:—**Held:** the erection of the proposed building would be a breach of the covenant also.

An injunction was accordingly granted to restrain the assign of the first plot from erecting such a block of buildings upon it.

These [ordinary covenants for title] undoubtedly run with the land, & each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the land purchased

by him (**FARWELL, J.**).—**ROGERS v. ROSEGOOD**, [1900] 2 Ch. 388; 69 L. J. Ch. 652; 83 L. T. 186; 48 W. R. 659; 16 T. L. R. 489; 41 Sol. Jo. 607, C. A.

Annotations:—As to (1) **Consd.** *Muller v. Trafford*, [1901] 1 Ch. 54; *Formby v. Barker*, [1903] 2 Ch. 539. **Apld.** *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386. **Consd.** *Forster v. Elvert Colliery Co.*, *Quin v. Same*, *Seed v. Same*, *Morgan v. Same*, [1908] 1 K. B. 629. **Distd.** *Reid v. Bickerstaff*, [1909] 2 Ch. 305. **Consd.** *Ricketts v. Enfield*, [1909] 1 Ch. 544; *Wilkes v. Spooner*, [1911] 2 K. B. 473. **Apld.** *Long v. Gray* (1913), 58 Sol. Jo. 46. **Consd.** *L. C. C. v. Allen*, [1914] 3 K. B. 642. **Distd.** *Milbourn v. Lyons*, [1914] 2 Ch. 231; *Ives v. Brown*, [1919] 2 Ch. 314; *Chambers v. Randall*, [1923] 1 Ch. 149. **Consd.** *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225. **Refd.** *Woodall v. Clifton*, [1905] 2 Ch. 257; *Westhoughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159; *Northbourne v. Johnston*, [1922] 2 Ch. 369; *Kelly v. Barrett*, [1924] 2 Ch. 379. As to (2) **Distd.** *Kimber v. Admans*, [1900] 1 Ch. 412. **Apld.** *Day v. Waldron* (1910), 88 L. J. K. B. 937. **Refd.** *Ilford Park Estates v. Jacobs*, [1903] 2 Ch. 522. **Generally, Mentd.** *Weatheritt v. Cantlay* (1901), 84 L. T. 768; *Humphrey v. Young* (1902), 87 L. T. 551.

2665. ——— **]**—In order to establish the existence of a building scheme there must be definite reciprocal rights & obligations extending over a defined area.

If on a sale of part of an estate the purchaser covenants with the vendor, his heirs & assigns, not to deal with the purchased property in a particular way, a subsequent purchaser from the same vendor of another part of the estate does not take the benefit of the covenant unless he is an express assignee thereof, or unless the covenant is expressed to be for the benefit & protection of the particular parcel purchased by the subsequent purchaser. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed, either by the deed containing the covenant or by some subsequent instrument executed by the covenantor, does not pass as an incident of land on a subsequent conveyance.

By a deed dated in 1840 deft.'s predecessor in title bought a piece of land, part of an estate comprising about 64 acres on the outskirts of Liverpool, which was vested in trustees for sale, & for himself, his heirs & assigns, covenanted with the vendors, their heirs & assigns, to observe certain restrictions relating to building on the land purchased. The trustees subsequently sold other portions of the estate to the predecessors in title of pltf., who entered into similar restrictive covenants affecting the land purchased by them. There was nothing to show whether pltf.'s predecessors were aware of the existence of the covenants of 1840, & there was no reference to them in their conveyances. The trustees at intervals before & after 1840 sold other plots of the estate to various purchasers who entered into varying covenants of a like nature, & eventually the whole estate was disposed of & became a residential quarter. In an action by pltf. to restrain deft. from building in breach of the covenants contained in the deed of 1840:—**Held:** (1) pltf. had failed to establish the essential requisites of a building scheme, namely, definite reciprocal rights & obligations extending over a defined area; (2) inasmuch as the benefit of the covenants in the deed of 1840 was not expressly assigned to pltf.'s predecessors, nor so annexed to the land of which they were the assigns as to pass by mere conveyance, pltf. were not entitled to succeed.

If on a sale of part of an estate the purchaser covenants with the vendor, his heirs & assigns, not to deal with the purchased property in a particular way, a subsequent purchaser of part of the estate does not take the benefit of the covenant unless (a) he is an express assignee of the covenant, as

distinct from assignee of the land, or (b) the restrictive covenants is expressed to be for the benefit & protection of the particular parcel purchased by the subsequent purchaser (COZENS-HARDY, M.R.).—**REID v. BICKERSTAFF**, [1909] 2 Ch. 305; 78 L. J. Ch. 753; 100 L. T. 952, C. A.

Annotations :—As to (2) **Consd.** *Milbourn v. Lyons*, [1914] 2 Ch. 231; *Kelly v. Barrett*, [1924] 2 Ch. 379. **Refd.** *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225. *Generally*, *Reid. Mayner v. Payne*, [1914] 2 Ch. 555.

2666. — Against assignee.—An action lies against the assignee of a covenant which runs with the land, although he is not named in it.—**HYDE v. WINDSOR** (DEAN & CANONS) (1597), Cro. Eliz. 552; 78 E. R. 798; *sub nom.* **HIDE v. WINDSOR** (DEAN & CANONS), Moore, K. B. 399; *sub nom.* **WINDSOR'S** (DEAN & CHAPTER) CASE, 5 Co. Rep. 24 a.

Annotations :—**Consd.** *Bally v. Wells* (1769), Wilm. 341. **Refd.** *Adams v. Gibeay* (1830), 6 Bing. 656; *Tremere v. Morison* (1834), 1 Bing. N. C. 89; *Penfold v. Abbott* (1862), 32 L. J. Q. B. 67; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.* (1898), 68 L. J. Q. B. 114. **Mentd.** *Taylor v. Caldwell* (1863), 3 B. & S. 826.

2667. — — — — ——A covenant between vendor & purchaser, on the sale of land, that the purchaser & his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.—**TULK v. MOXHAY** (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L. J. Ch. 83; 13 L. T. O. S. 21; 13 Jur. 89; 41 E. R. 1143, L. C.

Annotations :—**Consd.** *Patching v. Dubbins* (1853), Kay, 1; *Child v. Douglas* (1854), Kay, 560. **Apld.** *Coles v. Sims* (1854), 5 De G. M. & G. L. **Consd.** *Western v. Macdermott* (1866), 2 Ch. App. 72. **Apld.** *Wilson v. Hart* (1866), 1 Ch. App. 463; *Morland v. Cook* (1868), L. R. 6 Eq. 252. **Consd.** *Catt v. Tourle* (1869), 4 Ch. App. 654; *Keates v. Lyon* (1869), 4 Ch. App. 218; *Aspden v. Seddon, Preston & Saine* (1876), 1 Ex. D. 496; *Cooke v. Chilcott* (1876), 3 Ch. D. 694. **Apld.** *Birmingham Joint Stock Co. v. Lea* (1877), 36 L. T. 843; *Richards v. Revitt* (1877), 7 Ch. D. 221. **Expld. & Distd.** *Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403. **Apld.** *Patman v. Harland* (1881), 17 Ch. D. 353. **Distd.** *L. & S. Ry. v. Gomm* (1882), 20 Ch. D. 562. **Apld.** *L. C. & D. Ry. v. Bull* (1882), 47 L. T. 413; *Brown v. Inskip* (1884), Cab. & El. 231. **Distd.** *Austerberry v. Oldham Corp.* (1885), 29 Ch. D. 752. **Expld. & Distd.** *Hall v. Ewin* (1887), 37 Ch. D. 71. **Distd.** *Fawcett's Trustees & Holmes* (1889), 61 L. T. 105. **Consd.** *Mackenzie v. Childers* (1889), 43 Ch. D. 265. **Apld.** *Clegg v. Hands* (1890), 41 Ch. D. 503; *Mander v. Falcke*, [1891] 2 Ch. 554. **Distd.** *Holford v. Acton U. C.*, [1898] 2 Ch. 210. **Consd.** *John Brothers Abergarwy Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Rogers v. Hosgood*, [1900] 2 Ch. 388. **Distd.** *Formby v. Barker*, [1903] 2 Ch. 539. **Consd.** *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386. **Distd.** *Powell v. Hensley*, [1909] 2 Ch. 252. **Consd.** *Wilkes v. Spooner*, [1911] 2 K. B. 473. **Distd.** *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Smith v. Colbourne*, [1914] 2 Ch. 533. **Consd.** *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108. **Refd.** *Marker v. Marker* (1851), 9 Hare, 1; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Brabant v. Wilson* (1865), 35 L. J. Q. B. 49; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *McLean v. McKay* (1873), L. R. 5 P. C. 327; *Leech v. Schweder* (1874), 9 Ch. App. 465, n.; *Fairclough v. Marshall* (1878), 4 Ex. D. 37; *Bewley v. Atkinson* (1879), 13 Ch. D. 283; *Birmingham Canal Co. v. Cartwright* (1879), 27 W. R. 597; *Greeves v. Field* (1880), 14 Ch. D. 563; *Andrew v. Aiken* (1882), 22 Ch. D. 218; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Stuart v. Diplock* (1889), 43 Ch. D. 343; *Simpson v. Godmanchester*, [1897] A. C. 696; *White v. Southend Hotel Co.* (1897), 76 L. T. 273; *Ashby v. Wilson*, [1900] 1 Ch. 66; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch.

799; *Holloway v. Hill*, [1902] 2 Ch. 612; *Jaeger v. Mansions Consolidated* (1902), 87 L. T. 690; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1902), 71 L. J. K. B. 837; *Noakes v. Rice*, [1902] A. C. 21; *Wilson v. Twanley* (1903), 88 L. T. 803; *Teape v. Douse* (1905), 92 L. T. 319; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Schwann v. Cotton*, [1916] 2 Ch. 459; *Berton v. Alliance Economic Investment Co.*, [1922] 1 K. B. 712; *Atkin v. Rose*, [1923] 1 Ch. 522. **Mentd.** *Schlumberger v. Lister* (1860), 6 Jur. N. S. 1336; *Cable v. Bryant*, [1908] 1 Ch. 259.

2668. — — — — — To extent of requiring assignee actively to do certain acts.—The principle of *Tulk v. Moxhay*, No. 2667, *ante*, is not to be extended so as to compel a person acquiring property, either as purchaser in fee or as lessee, with notice of restrictive covenant, actively to do anything which may involve him in expense.—**HALL v. EWIN** (1887), 37 Ch. D. 74; 57 L. J. Ch. 95; 57 L. T. 831; 36 W. R. 84; 4 T. L. R. 46, C. A.

Annotations :—**Consd.** *Clegg v. Hands* (1889), 44 Ch. D. 506, n. **Apld.** *Powell v. Hensley*, [1909] 2 Ch. 252. **Refd.** *John Brothers Abergarwy Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Jaeger v. Mansions Consolidated* (1902), 87 L. T. 690; *Wilson v. Twanley* (1903), 88 L. T. 803; *Teape v. Douse* (1905), 92 L. T. 319; *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; *Berton v. Alliance Economic Investment Co.*, [1922] 1 K. B. 742; *Atkin v. Rose*, [1923] 1 Ch. 522.

2669. — — — — — Non-disclosure ground for repudiating purchase.—On an open contract for the sale of freehold property the vendor supplied an abstract showing a title for twelve years, & alleged that the purchasers had notice at the date of the contract of his inability to give an absolute title; he also set up a waiver by the purchasers of their right to a full forty years' title by a letter written by the purchasers. Part of the property was subject to a restrictive covenant not to carry on any trade or business on the premises. When the purchasers made inquiries as to restrictive covenants, they were informed that such covenants did not affect the user of the property for business purposes.—**Held**: if it is shown on the signing of a contract that a forty years' title was not able to be given, the purchasers cannot have it, but in this case the purchasers refused to take a shorter title, & the contract being silent on that point, the purchasers were entitled to their full forty years' title. The whole correspondence showed that the purchasers all along insisted on a forty years' title, & the letter referred to could not be held to be a waiver of itself. The restrictive covenants were perfectly good objections to the title, & notice of them had not been received by the purchasers, who were told there were no such restrictive covenants.—**Re JUDGE & SHERIDAN'S CONTRACT** (1907), 96 L. T. 451.

2670. — In favour of appointee under power.—**CHILD v. DOUGLAS**, No. 2661, *ante*.

2671. — Against squatter.—The benefit of a restrictive covenant affecting the user of land is a paramount right in the nature of a negative easement binding the land in equity; & a squatter who acquires a title to the land under Real Property Limitation Acts acquires his title subject to the covenant, even though he may have no actual notice of it.

A person who buys land from a successful squatter, & is content to take the squatter's title, depending upon Real Property Limitation Acts, without insisting upon a forty years' title, is

2666 i. — Against assignee.—**WARREN v. MUNROE** (1858), 15 U. C. R. 557.—**CAN.**

2666 ii. — — — — ——**INTERNATIONAL COAL & COKE CO. v. TREBLE** (1907), 7 W. L. R. 264; 1 Alta. L. R. 170.—**CAN.**

2666 iii. — — — — ——**Re BOWEN CO., LTD. & RANKIN**, [1924] 4 D. L. R.

406; 55 O. L. R. 601.—**CAN.**

2666 iv. — — — — ——**GILPINVILLE, LTD. v. DUMARESQ** (N. S.), [1927] 1 D. L. R. 730.—**CAN.**

2666 v. — — — — ——**Re ROWAN & FAYON**, [1927] 2 D. L. R. 722; 60 O. L. R. 245.—**CAN.**

2666 vi. — — — — ——**BATES v. CASEY**

& MILNE (1915), 34 N. Z. L. R. 714.—**N.Z.**

2666 vii. — — — — ——**VAN NIEKERK v. WIMBLE** (1878), 8 Buch. 190.—**S. AF.**

q. — Against squatter.—**INTERNATIONAL COAL & COKE CO. v. EVANS** (Alta.) (1908), 9 W. L. R. 711.—**CAN.**

Sect. 2.—Rights and liabilities in relation to covenants: Sub-sect. 4, B. & C. (a) i.]

affected with notice of covenants restricting the user of the land of which he would have become acquainted if he had made reasonable enquiry into the title prior to the squatter's.—*Re NISBET & POTTS' CONTRACT*, [1906] 1 Ch. 386; 75 L. J. Ch. 238; 94 L. T. 297; 54 W. R. 286; 22 T. L. R. 233; 50 Sol. Jo. 191, C. A.

Annotations:—*Consd.* *Abbey v. Gutters* (1911), 55 Sol. Jo. 364; *Wilkes v. Spooner*, [1911] 2 K. B. 473; L. C. C. v. Allen, [1914] 3 K. B. 642. *Refd.* *Long v. Gray* (1913), 58 Sol. Jo. 46; *Meyer v. Charles* (1918), 34 T. L. R. 589.

2672. — In favour of adjoining owners—Land sold in lots.—(1) Where an estate is vested in trustees who sell plots for building subject to restrictive covenants, each purchaser has an equity against the other purchaser to compel the observance of the covenants. Such equity may be lost by acquiescence.

(2) In a suit to enforce such an equity the trustees are necessary parties, & the remaining purchasers ought to be represented on the record.—*EASTWOOD v. LEVER* (1863), 4 De G. J. & Sm. 114; 3 New Rep. 232; 33 L. J. Ch. 355; 9 L. T. 615; 28 J. P. 212; 12 W. R. 195; 46 E. R. 859, L. J.J.

Annotations:—*As to (1)* *Apld.* *Brown v. Inskip* (1884), Cab. & El. 231. *Refd.* *Master v. Hansard* (1876), 4 Ch. D. 718; *Wheelton v. Burrows* (1879), 12 Ch. D. 31; *Rogers v. Hosegood* (1899), 81 L. T. 515.

2673. — Repurchase of lot sold subject to covenants.—A. sold part of an estate to B., who entered into restrictive covenants for himself, his heirs & assigns, with A., his heirs, exors., & administrators, as to buildings on the purchased property; but A. did not enter into any covenants as to the land retained. After this A. sold to other persons various lots of the part retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of the covenants entered into by B. After this A. bought back from B. what he had sold to him:—*Held*: the benefit of B.'s covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A., & A., after the repurchase, could make a title to the repurchased land discharged from the covenants.—*KEATES v. LYON* (1869), 4 Ch. App. 218; 38 L. J. Ch. 357; 20 L. T. 255; 33 J. P. 340; 17 W. R. 338, L. J.J.

Annotations:—*Distd.* *Birmingham Joint Stock Bank Co. v. Lea* (1877), 36 L. T. 843. *Apld.* *Renals v. Cowlishaw* (1878), 9 Ch. D. 125. *Consd.* *Nottingham Patent Brick & Tile Co. v. Butler* (1886), 16 Q. B. D. 778; *Reid v. Bickerstaff*, [1909] 2 Ch. 305. *Refd.* *Catt v. Tourle* (1869), 4 Ch. App. 654; *Master v. Hansard* (1876), 4 Ch. D. 718; *Collins v. Castle* (1887), 36 Ch. D. 243; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Clegg v. Hands* (1890), 59 L. J. Ch. 477; *Goddard v. Mid. Ry.* (1891), 8 T. L. R. 126; *Osborne v. Bradley*, [1903] 2 Ch. 446.

2674. — Question of fact.—Where a property is put up for sale by a vendor with the intention of selling the whole in lots, & restrictive

covenants are entered into with the vendor by each of the vendees, it is a question of fact whether the purchasers of the different lots intended to covenant in favour of the other purchasers. If such was, in fact, their intention, the ct. will enforce those covenants between the different purchasers & their assigns.—*NOTTINGHAM PATENT BRICK & TILE Co. v. BUTLER* (1886), 16 Q. B. D. 778; 55 L. J. Q. B. 280; 54 L. T. 444; 34 W. R. 405; 2 T. L. R. 391, C. A.

Annotations:—*Apld. & Extd.* *Collins v. Castle* (1887), 36 Ch. D. 243. *Consd.* *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6. *Apld.* *Bower v. Sandford* (1889), 5 T. L. R. 570; *Re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 342; *Nalder & Collyer's Brewery Co. v. Harman* (1900), 82 L. T. 594. *Consd.* *Rogers v. Hosegood*, [1900] 2 Ch. 388. *Apld.* *Reid v. Bickerstaff*, [1909] 2 Ch. 305. *Consd.* *Kelly v. Barrett*, [1924] 2 Ch. 379. *Refd.* *Spicer v. Martin* (1888), 14 App. Cas. 12; *Davis v. Leicester Corp.*, [1894] 2 Ch. 208; *Formby v. Barker*, [1903] 2 Ch. 539; *Whitehouse v. Hugh*, [1906] 1 Ch. 253; *Willé v. St. John*, [1910] 1 Ch. 84. *Mentd.* *Saxby v. Thomas* (1890), 63 L. T. 695; *Simpson v. Gilley* (1922), 92 L. J. Ch. 194; *Beyfus v. Lodge*, [1925] Ch. 350.

2675. — Original estate of covenantor ceasing to exist.—Purchasers, of land sold in plots for building in 1880 entered into restrictive covenants with the tenant for life of a settled estate, who had the legal estate therein, & the trustee, who had only a power of sale. There was no general building scheme applicable to the estate as a whole, but similar covenants were entered into by purchasers of property in the same road:—*Held*: the benefit of the covenant ran with the land in equity in the same manner as a negative easement, & an adjoining owner was entitled to enforce the covenant against a purchaser & his tenant, although the original legal estate of the covenantee had ceased to exist.—*LONG v. GRAY* (1913), 58 Sol. Jo. 46, C. A.

See, further, Law of Property Act, 1925 (c. 20), ss. 78, 79; Land Charges Act, 1925 (c. 22), s. 10.

C. Particular Covenants.

(a) Covenants in relation to Building.

i. Against Building.

2676. Whether enforceable against assignee.—A. being seised in fee of a house & a piece of open land near to it, sold & conveyed the house to B., & covenanted, for himself, his heirs & assigns, with B., his heirs & assigns, that no building whatever should at any time thereafter be erected on the piece of land. He afterwards sold & conveyed the piece of land to M. in fee, & took a covenant from him in the terms of that which he himself had entered into with B. The house, after divers mesne conveyances, became vested in X. in fee; & the piece of land, after one mesne conveyance, became vested in Y. in fee. Y., before the land was conveyed to him, had notice of the covenant; but, notwithstanding, he began to build upon the land. The ct., at the suit of X., restrained him from continuing the building.—

2674 i. — In favour of adjoining owners—Land sold in lots—Question of fact.—The fact of several fears of neighbouring plots of building land in the same street holding from a common superior does not, by itself, entitle one of those fears to claim the benefit of restrictions contained in the feu contract of another, unless some mutuality & community of rights & obligations is otherwise established between them.—*HISLOP v. LECKIE* (1881), 6 App. Cas. 580.—*SCOT.*

r. ——*Re SPEER*, [1926] 4 D. L. R. 492; 59 O. L. R. 385.—*CAN.*

Equitable

Deft. having in 1924 purchased a vacant lot of land from B. with full knowledge of the existence of a covenant made by B. in 1919, when the land was conveyed to B. by pltf., "not to erect on the said premises a house or workshop & to use the said lands as a residence only," was held bound by the covenant. Pltf. at the time of the making of the covenant, although not the registered owner of the adjoining land, had an equitable interest therein, & took the covenant from B. to protect that interest, & not as a collateral & personal contract.—*BESINNETT v. WHITE*, [1926] 1 D. L. R. 95; 58 O. L. R. 125.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 4.—C. (a) i.

2676 i. Whether enforceable against assignee.—A restrictive covenant in regard to building, contained in a deed of conveyance of land, creates an equitable interest analogous to a negative easement, requiring for its creation & continuance a dominant & servient tenement. If there is a dominant tenement, the owner, & he alone, can claim the benefit of the covenant. If there is not such a tenement, the claim upon the covenant, as against subsequent assignees or purchasers entirely ceases.—*Re HUNT & BELL* (1915), 8 O. W. N. 424, 581;

MANN v. STEPHENS (1846), 15 Sim. 377; 10 Jur. 650; 60 E. R. 665, L. C.

Annotations:—*Apld.* **Tulk v. Moxhay** (1848), 11 Beav. 571. *Consd.* **Child v. Douglas** (1856), 2 Jur. N. S. 950; **McLean v. McKay** (1873), L. R. 5 P. C. 327; **Ronalds v. Cowlishaw** (1878), 9 Ch. D. 125; **Nicoll v. Fenning** (1881), 51 L. J. Ch. 166. *Refd.* **Marker v. Marker** (1851), 9 Hare, 1; **Keates v. Lyon** (1869), 4 Ch. App. 218; **Nottingham Patent Brick & Tile Co. v. Butler** (1885), 15 Q. B. D. 261; **Sheppard v. Gilmore** (1887), 57 L. J. Ch. 6; **Rogers v. Hosegood**, [1900] 2 Ch. 388.

2677. —*J.*—**TULK v. MOXHAY**, No. 2667, *ante*.

2678. —*J.*—In 1916 premises were conveyed to T., who covenanted for himself & his assigns with the vendors & their assigns that no building should be erected on the premises which would materially restrict or interfere with the free access of light & air to the windows then existing in an adjoining cottage belonging to the vendors. The premises so conveyed were important business premises. In June, 1920, T. formed a co. to take over his business, of which he remained managing director. The co. carried on its business upon the premises, but they were not conveyed to the co. In Jan. 1926, T. informed S., the person who collected the rents for A., who had purchased the adjoining cottage, that he intended to raise the height of his stables. S. was not the agent of A. & did not give any valid assent. The raising of the wall to a height of 19 feet 6 inches was completed in Apr. 1926, when A. first knew of it. She & her tenants commenced an action against T. for a mandatory injunction to pull down so much of the wall as materially restricted or interfered with the access of light & air to the windows. She did not know of the existence of the co. until the action had been commenced, but afterwards joined them as defts. At the hearing A. refused to accept damages in lieu of an injunction:—*Held*: the co. being in possession of the premises with notice of the covenant & being in the position of assignees with notice, were responsible for the breach of the covenant; though pltf.'s premises were small & defts.' premises an important building, pltf's. were entitled to a mandatory injunction if they required it, & they could not be compelled to accept damages in lieu thereof.—**ACHILLI v. TOVELL**, [1927] 2 Ch. 243; 96 L. J. Ch. 493; 137 L. T. 805; 71 Sol. Jo. 745.

2679. Construction of covenant—Land opposite land conveyed.—The purchase deed of a house in a terrace contained a covenant on the part of the vendor, unexplained by any recital, that no building should be erected on any part of the land of the vendor lying on the east side of the said terrace & opposite to the plot of land thereby conveyed. The owners of the other houses had also similar covenants:—*Held*: the latter words were not merely descriptive of the position of the land, but restricted the general meaning of the former words; & the covenant applied only to that part of the land which lay immediately opposite, & was of the width of the plot conveyed.

The general rule that the construction must be taken most strongly against the grantor, modified by the necessity of giving effect to every word of the instrument, if it can reasonably be done.—**PATCHING v. DUBBINS** (1853), Kay, 1; 23 L. J. Ch. 15; 22 L. T. O. S. 116; 17 Jur. 1113; 2 W. R. 2; 39 E. R. 1; *affd.*, 2 Eq. Rep. 71; 23 L. J. Ch. 19, L. JJ.

Annotations:—*Consd.* **McLean v. McKay** (1873), L. R. 5 P. C. 327. *Mentd.* **Schlumberger v. Lister** (1860), 6 Jur. N. S. 1336.

2680. Validity of covenant.—The owner of some land sold a part of it, & entered into an agreement with the purchaser that an adjoining plot of land 'should never be hereafter sold, but left for the common benefit of both parties & their successors':—*Held*: this was merely an agreement that the plot of land should be left open, in the state in which it then was, for the common advantage of both parties, & such an agreement did not contravene any rule of law, but gave the person who might hold the vendee's land the right to enforce the obligation against the person who might hold the vendor's land. Thus the former might apply to a ct. of equity to order the removal of a structure that had been placed on the plot in violation of the agreement.—**MCLEAN v. MCKAY** (1873), L. R. 5 P. C. 327; 29 L. T. 352; 21 W. R. 798, P. C.

Annotations:—*Consd.* **Fairclough v. Marshall** (1878), 48 L. J. Q. B. 146. *Refd.* *Re* **Nisbet & Potts' Contract**, [1905] 1 Ch. 391.

2681. What amounts to breach—Excavation containing urinal.—A vendor covenanted with his purchaser that a piece of land belonging to the vendor which adjoined the property conveyed to the purchaser 'should for ever thereafter be kept open & unbuilt upon' by the vendor. The vendor subsequently excavated part of this piece of land & constructed therein a covered urinal, the roof of which projected very slightly above the adjoining surface:—*Held*: this was not a breach of the covenant.—**GRAHAM v. NEWCASTLE-UPON-TYNE CORPN.** (1892), 67 L. T. 790; 9 T. L. R. 130; 2 R. 254, C. A.

2682. —Erection of stone steps.—**CLARKE v. WADDINGTON** (1898), Emiden's B. C., 4th ed. 363.

2683. —Bill-posting on hoarding.—The plan & conditions of sale of a residential estate provided that all the lots should be subject to certain restrictive covenants for the general benefit of the estate, &, amongst others, that the purchasers were not to erect any 'building' for manufacturing purposes or 'for the carrying on of any noisy, noisome, offensive or dangerous trade or calling.' A lessee from one of the purchasers of two lots had erected along the boundary of the land where it adjoined pltf.'s plot a hoarding of a permanent nature, 156 feet long & 15 feet high, & covered the hoarding with advertisements. On an action by pltf. for a mandatory injunction for the

34 O. L. R. 256; 24 D. L. R. 590.—**CAN.**

2678 ii. —*J.*—*Re* **ROWAN & EATON**, [1926] 4 D. L. R. 582; 59 O. L. R. 379.—**CAN.**

a. Construction of covenant.—**DUMOULIN v. BURFOOT** (1893), 22 S. C. R. 120.—**CAN.**

b. —*J.*—**MENZIES v. VAN WALEGHEM** (1910), 15 W. L. R. 209; *affd.* (1911), 16 W. L. R. 646.—**CAN.**

c. —*J.*—In order to ascertain the scope & effect of building restrictions, regard must be had to the object which they are designed to accomplish.—*Re* **ROBERTSON & DEPOE** (1911), 20 O. W. R. 712; 3 O. W. N. 431; 25 O. L. R. 286.—**CAN.**

d. —*J.*—*Re* **LORNE PARK** (1913), 5 O. W. N. 626; 30 O. L. R. 289.—**CAN.**

2680 i. Validity of covenant.—**MCLEAN v. GRAY** (1896), 40 N. S. R. 111.—**CAN.**

2680 ii. —*J.*—An owner of a parcel of contiguous lands such as a parcel of adjoining lots may validly impose restrictions as to building, etc., against all of the lands by inserting, in an agreement with the first purchaser of the first portion sold, restrictive covenants to run not only with the portion sold but with all of the lands, & a caveat registered by said owner following upon said agreement is properly registered.—**MASSUE v. ROYAL**

LAND & INVESTMENTS, LTD. (MAN.), [1923] 2 W. W. R. 315.—**CAN.**

e. Building restriction on registered plan—Whether restrictive covenant.—A dotted line on the registered plan of sub-divided property, together with the words, 'no buildings to be erected between this line & the east side of S. Crescent':—*Held*: not to constitute a restrictive covenant preventing pltf. from transferring an unencumbered estate in fee simple.—**SUMNER v. MCINTOSH**, [1918] 2 W. W. R. 293; 11 Sask. L. R. 152; 40 D. L. R. 361.—**CAN.**

f. Land purchased with caveat.—**FRANCO CANADIAN CORPN., LTD. v. JOHNSON**, [1923] 1 D. L. R. 896; 16

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removal of this hoarding:—*Held*: this hoarding was, within the meaning of the above covenant, a "building" upon which the trade of bill-posting was carried on, & this was an "offensive" trade to the owners of the adjoining plots, & consequently, *pltf.* was entitled to a mandatory injunction.—*NUSSEY v. PROVINCIAL BILL POSTING CO. & EDDISON*, [1909] 1 Ch. 734; 78 L. J. Ch. 539; 100 L. T. 687; 25 T. L. R. 489; 53 Sol. Jo. 418, C. A.

Annotation:—*Apld.* *Tubbs v. Esser* (1909), 26 T. L. R. 145.

As to covenants between lessor & lessee.—*See LANDLORD & TENANT*, Vol. XXXI., pp. 154, 155, Nos. 2887–2891.

ii. Restriction as to Character of Buildings.

2684. Whether binding—On subsequent purchaser of unsold lots—Effect of delay.—On an agreement to sell part of a vendor's land, the vendor & purchaser entered into mutual covenants prohibiting building except in a specified manner, on the sold & unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant:—*Held*: (1) a subsequent owner of the unsold part, claiming through the grantor by means of deeds, one of which referred to the deed containing the prohibitory clause, but not to that clause, was bound by the prohibition in equity; (2) the circumstance of the grantor not having performed a covenant, to obtain for the grantee a direct covenant from the former purchaser, did not constitute a defence, it not appearing that any application had been made to the grantor for that purpose; (3) notice of a right to prevent building, & of an intention to enforce it, given before any expense was incurred, followed by a bill for an injunction, though not filed till four months afterwards, was sufficient to exclude a defence on the ground of laches, it appearing that *pltf.* could not sooner establish his right to enforce the prohibition; (4) the clause as to liquidated damages did not exclude the interference of the ct. by interlocutory injunction.—*COLES v. SIMS* (1854), 5 De G. M. & G. 1; 2 Eq. Rep. 951; 23 L. J. Ch. 258; 22 L. T. O. S. 277; 18 Jur. 683; 2 W. R. 151; 43 E. R. 768, L. J.

Annotations:—*As to* (1) *Consd.* *Keates v. Lyon* (1869), 4 Ch. App. 218. *Refd.* *Western v. Macdermott* (1866), 2 Ch. App. 72; *Renals v. Cowlshaw* (1878), 9 Ch. D. 125; *Patman v. Harland* (1881), 17 Ch. D. 353. *As to* (4) *Consd.* *General Accident Assce. Corp'n. v. Noel*, [1902] 1 K. B. 377. *Generally, Refd.* *Child v. Douglas* (1854) Kay, 560; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Howard v. Woodward* (1864), 29 J. P. 3; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *Cornwall v. Hawkins* (1872), 20 W. R. 653; *Luker v. Dennis* (1877), 26 W. R. 167; *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 15 Q. B. D. 261; *Russell v. Watts* (1885), 55 L. J. Ch. 158; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Holloway v. Hill*, [1902] 2 Ch. 612; *Brigg v. Thornton* (1903), 73 L. J. Ch. 301.

2685. ——— Effect of provision for liquidated damages.—*COLES v. SIMS*, No. 2684, *ante*.

2686. ——— At instance of subsequent purchasers — Taking without benefit of covenants.—The owners in fee of a residential estate & adjoining lands sold part of the adjoining lands to *deft.*'s predecessors in title, who entered into covenants with the vendors, their heirs & assigns, restricting their right to build on & use the purchased land.

The same vendors afterwards sold the residential estate to *pltf.*'s predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them:—*Held*: *pltf.*s. were not entitled to restrain *defts.* from building in contravention of the restrictive covenants entered into by their predecessors in title.

To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into (*JAMES, L.J.*).—*RENALS v. COWLISHAW* (1879), 11 Ch. D. 866; 48 L. J. Ch. 830; 41 L. T. 116; 28 W. R. 9, C. A.

Annotations:—*Distd.* *Nicoll v. Fenning* (1881), 19 Ch. D. 258. *Consd.* *Brown v. Inskip* (1884), Cab. & El. 231. *Apld.* *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6. *Apprvd.* *Spicer v. Martin* (1888), 14 App. Cas. 12. *Consd.* *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Davis v. Leicester Corp'n.*, [1894] 2 Ch. 208. *Apld.* *Hudson v. Cripps*, [1896] 1 Ch. 265. *Consd.* *Nalder & Collyer's Brewery Co. v. Harman* (1900), 82 L. T. 594; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Osborne v. Bradley*, [1903] 2 Ch. 446. *Apld.* *Elliston v. Reacher*, [1908] 2 Ch. 374; *Reid v. Bickerstaff*, [1909] 2 Ch. 305; *Ives v. Brown*, [1919] 2 Ch. 314; *Northbourne v. Johnston*, [1922] 2 Ch. 309. *Consd.* *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225. *Refd.* *Nottingham Patent Brick Co. v. Butler* (1886), 55 L. J. Q. B. 280; *Clegg v. Hands* (1890), 44 Ch. D. 503; *Goddard v. Mid. Ry.* (1891), 8 T. L. R. 126; *Everett v. Remington*, [1892] 3 Ch. 148; *Jaeger v. Mansions Consolidated* (1903), 87 L. T. 690; *Wille v. St. John* (1910), 79 L. J. Ch. 239; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Chambers v. Randall*, [1923] 1 Ch. 149; *Kelly v. Barrett*, [1924] 2 Ch. 379.

2687. ——— On purchasers inter se—Where covenant for benefit of vendor only.—Sites of a row of houses in a town were conveyed by the same vendors to various persons all about the same time, & the conveyances were substantially all in the same form. In each case a rentcharge was reserved, & the purchaser covenanted that he would build the houses agreeable to such order of building as was described in a plan drawn for & signed by as well the purchaser as the vendors; & that the outside or form of building of the house should not after the same was finished be ever altered.

The assignees of a purchaser were making an addition to the front of their house, & the assignees of the purchaser of the adjoining house sought to restrain that as being contrary to the covenants under which the property was held.

On no one of the conveyances produced was there any plan indorsed, & no plan signed by any of the purchasers was forthcoming at the trial:—*Held*: it was a question of fact in each case whether the restrictions were merely matters of agreement between the vendor & the several purchasers for the protection of the vendor, or were intended to be for the common advantage of the several purchasers, & in this case it was not shown that they were intended to be otherwise than for the benefit of the vendor, & *pltf.*s. could not enforce them.—*SHEPPARD v. GILMORE* (1887), 57 L. J. Ch. 6; 57 L. T. 614.

2688. ——— At instance of assign of purchaser—Assign purchasing small portion only.—About 1874, D., the owner of the B. estate, began to offer it in plots, on conveyances & leases, as building sites. Intending purchasers & lessees were shown, by D.'s agent, a form of agreement, a clause of which provided that the conveyance should contain certain restrictive covenants, to run with the land conveyed, including a covenant

Sask. L. R. 345; [1923] 1 W. W. R. 790.—CAN.

g. Power of court to remove.—*Re HOWIE*, [1923] 3 D. L. R. 754; 53 O. L. R. 65.—CAN.

PART XI. SECT. 2, SUB-SECT. 4.—C. (a) ii.

h. Whether binding — On purchasers inter se.—*HOODLESS v. SMITH* (1913), 24 O. W. R. 67; 4 O. W. N.

816; 9 D. L. R. 456.—CAN.

k. ————In 1909, a co., the owner of a block of land, conveyed to G. certain lots shown on a plan of the block. The deed contained a cove-

that the purchaser would not "without the consent in writing of D., his heirs or assigns," erect any building on the land conveyed, other than that which was to be built, according to the agreement, before the conveyance was executed.

In 1890, D. having died, deft., with the consent in writing of his successors in title, the owners of such part of the B. estate as had not been conveyed in plots, erected further buildings on his land.

Some hundreds of houses had then been erected on the B. estate, but a large portion of it still remained, unbuilt on, in the hands of D.'s successors in title:—*Held*: assuming pltf. was entitled to enforce the restrictive covenant, in deft.'s conveyance, against building, there had been no breach of such covenant; because the consent, required & obtained, was that of the owner of the B. estate in its popular & broad sense, & not of such owner & of all lessees & purchasers acquiring title after the date of the conveyance to the deft. *Semle*: pltf. was not entitled to enforce the covenant.—*EVERETT v. REMINGTON*, [1892] 3 Ch. 148; 61 L. J. Ch. 574; 67 L. T. 80.

Annotations:—*Consd.* *Ives v. Brown*, [1919] 2 Ch. 314. *Reid*. *Haynes v. King*, [1893] 3 Ch. 439.

2689. Covenant not to build except to plans to be approved — By principal engineer.—A railway co., having constructed a tunnel proceeded to dispose of the ground under which the tunnel ran, & contracted on June 5 to sell a portion to B., subject to the condition that he was to erect no buildings nor make any excavations, etc., but according to a specification approved in writing by the principal engineer. B. entered immediately, & sent in plans in Aug. to the resident engineer, for the approval of the principal engineer. The resident engineer never submitted them to the principal, but told B. verbally that he might proceed. B. thereupon proceeded till Oct. 26, when the conveyance was completed & the co.'s solr., finding him carrying on building operations, asked if he had the approval in writing of the principal engineer, & told him he must procure it. The principal engineer then for the first time saw the plans of the proposed buildings, & immediately condemned them as dangerous to the tunnel, & therefore, of course, also dangerous to the proposed houses. B. insisting on proceeding, the co. caused an information to be filed to restrain him, on the ground of danger to the public. A counter-information was thereupon filed against the co. to restrain them from running their trains on the same ground of danger to the public. The fact of danger to the public by the continuation of B.'s plans was fully made out. An injunction had been obtained on the first information, & refused on the second:—*Held*: the approval of the co.'s resident engineer was not binding on the co., deft. B. having been allowed to continue his works from Aug. to Oct. 26 was, under the circumstances, not such an acquiescence on the part of the co. as to exempt B. from being restrained from further prosecuting his building.—*A.-G. v. BRIGGS, A.-G. v. BIRMINGHAM & OXFORD JUNCTION RY. CO.* (1855), 1 Jur. N. S. 1084.

2690. — Liability for fees.—A conveyance of part of an estate at Reading contained a covenant by the purchasers not to erect any building otherwise than in accordance with such drawings & specifications as might be previously approved of in writing by the vendor's surveyor:—*Held*: on

the construction of the conveyance, the purchasers were not liable to pay the fees of the vendor's surveyor for approving the plans.—*READING INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. PALMER*, [1912] 2 Ch. 42; 81 L. J. Ch. 454; 106 L. T. 626.

2691. — Covenants relating to height & width.—The E. Railway co. obtained a conveyance for the purposes of their railway of certain land from C., & in the conveyance the co. bound themselves to erect & maintain a bridge over the road leading to C.'s property, which was to be according to the plans 35 feet wide, & leaving a road under it of 15 feet wide. Afterwards this bridge was made, but the E. co. some years later amalgamated with the H. co., & the latter co.'s Act authorised a junction with the E. railway at a point near this bridge. The two cos. then agreed as to the mode of effecting the junction, & part of the plan was to widen the arch or bridge over C.'s road so as to extend the bridge from 35 feet to 55 feet wide, thereby darkening the road beneath. C. applied for an injunction to restrain the cos. from carrying out this plan:—*Held*: the E. co. having in the first instance obtained the conveyance from C. on certain conditions as to the width of the bridge were bound not to depart from those conditions, & the H. co. were equally bound as claiming under the E. co., for it was part of the consideration to maintain the bridge of the height & width originally fixed.—*EDINBURGH & GLASGOW RY. CO. v. CAMPBELL* (1863), 9 L. T. 157, H. L.

2692. — — ——A railway co., in purchasing land, covenanted with the owner not to build upon it above a certain height. They afterwards obtained an Act of Parliament, empowering them to widen their line:—*Held*: on the construction of the covenant it would prevent them from building so as to widen the line.—*LOYD v. LONDON, CHATHAM & DOVER RY. CO.* (1865), 2 De G. J. & Sm. 568; 6 New Rep. 51; 34 L. J. Ch. 401; 12 L. T. 363; 29 J. P. 743; 11 Jur. N. S. 380; 13 W. R. 698; 46 E. R. 496, L. J.J.

2693. — — ——The conveyance of part of a residential estate contained a covenant by the grantee that any "building" which should be erected on the land should be of a certain height & have a stuccoed front & slated roof, & be used only as a dwelling-house:—*Held*: the erection of an advertisement hoarding was not prohibited by the covenant.—*FOSTER v. FRASER*, [1893] 3 Ch. 158; 63 L. J. Ch. 91; 69 L. T. 136; 57 J. P. 646; 42 W. R. 11; 9 T. L. R. 502; 37 Sol. Jo. 561; 3 R. 635.

Annotations:—*Consd.* *St. Botolph, Aldersgate Without v. Parishioners of Same*, [1900] P. 69; *Boyce v. Paddington B. C.*, [1903] 1 Ch. 109. *Reid*. *A.-G. v. St. Pancras Vestry* (1893), 69 L. T. 627; *Clifford v. Holt* (1898), 68 L. J. Ch. 332; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74.

2694. — — ——The D. harbour board were the owners of some property adjoining a house of which they were also the lessors. X. was the assignee of the lease of the house. The lease contained a covenant on the part of the lessors that they "shall not nor will at any time or times during the continuance of the term hereby granted, demise, or lease all or any part of the ground between C. crescent, aforesaid, & the sea for the erection of any building or buildings whatsoever other than public baths with or without reading rooms or libraries, nor permit or suffer any such buildings or any part of such buildings to be thereon erected

nant on the part of G., although the deed was not executed by him, not to erect any building on the lots other than of the kind & description specified in the covenant:—*Held*: although

G. did not execute the deed, he was in equity bound by the covenant, which was part of the transaction under which he took the land.—*Re WHEELER*, [1926] 4 D. L. R. 392; 59 O. L. R.

223.—CAN.

1. —.—*WEST v. HUGHES*, [1926] 1 D. L. R. 359; 58 O. L. R. 183. —CAN.

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which shall be of a greater height than 15 feet 7 inches above the ground floor of the centre houses in C.-crescent aforesaid." Some years after the date of the lease the board let the adjoining property to the D. corpn. The agreement between the board & the corpn. contained a provision that the corpn. should keep in repair a bandstand on the property. This bandstand was subsequently removed by the corpn., & a new bandstand exceeding 15 feet 7 inches in height was erected by them in its place. Pltf. brought this action against the corpn. & the board for an injunction for the removal of the bandstand & for damages:—*Held*: the operation of the covenant only extended to buildings for the erection of which the board was entitled to demise or let the land, & there was no covenant by the board not to permit any building whatever to be erected in excess of the specified height; no evidence was adduced of any arrangement between the board & the corpn.; the board could not have authorised the corpn. to erect a bandstand, though they could have erected one themselves; & pltf. had not succeeded in proving that there had been a breach of the covenant by the board.—*PALLISER v. DOVER CORPN.* (1914), 110 L. T. 619; 58 Sol. Jo. 379; 78 J. P. Jo. 123.

2695. — Covenants as to situation.]—A. purchased a building plot of G., & covenanted to build on it a dwelling-house of the value of £250 at least, under the inspection & to the satisfaction of G.'s architect, in twelve months. The twelve months expired, & A. proceeded to build a house of the required value, but as to situation contrary to the opinion of the architect:—*Held*: it was a breach of the covenant, & the injunction granted.—*GOOLDEN v. ANSTEE* (1868), 18 L. T. 898.

2696. — Covenant against alteration of elevation.]—*CLARKE v. WADDINGTON* (1898), *Emden's B. C.* 4th ed. 663.

2697. — Covenant against buildings other than shelters.]—A landowning co. conveyed land to a municipal corpn. The conveyance contained a covenant by the purchasers that no buildings or erections of any kind were to be put upon the land conveyed, except "such structures as summer-houses, a bandstand, or shelters, 12 feet in height, for the accommodation & convenience of the public." The corpn. proceeded to erect lavatories, calling them a "shelter" with a public convenience at each end, contending that they had a statutory right to override the covenant:—*Held*: the building was not a "shelter" within the meaning of the covenant; the covenant was binding upon the corpn.; & what they were doing was plainly in contravention thereof.—*STOURCLIFFE ESTATES CO., LTD. v. BOURNEMOUTH CORPN.*, [1910] 2 Ch. 12; 79 L. J. Ch. 455; 102 L. T. 629; 74 J. P. 289; 26 T. L. R. 450; 8 L. G. R. 595, C. A.

iii. Restriction as to Number of Dwelling-Houses on Site.

2698. What constitutes breach—Restriction to single dwelling—Block of flats.]—A building containing several residential flats constitutes only one house within the meaning of the word "house" in a covenant not to erect more than a certain number of houses, unless there is some context

which cuts down or alters the popular interpretation of the word.—*KIMBER v. ADMANS*, [1900] 1 Ch. 412; 69 L. J. Ch. 296; 82 L. T. 136; 48 W. R. 322; 16 T. L. R. 207; 44 Sol. Jo. 260, C. A.

Annotation:—*Distd. Ilford Park Estates v. Jacobs*, [1903] 2 Ch. 522.

2699. — — — — —.]—*ROGERS v. HOSEGOOD*, No. 2664, *ante*.

2700. — — — — — Building divided into two tenements.]—A building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, constitutes two houses within the meaning of a covenant not to erect more than one house on the site.—*ILFORD PARK ESTATES, LTD. v. JACOBS*, [1903] 2 Ch. 522; 72 L. J. Ch. 690; 89 L. T. 295; 19 T. L. R. 574.

2701. — — — — — Restriction to not more than two dwelling-houses—Erection of wall—To prevent acquisition of easement of light.]—*HAWES v. SCOTT* (1896), 40 Sol. Jo. 373, C. A.

iv. Covenants as to Value of Dwellings.

2702. Whether binding on purchasers—Land sold in lots.]—An estate was laid out for building, & a great part of it had been sold. In 1882, some of the unsold part was put up for sale by auction with a condition that the purchaser of certain lots was to covenant to expend on each of the dwelling-houses built not less than £1,200. As to some lots there were other restrictions; & some were free from restriction. One of pltf's. bought some of the free lots, & also a restricted lot, not being one of the first-named. Next year the unsold lots, together with another piece of land forming together the whole of the unsold parts of the estate, were put up for sale, with similar conditions as to the first-named lots; but as to other lots free from restrictions. All the lots were then sold, except the first-named lots, both pltf's. being purchasers of free lots. The first-named lots were in the following year sold to deft., who entered into a covenant with the vendors not to build houses of less value than £1,200. He now proposed to build houses of less value:—*Held*: the doctrine of *Nottingham Patent Brick & Tile Co. v. Buller*, No. 2674, *ante*, ought to be extended to cover the present case, & pltf's. were entitled to restrain deft. from building houses of less value.—*COLLINS v. CASTLE* (1887), 36 Ch. D. 243; 57 L. J. Ch. 76; 57 L. T. 764; 36 W. R. 300.

Annotations:—*Consd. Re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 342. *Apd. Tindall v. Castle* (1893), 62 L. J. Ch. 555. *Reid, Reid v. Bickerstaff*, [1909] 2 Ch. 305.

2703. — — — — — One lot with lodge built on it.]—Parts of a building estate were, in 1875, offered for sale by auction, in lots, as a residential property, according to a plan & particulars & conditions of sale. This plan showed a private road, terminated at its east end, where it joined a public road, by a gate. On one side of the private road were shown large residential lots: on the other side, smaller lots, called "stable plots," to go with the residential lots. On the east corner of the private road a piece of land with a lodge on it, marked "lodge," was shown. Each purchaser of a residential lot & a stable plot covenanted to build one dwelling-house only of a certain value on his residential lot, & to keep up an ornamental screen

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m. Whether binding on purchasers.]
—*RE BUTTON* (1925), 57 O. L. R. 161.

—*CAN.*

What amounts to breach—

Erection of building other than dwelling-house.]—A covenant whereby the covenantor agreed that "any building or dwelling-house" which he might erect on his lot should be of the value of at least \$2,500 & placed at least 20

feet back from the street line:—*Held*: not to prohibit the construction of any building other than a dwelling-house.—*SMITH v. EGGERTSON*, [1922] 1 W. W. R. 1089; 66 D. L. R. 774 32 Man. L. R. 94.—*CAN.*

on his stable plot. In 1882, & again in 1883, the two residential lots & stable plots which still remained unsold were (with other parts of the estate) put up for sale by auction, according to a plan & particulars & conditions of sale. Each of these plans showed the corner piece of land with the lodge on it, marked "lodge." In 1885 deft. purchased by private contract these two residential lots & stable plots; & he at the same time bought the corner piece of land marked "lodge." Deft. bought with notice of the three estate plans. In 1890 he commenced building cottages on the corner piece of land. Thereupon purchasers of some of the other residential lots brought an action for an injunction to restrain him from using the site for any purpose other than a lodge & garden thereto:—*Held*: as deft. bought with notice that the three estate plans were put forward as part of a general scheme, with the intention of representing to purchasers that the corner piece of ground was appropriated as a lodge, an injunction must be granted restraining him from building, or permitting to remain on the piece of ground, the cottages which he had commenced to build thereon, or from using the site for any purpose inconsistent with the scheme disclosed by the three estate plans.—*TINDALL v. CASTLE* (1893), 62 L. J. Ch. 555; 37 Sol. Jo. 326; 3 R. 418.

2704. What amounts to breach of the covenant—Stable with room over—Leaving room for erection of house of stipulated value.—A covenant to the effect that private houses only, of a certain minimum value, are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bedroom over it, of such dimensions & in such a position that it would still be possible to build a house of the stipulated value upon the plot.—*RUSSELL v. BABER* (1870), 18 W. R. 1021.

2705. Houses connected together—Being substantially two houses.—Land was subject to a covenant that no house should be erected on any part thereof of a less value than £400. The purchaser of the land proceeded to erect thereon two houses, which were afterwards thrown together in the following way: There was a communication between them on the ground floor; there was only one yard in the rear, one watercloset, one ashpit, & one kitchen. There were, however, separate doors opening on to the street, separate shop-windows fronting the street, & separate staircases. Each of the two houses so thrown together was of less value than £400, but the two together were of greater value than £400:—*Held*: the two houses so thrown together were substantially two & not one within the meaning of the covenant, & there had therefore been a breach of the covenant.—*SNOW v. WHITEHEAD* (1884), as reported in 53 L. J. Ch. 885; 51 L. T. 253; 33 W. R. 128.

v. Restrictions against Buildings Other than Private Dwelling-Houses.

2706. Who may be bound—Vendor—Representation that all leases will contain covenant.—*SPICER v. MARTIN*, No. 2641, *ante*.

2707. Purchaser—Taking possession on bankruptcy of lessee—Breach by lessee of purchaser.—The purchaser of part of a freehold building estate covenanted with the vendor for himself & his assigns to erect no other than private residences & to submit plans for approval before commencing to build. The purchaser granted a building lease with covenants similar to those in his conveyance; the lessees, without submitting plans for the vendor's approval, commenced a

building which was alleged to be & was held a breach of the covenant. The lessees became bkpt., & their trustee having disclaimed the lease, the purchaser took possession of the land & offending building. The vendor having sold the rest of the estate to pltf. with the benefit of the purchaser's covenants, & pltf. brought an action against the purchaser to compel removal of the building, & for damages:—*Held*: there was no continuing breach, the covenant having been broken once for all when the building was erected contrary to it; the breach was committed not by the purchaser, but by his lessees, & he had not by his conduct rendered himself liable for the violation of the covenant; & neither at law nor in equity was pltf. entitled to any relief.—*POWELL v. HEMSLEY*, [1909] 2 Ch. 252; 78 L. J. Ch. 741; 101 L. T. 262; 25 T. L. R. 649, C. A.

2708. Purchasers inter se—In absence of building scheme.—In 1903, 14 acres, forming part of the D. estate, were conveyed to H., who covenanted with the vendor & the owner for the time being of the estate to observe certain restrictive conditions under which only dwelling houses were to be built on the land, so as to bind the hereditaments thereby conveyed into whosoever hands the same should come. H. caused himself to be registered in the Land Registry as proprietor of the 14 acres. The restrictive conditions were not entered at that time, but on Apr. 6, 1905, they were entered on the register as affecting the whole of the land comprised in the title. On the same day Holmes transferred a plot of land, forming part of the 14 acres, to pltf. who covenanted to observe the conditions. In 1907, H. conveyed the plot adjoining pltf.'s plot to four purchasers, who built a church thereon. Pltf. brought an action against H. & the four purchasers for an order directing them to pull down the church, & for damages:—*Held*: the registration of the restrictive conditions did not entitle one purchaser from H. to enforce the conditions against another purchaser or against the common vendor, in the absence of proof of a building scheme, & the action failed.—*WILLÉ v. ST. JOHN*, [1910] 1 Ch. 325; 79 L. J. Ch. 239; 102 L. T. 383; 26 T. L. R. 405; 54 Sol. Jo. 269, C. A.

2709. What amounts to breach—Vinery—& heightening of wall for vinery.—Pltf., in 1866, took a conveyance of a piece of land bounded by a road, from a vendor, who covenanted that "no buildings" except dwelling-houses, not to cost less than £200 each, to front with the road, should be erected on the opposite side of the road to pltf.'s land. Deft., in 1869, agreed to purchase from the same vendor the land on the opposite side of the road to pltf.'s land; he also agreed to make a permanent fence around the land so agreed to be purchased, either by railing or walling, from 4 to 7 feet high; & he further agreed to enter into a covenant with the vendor similar to that which had been entered into by pltf. Afterwards deft., having thrown the land so agreed to be purchased into pleasure ground, built a garden wall alongside the road, 8 foot 6 inches high; & in one part 11 feet high; behind which part he also erected a vinery, with a roof leaning against the wall:—*Held*: (1) the building of the wall to the height of 8 feet 6 inches was not a breach of the covenant; (2) the building of the wall to the height of 11 feet, & the erection of the vinery were breaches of the covenant.—*BOWES v. LAW* (1870), L. R. 9 Eq. 636; 39 L. J. Ch. 483; 22 L. T. 267; 34 J. P. 436; 18 W. R. 640.

Annotations:—Generally, Consd. Sharp v. Harrison, [1922] 1 Ch. 502. *Refd. Goodson v. Richardson* (1874), 9 Ch

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App. 221; *Evans v. Davis* (1878), 10 Ch. D. 747; *Foster v. Fraser*, [1893] 3 Ch. 158; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74.

2710. — Charitable home.]—(1) The erection of a building, to be used for the education & lodging of one hundred girls in connection with a charitable institution for the daughters of missionaries, supported by voluntary contributions:—*Held*: to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as & for a private residence only, & not for any purpose of trade."

(2) Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, & the vendor had given permission to one of the purchasers to open a school in his house:—*Held*: not to be a waiver of the covenant as to another purchaser whose house was at some distance.—*GERMAN v. CHAPMAN* (1877), 7 Ch. D. 271; 47 L. J. Ch. 250; 37 L. T. 685; 42 J. P. 358; 26 W. R. 149, C. A.

Annotations:—As to (1) Consd. *Jackson v. Winniffrith* (1882), 47 L. T. 243. *Refd.* *McNair v. Baker* (1903), 90 L. T. 24. *As to (2) Apled.* *Knight v. Simmonds*, [1896] 2 Ch. 294; *Hooper v. Bromet* (1903), 89 L. T. 37; *Sobey v. Sainsbury*, [1913] 2 Ch. 513. *Generally, Refd.* *Meredith v. Wilson* (1893), 69 L. T. 336. *Mentd.* *Serrano v. Campbell*, [1891] 1 Q. B. 283.

2711. — Art studio.]—A conveyance in fee of building land was made to a purchaser, subject to a restrictive covenant contained in a collateral deed binding the purchaser & his assigns not to erect upon the land any building other than a private dwelling-house. The land was afterwards leased, & the lessee erected upon it a corrugated iron building as an art studio for ladies. In an action by the original vendor, against the lessee:—*Held*: the erection was an infringement of the covenant, as being in no way appurtenant to a private dwelling-house, & any representation by the lessor to the lessee that there was no restrictive covenant did not protect the lessee from being affected with constructive notice of the lessor's title.—*PATMAN v. HARLAND* (1881), 17 Ch. D. 353; 50 L. J. Ch. 642; 44 L. T. 728; 29 W. R. 707.

Annotations:—Apled. *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 15 Q. B. D. 261; *Tritton v. Bankart* (1887), 56 L. T. 306. *Consd.* *Mogridge v. Clapp*, [1892] 3 Ch. 382. *Apled.* *Spencer v. Bailey* (1893), 69 L. T. 179. *Consd.* *Hooper v. Bromet* (1903), 89 L. T. 37; *Jones v. Lavington*, [1903] 1 K. B. 253. *Apled.* *Teape v. Douse* (1905), 92 L. T. 319; *Re Nisbet & Pott's Contract*, [1906] 1 Ch. 386. *Refd.* *L. C. & D. Ry. v. Bull* (1882), 47 L. T. 413; *Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991; *Garnham v. Skipper* (1885), 53 L. T. 940; *Hall v. Ewin* (1887), 57 L. J. Ch. 95; *English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700; *Inray v. Oakshette*, [1897] 2 Q. B. 218; *Leschallas v. Woolf*, [1908] 1 Ch. 641; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Re Chafer & Randall's Contract*, [1916] 2 Ch. 8; *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225.

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2712 i. What amounts to breach—Stables appurtenant to dwelling-house.]—The owners of two adjoining parcels of land sold & conveyed one, the deed containing a covenant by the purchaser not to "erect or build more than one house upon the property hereby conveyed." The parcel first sold became vested by various mesne conveyances in defts., who built a stable upon part of it, sufficient space being left for the erection of a house in the terms of the covenant, which defts. asserted they intended to build:—*Held*: defts. had the right to build the stable as appurtenant to

the house to be erected afterwards.—*HIME v. LOVEGROVE* (1905), 11 O. L. R. 252; 7 O. W. R. 4.—**CAN.**

o. — Covenant for erection of single house—Erection of duplex house.]—An agreement of sale & purchase was conditioned upon the right of the purchaser to erect a duplex house thereon. The land was subject to a covenant restricting erections to such as are "for the purpose of a private dwelling-house & residence only":—*Held*: under the covenant but one private dwelling was permitted, & the purchaser could not erect a duplex house.—*Re JAMES & CUTTS*, [1923] 4 D. L. R. 950; 52 O. L. R. 453.—**CAN.**

p. Use to which building put—

2712. — Stables appurtenant to dwelling-house.]—Covenant that no buildings should be erected except private dwelling-houses on land conveyed:—*Held*: stables built thereon were part of & appurtenant to a private dwelling-house & did not constitute a breach of covenant.—*BLAKE v. MARRIAGE* (1893), 9 T. L. R. 509; 37 Sol. Jo. 633.

2713. — Boarding house for scholars—School kept by owner of house.] A covenant not to use a house "for any trade or manufacture, or for any other purpose than a private residence," is broken by using it as a boarding house for scholars attending a school in the neighbourhood kept by the owner of the house is question.

Such user practically converts the house from a "private residence" to the business of a boarding house.—*HOBSON v. TULLOCH*, [1898] 1 Ch. 424; 67 L. J. Ch. 205; 78 L. T. 224; 46 W. R. 331; 14 T. L. R. 241; 42 Sol. Jo. 290.

Annotations:—Consd. *Tompkins v. Rogers*, [1921] 2 K. B. 91. *Refd.* *McNair v. Baker* (1903), 90 L. T. 24.

2714. — Block of flats.]—ROGERS v. HOSEGOOD, No. 2664, ante.

2715. — Railway embankment.]—A railway co. took, for the purpose of its undertaking, land which was subject to a covenant, entered into by their vendor, not to erect thereon "any building other than private dwelling-houses." The co. erected a railway embankment on the land:—*Held*: the erection of the embankment was a breach of the covenant.—*LONG EATON RECREATION GROUNDS Co. v. MIDLAND RY. Co.*, [1902] 2 K. B. 574; 71 L. J. K. B. 837; 86 L. T. 873; 67 J. P. 1; 50 W. R. 693; 18 T. L. R. 743, C. A.

Annotation:—Consd. *White's Exors. v. I. R. Comis.*, [1914] 3 K. B. 196.

2716. — Alms houses.] WRIGHT v. BERRY (1903), 19 T. L. R. 259, C. A.

— *See, further, LANDLORD & TENANT, Vol. XXXI., pp. 157, 158.*

vi. Observance of Building Line.

2717. By whom enforceable—Purchaser.]—The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mtgees. in fee in possession of the estate, their heirs & assigns, not to erect any building "on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about 40 feet apart, & about 80 feet from the road. He then erected two houses on his plot, each of which had a bay window projecting 3 feet beyond the line of the existing houses, & carried from the foundation up to the roof. Upon bill for injunction filed by the transferee from the mtgees., & by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—*Held*: (1) the bay windows were "buildings" within the meaning of the covenant, & the erection of them a violation of it; (2) there being a clear

*Determines character.]—*A building restriction binding deft. forbade the erection of any building upon the lots in question herein "to be used for any purpose other than a private dwelling-house":—*Held*: it was not the type or design of a building but the use to which it was put that determined whether it fell within said inhibited class.—*ROWLIN v. TAYLOR (Man.)*, [1927] 3 W. W. R. 200.—**CAN.**

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2717 i. By whom enforceable—Purchaser.]—Re KEYSER & DANIEL J. MCANULTY REALTY CO., LTD. (1923), 55 O. L. R. 130.—**CAN.**

breach of covenant, the covenantees were entitled to their injunction without the necessity of show-damage; (3) invasion of privacy constituted damage; (4) the covenant being not to do an act the doing of which caused an invasion of privacy, it was not necessary for the covenant in terms to purport to preserve privacy; & (5) both plffs. had material interests sufficient to support the suit. — *MANNERS (LORD) v. JOHNSON* (1875), 1 Ch. D. 673; 45 L. J. Ch. 404; 40 J. P. 345; 24 W. R. 481.

Annotations. — *Generally*, *Consd. Sharp v. Harrison*, [1922] 1 Ch. 502. *Refd. Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74.

2718. — Assignee of one purchaser—Against assignee of another purchaser.—[A vendor entered into agreements, by deed, to sell to A., B., & C., a certain land, in lots, for building purposes reserving to himself a portion. Each deed of agreement contained covenants between the vendor & purchasers respectively, & amongst others, that the purchasers should, within a certain time, erect dwelling-houses upon their respective lots, in a uniform row, in a certain specified position, & that no building should be erected on the piece of ground in front of each house, which was to be laid out as a garden, & that the vendor would dispose of all the lots subject to the same conditions as to building; & that in case the vendor should build upon the portion reserved by him, he would build in a line with the other houses, & would keep a similar piece of land in front for a garden. Before the contracts were completed by conveyance, the vendor sold & conveyed the reserved land to J., & the deed of conveyance recited the said sales, & contained a covenant by the vendor, that, in the conveyances to A., B., & C. he would require them to enter into covenants with J., similar to their covenants in the agreements. J. also thereby covenanted with the vendor, that, if he should build on the land purchased by him, he would build within the line, & would keep the said piece of ground in front as a garden. Subsequently the land purchased by A. was conveyed to him by a deed, in which A. entered into the same covenants as he had entered into in the deed of agreement. After divers mesne assignments, the land purchased by J. became vested in deft.'s, with notice of the agreements & of J.'s covenants in his purchase deed, & the land of A. came in like manner to pltf. :—*Held*: whether the covenants ran with the land or not, as defts. had notice of them, pltf. might have an injunction to restrain defts. from building in a manner contrary to the general scheme for the benefit of all the original parties.—*COLES v. SIMS* (1853), Kay, 56; 23 L. J. Ch. 37; 22 L. T. O. S. 132; 2 W. R. 48; 69 E. R. 25; *affd.* (1854), 5 De G. M. & G. 1, L. J.]

Annotations. — *Consd. Keates v. Lyon* (1869), 4 Ch. App. 218; *Renals v. Cowlishaw* (1878), 9 Ch. D. 125; *Russell v. Watts* (1885), 55 L. J. Ch. 158. *Refd. Child v. Douglas* (1854), Kay, 560; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Western v. MacDermott* (1866), 2 Ch. App. 72; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *Luker v. Dennis* (1877), 26 W. R. 167; *Fatman v. Harland* (1881), 17 Ch. D. 353; *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 15 Q. B. D. 261; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Mackenzie v. Childers* (1889), 43 Ch. D. 205; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Holloway v. Hill*, [1902] 2 Ch. 612; *Brigg v. Thornton* (1903), 73 L. J. Ch. 301. *Mentd. Howard v. Woodward* (1864), 29 J. P. 3; *Cornwall v. Hawkins* (1872), 20 W. R. 653; *General Accident Assce. Corp'n v. Noel*, [1902] 1 K. B. 377.

2719. — Mortgagor—Against purchaser from mortgagee—Notice immaterial.—[On the sale of a building estate in lots the purchaser of each lot entered into a covenant with the vendor & with the purchasers of the other lots not to build upon

his lot beyond a specified building line. The purchaser of one lot mortgaged a part of his lot. The mtgee. had notice of the covenant but no express restriction as to the use of the land was imposed on him by the mtgor. The mtgee. afterwards foreclosed & sold the mtged. land part of which ultimately became vested in defts. by purchase. Defts. as well as the sub-purchasers through whom they claimed took with notice of the restrictive covenant :—*Held*: there was no implied obligation as between the mtgor. & the mtgee. restricting the use of the land & the mtgor. was not entitled to enforce the restrictive covenant as against defts.—*KING v. DICKSON* (1889), 40 Ch. D. 596; 58 L. J. Ch. 464; 60 L. T. 785; 37 W. R. 553.

2720. — Vendor—Against assignee of purchaser.—[In 1867 plffs. conveyed to a purchaser in fee simple certain hereditaments & appurtenances adjoining their railway, & by the deed of conveyance the purchaser covenanted "for himself, his heirs, exors., administrators & assigns, that he, the purchaser, would not erect or build any erection or buildings of any kind whatsoever within 10 feet of the roadway or viaduct of plffs. without their permission in writing first had & obtained." In the following year the purchaser conveyed the hereditaments & appurtenances to a person since dead, testator of deft. B. & testator took & accepted the conveyance without notice or knowledge of the covenant other than such constructive notice, if any, as he might be deemed to have had by reason of the deed of 1867 being a title deed of the premises. In 1869 testator rebuilt the hereditaments & erected on the premises a hotel, part of which stood within 10 feet of the roadway or viaduct of plffs., & he demised the hotel & premises for fifty years upon a certain rent to a woman, who assigned the lease to second deft. F. A covenant was contained in the lease to the effect that the lessee should not make any alteration in the premises without the lessor's consent, in writing, but neither the lessee nor defts. had any notice of the covenant in the conveyance of 1867 other than such constructive notice, if any, as before mentioned in the case of testator. In 1881 deft. F. increased the height of that part of the erection which was within 10 feet of plffs.' roadway or viaduct, having previously in consideration for the payment of a sum of money obtained the written authority of deft. B. for doing so. Plffs. had no knowledge of this erection by deft. B., or the alteration by deft. F., until they were both completed in 1881. Upon a special case :—*Held*: plffs. were entitled to an injunction to both defts.; requiring them to pull down the erections, & deft. F. was not entitled to be indemnified by deft. B.—*LONDON, CHATHAM & DOVER RY. CO. v. BULL* (1882), 47 L. T. 413, D. C.]

2721. What constitutes breach—Bay windows projecting beyond line.—*MANNERS (LORD) v. JOHNSON*, No. 2717, *ante*.

(b) Covenants against Trading.

i. In General.

2722. By whom enforceable—By purchaser of unsold lots without benefit of covenant.—[Under the will of E., who died in 1860, the S. estate was vested in trustees in trust for C. From 1860, onward, the S. estate was developed as a building estate, restrictive covenants to preserve the residential character of the estate as a whole being taken from the respective purchasers of portions of the estate from time to time sold in the course

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of its development. In 1881 part of the estate was sold & conveyed by the trustees & C. to R., who covenanted with the trustees to erect dwelling-houses thereon & use the same as dwelling-houses only. In accordance with that covenant a dwelling-house, known as No. 223 C. Road, was erected on part of the land so conveyed to R. In 1884 the trustees conveyed the then remaining unsold portions of the S. estate to C., but did not at the same time assign to her the benefit of the restrictive covenants taken from R. & purchasers of other portions of the estate sold from time to time. In 1893 N. became absolutely entitled under the will of C. of which he was thereby appointed an exor., to the unsold portions of the S. estate. Defts. J. were assigns of R., the original covenantor, having recently purchased No. 223, & they thereupon, in spite of the restrictive covenants of which they had notice, commenced to convert No. 223 into a shop. In 1921 the representative of the last surviving trustee of the will of E. assigned to N. the benefit of the restrictive covenants entered into with the trustees by purchasers on sales made from time to time of portions of the estate, including the covenants by R. contained in the conveyance of 1881. In an action by N. against J. to restrain the breach of those covenants:—*Held*: the effect of the assignment to N. in 1921 of the benefit of the covenants, in conjunction with the conveyance in 1884 of the then remaining unsold portions of the estate, was to reunite in N. as legal rights those equitable rights which C. originally possessed under the trusts of the will of E.; it was not incumbent on pltf. to show that the covenants imposed by the conveyance of 1881 were, in the first instance, intended to be for the benefit of any particular portions of the S. estate retained by the covenantees, but it was sufficient to show, as pltf. had in fact shown, that those covenants were intended to be enforceable for the purpose of preserving the general residential character of the estate as a whole.—*NORTHBORNE (LORD) v. JOHNSTON & SON*, [1922] 2 Ch. 309; 92 L. J. Ch. 12; 128 L. T. 496.

Annotation.—*Distd. Chambers v. Randall*, [1923] 1 Ch. 149.

2723. What constitutes breach—Covenant against trade, business or calling—School.—The owner of an estate covered it with houses, & sold some of them subject to a covenant not to carry on any trade, business or calling therein, or to otherwise use or suffer the same to be used to the annoyance, nuisance or injury of any of the houses on the estate:—*Held*: the carrying on of a girl's school in one of the houses was a breach of the covenant; & the covenantee had not waived the benefit of the covenant, though he had permitted other houses held under the like covenant to be used as schools.—*KEMP v. SOBER* (1851), 1 Sim. N. S. 517; 20 L. J. Ch. 602; 17 L. T. O. S. 117; 15 Jur. 458; 61 E. R. 200; *affd.* (1852), 19 L. T. O. S. 308, L. C.

Annotations.—*Distd. Johnstone v. Hall* (1856), 2 K. & J. 414. *Consd. Harrison v. Good* (1871), L. R. 11 Eq. 338; *Manners v. Johnson* (1875), 1 Ch. D. 673. *Refd. German v. Chapman* (1877), 7 Ch. D. 271; *Doherty v. Allman* (1878), 3 App. Cas. 709; *Sayers v. Collyer* (1883), 24 Ch. D. 180; *Holloway v. Hill*, [1902] 2 Ch. 612; *Sharp v. Harrison*, [1922] 1 Ch. 502. *Mentd. Rolfe v. Miller* (1883), 53 L. J. Ch. 99; *Christie v. Davey*, [1893] 1 Ch. 316.

2724. — Stables in connection with business.—An owner of a plot of land bound by covenant not to "use or suffer to be used any building which might be erected upon any part or parts of the said plot of land as a hotel, tavern, public-house, beerhouse, shop, warehouse, or manufacturing

dyehouse, chandler's shop, or other place of business," erected stables thereon, which he intended to use for horses employed in his business as a retail coal merchant. The ct. granted an *interim* injunction against him in the terms of the covenant.—*WHITE v. POLLARD* (1908), 52 Sol. Jo. 748.

Covenants in leases.—See *LANDLORD & TENANT*, Vol. XXXI., pp. 159–164.

ii. Particular Trades.

2725. Against whom enforceable—Vendor—Vendor's tenant not party to action.—The conveyance of an estate to a purchaser & his heirs to the use that certain specified trades should not be carried on upon the premises:—*Held*: to be a stipulation in the nature of a covenant running with the land; but the owner of the estate could alone be restrained from carrying on the trades, as his tenant was no party to the suit.—*HODGSON v. COPPARD* (1860), 29 Beav. 4; 7 Jur. N. S. 11; 9 W. R. 9; 54 E. R. 525; *sub nom. HODGSON v. COPPARD*, 30 L. J. Ch. 20.

Annotation.—*Apld. Williamson v. Sunderland Corpn.* (1892), 9 T. L. R. 143.

2726. What constitutes breach—Covenant confining building to "shops"—Public-house.—On a sale of an estate as building land in 309 plots each purchaser executed a covenant with trustees to observe certain conditions as to the user of the land. The conditions stated that certain plots were reserved for two taverns: that "no houses other than detached or semi-detached," were to be erected except on the portion on which shops were permitted to be built; & that shops would be allowed to be built on sixty specified plots. A purchaser of one of the plots set apart for shops was restrained from building a public-house on it.

It was not contended that shops could be erected except on the plots set apart for shops, but it was contended that a public-house was a shop. No doubt, in one sense, a beer-shop was a shop, but in common parlance the word did not include a public-house. He understood, from the conditions, that only the plots there specified could be used for the erection of taverns; & he did not think that a public-house, which in common language was a very different thing from a shop, & which the deed itself carefully distinguished from a shop, could be erected on one of the plots set apart for shops (*MALINS, V.-C.*).—*HALL v. BOX* (1870), 18 W. R. 820.

2727. — — — — ——The word "shop" in a conveyance, does not include a tavern.

The original grantor intends to lay out his land for particular purposes. He stipulates for certain uses, & only those uses can be made of it. The property is to be wholly used for private houses. Nothing must be done upon any part of it which is a nuisance, e.g. houses of ill-fame, skating-rinks, & the like. One part, however, for general convenience is allowed to be used for shops, which I understand to mean drapers', butchers', & greengrocers' shops, etc., to supply the neighbourhood with their daily wants. A tavern would not come within the definition of shop. It is true that beer is sold there. But a tavern is also a house of entertainment, & travellers have a right to food & refreshment there. I think that upon the estate generally private houses only were to be allowed, but that along this frontage there might be shops of an ordinary character, but not a tavern (*HUDDESTON, B.*).—*COOMBS v. COOK* (1883), Cab. & El. 75.

2728. — Covenant restricting trading to named business.—In pursuance of an option to purchase contained in a lease dated in 1876 by the

freeholder to S. of part of a building estate known as the B. estate, the demised premises were in 1883, after the death of the lessor, conveyed by the trustees of his will to S. in fee simple. The conveyance contained covenants by S. with the trustees, their heirs & assigns, to the intent that the same covenants might run with the land thereby conveyed, that S. & all persons deriving title under him would not exercise or carry on or permit to be exercised or carried on upon any part of the premises thereby conveyed any trade or business whatsoever except that of a builder or coal merchant, & would not do or permit or suffer to be done upon the premises any act, matter or thing which might be a nuisance, annoyance or disturbance to the trustees or the persons claiming under them or their tenants or the neighbourhood. E., one of the trustees & the person beneficially interested in the unsold portions of the B. estate, died in 1917, having by her will devised the gardens & other parts of the B. estate upon certain trusts, & devised the residue of that estate to uses under which pltf. R. was tenant for life. S. died in 1898, & tenants from the trustees of his will of the premises conveyed to him in 1883 having used the premises as a garage for motor char-a-bancs & other motor vehicles, pltf. R., one of the exors. of E., who as tenant for life was the owner of a great number of freehold premises adjoining the garage, commenced an action against the trustees of S.'s will & their tenants for breach of the covenants in the conveyance of 1883 & for an injunction. During the trial the other exor. of E., who was the survivor of the original covenantees, was added as co-pltf. :—*Held*: (1) in the absence of special definite words such as were present in *Rogers v. Hosegood*, No. 2664, *ante*, there was not sufficient context in the conveyance of 1883 to annex the benefit of the covenants to so much of the B. estate as then remained in the hands of the covenantees or to any particular portion thereof; (2) E., not having expressly assigned by her will the benefit of the covenants to pltf., R., the devise to him of the residue of the B. estate did not carry with it by operation of law the benefit of the covenants; (3) the covenants were personal, & as E., the beneficial owner of a large part of the B. estate & also the surviving covenantor, was entitled at the time of her death to restrain a breach of the covenants, pltf. as together representing her real & personal estate, were entitled to the benefit of the covenants in question; & accordingly an injunction was granted against the trustees & the tenants in respect of the breach of the first part of the covenant & against the tenants as to the latter part relating to nuisance, annoyance & disturbance.—*IVES v. BROWN*, [1919] 2 Ch. 314; 88 L. J. Ch. 373; 122 L. T. 267.

Annotations:—As to (3) *Apld.* *Northbourne v. Johnston*, [1922] 2 Ch. 309. *Distd.* *Chambers v. Randall*, [1923] 1 Ch. 149.

2729. ———.]—A sub-post office carried on with a chemist's shop on premises is outside a covenant "Trading to be restricted to Chemistry & Druggists' business & Dentist or Doctor" as the office of a sub-postmaster is a branch of the public service, in the nature of a monopoly, at a fixed remuneration, & cannot be said to be "trading."—*FRAMPTON v. GILLISON*, [1927] 1 Ch. 196; 95 L. J. Ch. 555; 136 L. T. 600; 42 T. L. R. 749; 70 Sol. Jo. 965, C. A.

2730. Licensed premises — Whether covenant runs with land.—A covenant by a purchaser of land, not naming his assigns, that no building erected on land shall be used as a beer-shop, does not run with the land.

The owner of a freehold house had entered into

a covenant with pltf., who was a previous owner, that the building should not be used as a beer-shop. The house was afterwards let to deft. as tenant from year to year, without express notice of the covenant:—*Held*: although the covenant might not at law run with the land, deft. was bound by it in equity.—*WILSON v. HART* (1866), 1 Ch. App. 463; 35 L. J. Ch. 569; 14 L. T. 499; 30 J. P. 582; 12 Jur. N. S. 460; 14 W. R. 748, L. J.J.

Annotations:—*Consd.* *Catt v. Tourle* (1869), 4 Ch. App. 651. *Refd.* *Fellden v. Slater* (1869), L. R. 7 Eq. 523; *Luker v. Dennis* (1877), 7 Ch. D. 227; *Richards v. Revitt* (1877), 7 Ch. D. 224; *Haywood v. Brunswick Permanent Benefit Bldg. Soc.* (1881), 8 Q. B. D. 403; *Thornwell v. Johnson* (1881), 50 L. J. Ch. 641; *Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough*, (1885), 54 L. J. Ch. 991; *Nottingham Patent Brick & Tile Co. v. Butler* (1886), 54 L. T. 444; *Clegg v. Hands* (1889), 44 Ch. D. 506, n.; *Fleetwood v. Hull* (1889), 23 Q. B. D. 35; *Mander v. Falccke*, [1891] 2 Ch. 554; *Holloway v. Hill*, [1902] 2 Ch. 612; *Formby v. Barker* (1903), 89 L. T. 249; *De Nisbet & Potts' Contract*, [1905] 1 Ch. 391; *L. C. C. v. Allen*, [1914] 3 K. B. 612. *Mentd.* *Cavander v. Buiteel* (1873), 9 Ch. App. 80, n.; *Putnam v. Harland* (1881), 17 Ch. D. 353; *Oliver v. Hinton*, [1899] 2 Ch. 264; *Teap v. Douse* (1905), 92 L. T. 319.

2731. — By whom covenant enforceable — Purchaser—Against another purchaser.—A., the owner of a piece of land, divided it into lots for building a row of houses, & a deed was made between him of the one part & X. & Y., who had purchased some of the lots from him, & the several persons who should at any time execute the deed of the other part; by which, after reciting that A. had determined & proposed & thereby expressly declared that it should be a general & indispensable condition of the sale of all or any of the lots that the proprietors thereof for the time being should observe & abide by the several stipulations & restrictions thereafter contained; it was mutually covenanted between A., X., & Y., & the several other persons who should at any time execute the deed, & each of them, A., X., & Y., & the several persons, etc., for himself, his heirs, exors. & administrators, thereby covenanted with all & every the other & others of them, & with the heirs, exors., administrators or assigns of all & every the other & others of them mutually & reciprocally, that none of the proprietors of any of the lots for the time being should at any time carry on thereon the business of an innkeeper. A. sold & conveyed one of the lots to B., & another to C., both of whom executed the deed of covenant. Pltf. afterwards purchased B.'s lot, & deft. purchased C.'s lot with notice of the deed of covenant. Deft. intending to use the house on his lot as a family hotel; an injunction was granted to restrain him from so doing.—*WHATMAN v. GIBSON* (1838), 9 Sim. 196; 7 L. J. Ch. 160; 2 Jur. 273; 59 E. R. 333.

Annotations:—*Consd.* *Coles v. Sims* (1853), Kay, 56; *Keates v. Lyon* (1869), 4 Ch. App. 218. *Refd.* *Child v. Douglas* (1856), 2 Jur. N. S. 950; *Potter v. Perry* (1859), 23 J. P. 644; *Russell v. Watts* (1885), 55 L. J. Ch. 158; *Rogers v. Hosegood*, [1900] 2 Ch. 28.

2732. — — — — —.]—ELLISTON v. REACHER, No. 2616, *ante*.

2733. — Mortgagor in receipt of rents.]—A mtgor. in receipt of the rents & profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mtged. property without joining the mtgee. F., being owner of copyhold land, covenanted with S. to stand seised thereof in trust for him & his heirs, subject to a rent, & subject to a covenant by S. not to use any building erected thereon as a beerhouse. All the estate of S. vested in deft. F. sold the land to pltf., B. advancing the purchase-money, & it was conveyed to B., subject to a proviso for conveyance to pltf. upon payment by him to B. of the amount advanced. Deft. used the building erected upon the land as a beerhouse:

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—*Held*: upon the general principles of equity, pltf. was entitled to restrain deft. by injunction from using the building for that purpose without joining B.—*FAIRCLOUGH v. MARSHALL* (1878), 4 Ex. D. 37; 48 L. J. Q. B. 146; 39 L. T. 389; 27 W. R. 145, C. A.

Annotations:—*Refd.* *Matthews v. Usher* (1899), 68 L. J. Q. B. 988; *Allen v. I. R. Comrs.*, [1914] 2 K. B. 329. *Mentd.* *Bennett v. Hughes* (1886), 2 T. L. R. 715; *Van Gelder Apsimon v. Sowerby Bridge United District Flour Soc.* (1890), 44 Ch. D. 374; *Turner v. Walsh*, [1909] 2 K. B. 484; *Re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179.

2734. — Against whom enforceable—Person who has parted with interest.—In 1845 S. conveyed to a purchaser a piece of land for building purposes, & the purchaser covenanted not to allow the trade of a retailer of beer or licensed victualler to be exercised upon the premises. A house was built upon the land, & in Mar. 1852, it was opened by T. for the sale of beer. In May, 1852, S. gave notice to T. not to carry on the trade of a retailer of beer on the premises. In Sept. 1852, & again in Sept. 1853, T. applied for a public-house license, & these applications were successfully opposed by S. In Dec. 1853, T. transferred her business to H. In Aug. 1854, a bill was filed by S. against T. & H. to restrain them from carrying on the trade of a retailer of beer & licensed victualler:—*Held*: S. was not entitled to an injunction against T., who had parted with her interest before the bill was filed; nor against H., so far as the business of a retailer of beer was concerned, by reason of the delay in filing the bill. But an injunction was granted against H. to restrain him from carrying on the trade of a licensed victualler.—*SCARISBRICK v. TUNBRIDGE* (1854), 3 Eq. Rep. 240.

2735. — Purchaser of reversion—Subsequently purchasing lease.—The owner in fee of two plots of land demised the first for an hotel, & covenanted that he would not let any house or land, within a certain distance of it, to be used as an hotel. He demised the second plot, which was within the distance, to another person. Deft. purchased the reversion of the second plot & afterwards bought up the lease of it, but, as the ct. held, with notice of the restrictive covenant relating to the first lot:—*Held*: (1) he was in equity bound by that covenant; (2) on the construction of a covenant on the part of a lessor, not to "let" any house or any land for the erection of any house to be used as an hotel, the lessor, & those who claimed under him, could not allow any of his land to be used for that purpose.—*JAY v. RICHARDSON* (1862), 30 Beav. 563; 31 L. J. Ch. 398; 6 L. T. 177; 26 J. P. 356; 8 Jur. N. S. 689; 10 W. R. 412; 54 E. R. 1008.

Annotation:—*Generally*, *Refd.* *Luker v. Dennis* (1877), 26 W. R. 167.

2736. — Assignee of purchaser—Injunction suspended during term of assignee's tenant.—The purchaser of a plot of ground agreed that no building erected on it should be used as a public-house during twelve years & a half. The agreement did not appear on the conveyance. The purchaser's assignee built a public-house on the plot, & let it to a yearly tenant. The assignee had notice, but the tenant had not. On a bill against the assignee & his tenant, an injunction was granted to restrain the assignee from allowing the premises to be used as a public-house; the injunction to be suspended during the existing yearly tenancy, with an intimation that the assignee would be liable to committal unless he determined the tenancy.—*CARTER v. WILLIAMS*

(1870), L. R. 9 Eq. 678; 39 L. J. Ch. 560; 23 L. T. 183; 34 J. P. 408; 18 W. R. 593.

Annotations:—*Refd.* *Patman v. Harland* (1881), 17 Ch. D. 353; *Thornevell v. Johnson* (1881), 50 L. J. Ch. 641.

2737. — Purchaser.—Upon the sale in 1863, to A. for the purposes of a public-house, of part of an estate intended to be laid out for building, the trustees of the estate covenanted with A., his heirs & assigns that they their heirs & assigns would not thereafter sell any portions of the estate without requiring the purchaser to enter into a covenant "not to erect thereon or use or permit to be used any building to be erected thereon as a tavern, public-house, or beer shop." Further portions of the estate were sold in 1870 by the then trustees to G., who covenanted with the vendors not to use or permit to be used any building erected on the land & premises intended to be thereby assured as a tavern, public-house, or beer-shop. The rest of the estate was sold to other persons. In 1879 H. purchased from G. part of the land comprised in G.'s purchase of 1870 & entered into a covenant with G., in terms similar to those of the covenant in the deed of 1870. D., a yearly tenant under H. of one of the houses, having obtained an "off licence," sold under it beer which was not drunk upon the premises:—*Held*: the property was bound by the restrictive covenant entered into by the vendors in 1863, & B., an assign of A., was entitled to an injunction & damages against H. & D. in respect of the breach of covenant in selling beer under an "off licence."—*NICOLL v. FENNING* (1881), 19 Ch. D. 258; 51 L. J. Ch. 166; 45 L. T. 738; 30 W. R. 95.

Annotation:—*Refd.* *Forinby v. Barker* (1903), 89 L. T. 249.

2738. — Tenant of purchaser.—*NICOLL v. FENNING*, No. 2737, *ante*.

2739. — — — — ——The purchaser of a freehold lot No. 712, on a building estate, brought an action for an injunction to restrain the tenant of another lot, No. 648, from setting up a nuisance in breach of restrictive covenants mutually entered into on purchase of the lots. Deft. was under-tenant of lot 648 from the lessee of the original purchaser, who on his purchase had covenanted with the owner of lot 712 (*inter alia*) not to retail beer. Deft. had recently commenced to sell beer on lot 648, which was the nuisance complained of:—*Held*: he was bound by the covenant, although he had had no notice of it.—*THORNEWELL v. JOHNSON* (1881), 50 L. J. Ch. 641; 44 L. T. 768; 29 W. R. 677.

2740. — Purchaser of lot unsold at auction.—Two lots of land were put up for sale under conditions which, after reciting that the vendor was possessed of adjoining property not included in the sale, provided that each purchaser should, in his conveyance, enter into a covenant with the vendor & the purchaser of the other lot not to use any building on his lot as a public-house, & to the conditions was annexed a form of covenant to this effect. No provision was made for the case of a lot remaining unsold. Lot 2 was purchased at the sale, & the purchaser signed a contract embodying the conditions. Lot 1 remained unsold:—*Held*: the purchaser was bound to enter into the restrictive covenant with the vendor.—*Re MORDY & COWMAN* (1884), 51 L. T. 721, C. A.

2741. — Assignee of purchaser—Vendor selling whole property to purchaser.—In Dec. 1898, the owner in fee of an hotel agreed to sell it to H., the predecessor in title of plffs. The contract provided that the conveyance should contain a covenant by H. restrictive of the user of the hotel

In 1886 certain land was sold & conveyed subject to a covenant to observe the following stipulation : " Except on lots marked ' tavern lots,' no hotel, tavern, public-house, beer house, shop, or other building for the sale of wines, spirits, ale, or stout, or any spirituous, malt, or excisable liquor, of any kind, shall be built upon any lot now offered for sale ; & on no lot shall any manufacture be carried on unless with the consent of the vendor, who shall be at liberty to grant a licence for same." In Jan. 1897 the lessees from the purchaser of two of the lots, which were not marked " tavern lots " with full notice of the covenant, erected a restaurant on the lots. This restaurant was opened to the public on Mar. 25, 1897, but without any wine, spirit, or beer licence. In Aug. 1897 a licence to sell wines & spirits was obtained. Thereupon the vendor, together with the purchaser of another lot, on which it was intended to erect a public-house, brought an action against the lessees, &

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then moved for an interlocutory injunction to restrain them from using their restaurant for any of the purposes mentioned in the stipulation:—*Held*: the true meaning of the covenant was that no hotel, tavern, etc., should “be” upon any lot except marked “tavern lot”; it would not be possible to tell whether or not a house when it was in course of building was intended for a hotel, tavern, etc., but that the user of the house would have to be looked to before declaring that the covenant had been infringed. *Pltfs.* were entitled to the injunction claimed.—*WEBB v. FAGOTTI BROTHERS* (1898), 79 L. T. 683, C. A.

2750. — Waiver of breach—Delay—Breach not apparent.—*Deft.* A. was the purchaser in fee of a house & premises, part of an estate formerly the property of *pltfs.*, of which all the purchasers of such parts as were sold, including A., were under a covenant not to use the house & premises so purchased, or any part thereof, as a public-house or beer shop. A. built a shop at the back of his premises, & on Feb. 11, without consent, but without interference on the part of *pltfs.*, opened it as a beer shop. In June he leased the beer shop to co-*deft.* B., who carried on the same business with the consent of A., but equally without consent of *pltfs.*, who on July 8 served B., with notice to desist. It further appeared that a purchaser of another house on the same estate had also, without consent, but without interference on the part of *pltfs.*, opened a beer shop at the back of his premises. The bill for an injunction was filed on Aug. 1:—*Held*: the conduct of *pltfs.* did not amount to such a degree of acquiescence & waiver as to preclude them from the right of enforcing the covenant.—*MITCHELL v. STEWARD* (1866), L. R. 1 Eq. 541; 35 L. J. Ch. 393; 14 L. T. 134; 30 J. P. 358; 14 W. R. 453.

Annotation:—*Reid*. *Knight v. Simmonds*, [1896] 2 Ch. 294.

2751. — Long continued acquiescence.—On a sale of part of the C. estate, the purchasers entered into a covenant with the vendors, “their & each of their heirs & assigns, & also separately with the owners & owner, lessors & lessees for the time being, or other the persons or person for the time being entitled to the receipt of the rents & profits of any part of” the C. estate, against (*inter alia*) keeping a beer shop on any part of the premises sold. In an action brought by subsequent purchasers of the C. estate to restrain a breach of this covenant:—*Held*: they had lost their right to bring an action by long-continued acquiescence in breaches of the covenant both by *deft.*, & other similar covenantors, & consequently were not entitled either to an injunction or to any damages. *Seem*: they were not entitled to sue on the covenant at law, even for nominal damages.—*KELSEY v. DODD* (1881), 52 L. J. Ch. 34.

Annotations:—*Distd.* *Jackson v. Winnifith* (1882), 47 L. T. 243. *Consd.* *Forster v. Elvert Colliery Co.*, *Quin v. Same*, *Seed v. Same*, *Morgan v. Same*, [1908] 1 K. B. 629. *Reid*. *Day v. Waldron* (1919), 88 L. J. K. B. 937.

See, further, *LANDLORD & TENANT*, Vol. XXXI., pp. 147, 160–162.

2752. Offensive trade—What constitutes breach—Butcher’s shop—Involving slaughtering.—The business of a butcher, though involving the slaughtering of beasts on the premises, is not necessarily an “offensive, noisy, or noisome trade” within the meaning of a restrictive covenant in a lease or conveyance prohibiting the carrying on of such trades.—*CLEAVER v. BACON* (1887), 4 T. L. R. 27.

2753. — Bill posting on hoarding.—

NUSSEY v. PROVINCIAL BILL POSTING CO. & EDDISON, No. 2683, *ante*.

See, further, *LANDLORD & TENANT*, Vol. XXXI., pp. 162–164.

(c) *Covenants affecting Adjoining Property.*

2754. Meaning of “adjoining.”—A vendor of a piece of land took from the purchaser a covenant that he would not do, or suffer to be done, on the premises, or any part thereof, anything which should be a nuisance to the vendor or his tenants, or the occupiers or owners of the “adjoining” property, or the houses to be built thereon. The purchaser, immediately after the sale, put up the piece of land again for sale by auction in lots, under conditions which required each purchaser to enter into a covenant in similar terms to the above; & each of the purchasers did enter into a covenant with his vendor that he would not do or suffer to be done on any of the premises anything which should, would, or might be deemed a nuisance to the original vendor, or the occupiers of proprietors for the time being of the “adjoining” property, or the houses to be built thereon:—*Held*: by the word “adjoining” in the last-mentioned covenant was meant the property adjoining each lot, & not merely the property adjoining the whole piece of land originally sold; & the owner of any lot was entitled to enforce the covenant against the owner of any other lot.—*HARRISON v. GOOD* (1871), L. R. 11 Eq. 338; 40 L. J. Ch. 294; 24 L. T. 263; 35 J. P. 612; 19 W. R. 346.

Annotations:—*Reid*. *Nottingham Patent Brick & Tile Co. v. Butler* (1886), 16 Q. B. D. 778; *Re Davis & Cavey* (1888), 40 Ch. D. 601; *Tod-Heatly v. Benham* (1888), 40 Ch. D. 80; *Sharp v. Harrison*, [1922] 1 Ch. 502. *Mentd.* *Christie v. Davey*, [1893] 1 Ch. 316.

2755. ——In a covenant by a lessor not to allow a certain trade to be carried on in the “adjoining premises,” the word “adjoining” was confined to the two houses on either side of the demised premises, although the lessor was at the time of the lease the owner of a block of buildings, of which these formed part only.—*VALE & SONS v. MOORGATE STREET & BROAD STREET BUILDINGS, LTD. & BAKER (ALBERT) & CO., LTD.* (1899), 80 L. T. 487.

Annotations:—*Distd.* *Ind. Coope v. Hamblin* (1900), 81 L. T. 779 (*See* 84 L. T. 168); *Cave v. Horsell*, [1912] 3 K. B. 533. *Reid*. *Derby Motor Cab Co. v. Crompton & Evans Union Bank* (1913), 29 T. L. R. 673.

2756. ——In a conveyance on sale of a portion of *pltfs.* land to *deft.*, the purchaser covenanted that he would not “in the erection of buildings adjoining the hereditaments of the vendors” permit the insertion of any “lights” overlooking such premises. *Deft.* constructed a number of houses, the backs of which were 20 ft. from the boundary fence separating the two properties. Their gardens or yards reached this fence & there were windows in the houses which overlooked *pltfs.* land:—*Held*: the houses did not “adjoin” *pltfs.* land within the meaning of the covenant.—*IND, COOPE & CO., LTD. v. HAMBLIN* (1900), 84 L. T. 168, C. A.

Annotations:—*Distd.* *Cave v. Horsell*, [1912] 3 K. B. 533. *Reid*. *Derby Motor Cab Co. v. Crompton & Evans Union Bank* (1913), 29 T. L. R. 673.

2757. — Against letting for particular business.—*Deft.*, being the owner of certain house property, which included five shops, numbered 2 to 6, Limes Parade, let to *pltfs.* the shop No. 4, Limes Parade, for twenty-one years, the lessor covenanting that he would not at any time during the continuance of the lease let “any of the adjoining shops belonging to me on the Limes

estate," for the purpose of the businesses of upholsterers, cabinet makers, furniture dealers, or French polishers. Subsequently, during the continuance of the lease, deft. let to a tenant the shop No. 6, Limes Parade, for a term of twenty-one years for the purpose of carrying on the business (*inter alia*) of a cabinet maker:—**Held**: the word "adjoining" was not confined to the two shops physically in contact with the demised shop, but it extended to No. 6, & there had therefore been a breach of deft.'s covenant in respect of which plffs. were entitled to recover damages.—**CAVE v. HORSELL**, [1912] 3 K. B. 533; 81 L. J. K. B. 981; 107 L. T. 186; 28 T. L. R. 543, C. A.

Annotation:—**Distd. Derby Motor Cab Co. v. Crompton & Evans Union Bank** (1913), 29 T. L. R. 673.

Whether restrictive covenants run in favour of adjoining owners.—See Nos. 2672-2675, *ante*.

(d) *Covenants as to Use and Maintenance of Garden.*

2758. Against whom enforceable—Vendor.—**DEANE v. RAMSGATE CORPN.** (1892), 8 T. L. R. 199, C. A.

2759. — Against purchaser—At instance of another purchaser.—By deed a vendor after granting in fee a site upon which a row of houses known as Stanley Gardens was being built, granted to the purchaser "his heirs exors. administrators & assigns & his & their lessees & sub-lessees or tenants, being occupiers for the time being" of Stanley Gardens, "& for his & their families & friends," the use of a garden adjoining. Nothing in the deed defined the class of houses in Stanley Gardens. Defts. were an incorporated co. who had purchased several of the houses for the purpose of affording a residential home & club for ladies engaged in professional work, where for a small weekly payment in advance members were provided with a furnished bedroom with use of public rooms, food being charged for at reasonable rates & paid for weekly. A small sum was paid by defts. towards the maintenance of the garden in respect of each of the houses held by them:—**Held**: the members of the club, whether resident or not, were not "lessees" or "sub-lessees" or "tenants" or "families" or "friends" of defts. within the meaning of the deed, & were not entitled to the use of the garden, & defts. were not entitled to authorise them to use it.—**KEITH v. TWENTIETH CENTURY CLUB, LTD.** (1904), 73 L. J. Ch. 545; 90 L. T. 775; 52 W. R. 554; 20 T. L. R. 462; 48 Sol. Jo. 458.

2760. What amounts to breach—Admission of the public.—**DEANE v. RAMSGATE CORPN.** (1892), 8 T. L. R. 199, C. A.

2761. — Admission of members of residential club.—**KEITH v. TWENTIETH CENTURY CLUB, LTD.,** No. 2759, *ante*.

(e) *Other Cases.*

2762. Covenant not to dispose of water—Whether runs with land.—Covenant upon a conveyance in fee with the grantors, lessees of waterworks, not to sell or dispose of water from a well to the injury of the proprietors of the said waterworks, their heirs, exors., administrators, & assigns.

Qu.: whether the covenant runs with the land, so as to bind, & be enforced by, assignees, whether it is contrary to the policy of the law, & as to the effect of a renewal of the lease.

The parties left to law, & a demurrer allowed,

from the inconvenience of enforcing such a covenant by injunction.—**COLLINS v. PLUMB** (1810), 16 Ves. 454; 33 E. R. 1057, L. C.

Annotations:—**Consd. Catt v. Tourle** (1869), 4 Ch. App. 654. **Refd. Clegg v. Hands** (1889), 44 Ch. D. 506, n. **Mentd. Lumley v. Wagner** (1852), 1 De G. M. & G. 604.

2763. Covenant not to permit opening of warehouse door—Door opened in premises not in occupation of purchaser.—Plffs. enfeoffed deft. with a piece of land bounded on the west by a street, & on the east part by buildings belonging to deft., & part by buildings belonging to W. G. Deft. covenanted "that he would not, at any time after the enfeoffment, permit or suffer any warehouse door to be opened or put out to the front of the street." A warehouse door was put out in the buildings belonging to W. G., at the eastern extremity of deft.'s land, about 8 feet distant from, but giving access to the street:—**Held**: this was a breach of the covenant by deft., though the premises in which the door was put out, did not stand upon his land, were not in his occupation, & were not level with the front of the street.—**LIVERPOOL CORPN. v. TOMLINSON** (1826), 7 Dow. & Ry. K. B. 556.

2764. Covenant for exclusive right to supply beer.—Pltf., a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs & assigns, should have the exclusive right of supplying beer to any public-house erected on the land, but pltf. did not enter into any covenant to supply it. Deft., a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, & erected on it a public-house which he supplied with his own beer. Pltf. filed his bill to restrain deft. from supplying beer, alleging that pltf. had always been ready to furnish a sufficient supply of good beer at a fair price:—**Held**: the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade, or because it purported to be perpetual, & though it was in terms positive, it was in substance negative, & the ct. could interfere by injunction to restrain deft. from acting in contravention of it.—**CATT v. TOURLE** (1869), 4 Ch. App. 654; 38 L. J. Ch. 605; 21 L. T. 188; 33 J. P. 659; 17 W. R. 939, L. J.J.

Annotations:—**Consd. Clegg v. Hands** (1889), 44 Ch. D. 506, n.; L. C. C. v. Allen, [1914] 3 K. B. 642. **Refd. Luker v. Dennis** (1877), 7 Ch. D. 227; **Zetland v. Hislop** (1882), 7 App. Cas. 427; **Donnell v. Bennett** (1883), 22 Ch. D. 835; **Metropolitan Electric Supply Co. v. Glinder**, [1901] 2 Ch. 799; **Courage v. Carpenter**, [1910] 1 Ch. 262; L. C. & D. Ry. & S. E. & C. Ry. Managing Committee v. Spiers & Pond (1916), 32 T. L. R. 493. **Mentd. Lord Stratheona S.S. Co. v. Dominion Canal Co.**, [1926] A. C. 108.

2765. Covenant not to obstruct view—By planting or otherwise—Permitting old trees to grow.—**CRAWLEY v. WOLFF** (1888), 4 T. L. R. 434, C. A.

2766. Covenant against fixing operative machinery—Switchback railway.—Deft. was bound by the restrictive covenants of a building estate that no "operative machinery" should be fixed or fastened on the land held by him, & also that "no hut, tent, shed, caravan, house on wheels, or other chattel," should be "erected, made, placed, or be allowed to remain upon any lot":—**Held**: a switchback railway erected upon piles driven into the ground was "operative machinery," & was also a "chattel" within the meaning of the covenant.—**CHAMBERLAYNE v. COLLINS** (1894), 70 L. T. 217; 10 T. L. R. 233; 9 R. 311, C. A.

2767. Covenant against fixing "chattel" to soil—Switchback railway.—**CHAMBERLAYNE v. COLLINS**, No. 2766, *ante*.

Sect. 2.—Rights and liabilities in relation to covenants: Sub-sect. 4, C. (e), & D. (a) & (b) i.]

2768. Covenant to keep windows obscured—Whether runs with land.]—A builder, L., who had entered into an agreement with a landlord by which a lease of certain property was to be granted him on the completion of certain buildings thereon, covenanted with B., the owner of adjoining land, that the windows in the said buildings facing B.'s land should be obscured & fixed. A block of flats was erected & a lease granted to L., by whom it was subsequently mortgaged & the equity of redemption released. Deft. became tenant of one of the flats & opened one of the fixed windows:—*Held*: the covenant was a restrictive covenant, binding on the leasehold interest, of which deft. had constructive notice, & could be enforced by injunction.—*ABBEY v. GUTTERES* (1911), 55 Sol. Jo. 364.

D. Remedies in case of Breach.

(a) In General.

2769. Who may proceed—Joinder of parties not injuriously affected.]—Each of the original owners of houses in a row entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house:—*Held*: the other owners of houses were not necessary parties to a suit by one to restrain a breach of the covenants.

I think that the owner of a house, who is injuriously affected by acts which are contrary to the covenant, may proceed against the party who commits them, without requiring the other owners, to whom they are not in the smallest degree prejudicial, to join him in the suit (*LORD CHELMSFORD, C.*).—*WESTERN v. MACDERMOTT* (1866), 2 Ch. App. 72; 36 L. J. Ch. 76; 15 L. T. 641; 31 J. P. 73; 15 W. R. 265, L. C.

Annotations:—*Apld.* Fairclough v. Marshall (1878), 4 Ex. D. 37. *Refd.* *Re* Drew, *Ex p.* Mason (1866), 35 Beav. 443; *Tulk v. Metropolitan Board of Works* (1868), L. R. 3 Q. B. 682; *Keates v. Lyon* (1869), 4 Ch. App. 218; *Leech v. Schweder* (1874), 9 Ch. App. 465, n.; *Manners v. Johnson* (1875), 1 Ch. D. 673; *Master v. Hansard* (1876), 46 L. J. Ch. 505; *Renals v. Cowlishaw* (1879), 11 Ch. D. 866; *Chitty v. Bray* (1883), 48 L. T. 860; *Brown v. Inskip* (1884), Cab. & El. 231; *Austerberry v. Oldham Corp.* (1885), 29 Ch. D. 750; *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 54 L. T. 444; *Martin v. Spicer* (1886), 55 L. T. 821; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Meredith v. Wilson* (1893), 69 L. T. 336; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Formby v. Barker*, [1903] 2 Ch. 539; *Hooper v. Bromet* (1903), 89 L. T. 37. *Mentd.* *Poulett v. Hood* (1866), 35 Beav. 234.

2770. Specific performance.]—Where land is conveyed in fee, by deed of feoffment, subject to a perpetual ground rent, & the feoffee covenants for himself, his heirs & assigns, with the feoffor, the owner of adjoining lands, his heirs, exors., administrators, & assigns, not to use the land in particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, & the subsequent acts of the feoffor, or of those claiming under him, have so altered the character & condition of the adjoining lands that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent & spirit of the contract, a ct. of equity will not interpose to enforce the covenant, but will leave the parties to law.

Qu.: whether upon such a covenant there could be any remedy at law against the assigns of the covenantor.—*BEDFORD (DUKE) v. BRITISH MUSEUM TRUSTEES* (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L. J. Ch. 129; 39 E. R. 1055, L. C.

Annotations:—*Apld.* *Hawkins v. Scarborough* (1833), 2 L. J. Ch. 126. *Consd.* *Tulk v. Moxhay* (1848), 11 Beav. 571. *Distd.* *Kemp v. Sober* (1851), 1 Sim. N. S. 517.

Consd. *Child v. Douglas* (1856), 2 Jur. N. S. 950; *Western v. MacDermott* (1866), 2 Ch. App. 72; *Peek v. Matthews* (1867), L. R. 3 Eq. 515; *Doherty v. Allman* (1878), 3 App. Cas. 709. *Expld.* *Sayers v. Collyer* (1884), 28 Ch. D. 103. *Consd.* *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Knight v. Simmonds*, [1896] 2 Ch. 294; *Osborne v. Bradley*, [1903] 2 Ch. 446. *Refd.* *Keppell v. Bailey* (1834), 2 My. & K. 517; *Kirk v. Bromley Union* (1846), 16 L. J. Ch. 114; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Wilson v. Hart* (1865), 2 Hem. & M. 551; *Mitchell v. Steward* (1866), L. R. 1 Eq. 541; *Bowes v. Law* (1870), L. R. 9 Eq. 636; *Kilbey v. Haviland* (1871), 24 L. T. 353; *German v. Chapman* (1877), 7 Ch. D. 271; *Renals v. Cowlishaw* (1879), 11 Ch. D. 866; *Brown v. Inskip* (1884), Cab. & El. 231; *Meredith v. Wilson* (1893), 69 L. T. 336; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Alliance Economic Investment Co. v. Berton* (1923), 92 L. J. K. B. 750. *Mentd.* *Squire v. Campbell* (1836), 1 My. & Cr. 459; *Dietrichsen v. Cabburn* (1846), 7 L. T. O. S. 445; *A.-G. v. Clapham* (1853), 10 Hare, 540; *Patching v. Dubbins* (1853), Kay, 1; *Ford v. Tynte* (1865), 34 L. J. Ch. 452; *Nethersole v. School for Indigent Blind* (1870), 35 J. P. 279.

Sec. further, SPECIFIC PERFORMANCE.

2771. Injunction.]—A railway co. having conveyed to A. a piece of land abutting on their viaduct, with a covenant not to build within 6 feet of the wall of the viaduct, the ct., in an action against A.'s widow, who took by assignment, for building against the wall in breach of the covenant, in which action she had suffered judgment by default, refused to grant an injunction against her commanding her to remove the building; it appearing that it had been erected by her under tenant, & consequently that she could not obey the writ, if granted.—*LONDON & SOUTH WESTERN RY. CO. v. WEBB* (1863), 15 C. B. N. S. 450; 12 W. R. 51; 143 E. R. 860; *sub nom.* *LONDON & NORTH WESTERN RY. CO. v. WEBB*, 9 L. T. 291.

Annotation:—*Refd.* *Mid. Ry. v. G. W. Ry.* (1873), 42 L. J. Ch. 438.

2772. —.—Where a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in a specified manner, has permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant; & there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others; nor in the case where the breaches have been committed before deft. became a purchaser, & executed the deed of covenant.—*PEEK v. MATTHEWS* (1867), L. R. 3 Eq. 515; 16 L. T. 199; 15 W. R. 689.

Annotations:—*Distd.* *German v. Chapman* (1877), 7 Ch. D. 271. *Refd.* *Knight v. Simmonds*, [1896] 2 Ch. 294; *Sobey v. Sainsbury*, [1913] 2 Ch. 513.

2773. —.—Where the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant.—*RICHARDS v. REVITT* (1877), 7 Ch. D. 224; 47 L. J. Ch. 472; 37 L. T. 632; 26 W. R. 166.

Annotations:—*Apld.* *Meredith v. Wilson* (1893), 69 L. T. 336. *Refd.* *Renals v. Cowlishaw* (1878), 38 L. T. 503; *Formby v. Barker* (1903), 89 L. T. 249; *Osborne v. Bradley*, [1903] 2 Ch. 446; *Elliston v. Reacher*, [1908] 2 Ch. 374; *Sharp v. Harrison*, [1922] 1 Ch. 502.

2774. —.—Pltf. was the owner of a piece of land which he had purchased some years before, & which formed part of an estate which was sold in lots for a general building scheme. Each of the purchasers entered into a restrictive covenant with the vendor not to erect any buildings beyond a certain line, such covenant to be only personally binding on the covenantor in respect of breaches committed during his seisin. Four years after

pltf.'s purchase deft., who had notice of the covenant, purchased the residue of a mtge. term in a lot opposite pltf.'s. on which about the time of pltf.'s purchase a bakehouse had been erected beyond the line violation of the covenant. Deft. proceeded to erect a wooden stable, also beyond the line. No complaint had been made by pltf. of the building erected prior to deft.'s purchase; but on deft. proceeding to erect the stable, he commenced an action for an injunction to restrain deft. from allowing any of the buildings erected beyond the building line to continue:—*Held*: the injunction must be confined to the building erected personally by deft.—*GASKIN v. BALLS* (1879), 13 Ch. D. 324; 28 W. R. 552, C. A.

Annotations.—*Apld.* *Powell v. Hemsley*, [1909] 2 Ch. 252. *Refd.* *North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30.

2775. —.]—*CHITTY v. BRAY*, No. 2801, *post*.

2776. —.]—A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors & with the purchasers of the other lots entitled to the benefit of the covenant not to build a shop on his land, or to use his house as a shop or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an "off" license, to restrain him from breaking his covenant & for damages. Pltf. had known for three years before the action was commenced that deft. was using his house as a beershop, & had himself bought beer at the shop. There was evidence that some of the houses built on other lots had been for some time used as shops notwithstanding the covenant, & that some of the houses near pltf.'s house were occupied, not each by a single tenant, but by two families at weekly rents:—*Held*: the change in the character of the neighbourhood was not in itself a ground for refusing relief to pltf., as the change was not caused by his conduct; but pltf. had lost the right to enforce his covenant either by injunction or damages, through his acquiescence in the proceedings of deft.—*SAYERS v. COLLYER* (1884), 28 Ch. D. 103; 54 L. J. Ch. 1; 51 L. T. 723; 49 J. P. 244; 33 W. R. 91; 1 T. L. R. 45, C. A.

Annotations.—*Distd.* *Northumberland v. Bowman* (1887), 56 L. T. 773. *Consd.* *Meredith v. Wilson* (1893), 69 L. T. 336; *Knight v. Simmonds*, [1896] 2 Ch. 294; *Osborne v. Bradley*, [1903] 2 Ch. 446. *Refd.* *Goddard v. Mid. Ry.* (1891), 8 T. L. R. 126; *Alexander v. Mansions Proprietary* (1900), 16 T. L. R. 431; *Elliston v. Reacher* (1908), 77 L. J. Ch. 617; *Pulleyn v. France* (No. 1) (1912), 57 Sol. Jo. 173; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Alliance Economic Investment Co. v. Berton* (1923), 92 L. J. K. B. 750. *Mentd.* *Dreyfus v. Peruvian Guano Co.* (1889), 42 Ch. D. 66; *Yates v. Kyffin-Taylor & Wark*, [1899] W. N. 141; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Re R.*, [1906] 1 Ch. 730; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851.

2777. —.]—Pltf. & deft. being purchasers of different plots of land from a common vendor, pltf. sought to obtain a mandatory injunction against deft. in respect of a breach of a covenant in the conveyance which pltf. himself had also committed. Injunction refused.—*GODDARD v. MIDLAND RY. CO.* (1891), 8 T. L. R. 126.

2778. —.]—Certain lots forming part of a building estate, were subject to a restrictive covenant that no building on any lot should be erected or used as a shop, workshop, warehouse, or factory, nor should any trade or manufacture be carried on on any lot. Since 1886, W. carried on the business of a laundryman on one of the lots. In July, 1893, he commenced to build on a lot of which he was the owner, a building adapted solely for the purposes of his business. An owner

of other of the lots, thereupon commenced an action to restrain the erection of the building. The evidence showed that all the buildings erected on the lots were private residences, but that in several of them trades, e.g. dressmaking, boot repairing, & washing, had for some time openly been carried on. It also appeared that pltf. had kept cows on some of his lots, & had sold their milk at a shed erected on the lots for their use, that he had discontinued this business in 1886, & that subsequently he had temporarily let a part of these lots to a mason, & permitted him to erect & use a shed thereon for the purposes of his business:—*Held*: deft. had committed a breach of the covenant; the breach was greater & more serious than any previously committed; having regard to that fact, pltf. was entitled to relief, & accordingly an injunction ought to be granted.—*MEREDITH v. WILSON* (1893), 69 L. T. 336.

2779. —.]—Where all the purchasers of lots of an estate are bound by restrictive covenants not to allow any trade or business to be carried on upon their lots, equitable relief in enforcing the covenants will be refused if the party suing has debarred himself from such relief by delay or acquiescence or if the property has been so laid out & used that the object of the covenants, namely the preserving the property as a residential property can no longer be attained; but it will not be refused merely because in a few instances the covenants have not been enforced.—*KNIGHT v. SIMMONDS*, [1896] 2 Ch. 294; 65 L. J. Ch. 583; 71 L. T. 563; 44 W. R. 580; 12 T. L. R. 401; 40 Sol. Jo. 531, C. A.

Annotations.—*Consd.* *Rowell v. Satchell*, [1903] 2 Ch. 212. *Refd.* *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Ramuz v. Leigh-on-Sea Conservative & Unionist Club* (1915), 31 T. L. R. 174.

2780. —.]—(1) The ct. will not generally infer that a building scheme was intended, where the contract leaves undefined the property to be bound by the conditions which are to apply, & does not bind the vendor to observe the conditions in the meantime as to property remaining unsold, especially where the vendor has the right to modify the conditions as to the unsold part.

(2) Where a restrictive covenant is entered into for the benefit of the covenantee personally, & not to secure the amenities of his property or as a part of a building scheme, pltf. will not lose his right to enforce the covenant by injunction, on the ground that there has been a change in the character of the neighbourhood, unless he himself has been guilty of some act or omission raising a personal equity against him.—*OSBORNE v. BRADLEY*, [1903] 2 Ch. 446; 73 L. J. Ch. 49; 89 L. T. 11.

Annotations.—*As to* (1) *Consd.* *Hooper v. Bromet, Raphael, Third Party* (1904), 90 L. T. 234. *Expld.* *Elliston v. Reacher*, [1908] 2 Ch. 665. *Consd.* *Sharp v. Harrison*, [1922] 1 Ch. 502. *As to* (2) *Refd.* *Kelly v. Barrett*, [1924] 2 Ch. 379. *Generally*, *Refd.* *Reid v. Bickerstaff*, [1909] 2 Ch. 305; *Sobey v. Sainsbury*, [1913] 2 Ch. 513.

2781. —.]—*DOWSETT v. RAMUZ* (1905), *Emden's B. C.*, 4th ed. 659.

— *Necessity for proof of damage.*—*See INJUNCTION*, Vol. XXVIII., p. 448, Nos. 669–677. *See, also*, *INJUNCTION*, Vol. XXVIII., pp. 447, 451, Nos. 666, 696.

2782. *Damages.*—*SAYERS v. COLLYER*, No. 2776, *ante*.

—.]—*See, further*, *INJUNCTION*, Vol. XXVIII., pp. 412 *et seq.*

(b) Loss of Remedy.

i. Change in Character of Neighbourhood.

See, now, *Law of Property Act*, 1925 (c. 20), s. 84 (1) (a).

Sect. 2.—Rights and liabilities in relation to covenants: Sub-sect. 4, D. (b) i., ii. & iii., & E.; sub-sect. 5, A.]

2783. Whether remedy lost—Change owing to acts of vendor or his successors.]—BEDFORD (DUKE) v. BRITISH MUSEUM TRUSTEES, No. 2770, ante.

2784. ———.]—KNIGHT v. SIMMONDS, No. 2779, ante.

2785. ———.]—OSBORNE v. BRADLEY, No. 2780, ante.

2786. ———.]—SAYERS v. COLLYER, No. 2776, ante.

2787. ———.]—Deflt. had purchased a plot of land, the conveyance of which, dated 1816, contained a covenant not to erect any building on the same. Deflt. commenced building operations, contending that the nature of the neighbourhood had completely changed, & that the same covenant had been relaxed in other cases with the approval of plffs.:—*Held*: deflt.'s contention failed, & plffs. were entitled to the injunction sought restraining any building operations.—**PLYMOUTH CORPN. v. MARTIN (1884), 1 T. L. R. 5.**

2788. ———.]—An Inclosure Act provided that the inclosed lands should not be built upon except with the consent of the adjoining owners:—*Held*: a great alteration in the neighbourhood did not remove the disability as to building.—**BIRD v. EGGLETON (1885), 29 Ch. D. 1012; 54 L. J. Ch. 819; 33 W. R. 774; sub nom. BIRD v. EGGLETON, BIRD v. PONSFORD, 53 L. T. 87; 49 J. P. 644; 1 T. L. R. 508.**

2789. ———.]—To disentitle an owner to enforce a restrictive covenant it is not sufficient to establish a change in the character of the neighbourhood without positive evidence of personal acquiescence in the change on the part of the person seeking to enforce the covenant.

Purchasers of land laid out upon a building scheme in 1862 covenanted to observe certain stipulations, one of which prohibited any trade or manufacture from being carried on upon the estate. Subsequent purchasers of other land on the estate purchased with notice of & subject to this covenant. One of them had permitted four houses upon land purchased by him to be turned into shops:—*Held*: in the circumstances, his exors. were entitled to restrain a purchaser from him from carrying on the trade of a fried fish vendor on his premises, in breach of the original covenant.—**PULLEYNE v. FRANCE (No. 1) (1912), 57 Sol. Jo. 173, C. A.**

2790. ———.]—In refusing to grant the equitable relief of specific performance of a restrictive covenant by way of injunction the ct. is entitled to take into consideration the fact of a general change in the character of the neighbourhood irrespective of any particular acts or omissions of pltf. & his predecessors in title.—**SOBEY v. SAINSBURY, [1913] 2 Ch. 513; 83 L. J. Ch. 103; 109 L. T. 393; 57 Sol. Jo. 836.**

2791. ———.]—A covenant, which was inserted in a conveyance of a plot of land by the owner of a building estate in accordance with a definite scheme, provided that "no house shall be used as a shop," & a co. which purchased the plot with notice of the covenant erected on the plot a building to be used as a club, the ground floor being composed of lock-up shops, which they had let or were intending to let to tradesmen. In an

action by the owner of the unsold portions of the estate against the purchasers for a breach of the covenant defts. contended that pltf. had caused a change in the character of the neighbourhood by permitting the erection of shops, & that the covenant merely meant that no dwelling-house should be converted into a shop:—*Held*: defts. had failed to prove a change in the character of the neighbourhood, & they had committed a breach of the covenant & pltf. was entitled to an injunction against them.—**RAMUZ v. LEIGH-ON-SEA CONSERVATIVE & UNIONIST CLUB, LTD. (1915), 31 T. L. R. 174.**

ii. Delay or Acquiescence.

2792. Whether remedy lost.]—BEDFORD (DUKE) v. BRITISH MUSEUM TRUSTEES, No. 2770, ante.

2793. ———.]—Acquiescence in breaches by other purchasers.]—**PEEK v. MATTHEWS, No. 2772, ante.**

2794. ———.]—GERMAN v. CHAPMAN, No. 2710, ante.

2795. ———.]—Acquiescence in minor breaches.]—**RICHARDS v. REVITT, No. 2773, ante.**

2796. ———.]—KNIGHT v. SIMMONDS, No. 2779, ante.

2797. ———.]—SAYERS v. COLLYER, No. 2776, ante.

2798. ———.]—A delay of fourteen months by a pltf. in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to such acquiescence as to disentitle him to an injunction.—**NORTHUMBERLAND (DUKE) v. BOWMAN (1887), 56 L. T. 773; 3 T. L. R. 606.**

2799. ———.]—OSBORNE v. BRADLEY, No. 2780, ante.

iii. Breach by Plaintiff.

2800. Whether remedy lost.]—On the sale of an estate in plots for building purposes, a deed of covenant was executed by all the purchasers, whereby they covenanted with the trustees, each purchaser covenanting with regard to the plot purchased by him, to observe certain stipulations as to the number of houses to be built on the plots, the building lines & other similar matters. Pltf. was owner of certain of these plots on which a house had been erected & grounds laid out. Deflt. had contracted for the purchase of some adjoining plots on which he was commencing to build more houses than were allowed by the deed of covenant, & in a position at variance with the building line therein laid down. The houses so built would overlook pltf.'s grounds somewhat more than if built within the building line. Pltf. claimed an injunction & deflt. pleaded that in several other instances, the original vendors, who were trustees under the deed of covenant for all the purchasers, had allowed considerable breaches of the covenants to be committed without interference, that they were therefore disentitled to enforce the covenants against deflt., & that pltf. as claiming under them, could not be in any better position. It also appeared that pltf.'s own house was built 2 feet in advance of the building line:—*Held*: as the breaches of covenant allowed by the trustees were committed in relation to other portions of the property, not affecting pltf.'s enjoyment of his plots, they could not be set up against him, & the deviation with regard to his own house was too trifling to affect his right.—**JACKSON v. WINNIFRITH (1882), 47 L. T. 243.**

2801. ———.]—Immaterial breach.]—The conveyances of plots of land, forming part of an estate

PART XI. SECT. 2, SUB-SECT. 4.— D. (b) i.

2786i. Whether remedy lost.]—Where, after the entering into of a covenant restricting the use to which the land

comprised in a building scheme may be put, there has been a general change in the character of the neighbourhood, the ct. will not enforce the covenant.—**COWAN v. FERGUSON (1919),**

45 O. L. R. 161; 15 O. W. N. 425; 48 D. L. R. 616.—**CAN.**

2786 ii. ———.]—Re ONTARIO LIME CO., [1927] 1 D. L. R. 765; 59 O. L. R. 646.—**CAN.**

laid out for building under a general scheme, contained restrictive covenants as to the front building line, & also as to the distance to which the buildings should be carried in the rear. Pltfs. claimed an injunction to restrain defts., & damages :—*Held* : (1) the two covenants were independent of each other, & a breach by one of the purchasers as to the building line in the rear did not deprive him of the right to relief against a breach of covenant as to the first building line by an adjoining owner ; (2) immaterial breaches of covenant as to the first building line did not deprive pltf. of the right to relief.—*CHITTY v. BRAY* (1883), 48 L. T. 860 ; 47 J. P. 695.

Annotation :—*Consd.* *Meredith v. Wilson* (1893), 69 L. T. 336.

2802. ——. [*Consd.*]—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, & what purported to be a true copy was produced. This copy subsequently proved to be defective.

An action was brought by an adjoining owner to restrain deft. from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a building line. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within 4 feet of a boundary fence :—*Held* : pltf. had only committed a trivial breach of a trivial covenant & such a breach did not disentitle pltf. from having the building stipulations strictly enforced.—*HOOPER v. BROMET* (1903), 89 L. T. 37 ; *on appeal* (1904), 90 L. T. 234, C. A.

2803. ——. [*Consd.*]—*GODDARD v. MIDLAND RY. CO.*, No. 2777, *ante*.

2804. ——. [*Consd.*]—*MEREDITH v. WILSON*, No. 2778, *ante*.

2805. ——. [*Consd.*]—*DOWSETT v. RAMUZ* (1905), *Emden's B. C.*, 4th ed. 659.

2806. ——. [*Consd.*]—*EFFECT ON REMEDY OF SUB-PURCHASER.*—(1) Where an estate is sold in lots at successive sales under a building scheme imposing restrictive stipulations on the lots, a purchaser can only enforce the stipulations against property shown as allotted in the plan & subject to the stipulations at the sale at which he purchases.

A purchaser can enforce the stipulations, although his conveyance contains an accidental or, *semble*, an intentional departure therefrom, as, notwithstanding the form of the conveyance, the purchaser is not entitled to the benefit of this departure as against other purchasers, nor are they bound by it.

(2) *Semble* : a sub-purchaser of part of a lot can enforce the stipulations, although, previously to his purchase, his vendor had committed a breach on another part.

(3) Where property is sold under an open contract, & no restrictions appear on the title, the mere fact that the vendor's solr. proposes to insert restrictive stipulations in the conveyance, which

are partly waived & partly insisted on, is not sufficient to affect the purchaser or his solr. with notice that the property is already subject to restrictions.—*ROWELL v. SATCHEL*, [1903] 2 Ch. 212 ; 73 L. J. Ch. 20 ; 89 L. T. 267.

E. Discharge or Modification of Covenants.

See Law of Property Act, 1925 (c. 20), s. 84.

2807. *Application for modification—Stay of proceedings pending application to authority.*—On Jan. 28, 1926, pltf. as tenant for life of a settled estate brought an action to restrain defts. from using certain premises at Blackburn for the purposes of a school in breach of restrictive covenants relating to the property. Defts. had purchased their property with notice of the restrictive covenants, & admitted that the school was carried on in breach thereof, but claimed that owing to the changes in the character of the neighbourhood they were entitled to a modification of the restrictive covenants so as to permit of the carrying on of this school. They accordingly moved in the action, pursuant to Law of Property Act, 1925 (c. 20), s. 84 (9), for leave to apply to the statutory authority under Law of Property Act, 1925 (c. 20), s. 84, & that in the meantime the proceedings in the action should be stayed :—*Held* : on the ground of the ct. having no jurisdiction to give defts. such modified relief as they claimed, circumstances existed which justified the making of the order asked, but they must proceed with their application forthwith.—*FEILDEN v. BYRNE*, [1926] Ch. 620 ; 95 L. J. Ch. 445 ; 135 L. T. 107.

SUB-SECT. 5.—COVENANTS FOR TITLE.

A. In General.

See Law of Property Act, 1925 (c. 20), ss. 59, 76 (1) (6), sched. II.

2808. *On whom binding—Heir.*—Heir bound by his father's covenant, the lands being conveyed to him.—*POOL v. POOL* (1625), 1 Rep. Ch. 18 ; 21 E. R. 494.

2809. ——. *Assignee of land.*—An assignee of land may have covenant against the covenantor & his heirs when the covenant runs with the land ; but covenant will not lie merely against one as assignee of land (*HOLT, C.J.*).—*BREWSTER v. KITCHELL* (1697), as reported in 1 Salk. 198 ; 1 Ld. Raym. 317 ; 12 Mod. Rep. 166 ; 91 E. R. 177.

Annotations :—*Consd.* *Milnes v. Branch* (1816), 5 M. & S. 411. *Apld.* *Austerberry v. Oldham Corp.* (1885), 29 Ch. D. 750. *Refd.* *Bally v. Wells* (1769), Wilm. 341 ; *Doe d. Angleson v. Rugeley* (1814), 6 Q. B. 107 ; *Tidswell v. Whitworth* (1867), 15 L. T. 574 ; *Bally v. De Crespiigny* (1869), 1 L. R. 4 Q. B. 180. *Mentd.* *Hopwood v. Barefoot* (1709), 11 Mod. Rep. 237 ; *Bank of England v. Morrice* (1736), *Lee temp. Hard.* 219 ; *Coxe v. Phillips* (1736), *Lee temp. Hard.* 237 ; *Blandford v. Marlborough* (1743), 2 Atk. 542 ; *Bradbury v. Wright* (1781), 2 Doug. C. B. 624 ; *Good v. Elliott* (1790), 3 Term Rep. 693 ; *Furtado v. Rogers* (1802), 3 Bos. & P. 191 ; *Toutong v. Hubbard* (1802), 3 Bos. & P. 291 ; *Louch v. Peters* (1834), 1 My. & K. 489 ; *Waller v. Andrews* (1838), 3 M. & W. 312 ; *Palmer v. Earlt* (1845), 14 M. & W. 428 ; *Moon v. Durden* (1848), 2 Exch. 22 ; *Festing v. Taylor* (1862), 26 J. P. 261 ; *Newby v. Sharpe* (1878), 8 Ch. D. 39 ; *Newington*

PART XI. SECT. 2, SUB-SECT. 4.—E.

r. Application for modification—Who may oppose.—Upon an application under Conveyancing Act, 1919, s. 88, for an order to discharge or modify a restriction imposed upon land under a covenant, the ct. must interpret the covenant, if necessary, in order to determine who are the persons entitled to the benefit of the restriction & therefore who are the persons entitled to oppose the application.—*Re Sporswood* (1926), 26 S. R.

N. S. W. 522 ; 43 N. S. W. W. N. 146.—*AUS.*

t. Jurisdiction of court.—The judge must satisfy himself that the balance of convenience is in favour of granting an application for modification or discharge, & the order should not be made unless the benefit to appet. greatly exceeds any possible detriment to resps.—*Re GEORGE*, [1927] 1 D. L. R. 155 ; 59 O. L. R. 571.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 5.—A.

2808 i. *On whom binding—Heir.*—In this Province, though not in England, the heir is only liable for the debts of his ancestor on account of lands. He is not liable for unliquidated damages, as, for instance, upon his ancestor's covenant for good title.—*VANKOUGHNET v. ROSS* (1850), 7 U. C. R. 248.—*CAN.*

a. ——. *Devisee.*—An action will not lie on a covenant for title against the devisees of the covenantor,—

Sect. 2.—Rights and liabilities in relation to covenants: Sub-sect. 5, A. & B. (a), (b) & (c).]

L. B. v. Cottingham L. B. (1879), 12 Ch. D. 725; *Re Shipton, Anderson & Harrison's Arbitration*, [1915] 3 K. B. 676; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Ertel Bieber v. Rio Tinto Co.*, *Dynamit Act. v. Same*, *Verenigte Koenigs & Laurabütte Act. v. Same*, [1918] A. C. 260; *Metropolitan Water Board v. Dick, Kerr*, [1918] A. C. 119.

2810. ——— Lessee becoming purchaser.]—

A lessee becoming purchaser takes upon himself the covenants or warranties of the lessor.—**PATON v. BREBNER** (1819), 1 Bli. 42; 4 E. R. 16, H. L. *Annotation:—Reid. Aylett v. Ashton* (1835), 1 My. & Cr. 105.

Covenants for right to convey.]—See Sub-sect. 5, B. (b), post.

Covenants for quiet enjoyment.]—See Sub-sect. 5, C. (b), post.

Covenants for further assurance.]—See Sub-sect. 5, D. (a), post.

2811. Who may enforce—Covenant running with land—Assignee of land.]—BREWSTER v. KITCHELL, No. 2809, *ante*.

2812. ——— Purchaser of portion of land.]

ROGERS v. HOSEGOOD, No. 2664, *ante*.
Covenants for further assurance.]—See Sub-sect. 3, D. (a), post.

2813. Effect of notice to purchaser—Of defect in title.]—LEVETT v. WITHERINGTON (1688), 1 Lut. 317; 125 E. R. 166.

Annotations:—Consd. Page v. Mid. Ry., [1894] 1 Ch. 11; *G. W. Ry. v. Flisher*, [1905] 1 Ch. 316.

2814. ——— Disclosure in conveyance.]—HUNT v. WHITE, No. 2449, *ante*.

2815. ———.]—PAGE v. MIDLAND RY. CO., No. 2450, *ante*.

2816. ——— Vendor not entitled to prove notice—In action for breach of covenant.]—MAY v. PLATT, No. 2459, *ante*.

Accord & satisfaction as defence to action for breach.]—See CONTRACT, Vol. XII., p. 437, Nos. 3534–3541.

Interpretation of covenants.]—See, generally, DEEDS, Vol. XVII., pp. 242–389.

Absolute & qualified covenants.]—See, generally, DEEDS, Vol. XVII., pp. 397–402.

Covenants in leases.]—See LANDLORD & TENANT, Vol. XXXI., pp. 115 *et seq.*

B. Right to Convey.

(a) In General.

See Law of Property Act, 1925 (c. 20), s. 76, *sed. II.*

2817. Covenant for seisin—Synonymous with covenant for right to convey.]—Covenant, that

notwithstanding anything by him done he was seized in fee, & that he hath good right to sell, are synonymous, & of the same effect.—**NERVIN v. MUNNS** (1682), 3 Lev. 46; 83 E. R. 569.

2818. Distinguished from covenant for quiet enjoyment.]—GREGORY v. MAYO (1677), 3 Keb. 744; *Freem. K. B.* 450; 2 Lev. 194; 84 E. R. 980.

2819. ———.]—VANE v. BARNARD (1708), *Gilb. Ch.* 6; 25 E. R. 5, L. C.

2820. ———.]—Releasors covenanted that for & notwithstanding any act, etc., by them or any or either of them done to the contrary, they had good title to convey certain lands in fee; & also, that they or some or one of them, for & notwithstanding any such matter or thing as aforesaid, had good right & full power to grant, etc., & likewise that the releasee should peaceably & quietly enter, hold, & enjoy the premises granted without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever, & that the releasee should be kept harmless & indemnified by the releasors, & their heirs against all other titles, charges, etc., save & except the chief rent issuing & payable out of the premises to the lord of the fee:—*Held*: (1) the generality of the covenant for quiet enjoyment against the releasors & their heirs, & any other person or persons whatsoever, was not restrained by the qualified covenants for good title & right to convey, for & notwithstanding any act done by the releasors to the contrary. But if the covenant for quiet enjoyment were to be restrained to the acts of the releasors by any qualifying context, then the declaration in covenant, stating it by itself in its own absolute terms, without such qualifying context belonging to it, seems to be an untrue statement of the deed in substance & effect, which deft. may take advantage of upon the general issue of *non est factum*, as a variance & ground of nonsuit, or of a verdict for him.

(2) The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity & quality which he purports to convey, viz. in this case an indefeasible estate in fee simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, & of any disturbances thereupon (**LORD ELLENBOROUGH, C.J.**).—**HOWELL v. RICHARDS** (1809), 11 East, 633; 103 E. R. 1150.

Annotations:—As to (1) **Distd.** *Nind v. Marshall* (1819), 1 Brod. & Bing. 319. *Expld.* *Line v. Stephenson* (1838), 6 Scott, 447. *As to* (2) **Reid.** *Baynes v. Lloyd*, [1895] 1 Q. B. 820. *Generally, Reid.* *Forde v. Wilson* (1813), 2 Moore, C. P. 592. *Mentd.* *McKay v. McNally* (1879), 41 L. T. 230.

SICKLEN v. SNYDER (1813), 10 U. C. R. 209.—**CAN.**

“Usual covenants.”—*“Usual covenants”* in a conveyance to a purchaser extend only to the acts of the vendor, if he take by descent, to the acts of himself & his ancestors, & if by devise to the acts of himself & his devisors.—**GAMBLE v. MCKAY** (1858), 7 C. P. 319.—**CAN.**

28131. Effect of notice to purchaser—Of defect in title.]—MILLER v. CUMMINGS (1861), 10 C. P. 448.—**CAN.**

2813 ii. ———.]—Where in an agreement for sale of land there is an express covenant by the vendor for title, knowledge by the purchaser of defects does not preclude him from insisting on the full benefit of the covenant.—BOARD v. BAUER, [1921] 2 W. W. R. 688; 16 Alta. L. R. 484.—**CAN.**

c. Qualified covenant.]—SHIRE v.

GATES (1862), 21 U. C. R. 419.—**CAN.**

d. Whether running with land.]—MEREDITH v. MCCUTCHEON (1863), 13 C. P. 209.—**CAN.**

*e. Land included by mistake.]—Part of the land included in a conveyance was inserted by mistake, the vendor not being or pretending to be the owner of it. To an action on the covenants for title deft. pleading these facts as an equitable defence:—*Held*: the plea was good as pleaded.—**BELYEA v. MUIR** (1870), 5 P. R. 273.—**CAN.***

f. Acceptance of title by purchaser—Entry.]—BERENIK v. SHELTON FARM CO., LTD., [1926] 2 D. L. R. 977; [1926] 2 W. W. R. 177; 20 Sask. L. R. 531.—**CAN.**

g. Sheriff's sale of land—Operation of implied covenants.]—The implied covenants between vendor & purchaser do not come into existence

where land is transferred by the sheriff pursuant to a sale under a writ of execution.—**ANDERSON v. STASHUK** (No. 1), [1927] 1 D. L. R. 529; [1927] 1 W. W. R. 49; 21 Sask. L. R. 276.—**CAN.**

PART XI. SECT. 2, SUB-SECT. 5.—B. (a).

2817 i. Covenant for seisin—Synonymous with covenant for right to convey.]—The usual covenant for good title runs with the land, & it is no objection therefore to an action by the assignee of the covenantee, that because according to the statement in the declaration, “the grantor was not seized in fee when he gave his covenant,” the covenant was broken as soon as made, & could not inure to the benefit of the assignee.—SCOTT v. FRALICK** (1850), 6 U. C. R. 511.—**CAN.****

2817 ii. ———.]—MCKAY v. MCKAY (1880), 31 C. P. 1.—**CAN.**

2821. Construction of covenant.]—A man covenanted that he had done no act "whereby" the estate in question could be affected in title. Breach assigned that, in fact, he had previously executed a certain deed between certain parties, "whereby" the estate was affected in title. Deft. pleaded over. The pleadings went on to demurrer. Deft. then contended that the breach was assigned in equivocal terms, because the word "whereby" might apply either to the deed itself, or merely to the execution of it by him; & if it were the first, it was no breach in him: Conceded, as to the equivocality; but held to have been cured by the pleading over.

A covenant that a man has not "permitted or suffered" any act which has a certain effect, is consistent with his having previously consented to such an act by another person, his own consent not being a necessary impediment to the transaction.—*HOBSON v. MIDDLETON* (1827), 6 B. & C. 295; 9 Dow. & Ry. K. B. 249; 5 L. J. O. S. K. B. 160; 108 E. R. 461.

Annotations:—*Apld.* *Clifford v. Hoare* (1874), L. R. 9 C. P. 362. *Consd.* *Berton v. Alliance Economic Investment Co.*, [1922] 1 K. B. 742. *Refd.* *Tolman v. Portbury* (1872), L. R. 7 Q. B. 344. *Mentd.* *Jones v. Waite* (1839), 7 Scott, 317; *Boydell v. Harkness* (1846), 3 C. B. 168; *Murphy v. Glass* (1869), L. R. 2 P. C. 408.

(b) *Who may Enforce.*

2822. Devisee of land.]—Covenant lies by devisee of lands in fee upon a covenant made by deft. to testator, to whom deft. conveyed the lands in fee, that deft. was lawfully seised, etc., & had a good right to convey, etc.; for such covenant runs with the land, & though broken in the lifetime of testator, is a continuing breach in the time of the devisee, & it is sufficient to allege for damage that thereby the lands are of less value to the devisee, & that he is prevented from selling them so advantageously.—*KINGDON v. NOTTLE* (1815), 4 M. & S. 53; 105 E. R. 755.

Annotations:—*Consd.* *Raymond v. Fitch* (1835), 2 Cr. M. & R. 588; *Spoor v. Green* (1874), L. R. 9 Exch. 99. *Refd.* *Ricketts v. Weaver* (1844), 12 M. & W. 718; *Goodman v. Boycutt* (1861), 6 L. T. 25; *David v. Sabin*, [1893] 1 Ch. 523; *Turner v. Moon*, [1901] 2 Ch. 825. *Mentd.* *Beckham v. Drake* (1849), 2 H. L. Cas. 579.

2823. Sub-purchaser of copyholds.]—A. sold & covenanted to surrender copyholds to B., & covenanted for the title in the usual manner. On the next day the surrender was made. Some time afterwards B. sold & covenanted to surrender the copyholds to C. & covenanted for the title as against his own acts only; & B. afterwards surrendered to C.:—*Held*: the original covenants were capable of being enforced against A., for that either they ran with the land, or C. was entitled to sue on them in B.'s name.—*RIDDELL v. RIDDELL* (1835), 7 Sim. 529; 5 L. J. Ch. 102; 58 E. R. 940.

Annotation:—*Refd.* *Haywood v. Brunswick Permanent Benefit Bldg. Soc.* (1881), 61 L. J. Q. B. 73.

2824. Assignees of equity of redemption.]—S. & R., trustees of a will, sold & conveyed a piece of land to T., who mortgaged it to B. Some time afterwards T. induced them to execute to him a second conveyance of part of the same land, he

representing to them that it was a conveyance of a piece of land not previously purchased by him. By this deed, which recited that testator was seised in fee at his death, & recited his will, by which he devised his real estate to the vendors giving them a power of sale, recited his death, & that the vendors in exercise of the power had contracted for the sale to T. of this piece of land in fee simple free from incumbrances, & that S. as beneficial owner had agreed to concur, S. & R. granted, & S. confirmed, the land to T. in fee & S. & R. entered into the usual trustee covenant that they had done no act to incumber, & S. also covenanted for title. T. then mortgaged this land to plffs. Some years afterwards B. took possession, & plffs.' security proved worthless. Plffs. sued S. & R. for indemnity on the ground that S. & R. had by the second conveyance to T. misrepresented their title, & in the alternative for damages on the covenants:—*Held*: the second conveyance to T. did not contain any such distinct averment that defts. were seised of the estate when they executed that conveyance as would estop them from denying that they were so seised; & as plffs. had no legal estate by estoppel or otherwise with which the covenants could run, plffs. could not sue the vendors on their covenants.—*ONWARD BUILDING SOCIETY v. SMITHSON*, [1893] 1 Ch. 1; 62 L. J. Ch. 138; 68 L. T. 125; 41 W. R. 53; 37 Sol. Jo. 9; 2 R. 106, C. A.

Annotations:—*Refd.* *Williams v. Pinckney* (1897), 77 L. T. 700; *Poulton v. Moore*, [1915] 1 K. B. 400; *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225.

(c) *What Amounts to Breach.*

2825. Sale of copyholds as fee simple.]—*GRAY v. BRISCOE* (1607), Noy, 142; 74 E. R. 1104.

Annotation:—*Refd.* *Turner v. Moon*, [1901] 2 Ch. 825.

2826. Infancy of conveying party.]—*NASH v. ASHTON* (1682), T. Jo. 195; 84 E. R. 1213.

Annotation:—*Refd.* *Hulbert v. Watts* (1695), 1 Ld. Raym. 112.

2827. Confiscation of property by act of foreign state.]—Covenant by deft. that he was lawfully seised of a good estate of inheritance in law in fee simple in certain premises conveyed to pltf. Breach, that he was not so seised, etc., & issue thereon. Previously to the conveyance, the premises had been confiscated by an Act of the State of New York:—*Held*: there was no breach of the covenant.—*WATKEYS v. DE LANCEY* (1785), 4 Doug. K. B. 354; 99 E. R. 919.

2828. —.]—*DUDLEY v. FOLLIOTT*, No. 2873, *post*.

2829. Defect of title depending on acts of predecessors.]—*BROWNING v. WRIGHT*, No. 2441, *ante*.

2830. Easement not acquired—Covenant limited to acts of vendor—As to existing title.]—In a deed of conveyance in fee from deft. to pltf. of a house & premises of which deft. was owner & occupier "together with all lights, easements & appurtenances to the premises belonging or usually held, occupied or enjoyed therewith, or deemed or taken as part thereof," deft. covenanted "that

2821 i. Construction of covenant.]—The covenant for right to convey implied by Real Property Conveyance Act is only operative as to the vendor's own acts & does not constitute a warranty of title. Where a vendor has not the title at all to the property sold, there can be no breach of the implied covenant.—*AMAR SINGH v. MITCHELL*, [1917] 1 W. W. R. 201; 23 B. C. R. 248.—*CAN.*

2821 ii. —.]—*DELMER v. M'CABE* (1863), 14 I. C. L. R. 377; 15 Ir. Jur. 236.—*IR.*

PART XI. SECT. 2, SUB-SECT. 5.—
B. (b).

2824 i. Assignees of equity of redemption.]—*Held*: plffs. had only an equity of redemption, & the right to sue on the covenants would not pass with it to their assignee.—*BURROWS v. DE BLAQUIERE* (1874), 34 U. C. R. 498.—*CAN.*

2824 ii. —.]—*CLAXTON v. GILBERT* (1874), 24 C. P. 500.—*CAN.*

h. Devisee of life estate.]—In the covenant for good title, it is only the

assignee of the fee who can represent the covenantor; the devisee of a life estate cannot sue on the covenant.—*CLARK v. ROBERTSON* (1852), 8 U. C. R. 370.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 5.—
B. (c).

k. Misrepresentation.]—*SPARLING v. BALLEARNY* (1918), 20 W. A. L. R. 72.—*AUS.*

l. Eviction by stranger.]—In covenant for title, the breaches assigned were, want of seisin in fee, & an

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notwithstanding any act, deed, matter, or thing whatsoever made, done, or permitted to the contrary by deft. or any person or persons claiming through, under, or in trust for him, he, deft., then had in himself good right & absolute authority to convey the said premises, with their appurtenances," according to the meaning of the deed. Several years before, deft. being then owner in fee & occupier of the same house, etc., in the same condition, entered into a written agreement with the owners of adjoining premises, that the cornice, spouts, & three windows of deft.'s house, overlooking the adjoining premises, were encroachments that he had paid 5s., as an acknowledgment, & would pay 6s. a year as long as he should be allowed to use the cornice, spouts, & windows. At the time of this agreement deft. had not acquired any easement in respect of the cornice, spouts, or windows, by twenty years' user:—*Held*: there was no breach of deft.'s limited covenant for title, which was only against acts of his which might destroy or make worse an existing title, which in this case he never had.—*THACKERAY v. WOOD* (1865), 6 B. & S. 766; 6 New Rep. 305; 34 L. J. Q. B. 226; 13 W. R. 996; 122 E. R. 1376, Ex. Ch.

2831. Minerals worked out.]—Dft. in 1844 let, by agreement, coal under his land for twenty-five years, with full powers to work the coal. The lessees entered & worked it, & in 1845, after their working had ceased, deft. sold part of his land to J. J. had seen the workings, but was not proved to be aware of the agreement. Dft. covenanted with J., his appointees, heirs, & assigns, for title, for quiet enjoyment, & against incumbrances. In 1846 J. appointed part of the land to pltf., who built on it, & who was not aware of the coal workings. In 1865 the lands & houses subsided, owing to workings carried on before J. bought. In 1848 some fire clay was taken by the lessees; the value was small, & the taking illegal; but this did not contribute to the damages. In 1867 pltf., as J.'s appointee, sued deft. on the covenants, alleging the entry & working of the lessees as breaches:—*Held*: (1) the benefit of the covenants passed to pltf. as appointee, that a variance between the time of working as laid in the declaration, & as proved, was fatal; (2) there was no breach of the covenant for title, that pltf. had bought the land without the coal; the covenant for quiet enjoyment was not broken by what was done in 1848; the making of the agreement if a breach at all was not a continuing breach, that the action was barred by Stat. Limitations.—*SPOOR v. GREEN* (1874), L. R. 9 Exch. 99; 43 L. J. Ex. 57; 30 L. T. 393; 22 W. R. 547.

Annotation:—As to (2) Consd. Turner v. Moon, [1901] 2 Ch. 825.

eviction by a stranger, to which deft. pleaded a selsin in fee in himself:—*Held*: on pltf. proving an eviction by a stranger, without showing his title, it was incumbent on deft. to give evidence of a selsin in fee in himself.—*VALEY v. MUIRHEAD* (1831), Dra. 486.—*CAN.*

m. Whether delay in obtaining possession.]—No action will lie on the covenant for title when the grantor had a good title at the time of conveying, although pltf. experienced delay & expense in getting into possession.—*CARR v. DUNN* (1852), 9 U. C. R. 216.—*CAN.*

n. Covenantee's knowledge of defects.]—*TRUST & LOAN CO. OF UPPER CANADA v. COVERT & RUTTAN* (1867),

27 U. C. R. 120.—*CAN.*

o. Purchaser forced to surrender land.]—*TRUST & LOAN CO. OF UPPER CANADA v. COVERT & RUTTAN* (1870), 30 U. C. R. 239.—*CAN.*

p. Omission of formal words in conveyance.]—*BROWN v. O'DWYER* (1874), 35 U. C. R. 351.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 5.—B. (d) i.

q. Right to damages.]—In an action on the covenants for selsin & right to convey, pltf. is not entitled to substantial damages without showing an eviction or ouster from the premises in question, or some other facts which would entitle him to more than nominal damages.—*SNIDER v. SNIDER*

2832. Subsequent enforcement of right of common—Grant not inferred.]—*HOWARD v. MAITLAND*, No. 2864, *post*.

2833. Defect of title as to portion of land sold.]—*MAY v. PLATT*, No. 2459, *ante*.

2834. Omission to prevent acquisition of advance title—Under Statute of Limitations.]—In 1911 the vendor as beneficial owner conveyed to the purchaser a farm called Bank Hey Farm containing 84 acres 3 roods 4 poles or thereabouts & in the occupation as to part thereof H. as yearly tenant thereof & as to the remainder thereof C. as half-yearly tenant thereof, all which premises were more particularly described in the plan indorsed on the conveyance & coloured red. The plan included a small strip of land some 150 feet long by 36 feet wide which had formerly formed part of Bank Hey Farm, but as to which at the date of the conveyance an adverse title under Stat. Limitations had been acquired by the adjoining owners & which was occupied by them or their tenants. At the date of the conveyance only the land occupied by H. was known as Bank Hey Farm, & part of the land described as in the occupation of C. was sub-let by him. The acreage was not an exact measurement:—*Held*: (1) the description by reference to the plan ought to prevail & the strip of land was included in the conveyance; (2) the omission of the vendor to prevent the acquisition of an adverse title to the strip of land under Stat. Limitations constituted a breach of the implied covenant for the right to convey under Conveyancing & Law of Property Act, 1881 (c. 41), s. 7 (1) (A).—*EASTWOOD v. ASHTON*, [1915] A. C. 900; 84 L. J. Ch. 671; 113 L. T. 562; 59 Sol. Jo. 560, H. L.

Annotations:—As to (1) Rejd. Norman v. Norman, [1919] 1 Ch. 297; Watcham v. East Africa Protectorate, [1919] A. C. 533.

(d) Remedies for Breach.

i. In General.

2835. Right to prove in bankruptcy.]—A vendor sold for £655 an estate as unincumbered, which he had previously mortgaged for £1,000 & of which he had by fraud retained the title deeds; & he entered into the usual covenants for title as absolute owner. After the sale had been completed the mtgee. filed a foreclosure bill. The purchaser contested the mtgee.'s right to relief &, a decree being made against him in the first instance, appealed. The appeal substantially affirmed the original decree, & the purchaser thereupon paid the mtge. debt & interest & costs. The vendor having become bkpt. in 1858:—*Held*: the purchaser was not entitled to prove for the costs of the appeal, but he was entitled under the covenant for good right to convey, to prove for the amount of principal, interest, & costs other than the costs of appeal, which he had paid, although such amount exceeded the purchase-

(1863), 13 C. P. 157.—*CAN.*

r. —.]—*ROJECK v. SINCLAIR* (Man.), [1924] 3 W. W. R. 785.—*CAN.*

t. When action lies—Purchaser mortgagor to vendor.]—Where a purchaser mortgages the same lands to his vendor in fee, to secure payment of the purchase-money, he cannot sue the vendor, for breach of covenant for good title, while the mtge. continues in force.—*HUYCK v. McDONALD* (1834), 3 O. S. 292.—*CAN.*

a. —.]—*RIEES v. STRACHAN* (1850), 14 U. C. R. 53.—*CAN.*

b. —.]—*KAVANAGH v. KINGSTON CORPN.* (1876), 39 U. C. R. 415.—*CAN.*

c. — Want of title in grantor.]

money.—*Re HUGHES, Ex p. ELMES* (1864), 4 New Rep. 3; 33 L. J. Bcy. 23; 10 L. T. 314; 12 W. R. 778, L. C.

2836. Right to damages—Implied covenant.]—TURNER v. MOON, No. 2456, *ante*.

2837. ———.]—GREAT WESTERN RY. CO. v. FISHER, No. 2457, *ante*.

2838. ———. Effect of condition excluding liability for incorrect statements.]—In 1911 the vendor as beneficial owner conveyed to the purchaser a farm with the message, closes, or parcels of land belonging thereto, called Bank Hey Farm, containing 84 acres 3 roods 4 poles, or thereabouts, & in the occupation as to part thereof by T. & as to the remainder thereof by C., all which premises were more particularly described in the plan indorsed thereon & coloured red. The plan included a small strip of land some 100 feet long by 30 feet wide which had formerly formed part of Bank Hey Farm, but as to which it was admitted for the purposes of this action that at the date of the conveyance an adverse title under Stat. Limitations had been acquired by adjoining owners, & in the view the ct. took of the evidence the acts of the adjoining owners had been brought to the notice of the vendor, who became entitled in possession to the property in 1900 under the will of testator who died in 1883. Condition 14 of the conditions of sale under which the vendor sold provided that any incorrect statement in the particulars was not to annul the sale, nor was the vendor or purchaser to be allowed compensation in respect thereof. In an action by the purchaser to recover damages from the vendor under the covenants for title implied by the vendor conveying this strip of land as beneficial owner:—*Held*: (1) condition 14 did not, after the execution of the conveyance, prevent the purchaser from recovering damages against the vendor under the covenants for title implied by the vendor conveying as beneficial owner in any case to which such covenants were applicable; (2) the measure of damages was not the difference in price which would have been obtained at the sale if the disputed strip had not been included in the lot sold, but the difference in value of the land as purporting to be conveyed & the land as it actually passed to the purchaser.—*EASTWOOD v. ASHTON*, [1913]

2 Ch. 39; 82 L. J. Ch. 313; 108 L. T. 750; 57 Sol. Jo. 533; *reversd.*, [1914] 1 Ch. 68, C. A.; *resid.*, [1915] A. C. 900, H. L.

Annotations:—Generally, Reid. Norman v. Norman, [1919] 1 Ch. 297; *Watham v. East Africa Protectorate*, [1919] A. C. 533.

2839. When action lies—Sale void for non-payment of purchase-money.]—The vendee of lands may sue on a covenant for title, although the sale has previously become void by the non-payment of money on a certain day.—*RAYNOLLS v. WOOLMER* (1672), 1 Freem. K. B. 41; 80 E. R. 33.

2840. ———. Necessity for actual interference with title.]—BUTTERFIELD v. MARSHALL (1701), 1 Lut. 603; 125 E. R. 316.

2841. Defence to action—Title as good as that of predecessor.]—COOKES v. FOWNS (1661), 1 Keb. 95; 1 Lev. 40; 83 E. R. 832.

Annotation:—Reid. May v. Pitt, [1900] 1 Ch. 616.

2842. ———. Fraud of original covenantor—Action by bona fide purchaser for value.]—DAVID v. SABIN, No. 2455, *ante*.

Notice to purchaser.]—See Sub-sect. 3, A., ante.

Statute of Limitations.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 396, 397, Nos. 764, 765.

Recovery of purchase-money.]—See Part XI., Sect. 5, sub-sect. 2, post.

ii. Damages.

2843. Measure of damages—Difference in value of land—Copyhold sold as freehold.]—GRAY v. BRISCOE (1607), Noy, 142; 74 E. R. 1104.

Annotation:—Reid. Turner v. Moon, [1901] 2 Ch. 825.

2844. ———.]—TURNER v. MOON, No. 2456, *ante*.

2845. ———.]—EASTWOOD v. ASHTON, No. 2838, *ante*.

2846. ———. Where land conveyed in undivided moieties—Covenant relating to one moiety only.] A. conveyed to C. an undivided moiety of land as trustee. B. conveyed the other moiety as beneficial owner. In an action by C. against B. for damages for breach of covenant for quiet enjoyment by reason of the existence of rights of way claimed by D.:—*Held*: (1) B. was liable only to the extent of one-half of any damages sustained by

—Where two owners of land effect an exchange, & mutual conveyances are executed between the parties, & one of them loses the estate conveyed to him in consequence of the want of title in his grantor, he is not obliged to resort to an action on the covenants in the deed conveying the property to him; but may claim a rescission of the bargain, & a restoration of the lands conveyed by him.—*ROSE v. ANGER* (1875), 22 Gr. 525.—*CAN.*

d. ———.]—An action will lie for the vendor's breach of agreement in not making a good title within a reasonable time, or for breach of warranty.—*JACKSON v. VEICH* (1857), 10 Ir. Jur. 201.—*IR.*

e. ———.]—CULLIN v. RINN (1887), 5 Man. L. R. 8.—*CAN.*

f. Defence to action—Seisin.]—Where to a declaration in covenant for title generally, & a breach that deft. had no title, deft. pleaded a seisin in fee:—*Held*: the issue lay upon him, & he must show such seisin by proof of actual possession at some time as *prima facie* evidence of his estate in fee.—*McKINNON v. BURROWS* (1833), 3 O. S. 114.—*CAN.*

g. ———.]—In an action on a covenant for title, where deft. pleads that he was seised in the terms of the covenant, the *onus* of proof lies upon him, & plff. need not first prove a

breach to entitle himself to a verdict.—*LEMESURIER v. WILLARD* (1817), 3 U. C. R. 285.—*CAN.*

h. ———. Surrender for consideration.]—VANBUSKIRK v. McDERMOTT (N. S.) (1912), 11 E. L. R. 100; 5 D. L. R. 1.—*CAN.*

k. Removal of obstructions.]—Where a conveyance describes lands conveyed as abutting on a lane, & the plan by which the lands are sold shows such lane, notwithstanding which the vendors allow obstructions in the shape of buildings to continue thereon, the ct. will grant relief by directing a removal of such obstructions.—*O'SULLIVAN v. CLUXTON* (1879), 26 Gr. 612.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 5.— B. (d) ii.

1. Measure of damages—Purchase-money & interest.]—In an action for breach of covenant of good title the measure of damages is the purchase-money paid with interest. No allowance is to be made for the improvements or increased value.—*McKINNON v. BURROWS* (1831), 3 O. S. 590.—*CAN.*

m. ———.]—A party is liable only for such damages as are the natural consequences of his act or omission. Where, therefore, the vendee of land allowed it to be sold for taxes accrued

during his vendor's time, & neglected to redeem it within the year:—*Held*: on a covenant for a right to convey, & freedom from incumbrances, he could not as of right recover the value of the land so allowed to be sold.—*McCOLLUM v. DAVIS* (1851), 8 U. C. R. 150.—*CAN.*

n. ———.] In an action on the covenants for seisin & right to convey, plff. is not entitled to substantial damages without showing an eviction or ouster from the premises in question, or some other facts which would entitle him to more than nominal damages.—*GRAHAM v. BAKER* (1861), 10 C. P. 426.—*CAN.*

o. ———.]—BANNON v. FRANK (1861), 14 C. P. 295.—*CAN.*

p. ———.]—In an action for breach of an absolute covenant for title to land:—*Held*: plff., vendee, was entitled only to nominal damages where deft., vendor, had, after action brought, acquired the outstanding title.—*BOULTER v. HAMILTON* (1864), 15 C. P. 125.—*CAN.*

q. ———.]—NEILON v. WALLACE (1906), 1 E. L. R. 500.—*CAN.*

r. ———.]—Deft., a foreigner, while not expressly guaranteeing title to certain lots, led plff. to believe he was; although believing he had, yet he had no title to them. Plff. had transferred certain property to deft.,

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C.; (2) the measure of damages was (a) the difference in the value of the land free from the rights of the way & fettered; (b) the costs incurred by C. in defending an action brought by D. & of an appeal by C., two judges below having differed as to the existence of the rights of way.—*SUTTON v. BAILLIE* (1891), 65 L. T. 528; 8 T. L. R. 17.

2847. What may be recovered as damages—Cost of compromising adverse claim.]—Deft. conveyed premises to pltf. & covenanted for good title. An action of formedon was afterwards brought against pltf. by a party having better title, & pltf. compromised it for £550:—*Held*: pltf. in an action for the breach of covenant, might recover the whole sum so paid, & his costs as between attorney & client, in the compromised suit, though he had given no notice of that suit to deft. For in an action on a general guarantee, the only effect of such want of notice to the indemnifying party is to let in proof on his part, that the compromise was improvidently made, & it lies on him to establish that fact, which was not done in the present case.—*SMITH v. COMPTON* (1832), 3 B. & Ad. 407; 1 L. J. K. B. 146; 110 E. R. 146.

Annotations:—Expld. Gray v. Lewis, Parker v. Lewis (1873), 8 Ch. App. 1035. *N.F.G. W. Ry. v. Fisher*, [1905] 1 Ch. 316. *Refd. Broom v. Hall* (1859), 7 C. B. N. S. 503.

2848. ——*—*—*—*—*GREAT WESTERN RY. Co. v. FISHER*, No. 2457, *ante*.

2849. ——*Value of house built on land sold.]*—A. sold some building land to B., & he covenanted for title. After some houses had been built on the land, the purchaser was evicted:—*Held*: the purchaser was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon.—*BUNNY v. HOPKINSON* (1859), 27 Beav. 505; 29 L. J. Ch. 93; 1 L. T. 53; 6 Jur. N. S. 187; 54 E. R. 223. *Annotation:—Consd. Turner v. Moon*, [1901] 2 Ch. 825.

2850. ——*Principal & interest of undisclosed mortgage.]*—*Re HUGHES, Ex p. ELMES*, No. 2835, *ante*.

2851. ——*Costs of contesting adverse claim—Not costs of appeal.]*—*Re HUGHES, Ex p. ELMES*, No. 2835, *ante*.

the part of the consideration being deft.'s supposed interest in said lots. Damages equal in amount to said interest given to pltf.—*GRAHAM v. DREMEN* (Man.) (1909), 9 W. L. R. 641.—*CAN.*

t. ——*—*—*BAZIN v. BONNEFOY* (Man.) (1914), 27 W. L. R. 86; 16 D. L. R. 100.—*CAN.*

a. ——*—*—*BAGLEY v. B. C. SOUTHERN RY. Co. (B. C.)* (1918), 37 D. L. R. 733.—*CAN.*

b. ——*—*—*MATHESON v. THYNNE*, [1926] 2 D. L. R. 157; [1926] 1 W. W. R. 645; 36 B. C. R. 376.—*CAN.*

c. ——*—*—*CURRAN v. CARNELL* (1888), 7 Nfld. L. R. 375.—*NFLD.*

2847 i. What may be recovered as damages—Costs of compromising adverse claim.]—*BOWN v. HART* (1853), 10 U. C. R. 228.—*CAN.*

2847 ii. ——*—*—*W.* sold & conveyed lands by metes & bounds to B., who conveyed to D. by a deed containing absolute covenants for title. A portion of the land so conveyed was subsequently claimed by one R., & an action of ejectment was brought by him to recover possession of it. B. subsequently compromised with it. respecting his claim:—*Held*: W.'s estate was only liable for what should be found to be the value of the piece

of land so claimed, & not the amount paid by his vendee on the occasion of the compromise.—*HART v. BOWEN* (1859), 7 Gr. 97.—*CAN.*

d. ——*Costs of contesting adverse claim.]*—A purchaser, who had been ejected, suing upon his covenant for a good title, may recover as damages the costs of defending an ejectment, brought against him.—*STUBBS v. MARTINDALE* (1857), 7 C. P. 52.—*CAN.*

e. ——*—*—*BLEEKER v. MYERS* (1826), *Tay.* 285.—*CAN.*

f. ——*Costs.]*—*Held*: pltf. was entitled to recover the costs paid in defending himself in the suit of ejectment under which he had been dispossessed.—*BRENNAN v. SERVIS* (1851), 8 U. C. R. 191.—*CAN.*

g. ——*Not loss of profit.]*—*HETHERINGTON v. SINCLAIR* (1915), 8 O. W. N. 383; 34 O. L. R. 61; 23 D. L. R. 630.—*CAN.*

h. ——*—*—*BAGLEY v. BRITISH COLUMBIA SOUTHERN RY. Co. (B. C.)*, [1919] 2 W. W. R. 250.—*CAN.*

k. Effect of knowledge of defect.]—Where heavy damages are given in an action of covenant for good title, & it appears that pltf. knew the state of deft.'s title, the ct. will grant a new trial.—*EMER v. MILLER* (1826), *Tay.* 336.—*CAN.*

2852. ——*Value of land from which purchaser evicted.]*—Although 32 Hen. 8, c. 9, s. 2, cannot be said to have been repealed by Real Property Act, 1845 (c. 106), s. 6, nevertheless since the passing of the latter statute a grant of lands to which the grantor has a title existing in fact, but of which he has never been in possession, & on which he is entitled only to a right of entry, will be valid, even although at the time of the grant a litigation is pending as to the title to the lands. A. sought to recover by ejectment certain lands; the person in possession, amongst other defences, alleged that one-fourth share thereof belonged to B., who had never been in possession. Thereupon A., for the sum of £10, took from B. a conveyance dated July 4, 1877, of his share, containing covenants for title & quiet enjoyment. The actual value of B.'s share was £500. A. then recovered possession of the lands. Before the date of the conveyance B. had been bkpt., & after A. had recovered possession of the lands, B.'s trustees in bkpey. recovered possession from A. of the one-fourth share which had been conveyed by B. to A. In an action by A. against B. for damages for breach of the covenants for title & quiet enjoyment:—*Held*: A. was entitled to recover from B. the sum of £500 as damages.—*JENKINS v. JONES* (1882), 9 Q. B. D. 128; 51 L. J. Q. B. 438; 46 L. T. 795; 30 W. R. 668, C. A.

Annotation:—Apld. Kennedy v. Lyell (1885), 15 Q. B. D. 491.

C. Quiet Enjoyment and Freedom from Incumbrances.

(a) *In General.*

2853. When covenant implied—Sale by purchaser from trustee of bankrupt—As against lessee of bankrupt.]—(1) Where pltf. purchased premises from defts., who had previously purchased from the trustee in bkpey. of F., & pltf. was subsequently evicted by a lessee of F.:—*Held*: there was no implied covenant by defts. for quiet enjoyment or freedom from incumbrance as against F. & his lessee, under Conveyancing & Law of Property Act, 1881 (c. 41), s. 7 (1) (a), F. not being a person through whom defts. derived title otherwise than by purchase for value.

(2) Defts., before conveying to pltf., had severed

PART XI. SECT. 2, SUB-SECT. 5.—
C. (a).

i. Covenant by Canada Company.]—The Canada Co. by their charter, are not exempted from giving to purchasers of the lands granted to them by the Crown the usual covenants against their own acts; & as to lands purchased from private individuals, the Co. will be required to give the same covenants as another vendor.—*SCARLETT v. CANADA CO.*, 1 Ch. Ch. 90.—*CAN.*

m. Necessity to aver breach.]—The devisee of a grantee suing upon the grantor's covenant, that "the land was free from incumbrances," must aver that the incumbrance was unsatisfied when the devisee took the estate.—*MANAGAN v. FRASER* (1851), 8 U. C. R. 11.—*CAN.*

n. Extent of covenant.]—*Held*: a mtgo. in fee made subsequently to a breach of a covenant for quiet enjoyment, & to an action for substantial damages therefor, does not estop the mtgor. from suing the vendor of the party from whom he purchased, on the covenant contained in the vendor's deed for the property.—*CUTHBERT v. STREET* (1860), 9 C. P. 386.—*CAN.*

o. ——*—*—*AUSTIN v. FERGUSON* (1866), 25 U. C. R. 270.—*CAN.*

certain portions of the premises & retained them for municipal purposes, & on this account the lessee of F., after re-entering, refused to pay rent to pltf. as owner of the reversion:—*Held*: the severance of ownership was not an incumbrance by defts. within Conveyancing & Law of Property Act, 1881 (c. 41), s. 7 (1) (a).—*WOODWARD v. MARGATE CORPN.* (1886), 2 T. L. R. 829.

See Law of Property Act, 1925 (c. 20), s. 76, sched. II.

Distinguished from covenant for right to convey.]—See Sub-sect. 5, B. (a), *ante*.

(b) *Who may Enforce.*

2854. Successor in title of purchaser.]—*BIDLAKE v. ARUNDEL* (1636), 1 Rep. Ch. 93; 21 E. R. 517.

2855. Executor of purchaser.]—*LUCY v. LEVINGTON* (1671), 2 Lev. 26; 1 Vent. 175; 2 Keb. 831; 83 E. R. 436; *subsequent proceedings* (1673), Freem. K. B. 103.

Annotations:—*Apld.* *Kingdon v. Nottle* (1813), 1 M. & S. 355. *Distd.* *King v. Jones* (1814), 1 Marsh. 107. *Apld.* *Knights v. Quarles* (1820), 4 Moore, C. P. 532. *Consd.* *Orme v. Broughton* (1834), 10 Bing. 533; *Raymond v. Fitch* (1835), 2 Cr. M. & R. 588. *Refd.* *Doe d. Angelsea v. Rugeley* (1844), 6 Q. B. 107. *Mentd.* *Riddell v. White* (1794), 1 Aust. 281; *Stead v. Carey* (1845), 1 C. B. 496; *Dawson v. Paver* (1847), 5 Hare, 415; *Re Wilton's S. E.*, [1907] 1 Ch. 50.

2856. Assign of purchaser.]—Where A. being possessed of certain premises for a term of years assigned part of them over to B. for the residue of his term with a covenant for quiet enjoyment & B. afterwards assigned them over to C.:—*Held*: C. having been evicted by J., the lessor of A., for a breach of covenant committed by A. previously to the assignment to B. might maintain an action against A. upon the covenant for quiet enjoyment on the ground that there was privity of estate between A. & C.—*CAMPBELL v. LEWIS* (1820), 3 B. & Ald. 392; 106 E. R. 706; *affg.* *S. C. sub nom. LEWIS v. CAMPBELL* (1819), 8 Taunt. 715.

Annotations:—*Refd.* *Ireland v. Bircham* (1835), 4 L. J. C. P. 305; *David v. Sabin*, [1893] 1 Ch. 523; *Dewar v. Goodman*, [1908] 1 K. B. 94.

(c) *What Amounts to Breach.*

i. *In General.*

2857. Act of covenantee.]—Debt on bond with a condition reciting a sale of lands, & that the obligor shall warrant A. if he shall enjoy it peaceably to him & his heirs to hold of a manor by services, etc. Deft. pleads a custom of the manor for the lord to enter for rent arrear; & that A. enjoyed peaceably till his death, when pltf., his

son, entered without admission contrary to the custom; also stating an entry of the lord for rent arrear. The words "warrant the said A.," without saying what, shall be meant of the lands so sold.

If A. peaceably enjoy during his life, that is sufficient performance of the warrant.—*GRENE-LIFE'S EXECUTORS v. W*—(1538), 1 Dyer, 42 a; 73 E. R. 91.

2858. Acts of persons other than covenantor.]—*BROUGHTON v. CONWAY* (1564), Dal. 58; Moore, K. B. 58; Dyer, 240 a; 123 E. R. 271.

Annotations:—*Consd.* *Foord v. Wilson* (1818), 8 Taunt. 543; *Nind v. Marshall* (1819), 1 Brod. & Bing. 319. *Refd.* *Crayford v. Crayford* (1628), Cro. Car. 106; *Gale v. Reed* (1806), 8 East, 80; *Iggulden v. May* (1806), 7 East, 237.

2859. —.]—*FERRAR v. FERRAR* (1662), cited in Freem. Ch. 173; 22 E. R. 1139.

Annotation:—*Refd.* *Collicott v. Hill* (1662), Freem. Ch. 173.

2860. —.]—*COLLICOTT v. HILL* (1662), Freem. Ch. 173; 22 E. R. 1139; *sub nom.* *COLDROT v. HILL*, 1 Cas. in Ch. 15, L. C.

2861. — Sale of land with knowledge of incumbrance — Rentcharge.]—*HARDING v. NETHROPE* (1667), Nels. 118; 21 E. R. 804.

2862. Necessity for actual disturbance.]—*VANU v. BARNARD (LORD)* (1708), Gilb. Ch. 6; 25 E. R. 5, L. C.

2863. —.]—There must be a particular act shown by which pltf. is interrupted, otherwise the breach of a condition for a quiet enjoyment, is not well assigned.—*ANON.* (1715), 1 Com. 228; 92 E. R. 1046.

Annotation:—*Mentd.* *Holland v. Fisher* (1662), O. Bridg. 181.

2864. —.]—In a conveyance of land by deft. to pltf., deft. covenanted for title & quiet enjoyment notwithstanding any act or thing done or suffered by him or by any of his ancestors or predecessors in title. After the conveyance a decree was made in a suit in Ch., in which pltf., though not a party, was represented as being one of a class of persons against whom the suit was brought, & by the decree the land so conveyed by deft. was declared to be subject to a general right of common over it:—*Held*: (1) the decree alone, without any entry or actual disturbance of pltf. in his possession, was no breach of deft.'s covenant for quiet enjoyment; (2) the ct., in the absence of evidence of a grant of such right of common by some predecessor in title of deft., would not infer that there must have been such grant so as to be a breach of his covenant for title within the meaning of the covenant.—*HOWARD v. MAITLAND* (1883), 11

p. —.]—A covenant in a deed that the land conveyed is free from all incumbrances extends to a lien for sewerage rates by the city in which the property is situated, & entitles the purchaser of the property to claim exoneration at the hands of the vendor.—*NATHANSON v. CAMPBELL* (1921), 54 N. S. R. 384.—*CAN.*

g. —.]—The obligation to pay incumbrances which the law generally fastens on the purchaser of an equity may be displaced & nullified by express provision.—*NORTHERN TRUSTS Co. v. ROWLAND & HANBURY MANUFACTURING CO., THIRD PARTY*, [1921] 2 W. W. R. 709.—*CAN.*

r. —.]—*FAUSETT v. KELEHER*, [1924] N. Z. L. R. 1.—*N.Z.*

t. *Covenant limited to vendor's acts.]*—After a conveyance incumbrances upon the property sold were discovered, created by a former owner, but of which neither the vendor nor the purchaser had been previously aware. The covenants given by the vendor only extended to his own acts

& the acts of those claiming under him:—*Held*: the vendor was not bound to pay off the incumbrances.—*Re BUCK, PECK v. BUCK* (1873), 6 P. R. 98.—*CAN.*

a. *Covenant to pay mortgage.]*—*EGLESON v. HOWE* (1879), 3 A. R. 566.—*CAN.*

b. *Covenant to warrant & defend.]*—A covenant to warrant & defend is simply a covenant for quiet enjoyment.—*REDDEN v. TANNER* (1896), 29 N. S. R. (17 R. & G.) 40.—*CAN.*

c. *Absence of covenant for title.]*—*Held*: where a vendor conveys all his interest in land to purchaser without any covenant for title, express or implied, on his part, purchaser holds the land subject to such incumbrances as attach to it.—*BRODER v. GLENN* (1914), 29 W. L. R. 368; 7 W. W. R. 71; 7 Sask. 122; 20 D. L. R. 106.—*CAN.*

d. *Necessity for express covenant.]*—*HANNAH v. NATIONAL INVESTORS, LTD. (Man.)*, [1923] 1 W. W. R. 699.—*CAN.*

e. —.]—*Re HAYWARD v. DISNEY, DISNEY v. HORWICH* (Sask.), [1925] 3 D. L. R. 989; 57 O. L. R. 365.—*CAN.*

PART XI. SECT. 5, SUB-SECT. 5.—C. (b).

f. *Assignee of part.]*—An assignee of part of the land conveyed by a deed containing a covenant for seisin in fee may sue upon the covenant & recover damages in proportion to his interest.—*KEYES v. O'BRIEN* (1860), 20 U. C. R. 12.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 5.—C. (c) i.

2862 i. *Necessity for actual disturbance.]*—*GOOD v. END* (1850), 1 All. 603.—*CAN.*

2862 ii. —.]—The right to damages is not lessened by the fact that pltf. have never been disturbed in their possession, if an incumbrance really do exist.—*GIBSON v. BOULTON, HACKETT v. BOULTON* (1853), 3 C. P. 407.—*CAN.*

Sect. 2.—Rights and liabilities in relation to covenants: Sub-sect. 5, C. (c) i. & ii., & (d).]

Q. B. D. 695; 53 L. J. Q. B. 42; 48 J. P. 165, C. A.

*Annotation:—*Refd. United States Shipping Board v. Durrell, [1923] 2 K. B. 739.

2865. —. —. In *Platt's Law of Covenants*, however, it is laid down (p. 331) that a covenant against incumbrances in similar form where no incumbrances are specified is not broken by the existence of incumbrances, but that an actual interruption of enjoyment at least by claim or demand on the purchaser is necessary to justify an action. This seems to me the correct construction of the covenant (NEVILLE, J.).—NORTIDGE v. DERING, RABAN v. DERING, [1909] 2 Ch. 647; 79 L. J. Ch. 65; 101 L. T. 491; *on appeal*, [1910] 1 Ch. 297, C. A.

*Annotation:—*Mentd. *Re* Evered, Molinoux v. Evered (1910), 102 L. T. 694.

2866. Whether restricted to disturbance by legal title.—DUDLEY v. FOLLIOTT, No. 2873, *post*.

Covenants in leases.—See LANDLORD & TENANT, Vol. XXXI., pp. 129–138, Nos. 2633–2741.

ii. *Particular Instances.*

2867. Claim to rentcharge—On death of tenant in tail.—RUDIARD v. HANNINGTON (1586), 1 And. 102; 123 E. R. 408; *sub nom.* HANNINGTON v. RYDER, 1 Leon. 92; *sub nom.* HANNINGTON v. RICHARDS, Gouldsb. 59; *sub nom.* HAVERINGTON'S CASE, Owen, 6.

*Annotation:—*Consd. Lampet's Case (1612), 10 Co. Rep. 46 b.

2868. Claim by son of tenant for life. ANON. (1586), Moore, K. B. 249; 72 E. R. 560.

2869. Trespass by servant of covenantor.—SEAMAN & BROWNINGS CASE (1588), 4 Leon. 123; 74 E. R. 771.

*Annotation:—*Mentd. Boson v. Sandford (1690), 3 Mod. Rep. 321.

2870. Ejectment of one of two covenantees—Covenant to husband & wife.—On a covenant that A. & his wife shall enjoy, etc., a breach that A. was ousted is sufficient.—PENNING v. PLAT (1615), Cro. Jac. 383; 79 E. R. 327.

*Annotation:—*Mentd. Smith v. Scott (1859), 6 C. B. N. S. 771.

2871. Wife's title to dower.—ANDREWS v. TANNER (1665), 1 Keb. 937; 83 E. R. 1330.

2872. Erection of gate.—If a man covenant that he will not interrupt the covenantee in the enjoyment of a close; the erection of a gate which intercepts it, is a breach of the covenant, although

he had a right to erect it.—ANDREWS v. PARADISE (1724), 8 Mod. Rep. 318; 88 E. R. 228.

*Annotations:—*Expld. Pettey v. Parsons, [1914] 1 Ch. 704. Refd. Shaw v. Stanton (1858), 30 L. T. O. S. 352; Anderson v. Appenheimer (1880), 5 Q. B. D. 602; Harrison Allsle v. Muncester, [1891] 2 Q. B. 680.

2873. Confiscation of land by foreign state.—A covenant in a conveyance of lands in America, during the time of the Rebellion in that country, that the grantor had a legal title, & that the grantee might peaceably enjoy, etc., without the let, interruption, etc., of the grantor & his heirs, of or any other person whomsoever, is not broken by the States of America seizing the lands as forfeited for an act done previous to the conveyance; notwithstanding the subsequent acknowledgment of their independence by this country. Such a covenant does not extend to the acts of wrongdoers, but only to persons claiming by a legal title.—DUDLEY v. FOLLIOTT (1790), 3 Term Rep. 584; 100 E. R. 746.

*Annotation:—*Mentd. Ogden v. Folliott (1790), 3 Term Rep. 726.

2874. Claim of right of way—Way of necessity.—An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity.—MORRIS v. EDGINGTON (1810), 3 Taunt. 24; 128 E. R. 10.

*Annotations:—*Consd. Wilson v. Bagshaw (1830), 5 Man. & Ry. K. B. 448; Barlow v. Rhodes (1833), 1 Cr. & M. 439; Plant v. James (1833), 5 B. & Ad. 791. Refd. Phycsey v. Vicary (1847), 16 M. & W. 484; Tatton v. Hammersley (1849), 3 Exch. 279; Dodd v. Burchell (1862), 1 H. & C. 113.

2875. Eviction by heir-at-law of covenantor.—Declaration by exors. of covenantee for breach of covenant for quiet enjoyment, after reciting that deft.'s wife was heiress of A., alleged that deft. covenanted that for & notwithstanding any act, matter, or thing done, omitted, etc., by deft. & wife or A. deceased, deft. & wife were lawfully seised of or entitled to the premises, etc., & that for & notwithstanding, etc., deft. & wife had power to appoint the said premises, etc., to the uses thereby declared. That it should be lawful for testator, his heirs, etc., peaceably to enter & possess the said premises, etc., without any lawful let, suit, or eviction of deft. & wife, or of, from, or by any other person, lawfully or equitably claiming under them, or A. deceased. Then followed a covenant for further assurance against all acts, etc., of deft. & wife, & all persons claiming under them or A. deceased. The declaration alleged, as a breach of covenant for quiet enjoyment, that testator was not permitted peaceably, etc., to enter & possess, etc., in words negating

2866 i. Whether restricted to disturbance by legal title.—COCHRANE v. McDONALD (1861), 11 C. P. 202.—CAN.

g. Concealment of incumbrances.—LOVELACE v. HARRINGTON (1879), 27 Gr. 178.—CAN.

PART XI. SECT. 2, SUB-SECT. 5.—C. (c) ii.

2871 i. Wife's title to dower.—It is no breach of the covenant for seisin free from incumbrances that covenantor's wife is alive & had not barred her dower.—DOWER v. BRASS (1842), 1 Ont. Dig. 1542.—CAN.

2871 ii. —. —. HOYT v. WIDDERFIELD (1848), 5 U. C. R. 180.—CAN.

2871 iii. —. —. THORNHILL v. JONES (1854), 12 U. C. R. 231.—CAN.

2871 iv. —. —. DACK v. CURRIE (1855), 12 U. C. R. 334.—CAN.

2871 v. —. —. WILSON v. BIGGAR (1866), 26 U. C. R. 85.—CAN.

2871 vi. —. —. MCCLURE v. GRATON (1868), 19 C. P. 149.—CAN.

h. Arrears of taxes.—Where in covenant for quiet enjoyment free from incumbrances, the breach assigned was, that £15 was due upon the land for arrears of taxes, without stating of what nature.—Held: bad.—WILSON v. RORKE (1846), 2 U. C. R. 437.—CAN.

k. —. —. MOORE v. HYNES (1862), 22 U. C. R. 107.—CAN.

l. —. —. HARRY v. ANDERSON (1864), 13 C. P. 476.—CAN.

m. —. —. MCLENNAN v. CHEQUIN (1875), 37 U. C. R. 301.—CAN.

n. —. —. SILVERTHORN v. LOWE (1876), 40 U. C. R. 73.—CAN.

o. —. —. Deft. agreed to give to pltf., a purchaser of lands, "a Torrens title, free of any & all incumbrances." After such title had been given, it was found that there were taxes under Land Drainage Act against the lands which the purchaser paid:—Held: the covenant did not become merged in the subsequent transfer & certificate, & the purchaser was

entitled to recover the taxes so paid.—FREEMAN v. CALVERLEY (1916), 31 W. L. R. 514; 10 W. W. R. 567.—CAN.

p. Reservation of highway.—A public highway is not an incumbrance within the covenant for quiet enjoyment.—MOORE v. BOULTON (1852), 10 U. C. R. 140.—CAN.

q. —. —. PEAKE v. MITCHELL, MITCHELL v. PEAKE (1913), 24 O. W. R. 291; 4 O. W. N. 988; 10 D. L. R. 140.—CAN.

r. Incumbrances not created by vendor.—WHITEHOUSE v. ROOTS (1860), 20 U. C. R. 65.—CAN.

t. Local improvement rate—Created at instance of covenantor.—CUMBERLAND v. KEARNS (1889), 18 O. R. 151; 17 A. R. 281.—CAN.

a. Disturbance.—LUMBERS v. GOLD MEDAL FURNITURE MANUFACTURING CO. (1899), 30 S. C. R. 55.—CAN.

b. —. —. DROVIN v. MORSETTE (1901), 31 S. C. R. 563.—CAN.

c. Tax upon increased value.—

the averment, but that on the contrary thereof, P., claiming as heir of A., brought ejectment against testator, & recovered possession of the premises. Plea (*inter alia*), that A. died, leaving deft.'s wife heiress-at-law, & testator instigated P. to claim the premises, & institute the proceedings against him, & so testator was ousted through his own act; replication, *de injuria*.—*Held*: the covenant for quiet enjoyment was not qualified by the restrictive words introductory to the set of covenants.—*YOUNG v. RAINCOCK* (1849), 7 C. B. 310; 18 L. J. C. P. 193; 13 L. T. O. S. 401; 13 Jur. 539; 137 E. R. 124.

Annotations.—*Mentd.* *Stroughill v. Buck* (1850), 14 Q. B. 781; *Wiles v. Woodward* (1850), 5 Exch. 557; *Norman v. Mitchell* (1854), 5 De G. M. & G. 648.

2876. Raising level of stream—On property of covenantor adjoining.—A. sold a piece of land to C. & covenanted for quiet enjoyment. Afterwards A. raised the level, by 3 inches, of a brook running past C.'s grounds through his A.'s property:—*Held*: this was not a proper subject of complaint for the interference of this ct.—*INGRAM v. MORECRAFT* (1803), 33 Beav. 49; 55 E. R. 284.

2877. Subsidence due to old working of mines.—*SPOOR v. GREEN*, No. 2831, *ante*.

2878. Interception of water flowing into well—Sale of neighbouring land to railway company.—M. sold to B. a well, on M.'s land, with right to B. to draw water therefrom through pipes in M.'s lands, & covenanted for himself, his heirs, or assigns, not to disturb B.'s right. M. voluntarily sold to a railway co. some land near, & owing to their operations the springs that supplied the well were intercepted, & the well became dry:—*Held*: B. had not broken his covenant, for it only applied to the water that flowed from the well after reaching it, & not before it reached it.—*BRAIN v. MARFELL* (1879), 41 L. T. 455; 44 J. P. 56; 28 W. R. 130, C. A.

2879. Severance of ownership by vendor.—*WOODWARD v. MARGATE CORPN.*, No. 2853, *ante*.

Defect of title—Effect of notice to purchaser.—*See* Sect. 2, sub-sect. 2, *ante*.

(d) Remedies for Breach.

2880. Right to lien—On stock transferred by way of purchase price.—Purchaser, without notice of a rentcharge, transfers stock in payment, the party entitled for life grants an annuity out of the dividend, secured by a letter of attorney to

receive the dividends, to a person who had not notice of the transaction; the purchaser of the estate is evicted by grantee of the rentcharge, he has no lien on the stock.—*CATOR v. PEMBROKE (EARL)* (1783), 1 Bro. C. C. 301; 28 E. R. 1145; *affd.* (1787), 2 Bro. C. C. 282, L. C.

Annotations.—*Consd.* *Crompton v. Melbourne* (1832), 5 Sim. 353. *Distd.* *Small v. Attwood* (1832), You. 407.

2881. Right to deduct from purchase-money.—*LACEY v. INGLE* (1847), 2 Ph. 413; 41 E. R. 1002, L. C.

2882. Right to apply unpaid purchase-money—In purchase of portions of estate not conveyed.—*LACEY v. INGLE* (1847), 2 Ph. 413; 41 E. R. 1002, L. C.

2883. Action on covenant.—A. purchased property which was conveyed to him in fee with a covenant only for quiet enjoyment, by B. the vendor. Within a month A. mortgaged the property to C. to secure a sum of money & interest, but was afterwards, after an action of ejectment evicted by D., who claimed by a title paramount to A. & B. A. defended the action without consulting B., & incurred costs thereby. A. then brought an action against B. upon his covenant; but was stopped by a plea that at the date of the eviction the legal estate in the premises was not in A., but C. B. afterwards paid off the mtge., C., the mtgee., handing him over the mtge. deed, & signing an acknowledgment by indorsement thereon, of the receipt of the mtge. money & interest from the deft. B., & the same was in full satisfaction & discharge of the mtge. debt, & of all right of action or demand on the part of the mtgee. against B. under the covenant for quiet enjoyment. A bill having been filed by A. against B. praying that A. might be declared entitled to the benefit of the covenant for quiet enjoyment, & for a reference to the master to assess the damage sustained by A. plff., in consequence of the breach of such covenant:—*Held*: A. had clearly a right to have the damages assessed; & leave was accordingly given to him to bring an action upon the covenant within a time mentioned in the order, B. being at the same time restrained from setting up, in defence to the action, the mtge. deed or the indorsement thereon.—*THORNTON v. COURT* (1853), 3 De G. M. & G. 293; 22 L. J. Ch. 361; 20 L. T. O. S. 318; 17 Jur. 151; 43 E. R. 115, L. JJ.

Annotation.—*Consd.* *Walker v. Jones* (1866), L. R. 1 P. C. 50.

ELART v. SHAFER & DUNSMORE (1916), 34 W. L. R. 57; 10 W. W. R. 120.—CAN.

d. Arrears of rates.—A holding was sold by the Land Commission to realise arrears of purchase annuity. There were arrears of poor rate due by the vendor in respect of the holding. The purchaser after conveyance paid these arrears under threat of distraint & claimed to be refunded the fund so paid out of the surplus purchase-money:—*Held*: as poor rate was a personal liability payable by the occupier, & was not a charge or incumbrance on the land, the purchaser was not entitled to be repaid the amount.—*It* *WAKEHAM* (1923), 58 I. L. T. 5.—IR.

e. Delay in giving possession.—*SCHULTS BROTHERS v. ROODEFOORT VENTURE SYNDICATE*, [1905] T. H. 356.—S. AF.

PART XI. SECT. 2, SUB-SECT. 5.—C. (d).

2881 i. Right to deduct from purchase-money.—Ordinarily, where the vendor is unable to convey the whole of the land which he has contracted to sell, the purchaser may refuse to complete

the purchase, in which case he may sue for damages or require the vendor to convey that to which he can make title & to submit to a proportionate abatement of the purchase-money.—*ONTARIO ASPHALT BLOCK CO. v. MONTEUIL* (1913), 5 O. W. N. 298; 29 O. L. R. 534; 24 O. W. R. 838; 12 D. L. R. 223.—CAN.

2881 ii.—*ACTON-ADAMS v. RUTHERFORD* (1914), 33 N. Z. L. R. 774.—N. Z.

2881 i. Action on covenant.—*THOMAS v. CROOKS* (1854), 11 U. C. R. 579.—CAN.

2883 ii.—After a contract had been perfected by conveyance a bill for compensation on account of defects cannot be maintained; after conveyance the purchaser is confined to his remedy upon the covenants.—*PENROSE v. KNIGHT*, Cass. Dig. 2nd ed. 776.—CAN.

2883 iii.—*SNYDER v. SNYDER* (1873), 22 C. P. 361.—CAN.

2883 iv.—*GILMOUR v. TRUSTEE CO. OF WINNIPEG & DISTRICT REGISTRAR FOR WINNIPEG (Man.)*, [1923] 4 D. L. R. 344; [1923] 3 W. W. R. 177.—CAN.

2883 v.—A suit for compensation for breach of an express or implied covenant for title & quiet enjoyment in respect of a sale deed executed after coming into force of Transfer of Property Act, 1882, s. 55, is governed by Limitation Act, 1908, Art. 116.—*ARUNACHALA v. RAMANMI* (1911), 1 L. R. 38 Mad. 1171.—IND.

2883 vi.—*CRAIG v. HOPKINS* (1732), Mor. Dict. 16,623.—SCOT.

f. What damages recoverable—Costs of ejecting trespasser.—*WHELAN v. HANNIGAN* (1879), 5 V. L. R. (Law) 35.—AUS.

g.—Taxes due upon land at the time of sale, are an incumbrance within the covenant for quiet enjoyment; but plff. can recover only the arrears due at the date of the conveyance.—*HAYNES v. SMITH* (1853), 11 U. C. R. 57.—CAN.

h.—*PROCTOR v. GAMBLE* (1858), 16 U. C. R. 110.—CAN.

k.—*CONNELL v. BOULTON* (1866), 25 U. C. R. 444.—CAN.

l.—A covenant against incumbrances in a deed purporting to convey the legal fee simple, runs with the land, although the grantor was in

Sect. 2.—Rights and liabilities in relation to covenants: Sub-sect. 5, C. (d), & D. (a) & (b).]

2884. Injunction — Distraint by vendor on tenant's of property—For arrears of rent accrued since assignment.]—Where a vendor has executed a legal assignment of property to a purchaser, the Ct. of Ch. will not, on application of the latter, interfere by injunction, to restrain the former from illegally distraining upon the tenants of the property assigned, for alleged arrears of rent accrued since the assignment.—*BEST v. DRAKE* (1853), 11 Hare, 369; 21 L. T. O. S. 193; 1 W. R. 229; 68 E. R. 1318; *sub nom.* *DRAKE v. WEST*, 22 L. J. Ch. 375.

2885. What damages recoverable—Purchase at undervalue.]—A. draws in B. a young gentleman to sell his estate at a great undervalue, with covenants from B. for A.'s quiet enjoyment. A. is evicted, & brings action on the covenants. B. relieved in equity upon repayment only of the purchase-money & interest, & not left liable at law to answer the value of the land upon the covenant.—*ZOUCH v. SWAINE* (1685), 1 Vern. 320; 23 E. R. 495.

2886. — — Eviction from part of land sold.]—*JENKINS v. JONES*, No. 2852, *ante*.

2887. — — Arrears of annuity charged on land—Right to interest—Negligence of covenantee.]—Where deft. conveyed an estate to plff. with a covenant for quiet enjoyment, & also gave an indemnity bond with sureties against "all costs, claims, demands, damages & expenses whatsoever," plff. having been obliged to pay divers sums for arrears of an annuity charged on the estate, sued deft. on the bond to recover them back with interest; the jury found that plff. had been negligent in not suing the sureties on the bond at the time the payments were made.—*Held*: this finding prevented plff. from recovering the interest.—*ANDERTON v. ARROWSMITH* (1839), 2 Per. & Dav. 408.

Annotation:—Reid. Petre v. Duncombe (1851), 2 L. M. & P. 107.

Covenants in leases.]—See LANDLORD & TENANT, Vol. XXXI., pp. 139–141, Nos. 2742–2768.

D. Further Assurance.

(a) In General.

2888. Covenant to assure as counsel should advise—Necessity for notice by covenantee.]—*BENNETT'S CASE* (1582), Cro. Eliz. 9; 78 E. R. 275.

2889. — —.]—If a person covenant to convey lands to a purchaser, his heir need not aver

notice of his title in a declaration founded on a breach of covenant by the covenantor; & even if it be necessary, an averment of a request is sufficient to imply such notice. Where, therefore, in an action by the heir of a purchaser, to whom an estate had been conveyed in fee by a tenant for life under a covenant that his first son who should attain the age of twenty-one, should, at the request of the purchaser or his heirs, by such common recovery, fine, & other assurances as counsel should advise, effectually convey the premises to the purchaser, & he having died, & his heir having requested the tenant for life to cause his eldest son, then of age, to suffer a recovery, & the tenant for life having refused to do so. In a declaration on this covenant by the heir of the purchaser against the tenant for life:—*Held*: it was not necessary to aver that the latter had notice of the heir's having become entitled to the property; it was unnecessary to allege a request by the heir to the son of the tenant for life to suffer the recovery, as the covenant was entered into by his father, neither was it necessary to aver that counsel had advised a recovery to be suffered, nor that the heir of the purchaser had offered to make a tenant to the *procurator*.—*BLICKE v. DYMOKE* (1824), 2 Bing. 105; 9 Moore, C. P. 203; 2 L. J. O. S. C. P. 140; 130 E. R. 245.

2890. — — Covenantee must take professional advice.]—*BENNETT'S CASE* (1582), Cro. Eliz. 9; 78 E. R. 275.

2891. — —.]—Covenant in a bargain & sale of lands in fee, for further assurance as the counsel of the bargainee shall advise; the bargainee, though learned in the law, cannot advise; but some of his counsel ought.—*ROSEWEL'S CASE* (1593), 5 Co. Rep. 19 b; 77 E. R. 78; *sub nom.* *MORE v. ROSWELL*, Cro. Eliz. 297.

2892. Conveyance void for want of surrender—Further assurance not enforceable.]—*FURSAKER v. ROBINSON* (1717), 1 Eq. Cas. Abr. 123, pl. 9; Gilb. Ch. 139; Prec. Ch. 475; 21 E. R. 929.

2893. On whom binding—Assignees on bankruptcy of covenantor.]—Where a trader sold an estate & conveyed it as tenant in fee simple, with the usual covenant for further assurance, & became bkpt., & it was afterwards considered that he was tenant in tail only, it was ordered that the Comr. should be at liberty to execute a deed of confirmation to the purchaser & that the assignees should convey.—*Re PHELPS, Ex p. FRIPP* (1846), 1 De G. 293, Ct. of R.

2894. By whom enforceable—Assignees of purchaser—Husband & wife—Both must join in

fact seized only of an equity of redemption, & can be sued upon by the assignee of the covenantee, who will be entitled to substantial damages, represented by the amount for which the mtge. stands as security, though it may not be yet due.—*EMPIRE GOLD MINING Co. v. JONES* (1869), 19 C. P. 245.—*CAN.*

m. — —.]—*TRUST & LOAN Co. OF UPPER CANADA v. COVERT & RUTAN* (1876), 39 U. C. R. 327.—*CAN.*

n. — —.]—*McCRAE v. BACKER* (1885), 9 O. R. 1.—*CAN.*

o. — —.]—Where the vendee of lands, who had himself after purchasing mortgaged the property, brought action for breach of covenant against incumbrances; & the mtge., constituting the breach, covered other lands as well as his, & was for an amount much greater than the present value of the land, & it was impossible to apportion it:—*Held*: the measure of damages was the whole amount due on the mtge., which should be paid into Ct. to insure its reaching its proper destination.—*MCGILLIVRAY v. MIMICO*

REAL ESTATE SECURITY Co. (1896), 28 O. R. 265.—*CAN.*

p. — —.]—Defts. gave covenants as to title:—*Held*: plff. is entitled to have mtges. discharged & removed from record, & damages must be the sum required to obtain such release.—*ROST v. SYNDICAT LYONNAIS DU KLONDIKE* (1908), 9 W. L. R. 352.—*CAN.*

q. — —.]—A purchaser evicted from his holding is entitled to recover from a vendor who has guaranteed his title the value of the land at the date of the eviction.—*NAGARDAS SAUBHAGYADAS v. AHMEDKHAN* (1895), 1 L. R. 21 Bom. 175.—*IND.*

r. — — Judgment for dower.]—*HODGINS v. HODGINS* (1863), 13 C. P. 146.—*CAN.*

t. — —.]—In an action on a covenant for quiet enjoyment, the breach alleged was the recovery of a judgment for dower, & eviction of deft. from one-third of the land:—*Held*: plff. was entitled, in assessing damages, to recover the costs of the dower suit,

& to the whole value of the dower estate, not merely damages to the bringing of this action.—*STUART v. MATHIESON* (1863), 23 U. C. R. 135.—*CAN.*

a. — — Costs.]—W. sold land to H., & covenanted to indemnify him against a mtge. thereon:—*Held*: H. was not entitled to solr. & client, but only to party & party, costs of an action on the covenant.—*HUTTON v. WANZER* (1886), 11 P. R. 302.—*CAN.*

b. — — Costs of purchasing access.]—*PALMER v. JONES* (1901), 21 C. L. T. 556; 2 O. L. R. 632.—*CAN.*

c. Injunction.]—*HEAP v. CRAWFORD* (1864), 10 Gr. 442.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 5.—D. (a).

d. Independent covenant.]—*BOWLEN v. CANADA PERMANENT TRUST Co.*, [1925] 3 D. L. R. 786; [1925] S. C. R. 672.—*CAN.*

e. Necessity for registration.]—*HICKS v. POWELL* (1869), 17 W. R. 449.—*IND.*

action.]—If lands be conveyed with a covenant of further assurance & afterwards assigned to husband & wife, they must both join in an action on the covenant.—*MIDDLEMORE v. GOODALE* (1638), Cro. Car. 503; W. Jo. 406; 79 E. R. 1033.

Annotations:—*Apld.* *Campbell v. Lewis* (1820), 3 B. & Ald. 392. *Refd.* *Harper v. Bird* (1678), T. Jo. 102; *David v. Sabin*, [1893] 1 Ch. 523.

2895. — **Heir of purchaser.]**—*KING v. JONES*, No. 2901, *post*.

(b) *What further Assurance may be required.*

2896. General rule.]—*Semble*: unless there be words in a conveyance to show it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, & to barring an interest in other persons than the grantor, the ct. will not resort to its extraordinary jurisdiction for specific performance, to compel the grantor to execute an assurance of a kind that was not contemplated when the grant was made.

The covenant for further assurance in a deed is a covenant intended to give full effect & operation to the estate & interest conveyed by the deed. Where it is sought to extend the operation of a general covenant of that kind to the execution of an instrument which would bar a title in others, which would continue but for the execution of the instrument sought to be executed, I have always understood that an express stipulation to that effect is necessary between the contracting parties. For that reason it has, so far as I know, never been considered that a covenant for further assurance implied, without regard to the other covenants in the deed, a covenant to levy a fine, or to suffer a recovery, or to surrender a copyhold. The utmost extent to which the ct. has gone, with reference to covenants for further assurance, has been to extend their operation to that very estate & interest which are conveyed by the deed (*STUART, V. C.*).—*DAVIS v. TOLLEMACHE* (1856), 28 L. T. O. S. 188; 2 Jur. N. S. 1181.

Annotations:—*Refd.* *Bankes v. Small* (1887), 36 Ch. D. 716. *Mentd.* *Dering v. Kynaston* (1868), 16 W. R. 819.

2897. Acknowledgment of fine—Execution impossible by reason of insanity.]—*PET & CALLY'S CASE* (1589), 1 Leon. 304; 74 E. R. 277.

2898. — **]**—On a covenant to make assurance, etc., if a note of a fine be required, it is a breach not to acknowledge it, though no writ of covenant be depending, & it include more than was agreed.—*BOULNEY v. CURTEYS* (1610), Cro. Jac. 251; 79 E. R. 215.

Annotation:—*Refd.* *Danby v. Gregg* (1739), Willes, 150.

2899. Covenant for title—In deed of further assurance.]—An indenture of feoffment with covenant of warranty is not within a promise to make reasonable assurance of land.—*COLES v. KINDER* (1620), Cro. Jac. 571; 79 E. R. 489.

2900. — **]**—On an agreement to make a conveyance of all lands in A. in the possession of B. the party is not bound to execute a conveyance, with a warranty of those lands & all other lands in A.—*LASSELS v. CATTERTON* (1670), 1 Mod. Rep. 67; 1 Sid. 467; 86 E. R. 736.

2901. Levying fine.]—A covenant to do all lawful & reasonable acts for further assurance includes the levying a fine, though not named. So, the satisfying judgments.

Upon a covenant with A. & his heirs to do all lawful & reasonable acts for further assurance upon request, & request made by the purchaser in his life to levy a fine, & neglect so to do, the

ancestor not being evicted in his life, but the heir being evicted afterwards, the heir may maintain an action upon the request of the ancestor, & refusal made to him because the ultimate damage had not accrued in the life of the ancestor, but the ancestor, if he had pleased, might also have sued.—*KING v. JONES* (1814), 5 Taunt. 418; 1 Marsh. 107; 128 E. R. 751; *affd. sub nom. JONES v. KING* (1815), 4 M. & S. 188.

Annotations:—*Consd.* *Raymond v. Fitch* (1835), 2 Ct. M. & L. 588; *Spoor v. Green* (1874), L. R. 9 Exch. 99; *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461. *Refd.* *Knights v. Quarles* (1820), 4 Moore, C. P. 532; *Orme v. Broughton* (1834), 10 Bing. 533; *Ricketts v. Weaver* (1844), 12 M. & W. 718; *Goodman v. Boycutt* (1861), 6 L. T. 25. *Consd. Re Durham, Grey v. Durham* (1887), 57 L. T. 164.

2902. Satisfaction of judgments.]—*KING v. JONES*, No. 2901, *ante*.

2903. Covenant for production of documents—Partnership books—Conditional sale by trustee.]

A. conveys lands to trustees on trust to sell if the unsatisfied debts of a partnership, in which he had been concerned, should at a given time exceed £40,000; the trustees sell & convey to the purchaser by a deed, which recites that the debts of the partnership exceeded the specified amount & that A. had died intestate, as to his real estates; & the heir-at-law of A. joins in that deed, & enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, & a covenant for further assurance: it afterwards appears to be uncertain whether A. had not devised his real estate, & the purchaser files a bill to have protection against, or remedy of, the alleged defect in his title, which this discovery created:—*Held*: the purchaser was not entitled to have an account taken of the debts of the partnership, in order to establish the fact of their having, at the specified time, exceeded the specified amount; he is not entitled to have the books & documents connected with the accounts of the partnership, delivered to him or deposited for safe custody; he is not entitled to a covenant, either from the heir or from any other person, for the production of those books & papers.—*HALLETT v. MIDDLETON* (1826), 1 Russ. 243; 38 E. R. 95.

Annotation:—*Refd.* *Fair v. Ayres* (1826), 1 L. J. O. S. Ch. 166.

2904. — **Title deeds.]**—*FAIN v. AYERS*, No. 2467, *ante*.

2905. Conveyance of property—When dishonestly acquired.]—S. obtained a loan of £7,700, which he knew to be trust money, upon the security of hereditaments which he mortgaged in fee to H. & C., the trustees. S. in 1859 contracted to sell part of the hereditaments to B. & others for £3,080, but on C. representing that H. was abroad, & that it would delay the sale to get H.'s signature, S. agreed with C. to conceal the mtge. C. gave up the title deeds to B., & the other purchasers, to whom S. made conveyances as owner in fee. The conveyances contained recitals in the usual form that S. was seised or otherwise well entitled to an estate in fee simple in the properties comprised therein free from incumbrances, & contained the usual covenants by S. for further assurance. The purchasers had not notice of the mtge. C. received the purchase-money & gave S. a receipt signed by himself only. S. in 1869 sold further part of the hereditaments to P. for £1,500. On the occasion of this sale C. induced H. to execute a conveyance to P. of the

Sect. 2.—Rights and liabilities in relation to covenants: Sub-sect. 5, D. (b) & (c). Sects. 3 & 4: Sub-sect. 1.]

property sold to him, & sign a receipt for the £1,500, & also to execute a reconveyance to S. of the property sold in 1859, upon the representation that sales were about to be made by S. to the amount of £1,500 & £3,080, & that the purchase-money would be paid in exchange for the reconveyance. S. at this time discovered that C. had not accounted to H. or his *cestui que trusts* for the £3,080, but he allowed P. to pay the purchase-money to C., who threatened to withhold from S. the reconveyance if he stopped the sale. C. received P.'s purchase-money & absconded.

H. filed his bill against C., S., B., & the other purchasers in 1859, & P.:—*Held*: the purchasers in 1859 had no right under the covenants by S. for further assurance as such covenants extended only to further assurance of estates or interests honestly acquired; the reconveyance to S. must be set aside; & as the purchasers in 1859 had possession of the title deeds & the estates, the ct. would not interfere with such possession, but would make a simple decree for foreclosure against them.—*HEATH v. CREALOCK* (1874), 10 Ch. App. 22; 44 L. J. Ch. 157; 31 L. T. 650; 23 W. R. 95, L. C. & L. JJ.

Annotations:—*Refd.* *Waldy v. Gray* (1875), L. R. 20 Eq. 238; *General Finance Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc.* (1878), 10 Ch. D. 15; *Heath v. Tugh* (1881), 50 L. J. Q. B. 473; *Re Morgan, Pillgren v. Pillgren* (1881), 18 Ch. D. 93; *Re Horton, Horton v. Perks, Horton v. Clark* (1884), 51 L. T. 420; *Manners v. Mew* (1885), 29 Ch. D. 725; *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352; *Onward Bldg. Soc. v. Smithson*, [1893] 1 Ch. 1. *Mentd.* *The Horlock* (1877), 2 P. D. 243; *Ortigosa v. Brown* (1878), 47 L. J. Ch. 168; *Low v. Bouverie*, [1891] 3 Ch. 82; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231; *Brigg v. Thornton*, [1904] 1 Ch. 386; *Poulton v. Moore* (1913), 83 L. J. K. B. 875.

2906. Execution of disentailing deed.—A tenant in tail in remainder barred his estate tail without the consent of the protector, & afterwards conveyed all his estate & interest to a purchaser & covenanted that he would, at the request of the purchaser, his heirs or assigns, execute every such disentailing or other assurance as might be necessary to vest the premises in the purchaser, his heirs & assigns. The protector having died, the purchaser applied to the vendor to execute a disentailing deed to enlarge the base fee into a fee simple:—*Held*: the vendor was bound to execute such a deed, for his covenant was not confined to executing assurances to remedy any defects in the title to the base fee, but obliged him to execute an assurance to enlarge the base fee into a fee simple & he had power to execute an assurance which would have that effect, for *Fines & Recoveries Act*, 1833 (c. 74), s. 19, is not confined to cases where the tenant in tail is owner of the base fee into which his estate tail has been converted; *sect. 47 of the Act* does not interfere with the jurisdiction of the ct. to decree against a tenant in tail specific performance of a contract for disentailment entered into by him, but only prevents the ct. from treating the contract as being in equity a disposition taking effect under the Act so as to bind the issue in tail & remainderman.—*BANKES v. SMALL* (1887), 36 Ch. D. 716; 56 L. J. Ch. 832; 57 L. T. 292; 35 W. R. 765; 3 T. L. R. 740, C. A.

Annotations:—*Refd.* *Mills v. Fox* (1887), 37 Ch. D. 153; *Re Gaskell & Walters' Contract*, [1906] 2 Ch. 1; *Re E. D. S.*, [1914] 1 Ch. 618; *Meeking v. Meeking*, [1917] 1 Ch. 77. *Mentd.* *Case v. Case* (1889), 61 L. T. 789; *Re Montagu, Falser v. Montagu*, [1896] 1 Ch. 549.

2907. Payment of charge—Estate subject to mortgage—Sale of undivided moiety.—The owner

of an estate mortgaged it, & afterwards sold an undivided moiety of it. The conveyance to the purchaser did not mention the mtge., but it contained a covenant by the vendor with the purchaser for further assurance. The two moieties afterwards devolved on different persons. In a partition action:—*Held*: as between the owners of the two moieties, the unsold moiety must bear the mtge. debt.

The conveyance of the contingent moiety to the mother contained, not a covenant against incumbrances, but a covenant for further assurance, & it being a conveyance for value, in my opinion the grantee was by reason of that covenant entitled to call upon the grantor to pay off the charge (NORTH, J.).—*Re JONES, FARRINGTON v. FORRESTER*, [1893] 2 Ch. 461; 62 L. J. Ch. 996; 69 L. T. 45; 3 R. 498.

Annotations:—*Refd.* *Re Darby's Estate, Rendall v. Darby*, [1907] 2 Ch. 465. *Mentd.* *Cook's Mortgage, Lawledge v. Tyndall*, [1896] 1 Ch. 923; *Hill v. Hickin*, [1897] 2 Ch. 579; *Kenrick v. Mountsteven* (1899), 48 W. L. 141; *Re Repington, Wodehouse v. Seobell* (1904), 73 L. J. Ch. 533; *Re Coulson's Trusts, Prichard v. Coulson* (1907), 97 L. T. 754; *Carnell v. Harrison*, [1916] 1 Ch. 328.

(c) Remedies for Breach.

See, generally, SPECIFIC PERFORMANCE.

2908. Specific performance—Collateral security.—*ERSWICK v. BOND* (1875), 1 Cas. in Ch. 252; 22 E. R. 786.

2909. — Title subsequently acquired.—*TAYLOR v. DEBAR* (1875), 1 Cas. in Ch. 274; 2 Cas. in Ch. 212; 22 E. R. 798.

Annotation:—*Refd.* *Smith v. Osborne* (1857), 6 H. L. Cas. 375.

2910. — — — — ——J. S., under the belief that he had the fee simple in an estate subject to a life interest in his mother, conveyed all his interest to trustees for the benefit of his creditors. The conveyance contained covenants for title & for further assurance. It turned out that at the time of the conveyance, the mother had the fee simple, which, upon her death, descended to J. S. as her heir-at-law:—*Held*: although no estate passed by the conveyance, yet the transaction amounted to a contract for sale of the specific estate, & J. S., unless he could set aside the contract for fraud, was in equity compellable to carry it into execution.—*SMITH v. BAKER* (1842), 1 Y. & C. Ch. Cas. 223; 62 E. R. 864.

Annotations:—*Refd.* *Smith v. Osborne* (1857), 30 L. T. O. S. 57; *Re Bridgewater's Settlement, Partridge v. Ward*, [1910] 2 Ch. 342.

2911. — Land sold by order of court.—*NAPPER v. ALLINGTON (LORD)* (1700), 1 Eq. Cas. Abr. 166; 21 E. R. 962.

2912. — Must have been in contemplation of parties.—*DAVIS v. TOLLEMACHE*, No. 2896, *ante*.

2913. — Covenant to execute disentailing deed.—*BANKES v. SMALL*, No. 2906, *ante*.

2914. Damages—Refusal of covenantor to join in execution of mortgage—What damages recoverable—Costs of preparation of mortgage.—The owners of building land, in consideration of pltf. paying off certain of their creditors, conveyed the land, discharged from all equity of redemption, to pltf. upon trust for sale, & out of the proceeds to pay off the first mtgees. their debt of £4,300, & in the next place to pay debt., a second mtgee., £350, & in the next place to repay pltf. the advances made to the creditors & all expenditure relating to the trusts, then a third mtgee. £100, & a fourth mtgee. £135, & lastly, to pay the surplus to the owners. The deed empowered pltf. to complete certain buildings on the land, making the moneys expended a charge on it, & also to raise by mtge a sum not exceeding £5,000 for carrying into effect

the trusts of the deed, such mtge. to have priority over all the other mtges. except the first mtge. for £4,300. Deft. covenanted to execute all assurances for enabling pltf. to execute the trusts of the deed. Pltf. expended £1,100 in carrying out the trusts of the deed, & made arrangements for borrowing £5,000, & got the first mtgees. to agree to take £4,100 in discharge of their claim. After deft. had approved of the mtge. deed for the £5,000, he, at the last moment, refused to execute it. The result was, that the money was not advanced, & the first mtgees. sold the property, under a power of sale, for £4,510, which was exhausted in satisfaction of their debt & costs. Pltf. brought an action against deft. for the breach of his covenant, alleging that pltf. by reason of the breach was unable to pay off the first mtgees. & that they sold the property for less than its value :—*Held* : pltf. was only entitled to recover, as damages, the costs attending the preparation of the abortive mortgage.—*DUCKWORTH v. EWART* (1863), 2 H. & C. 129; 33 L. J. Ex. 24; 9 L. T. 297; 10 Jur. N. S. 214; 12 W. R. 608.

SECT. 3.—RIGHTS AND LIABILITIES AS TO EASEMENTS.

See, generally, EASEMENTS, Vol. XIX., pp. 7 *et seq.*

Easements affecting mines.—*See* MINES, Vol. XXXIV., pp. 700–729.

Land compulsorily purchased—Right to support.—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 158, 159, Nos. 382–393.

Effect of inclosure award.—*See, generally*, COMMONS, Vol. XI., pp. 75–84.

SECT. 4.—REMEDIES OF PARTIES.

SUB-SECT. 1.—IN GENERAL.

2915. General rule—Completion of conveyance final—In absence of fraud—Or breach of contract or warranty.—After the purchaser has taken a conveyance & the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amount to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud & deceit has been practised upon the purchaser (*WATKIN WILLIAMS, J.*).—*JOLIFFE v. BAKER* (1883), 11 Q. B. D. 255; 52 L. J. Q. B. 609; 48 L. T. 966; 47 J. P. 678; *sub nom.* *JOLIFFE v. BAKER*, 52 L. J. Q. B. 609; 32 W. R. 59, D. C.

Annotations :—*Consd.* *Nash v. Wooderson* (1881), 52 L. T. 49. *Distd.* *Palmer v. Johnson* (1884), 13 Q. B. D. 351. *Distd.* *Saunders v. Cockrell* (1902), 87 L. T. 30. *Reid.* *Greswolde-Williams v. Barneby* (1900), 83 L. T. 708.

2916. ———— *Barneby*—After a purchase of real

property has been completed & a conveyance executed no action can, in the absence of fraud, be maintained by the purchaser against the vendor, in respect of errors of description in the particulars contained in the contract of sale but not contained in the conveyance, as all such particulars are merged in & put an end to by the subsequent conveyance. Pltfs. in their statement of claim alleged that by an agreement in writing they agreed with deft. to purchase from him an estate in fee simple, & that by this agreement which incorporated certain particulars of sale, deft. contracted & warranted that the mansion house was in first class order as to drainage & otherwise; that subsequently the purchase was completed & the conveyance executed, & that they then discovered serious defects in the drainage which they had to remedy. In an action by pltf. to recover damages in respect of the errors in the particulars of sale :—*Held* : after conveyance such action could not be maintained.—*GRESWOLDE-WILLIAMS v. BARNEBY* (1900), 83 L. T. 708; 49 W. R. 203; 17 T. L. R. 110.

Annotation :—*Reid.* *Millbourn v. Lyons* (1911), 111 L. T. 388.

2917. Bond given for balance of purchase-money—Incumbrance subsequently discovered—Right to discharge from bond.—Where a man purchases an estate, pays part, & gives bond to pay the residue of the money; notice of an equitable incumbrance before payment of the money, though after the bond, is sufficient.

Though the purchaser has no remedy at law against the payment of the residue, for which he gave his bond, yet he would be entitled to relief in equity, on bringing his bill & showing, that though he has given his bond for payment of the residue of his purchase-money, yet, now he has notice of an incumbrance, under which circumstances the Court would stop payment of the money due on the bond (*LORD TALBOT, C.*).—*TOURVILLE v. NAISH* (1734), 3 P. Wms. 307; 24 E. R. 1077, L. C.

Annotation :—*Mentd.* *Dearle v. Hall* (1828), 3 Russ. 1.

2918. Property sold subject to void lease—Right of purchaser to have lease set aside—Effect of laches.—Where property of which a defective lease has been granted is subsequently sold, the purchaser takes the property subject to the burthen of any delay of which the vendor may have been guilty; & in reference to a defence founded on laches, the purchaser can stand in no better position than the vendor would have done, if he had never parted with the property.

A. was tenant for life of estates, with an ill-defined power of leasing the minerals thereunder. In 1840 she granted a lease of the mines for a long term of years, & died the same year. B., the remainderman in tail to the property, was then an infant. He entered into possession & attained his majority in 1846, when he executed a disentailing deed. He then first discovered the existence of the lease granted by A., & protested against the

PART XI. SECT. 4, SUB-SECT. 1.

2916 i. General rule—Completion of conveyance final—In absence of fraud.

—If the purchaser discovers material defects after the conveyance, he must make out a case of fraud in order to set aside a sale.—*EASTERN MORTGAGE & AGENCY CO., LTD. v. MUHAMMAD FUZLUL KARIM* (1925), 1 L. R. 52 Cal. 914.—*IND.*

1. Infraction.—*Howcutt v. REES* (1852), 3 Gr. 527.—*CAN.*

g. Compensation.—*FOLLIS v. PORTER* (1865), 11 Gr. 442.—*CAN.*

h. ———— *Compensation for a deficiency in acreage on a sale of land*

may be given even after conveyance if the representation as to acreage amounted to a warranty.—*FRANZ v. HANSEN* (Alta.), [1917] 3 W. W. R. 77; 36 D. L. R. 349.—*CAN.*

k. ———— *Misdescription in the advertisement, where it amounts to a material representation, is ground for compensation even after conveyance.*—*BULL v. HARPER* (1873), 6 P. R. 36.—*CAN.*

l. ———— *Re BOUTLON & GARFUNKEL* (1912), 23 O. W. R. 1; 4 O. W. N. 25; 6 D. L. R. 373.—*CAN.*

m. ———— *JACKSON v. IRWIN &*

BILLINGS CO., LTD. (1913), 18 B. C. R. 225.—*CAN.*

n. ———— *BESNER v. TRICKEY* (1923), 53 O. L. R. 351.—*CAN.*

o. ———— *SULEMAN VADU v. TRIKAMJI VELJI* (1875), 12 Bom. 10.—*IND.*

p. ———— *ABDULLAH KHAN v. ABDUL RAHMAN BEG* (1896), 1 L. R. 18 Al. 322.—*IND.*

q. ———— *DOYAL KRISHNA NASKAR v. AMRITA LAL DAS* (1901), 1 L. R. 29 Cal. 370.—*IND.*

r. Specific performance.—*CARROLL*

Sect. 4.—Remedies of parties: Sub-sects. 1 & 2.]

validity of it, as not being authorised by the power, & as being obtained by fraud; & he refused to receive the rents & royalties reserved thereby. In 1852 he agreed to sell the whole estate to E., but with a stipulation that he should receive the rents & profits of the mines of the estate until Aug. 1856. In 1855 B. & the representatives of E., who had died, conveyed the whole property to pltf. in this suit, who had throughout acted as B.'s agent. B. died in 1856. In 1860 pltf. filed this bill, alleging that he had then first ascertained the nature of the lease of 1840, & the circumstances under which it was granted, & praying a declaration that it was void, or that it was obtained by fraud, & ought to be set aside, & an injunction; or in the alternative, if the ct. should think the lease valid, then for an account & further relief:—*Held*: on the ground of laches alone, pltf. was not entitled to a decree on the first part of his prayer, & the bill must be dismissed; but without prejudice to his filing a bill for an account, on the footing of the validity of the lease, or to his taking such proceedings at law as he might be advised.—*ERNEST v. VIVIAN* (1863), 33 L. J. Ch. 513; 9 L. T. 785; 12 W. R. 295.

Annotation:—*Mentd.* *Jegon v. Vivian* (1871), 6 Ch. App. 742.

2919. ———.]—A tenant for life without leasing power demised a plot of building land for the term of sixty years from Sept. 29, 1834, at the annual rent of 6d.; the lease contained a covenant by the tenant for life for quiet enjoyment. The lessee accordingly erected a house on the plot of land. After the death of the tenant for life, the fee simple ultimately vested in H., who accepted rent at the rate above mentioned from J., who was a son of the original lessee & was then in possession of the house. H. afterwards conveyed the house & land to pltf. by indenture; the grant was made expressly subject to the supposed term of sixty years. No notice to quit had been given & the annual value of the house & land was about £6. Pltf. having sued to recover possession of the house & land:—*Held*: as the representative of the original lessee, under the indenture of Sept. 29, 1834, could not have sued H. for breach of the covenant for quiet enjoyment, the void lease afforded no defence against pltf. claiming under the grant of a fee simple subject to it; that a tenancy from year to year had not been created by the payment of a rent at the rate of 6d. a year; & pltf. was entitled to immediate possession of the house & land.—*SMITH v. WIDLAKE* (1877), 3 C. P. D. 10; 47 L. J. Q. B. 282; 26 W. R. 52, C. A.

Annotation:—*Reffd.* *Mercantile Investment & General Trust Co. v. River Plate Trust Loan & Agency Co.*, [1892] 2 Ch. 303.

v. McDONALD (1868), 15 Gr. 329.—**CAN.**

l. ———.]—*KLING v. L'YNG* (1913), 24 O. W. R. 738; 4 O. W. N. 1422; 12 D. L. R. 1.—**CAN.**

—.]—*FOSTER v. GOODACRE* (B. C.), [1917] 2 W. W. R. 636; 34 D. L. R. 42.—**CAN.**

b. Action for fraud.]—*FEINDEL v. ZWICKER* (1898), 31 N. S. R. (19 It. & G.) 232.—**CAN.**

c. ———.]—*ELLERMAN v. CARRUTHERS* (1908), 8 W. L. R. 692; 1 Sask. L. R. 157.—**CAN.**

d. Foreclosure of agreement.]—An agreement in writing for the sale of land cannot be foreclosed under the rules & procedure applicable to the foreclosure of a mortgage.—*PENNY v. SHAW*, [1925] 1 D. L. R. 1137; 57

N. S. R. 522.—**CAN.**

e. Unpaid vendor—Action on covenant.]—*KESRI v. GANGA PRASAD* (1881), 1 L. R. 4 All. 168.—**IND.**

f. ———.]—*SAGAJI v. NAMDEV* (1899), 1 L. R. 23 Bom. 525.—**IND.**

g. Remedy expressly given in contract—Effect of election to enforce such remedy.]—*WILSON v. ABBOTT* (1914), 28 W. L. R. 437; 18 D. L. R. 34; 7 Sask. L. R. 107; 6 W. W. R. 1097.—**CAN.**

h. Sale under crop payment system—Removal of crop.]—*STROSCHEER v. SCHULTZ* (Alta.) (1918), 40 D. L. R. 162.—**CAN.**

PART XI. SECT. 4, SUB-SECT. 2.

2923 i. General rule—Not recoverable.—A pltf. cannot arrest for purchase-

2920. Purchaser taking possession of excess land—Right of vendor to recover—Costs.]—A purchaser in 1895 took possession of land in excess of that purported to be conveyed to him, & inclosed the land with a wall. In 1899 the vendors brought an action for declaration of title:—*Held*: deft. was bound to give up so much of the land as did not pass by his conveyance; he was not entitled to compensation for his expenditure thereon; there was a duty on the part of the vendors under the conditions of sale to stump out the plots, which in this case they had not done, therefore there would be no order as to costs.—*MARRIOTT v. REID* (1900), 82 L. T. 369; 64 J. P. 376.

2921. Recovery of damages for failure to preserve property—Between contract & completion.]—Where a vendor under a contract for sale of land keeps possession until completion & payment of the purchase-money, he is in the position of a trustee for the purchaser, & bound as such to take reasonable care to preserve the property.

While a vendor so remained in possession, a trespasser without his authority or knowledge removed large quantities of surface soil from the property. A conveyance of the land was subsequently executed, & completion took place, neither party being then aware of the removal of soil:—*Held*: notwithstanding the conveyance, the purchaser could maintain an action against the vendor for a breach of trust in taking no care to prevent such removal of the soil.—*CLARKE v. RAMUZ*, [1891] 2 Q. B. 456; 60 L. J. Q. B. 679; 65 L. T. 657; 56 J. P. 5; 7 T. L. R. 626, C. A.

Annotations:—*Distd.* *Greswolde-Williams v. Barney* (1900), 83 L. T. 708. *Reffd.* *Leppington v. Freeman* (1891), 66 L. T. 357; *Re Wilson & Stephens' Contract* (1894), 43 W. R. 23.

2922. Recovery of damages for breach of collateral stipulation—After completion.]—S. agreed to buy a house in the course of erection from C., who agreed to supply & fix certain drains, stoves, fixtures, etc., & complete the house in a proper & workmanlike manner:—*Held*: notwithstanding the completion of the conveyance of the house S. could maintain an action against C. for failing to supply & fix certain articles, & for not completing the house in a proper & workmanlike manner.—*SAUNDERS v. COCKRILL* (1902), 87 L. T. 30, D. C.

SUB-SECT. 2.—RECOVERY OF PURCHASE-MONEY PAID.

2923. General rule—Not recoverable.]—He that purchases lands without any covenants or warranties against prior titles, as here, where defts. sold only their own title, if the land be afterwards evicted by an *eigne* title, can never exhibit a bill in equity to have his purchase-money again upon

money paid for an estate conveyed to him by deed, upon the ground that deft., the vendor, was not lawfully seized; he must resort to his covenant.—*M'LEAN v. HALL* (1827), Tay. 491.—**CAN.**

2923 ii. ———.]—Where land has been sold & the deed executed, & there is no fraud, the purchaser cannot recover back the purchase-money in an action for money had & received, although he may have been evicted by title paramount. The rule of caveat emptor applies, & he should have protected himself by covenants.—*ROBINSON v. JARVIS* (1832), N. B. Dig. 79.—**CAN.**

2923 iii. ———.]—*SMART v. BROWN* (1838), 5 O. S. 650.—**CAN.**

2923 iv. ———.]—*FOSTER v. STIFFLER* (1909), 12 W. L. R. 60.—**CAN.**

that account: possibly there may be equity to stop the payment of such purchase-money as is behind, but never to recover what is paid (*LORD NOTTINGHAM, C.*).—*MAYNARD v. MOSELEY* (1676), 3 Swan. 651; 36 E. R. 1009; *sub nom.* *MAYNARD'S CASE*, *Freem. Ch. 1, L. C.*

Annotation:—*Mentd.* *Samuel v. Newbold* (1906), A. C. 461.

2924. ——— **Purchase-money paid into court.**—In a suit for the payment of creditors the real estates of testator were ordered to be sold. A. being reported the purchaser of one of the estates for £14,480, entered into possession & accepted the title, & proper conveyances were executed. On application by the creditors to have the purchase-money paid out, the purchaser stated that the tenants of the estate had been served with a writ of right at the suit of a person who claimed the whole estate under an adverse title. But the ct. thought that the purchaser having accepted the title, etc., could not now prevent the money being paid out of ct., & ordered accordingly.—*THOMAS v. POWELL* (1794), 2 Cox, Eq. Cas. 394; 30 E. R. 182, L. C.

Annotations:—*Distd.* *Cann v. Cann* (1830), 3 Sim. 447.

Expld. *Crompton v. Melbourne, Crompton v. Wombwell* (1832), 5 Sim. 353. *Consd.* *Allen v. Richardson* (1879), 13 Ch. D. 524. *Refd.* *McCulloch v. Gregory* (1855), 1 K. & J. 286; *Manson v. Thacker* (1878), 7 Ch. D. 620.

2925. ——— **—**—*URMSTON v. PATE* (1794), 4 Cru. Dig. 390.

Annotations:—*Distd.* *Edwards v. McLeay* (1815), Coop. G. 308. *Refd.* *Wakeman v. Rutland* (1796), 3 Ves. 233; *Clare v. Lamb* (1875), 23 W. R. 389.

2926. ——— **—**—The purchaser of an estate cannot recover back his purchase-money on the ground of a concealment of a defect in the title by the vendor, without proving that such concealment was fraudulent.—*EARLY v. GARRETT* (1829), 9 B. & C. 928; 4 Man. & Ry. K. B. 687; 8 L. J. O. S. K. B. 76; 109 E. R. 345.

Annotations:—*Refd.* *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542. *Mentd.* *Morley v. Attenborough* (1849), 3 Exch. 500; *Eichholtz v. Bannister* (1864), 17 C. B. N. S. 708.

2927. ——— **—**—When an interest, either legal or equitable, in any real property has been sold, & the conveyance thereof has been executed by the parties to the same, the purchaser in the absence of fraud on the vendor's part cannot maintain an action for money received for his use to recover the price paid by him, if the vendor had no title to the property sold & his conveyance turns out to be worthless. In order to protect himself, a purchaser ought to take care that proper covenants are inserted in the deed of grant to him.

Defts. believing themselves to be entitled to an

equity of redemption in a term of years, purported to convey the same to pltf. for £240. It afterwards appeared that they were not entitled to the equity of redemption, & that their conveyance was, in fact, worthless. Pltf. having sued for money received to his use was nonsuited:—*Held*: as defts. were innocent of fraud, the maxim "*caveat emptor*" applied, there was no such total failure of consideration as to entitle pltf. to maintain an action for money received, it was incumbent on pltf. to ascertain whether defts. had a good title to the equity of redemption, & the nonsuit was right.—*CLARE v. LAMB* (1875), L. R. 10 C. P. 334; 44 L. J. C. P. 177; 32 L. T. 196; 39 J. P. 455; 23 W. R. 389.

2928. When recoverable—Fraud of vendor.—*SHOVEL v. BOGAN* (1708), 2 Eq. Cas. Abr. 688; 22 E. R. 578, L. C.

2929. ——— **—**—*EARLY v. GARRETT*, No. 2926, *ante*.

2930. ——— **Where no conveyance.**—Deft. supposing himself the legal representative of lessee for years sold the term, & delivered the lease to pltf., but without any assignment or formal conveyance, saying the premises were his & if anything happened he would see pltf. righted:—*Held*: pltf. might maintain an action against him for money had & received, the rightful administrator or tenant for years having ousted pltf. by ejectment.—*CRIPPS v. READE* (1796), 6 Term Rep. 606; 101 E. R. 728.

Annotations:—*Consd.* *Jones v. Ryde* (1814), 1 Marsh. 157. *Refd.* *Smith v. Mercer* (1815), 6 Taunt. 76; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Clare v. Lamb* (1875), L. R. 10 C. P. 334; *Allen v. Richardson* (1879), 13 Ch. D. 524.

2931. ——— **Purchase by trustee from co-trustees—Defect in title under will.**—A. by will devised to B., C., D. & E. two parcels of land upon trust to sell & divide the money among his brothers' & sisters' children. B., C., D. & E., the latter being one of twenty-four persons entitled under the will to a share of the money, were proceeding to sell when it was agreed by the three first trustees & the twenty-three other persons entitled to the money that E. should become the purchaser of the two parcels of land, paying £300 for one & £700 for the other. A conveyance was accordingly prepared & executed by B. & C. only, upon which E. took possession of the lands, & paid the purchase-money, which was divided among the several persons entitled under the will. E., being afterwards evicted from the smaller parcel in consequence of a defect in the title derived under the will, brought an action for money had & received

2923 v. ——— **—**—*KELLY v. SETH GOBIND DASS* (1874), 6 N. W. 168.—*IND.*

2923 vi. ——— **—**—*COOMBS & CONNOR v. EDWARDS* (1915), 34 N. Z. L. R. 984.—*N.Z.*

2928 i. When recoverable—Fraud of vendor.—*STEELE v. PRITCHARD* (1907), 17 Man. L. R. 226.—*CAN.*

2928 ii. ——— **—**—*EMERSON v. QUINN* (1914), 28 W. L. R. 405; 18 D. L. R. 241.—*CAN.*

2928 iii. ——— **—**—*MAHOMED SHARE KHAN v. MUSSUMAT SIRDAR BAHOO BEGUM* (1869), 1 N. W. (pt. 2), 84.—*IND.*

k. Defect in title.—*McKINNON v. BURROWS* (1835), 4 O. S. 71.—*CAN.*

l. ——— **—**—*FORSYTH v. McINTOSH* (1860), 9 C. P. 492.—*CAN.*

m. ——— **—**—*SIMMERS v. ERB* (1874), 21 Gr. 289.—*CAN.*

n. ——— **—**—Where a vendor of land has received the amount of the purchase price agreed on & covenanted

to convey with a clear title within a time limited, the purchaser may in case of failure to make title recover the purchase price paid.—*SNIDER v. WEBSTER* (1911), 20 Man. L. R. 562.—*CAN.*

o. Disposition of sub-purchaser.—Deft. agreed to sell land to P. for £150, & gave him a bond for a deed. P. sold to O., who sold to pltf., & at his request deft. executed a deed in fee to pltf., the consideration expressed being £425, with covenants in fee. Pltf. being dispossessed:—*Held*: entitled to recover the full consideration in the deed.—*GRAHAM v. LESLIE* (1854), 4 C. P. 176.—*CAN.*

p. Deficiency in acreage—Proportion recovered.—*HIRD v. ESQUIMALT & NANAIMO RY. CO.* (1909), 14 B. C. R. 382.—*CAN.*

q. GILMOUR v. WINNIPEG, (ADMINISTRATORS OF GOODMAN ESTATE), [1921] 2 W. W. R. 770.—*CAN.*

— **—**—*WILKEN v.*

KOHLER, [1913] App. D. 135.—*S. AF.*
t. Breach of warranty.—*BOIVIN v. LESARD* (1913), 26 W. L. R. 312; 14 D. L. R. 808; 7 Alta. L. R. 97.—*CAN.*

Land Titles Act, 1912-13 (Sask.) (c. 165), s. 6 (7).—*SLATER v. HOPKINS & CAMERON* (Sask.), [1924] 2 D. L. R. 52.—*CAN.*

r. Failure of vendor to give possession.—A purchaser of property of which possession was contracted to be given, but the vendor was unable to fulfil the contract, is at liberty to sue for repayment of the purchase-money, & is not obliged to sue for possession of the property.—*MOHUN LAL v. BEHAREE LAL* (1871), 3 N. W. 336.—*IND.*

s. Execution sale.—*MUNNA SINGH v. GAJADHAR SINGH* (1883), L. R. 5 All. 577.—*IND.*

d. ——— **—**—*BENODE BEHARI NUNDI v. MOHESHI CHUNDER GHOSH* (1883), 12 C. L. R. 331.—*IND.*

e. Mutual mistake.—*ISMAIL*

Sect. 4.—Remedies of parties: Sub-sects. 2 & 3, A.
(a) & (b).]

against one of the twenty-three persons to recover the share of the £300 received by him, at the same time refusing to give up the parcel of land for which £700 had been paid:—*Held*: he was entitled to recover.—*JOHNSON v. JOHNSON* (1802), 3 Bos. & P. 162; 127 E. R. 89.

Annotations:—*Consd.* *Clare v. Lamb* (1875), L. R. 10 C. P. 334. *Reid.* *Walker v. Moore* (1829), 10 B. & C. 416; *Sikes v. Wild* (1861), 1 B. & S. 587; *Lock v. Furze* (1866), L. R. 1 C. P. 441; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158; *Allen v. Richardson* (1879), 13 Ch. D. 524. *Mentd.* *Re West, West v. Roberts*, [1909] 2 Ch. 180; *Sinclair v. Brougham*, [1914] A. C. 398.

2932. — Non-disclosure of defect in title.]—*EDWARDS v. M'LEAY*, No. 2968, *post*.

— **Under covenant for title.]—***See* Sect. 3, sub-sect. 5, *ante*.

SUB-SECT. 3.—RECTIFICATION.

A. When Available.

(a) Mutual Mistake.

See, generally, **MISTAKE**, Vol. XXXV., pp. 127-129, Nos. 282-299; **LANDLORD & TENANT**, Vol. XXX., pp. 480-482.

2933. General rule—Mistake must be mutual.]—*COOKE v. LEERE* (1826), Toth. 44; 21 E. R. 118.

2934. —.]—Trustees for sale put certain property, including two freehold houses, into the hands of an auctioneer to be sold. The property for sale comprised a scullery so situated that it might have belonged to either of the two houses. The auctioneer prepared a plan which clearly showed the scullery as part of lot 2, but, by some inadvertence, it was in the particulars of sale clearly included in lot 3. The person who subsequently became the purchaser of lot 2, having before the sale called the auctioneer's attention to the discrepancy, was informed by the latter that the plan was correct, & that the scullery was included in lot 2. He also orally pointed out the mistake at the sale, & informed those present that the scullery formed part of lot 2. Lot 2 was sold, but lot 3 was not sold. The conveyance of lot 2 was made, after an interview on the subject between the solr. of the vendors & of the purchaser, so as expressly to comprise the scullery. The purchaser, immediately after the execution of the conveyance, mortgaged lot 2. The vendors brought an action against the purchaser & his mtgees. for rectification of the conveyance, alleging that the scullery was included in the conveyance by mistake, as they had never authorised their agents to include it in lot 2, their attention never having been called to what had passed between their agents & the purchaser with reference to it, & that they had executed the conveyance without reading it. Pltfs. contended that, there being a written contract to sell lot 2 without the scullery, & that contract being free from ambiguity, parol evidence to vary it was not admissible:—*Held*: even apart from the difficulty arising from the position of the mtgees., who, like the purchaser himself, had no notice at the time they took their

mtge., of the facts on which the equities claimed by pltfs. were based, there was certainly no mistake on the part of deft. the purchaser, & none was satisfactorily proved even on the part of pltfs., as they simply left the matter to their agents, who accordingly had authority to include the scullery in lot 2 in the way they did, & there was therefore no case for rectification.—*ELLIS v. HILLS & BRIGHTON & PRESTON A. B. C. PERMANENT BENEFIT BUILDING SOCIETY* (1892), 67 L. T. 287.

2935. —.]—*MAY v. PLATT*, No. 2459, *ante*.

2936. —.]—The G. estate was offered in eight lots by public auction, subject to a stipulation that each lot was sold subject to all occupation ways & methods of drainage enjoyed by the vendors & their tenants. N. purchased the whole estate, & on June 1, 1910, agreed to sell lot 6, which another lot, 3, adjoined, to H. upon the conditions read at the auction. The G. estate was conveyed to N. subject to easements. N. conveyed lot 3 to pltfs. in Feb. 1911. N. had previously in Nov. 1910, conveyed lot 6 to deft. H., who mortgaged it to C., the same solr. acting for H. on his purchase & for H. & C. as to the mtge. Rights of occupation way & drainage in fact existed over the part of the G. estate conveyed to H.:—*Held*: the conveyance to H. containing no reservation, the fact that lot 6 was sold subject to the privileges in favour of lot 3 would not, if N. had not parted with lot 3, have entitled pltfs. to rectification of H.'s conveyance without showing mutual mistake, which was not proved. At any rate, there was no such right to rectification when N. had conveyed lot 3 by deed to which H. was not a party.—*SLACK v. HANCOCK* (1912), 107 L. T. 14.

2937. —.]—Conveyance of less land than was intended.]—*THOMAS v. DAVIS* (1757), 1 Dick. 301; 21 E. R. 284.

Annotations:—*Consd.* *Johnson v. Bragge*, [1901] 1 Ch. 28. *Reid.* *Craddock v. Hunt*, [1923] 2 Ch. 136.

2938. —.]—A deed was executed purporting, by mistake, to convey a moiety only of real estate, the intention of the parties having been to pass the whole. Infants were interested. Upon bill for rectification:—*Held*: a conveyance of the other moiety by another deed was not necessary, & order made declaring that the deed was, in the particulars after specified, executed by mistake, it was intended to pass the entirety, & the deed ought to be rectified, ordering rectification by words & figures accordingly, & directing a copy of the order to be indorsed on the deed.—*WHITE v. WHITE* (1872), L. R. 15 Eq. 247; 42 L. J. Ch. 288; 27 L. T. 752.

Annotation:—*Reid.* *Hanley v. Pearson* (1879), 13 Ch. D. 545.

2939. —.]—Conveyance of more land than was intended.]—*CLIFFORD v. LAUGHTON* (1606-7), Toth. 21; 21 E. R. 111.

2940. —.]—*TAYLOR v. BEVERSHAM* (1074), 2 Cas. in Ch. 194; 22 E. R. 908; *sub nom.* *TYLER v. BEVERSHAM*, Cas. temp. Finch, 80; *sub nom.* *BEVERSHAM'S CASE*, 2 Vent. 345.

2941. —.]—Bill to rectify a conveyance, alleged to have passed by mistake more

ALLARAKHIA v. DATTATRYAR GANDHI (1916), L. L. R. 40 Bom. 634.—**IND.**

f. —.]—*HUDSON'S BAY CO. v. MACDONALD* (1887), 4 Man. L. R. 237.—**CAN.**

g. —.]—*BURNS v. YOUNG* (1884), 10 A. R. 215.—**CAN.**

PART XI. SECT. 4, SUB-SECT. 3.—
A. (a).

2933 i. General rule—Mistake must be

mutual.]—*JOHNSON INVESTMENT CO., LTD. v. FISHER*, [1921] 3 W. W. R. 680; 66 D. L. R. 634; 17 Alta. L. R. 6.—**CAN.**

2933 ii. —.]—*YOUNG v. HALAHAM* (1875), 9 I. R. Eq. 70.—**IR.**

2939 i. —.]—Conveyance of more land than was intended.]—*FERGUSON v. WINSOR* (1885), 10 O. R. 13; (1886), 11 O. R. 88.—**CAN.**

2939 ii. —.]—*COTTING-*

HAM v. COTTINGHAM (1885), 11 A. R. 624.—**CAN.**

2939 iii. —.]—The mere circumstance that pltf. sold more than he thought he was selling, & defts. got more than they expected, is not, in the absence of unfair dealing, sufficient to entitle pltf. to have his deed rectified.—*GALLAGHER v. ONTARIO SEWER PIPE CO.* (1912), 21 O. W. R. 550; 3 O. W. N. 742; *affd.*, 3 D. L. R. 394.—**CAN.**

than was included in a previous agreement, dismissed; the conveyance reciting a more extended agreement, the parties being dead, the agent of the grantor having acknowledged the extended agreement, & the agent of the grantee, who could have given a personal account of the transaction, not having been examined by pltf.

A conveyance which passes too much may be rectified, & the excess deducted. *Semble*: an issue may be directed with a view to correcting a mistake in a deed.—*BEAUMONT v. BRAMLEY* (1822), *Turn. & R.* 41; 37 E. R. 1009, L. C.

Annotations:—*Refd.* *Howkins v. Jackson* (1850), 2 H. & Tw. 301; *Rooke v. Kensington* (1856), 2 K. & J. 753; *Cox v. Bruton* (1857), 5 W. R. 544; *Wright v. Wilkin* (1859), 4 De G. & J. 141; *Bentley v. Mackay* (1862), 4 De G. F. & J. 279.

2942. ————.]—Where a contract is entered into for the sale of an estate, & under the general words, property passes, which the vendor insists he did not mean to sell, but the purchaser by his answer denies or does not admit that it was not in his contemplation at the time of the purchase: *Semble*, the vendor cannot sustain a bill against the purchaser to have the contract rectified, on the ground of mistake, & carried into execution.—*A.-G. v. SITWELL* (1835), 1 Y. & C. Ex. 559; 5 L. J. Ex. Eq. 86; 160 E. R. 228.

Annotations:—*Refd.* *Steele v. Haddock* (1855), 10 Exch. 643; *Wharram v. Wharram* (1864), 3 Sw. & Tr. 301.

2943. ————.]—Particulars of sale described lot 5 as consisting of a leasehold house, No. 20, of a certain description, with a yard, at the end of which was a coach house & stable, & small yard beyond, with extra stable; & stated, that the house was occupied by W., the yard, coach house, etc., by H. Lot 6 was described as a leasehold house, "No. 21, adjoining lot 5, & of similar design & accommodation. Is now & has been for years in the occupation of T." The two houses were built on adjoining strips of land, each held under a separate lease. The small yard & extra stable lay behind No. 21, & were comprised in the lease of lot 6. The occupations were as stated in the particulars. Pltf. purchased lot 5, deft. H. lot 6. Pltf. took an assignment from the vendor of the property in the lease of lot 5, & no more. H., on the following day, took an assignment of all the property comprised in the lease of lot 6, thus obtaining the legal estate in the small yard & extra stable:—*Held*: pltf. was entitled to an assignment from H. of a small yard & extra stable, for, according to the true construction of the particulars, H. had not contracted to purchase them, but pltf. had.—*LEUTY v. HILLAS* (1858), 2 De G. & J. 110; 27 L. J. Ch. 534; 22 J. P. 96; 4 Jur. N. S. 1166; 6 W. R. 217; 44 E. R. 929; *sub nom.* *LEUTY v. HILLAS*, 30 L. T. O. S. 299, L. C.; *subsequent proceedings*, *sub nom.* *WILD v. HILLAS*, 28 L. J. Ch. 170.

Annotations:—*Distd.* *Ellis v. Hills & Brighton & Preston A. B. C. Permanent Benefit Bldg. Soc.* (1892), 67 L. T. 287. *Apld.* *Craddock v. Hunt*, [1923] 2 Ch. 136.

2944. ————.]—*BEALE v. KYTE*, No. 2957, *post*.

2945. ————.]—Mistake in covenants for title.]—*COLLICOTT v. HILL* (1662), *Freem. Ch.* 173; 22 E. R. 1139; *sub nom.* *COLDROT v. HILL*, 1 Cas. in Ch. 15, L. C.

2949 i. *Application of rule*—Parties capable of being replaced in original position.]—*HICKMAN v. WARMAN* (1919), 44 O. L. R. 257; 15 O. W. N. 201; 46 D. L. R. 66.—*CAN.*

h. ————.]—Although where a written contract for the sale of land is followed by a transfer, the transfer may be rectified on the ground of

mistake so as to correspond with contract yet when the two documents as executed correspond, a common mistake is not sufficient ground for rectifying both.—*MATEAR v. LYNE*, [1918] V. L. R. 629.—*AUS.*

k. *Omission of covenant for payment of incumbrance.*]—*PARKINSON v. CLENN* (1878), 29 C. P. 13.—*CAN.*

2946. ————.]—*FEILDER v. STUDLEY* (1673), *Cas. temp. Finch*, 90; 23 E. R. 48.

Annotations:—*Consd.* *Browning v. Wright* (1799), 2 Bos. & P. 13; *Hesse v. Stevenson* (1803), 3 Bos. & P. 565.

2947. ————.]—A contract for the sale of a lease contained a condition that the vendor should not be required to get in an outstanding bare legal estate nor to obtain the concurrence in the purchaser's conveyance of the person in whom such estate was vested. The conveyance which was in common form did not refer to the condition, & the vendor conveyed "as beneficial owner" thereby incorporating the covenants for title in Conveyancing Act, 1881 (c. 41), s. 7 (1). The purchaser some years afterwards under a power in the lease gave the lessors notice to determine it at the expiration of the first seven years of the term, but the notice was held to be invalid because it was not given by the person who had the legal estate in the term. The purchaser then sued the vendor for damages for breach of his covenants for title:—*Held*: the vendor was entitled to have the conveyance rectified by inserting therein a proviso excluding any liability on his part by reason of the legal estate in the term being outstanding.—*STAIT v. FENNER*, [1912] 2 Ch. 504; 56 Sol. Jo. 669; *sub nom.* *STAIT v. FENNER*, *FENNER v. MCNAB*, 81 L. J. Ch. 710; 107 L. T. 124.

Annotation:—*Mentd.* *Burch v. Farrows Bank*, [1917] 1 Ch. 606.

2948. ————.]—Insertion of covenant not agreed upon.]—The ct. will reform a deed, entered into under a previous agreement, by ordering a fresh conveyance to be executed, from which a covenant, complained of as not being the intention of the covenantor at the time of the agreement, or inserted therein, will be directed to be expunged, although such covenant was introduced by the attorney of the covenantor, but without his express authority, on its being shown that the party had not considered himself when liable to such covenant he entered into the agreement.—*ROB v. BUTTERWICK* (1816), 2 Price, 190; 146 E. R. 65.

2949. *Application of rule*—Parties capable of being replaced in original position.]—The rule that the ct. will not interfere to rectify an instrument unless it is proved that the mistake was common to both parties, does not apply to the case of a contract which has been executed between parties in the relation of vendor & purchaser, whom it is in the power of the ct. to replace in their original position. Accordingly where, in a conveyance of messuages, the plan on the deed comprised a piece of land not intended by the vendor to be included, a decree was made to rectify the deed, an option being given to the purchaser to have his contract annulled.—*HARRIS v. PEPPERELL* (1867), L. R. 5 Eq. 1; 17 L. T. 191; 32 J. P. 132; 16 W. R. 68.

Annotations:—*Expld.* *May v. Platt*, [1900] 1 Ch. 616.

Refd. *Baskcomb v. Beckwith* (1869), L. R. 3 Eq. 100; *Paget v. Marshall* (1884), 49 J. P. 85.

Compare, also, *LAND TAX*, Vol. XXX., p. 313, No. 131.

(b) *Unilateral Mistake.*

See *MISTAKE*, Vol. XXXV., pp. 129, 130, Nos. 300–304.

2950. *Necessity for fraud or misrepresentation amounting to fraud.*]—*MAY v. PLATT*, No. 2459, *ante*.

1. *Mistake as to statutory rights.*]—*SPENCE v. ARNOLD* (1901), 5 Terr. L. R. 176.—*CAN.*

PART XI. SECT. 4, SUB-SECT. 3.—*A. (b).*

2950 i. *Necessity for fraud or misrepresentation amounting to fraud.*]—*FREE-*

Sect. 4.—Remedies of parties: Sub-sect. 3, A. (c) & (d), B., C. & D.: sub-sect. 4, A. (a) i.]

(c) *Necessity for Prior Contract.*

See, generally, MISTAKE, Vol. XXXV., pp. 131, 132, Nos. 309–321.

2951. Conveyance differing from articles—Conveyance not in purported execution of articles.] *MOSELY v. VIRGIN, No. 2977, post.*

(d) *Conveyance after Previous Written Agreement.*

See MISTAKE, Vol. XXXV., p. 132, Nos. 322–325.

2952. Whether rectification available—Conveyance in conformity with agreement.]—MAY v. PLATT, No. 2459, ante.

2953. ———.]—Where a deed has been executed in pursuance of a previous option in writing between the same parties:—*Held*: the ct. could not rectify the deed on the ground that it did not represent the true intention of the parties.—*THOMPSON v. HICKMAN, [1907] 1 Ch. 550; 76 L. J. Ch. 254; 96 L. T. 454; 23 T. L. R. 311.*

Annotations:—Consd. Craddock v. Hunt, [1923] 2 Ch. 136. Refd. Fowler v. Sugden (1916), 85 L. J. K. B. 1090. Mentd. Glyn v. Howell, [1909] 1 Ch. 666.

2954. ———.]—Where owing to a mutual mistake in reducing a verbal agreement for the sale of land into writing, the written agreement failed to express the real bargain between the parties, & the mistake was embodied in a deed of conveyance, with the result that a piece of land, which had in fact been bought & paid for by plffs., was wrongly conveyed by the vendors to deft. who had notice of plffs.' title:—*Held*: the ct. since the Jud. Act, 1873 (c. 66), had jurisdiction to rectify the conveyance, notwithstanding that the deed conformed strictly with the written agreement, & although the effect of ordering rectification was to grant specific performance of a written agreement with a parol variation.—*CRADDOCK BROTHERS v. HUNT, [1923] 2 Ch. 136; 92 L. J. Ch. 378; 129 L. T. 228; 67 Sol. Jo. 593.*

Annotation:—Apprvd. U.S.A. v. Motor Trucks, [1924] A. C. 196.

Admissibility of previous agreement.]—See DEEDS, Vol. XVII., pp. 341, 342, Nos. 1519–1527.

B. What must be Proved.

See MISTAKE, Vol. XXXV., pp. 133–135, Nos. 328–347.

C. Form of Rectification.

See, generally, MISTAKE, Vol. XXXV., pp. 144, 145, Nos. 427–437.

2955. Declaration indorsed on instrument—New instrument unnecessary.]—WHITE v. WHITE, No. 2938, ante.

D. Effect of Delay.

See MISTAKE, Vol. XXXV., pp. 142, 143, Nos. 409–413.

2956. Whether right to rectification lost.]—The conveyance made in 1866, upon a sale of land by S. to B., contained a reservation to S. of minerals. Four years subsequently B. filed a bill against S., alleging that the reservation was inserted in the

conveyance under a mistake common to both parties, & recently discovered by him, & praying for the rectification of the conveyance by the omission of it. S. put in an answer denying the mistake & claiming the benefit of the reservation; & afterwards died before he could be cross-examined:—*Held*: although, in the opinion of the ct., a mistake common to both parties had been made, of which S. sought to take an improper advantage, yet a simple decree for rectification could not be made after the lapse of time & against the oath of one of the parties; but defts., the representatives of S., were entitled to the option of having the conveyance rectified, or the whole transaction set aside; & in the event of pltf. not choosing to accept the latter alternative, the bill must be dismissed without costs.—*BLOOMER v. SPITTLE (1872), L. R. 13 Eq. 427; 41 L. J. Ch. 369; 26 L. T. 272; 20 W. R. 435.*

Annotations:—Dtd. Beale v. Kyte, [1907] 1 Ch. 564. Refd. McKenzie v. Hesketh (1877), 7 Ch. D. 675; Huddersfield Banking Co. v. Lister (1895), 72 L. T. 703.

2957. ——— When time begins to run.]—(1) In 1900 A. sold & conveyed land to B. In 1906 A. brought an action against B. for rectification of the conveyance, alleging that by common mistake the parcels in the conveyance included more land than was comprised in the written contract in pursuance of which the conveyance was executed. A. commenced the action as soon as he became aware of the error. B. denied any mistake, & further contended that A. came too late for rectification:—*Held*: there had been a common mistake, & A. was entitled to rectification for that he had not been guilty of any laches.

(2) In considering a question of *laches*, time runs not from the date of the conveyance, but from the date when the party seeking relief first became aware of the mistake.—*BEALE v. KYTE, [1907] 1 Ch. 564; 76 L. J. Ch. 294; 96 L. T. 390.*

SUB-SECT. 4.—RESCISSIION.

A. When Available.

(a) *Fraud or Misrepresentation.*

i. In General.

2958. Whether rescission available.]—Where arts. & a conveyance are not obtained with the strictest fairness, a ct. of equity will set them aside, & order the conveyance to stand as a security only for the consideration money.—WHITE v. LIGHTBURN (1722), 4 Bro. Parl. Cas. 181; 2 B. R. 123, H. L.

Annotation:—Apld. Adams v. Swower (1861), 10 Jur. N. S. 223.

2959. ———.]—A purchase obtained by fraud would be, in effect, no purchase, & could not acquire any validity by the confirming statutes.—BEADEN v. KING (1852), 9 Hare, 499; 22 L. J. Ch. 111; 68 E. R. 608.

Annotation:—Refd. Whidborne v. Eccl. Comrs. of England (1877), 7 Ch. D. 375.

See, generally, EQUITY, Vol. XX., pp. 257 et seq.; MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 65–72.

MAN v. MITCHELL (1898), 30 N. S. R. 513.—CAN.

2950 ii. ———.]—RAMSAY v. MFISNERS (1900), 33 N. S. R. 339.—CAN.

m. Words in deed wrongly used.]—A deed executed in Lower Canada conveyed certain lands situate in Upper Canada to parties " & their successors," which words it was proved would convey the fee simple according to the law of Lower Canada, & it was shown that the grantor's intention was to convey

the lands absolutely. The ct. ordered the devisee of the grantor to execute a release of the lands according to the law of Upper Canada.—*ALLAN v. THORNE (1853), 3 Gr. 445.—CAN.*

PART XI. SECT. 4, SUB-SECT. 3.—A. (d).

2952 i. Whether rectification available—Conveyance in conformity with agreement.]—LANG v. MATTHEWMAN (1871), 32 U. C. R. 126.—CAN.

—.]—MCCALL v. FAITHORNE (1863), 10 Gr. 324.—CAN.

PART XI. SECT. 4, SUB-SECT. 3.—D.

2956 i. Whether right to rectification lost.]—CALVERT v. LINLEY (1874), 21 Gr. 470.—CAN.

2956 ii. ———.]—BROOKES v. BROOKES (N. S.) (1910), 9 E. L. R. 44.—CAN.

2956 iii. ———.]—MINER v. HINCH (1913), 26 W. L. R. 293.—CAN.

2960. — Necessity for fraud.]—There is no general rule that actual fraud is necessary to induce a ct. of equity to rescind a contract for sale. The ct. acts on the same principle in rescinding contracts for sale as in setting aside other contracts & dealings which it considers unconscientious.

Certain property was put up for sale by auction, & in the particulars which were advertised was described as an immediate absolute reversion of a freehold estate falling into possession on the death of a lady seventy years old. By the conditions of sale, which were read in the auction room just previously to the sale, but were not printed or circulated among those present, the property was stated to be subject to three mtgs. The property was bought by pltf., who stated that he was deaf, & did not understand that he was buying an equity of redemption. On a bill filed by pltf. to have the contract for sale rescinded:—*Held*: the description of the property in the particulars of sale was misleading, the *onus* was therefore on the vendor to show that the purchaser was not actually misled, & as he had failed to do so pltf. was entitled to have the contract rescinded & his deposit returned.—*TORRANCE v. BOLTON* (1872), 8 Ch. App. 118; 42 L. J. Ch. 177; 27 L. T. 738; 37 J. P. 164; 21 W. R. 134, L. J. J.

Annotations:—Expld. & Distd. Blairberg v. Reeves, [1906] 2 Ch. 175. *Consd. Carlish v. Salt*, [1906] 1 Ch. 335; *Nocton v. Ashburton*, [1914] A. C. 932.

2961. — —.]—REDGRAVE v. HURD, No. 3035, *post*.

2962. — —.]—A deed of covenant of 1851, relating to a building estate, after forbidding certain offensive & noisy trades & businesses, provided that there should not be carried on "any trade or business or occupation whatsoever whereby any injurious offensive or disagreeable noise or nuisance shall or may be occasioned caused or made." Pltf. entered into a contract for the purchase from deft. of a house on this estate for the purpose of a boys' school, on the representation of deft.'s agent that there was nothing in this deed which would prevent him from carrying on

such a school on this property. On an action for rescission of the contract:—*Held*: the carrying on of pltf.'s school in an ordinary & reasonable way would be within the wording of the restrictive covenant, which could not be limited to trades or businesses *ejusdem generis* with those specifically mentioned; & pltf., having been induced by a misrepresentation of fact made by deft.'s agent to enter into this contract, was entitled in equity to rescission, even though the representation had not been made fraudulently.—*WAUTON v. COPARD*, [1899] 1 Ch. 92; 68 L. J. Ch. 8; 79 L. T. 467; 47 W. R. 72; 43 Sol. Jo. 28.

2963. — — Conveyance not completed.]—It is undoubted law that where a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase, prior to completion, even though the misrepresentation be innocent (*MCCARDIE, J.*).—*ARMSTRONG v. JACKSON*, [1917] 2 K. B. 822; 86 L. J. K. B. 1375; 117 L. T. 479; 33 T. L. R. 444; 61 Sol. Jo. 631.

Annotation:—Mentd. Collins v. Hopkins, [1923] 2 K. B. 617.

2964. — — — Conveyance completed.]—A. contracted with S. & T. for the sale to them, in their own names, of freehold & leasehold property, including mines & works for making iron; the purchase being made, in fact, for a numerous co., of which S. & T. were managing directors. Some difficulty occurring as to A.'s title, the time for completing the contract elapsed; but upon further treaty, S. & T. agreed to complete it, if A. would verify his statements of the capabilities of the property; & on his consenting, they deputed some of their co-directors, together with experienced agents, to ascertain the correctness of his statements. These persons examined the property & works, & the accounts kept by A., receiving from him & his agents all facility & aid for the purpose; & they reported to their constituents that A.'s statements were correct, & P., their partner & agent, remaining on the property, with particular instructions to make

PART XI. SECT. 4, SUB-SECT. 4.— A. (a) i.

2960 i. Whether rescission available.—Necessity for fraud.]—A clear case of fraud must be established to obtain the rescission of an executed contract.—*HUTCHINSON v. CALDER*, *Cass. Dig.* 2nd. ed. 785.—*CAN.*

2960 ii. — —.]—DUNBAR v. MEEK (1881), 32 C. P. 195.—*CAN.*

2960 iii. — —.]—BRADY v. BELL (1884), 19 N. S. R. (7 R. & G.) 356; 7 C. L. T. 408.—*CAN.*

2960 iv. — —.]—GARLAND v. THOMPSON (1885), 9 O. R. 376.—*CAN.*

2960 v. — —.]—A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent & degree as a pltf. in an action for deceit.—*BELL v. MACKLIN* (1887), 15 S. C. R. 576.—*CAN.*

2960 vi. — —.]—CAMERON v. CAMERON (1887), 14 O. R. 561.—*CAN.*

2960 vii. — —.]—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation, but where, by error of both parties & without fraud or deceit, there has been a complete failure of consideration, a ct. of equity will rescind the contract & compel the vendor to return the purchase-money.—*COLE v. POPE* (1898), 29 S. C. R. 291.—*CAN.*

2960 viii. — —.]—ATKINSON v. BORLAND (1901), 14 Man. L. R. 205.—*CAN.*

2960 ix. — —.]—SHURIE v. WHITE (1906), 12 O. L. R. 51; 7 O. W. R. 773.—*CAN.*

2960 x. — —.]—KAMP v. ALBRECHT (Sask.) (1911), 19 W. L. R. 153.—*CAN.*

2960 xi. — —.]—STOCKS v. BOULTER (1912), 22 O. W. R. 464; 3 O. W. N. 1397; 5 D. L. R. 268.—*CAN.*

2960 xii. — —.]—Where a conveyance has been executed & delivered, nothing in the way of misrepresentation, short of actual positive fraud, will warrant a judicial rescission between vendor & purchaser.—*KELLY v. ENDERTON* (1912), 21 W. L. R. 337; 2 W. W. R. 453; 22 Man. L. R. 277; 5 D. L. R. 613.—*CAN.*

2960 xiii. — —.]—A purchaser of land under a contract providing for payment in instalments may, if he has been induced to enter into the contract by fraud, have the agreement rescinded even if the fraudulent party has assigned his interest in the contract for value to an innocent party.—*ROLT v. GRIESE & WOOD* (1915), 32 W. L. R. 874; 9 W. W. R. 462; 25 D. L. R. 740; 8 Sask. L. R. 336.—*CAN.*

2960 xiv. — —.]—HAND v. WARNER (1916), 44 N. B. R. 215.—*CAN.*

2960 xv. — —.]—HAMILTON v. COLLOWAY (Alta.) (1918), 43 D. L. R. 768.—*CAN.*

2960 xvi. — —.]—FRANZ v. HANSEN, [1918] 2 W. W. R. 40; 41 D. L. R. 457.—*CAN.*

2960 xvii. — —.]—WILLIAMS v.

SHIELDS (1919), 25 B. C. R. 198.—*CAN.*

2960 xviii. — —.]—ROLT v. LONG, [1920] 2 W. W. R. 214.—*CAN.*

2960 xix. — —.]—CURRIE v. TAYLOR, [1920] 2 W. W. R. 579.—*CAN.*

2960 xx. — —.]—CURPHEY v. PERRY (N. S.) (1922), 65 D. L. R. 561.—*CAN.*

2960 xxi. — —.]—BURGESS v. PACIFIC PROPERTIES, LTD. (1923), 32 B. C. R. 317.—*CAN.*

2960 xxii. — —.]—Although a contract for the sale of property has been executed by a conveyance, it can be set aside for a misrepresentation by the vendor, known to him to be untrue, that there were no incumbrances, even though he had no active positive intention to defraud.—*HINES v. MCCALLUM*, [1925] 2 D. L. R. 403; [1925] 1 W. W. R. 838.—*CAN.*

2960 xxiii. — —.]—MIR AZIMUDDIN KHAN v. ZIA-UL-NISA (1882), 1 L. R. 6 Bom. 309.—*IND.*

2960 xxiv. — —.]—BROJO GOPAL SARKAR v. BUSIRUNNISA BIBI (1887), 1 L. R. 15 Calc. 179.—*IND.*

2960 xxv. — —.]—PARESH NATHI MALICK v. HARI CHARAN DEY (1911), 1 L. R. 38 Calc. 622.—*IND.*

o. — — Failure of consideration.]—Where by error of both parties & without fraud or deceit, there has been a complete failure of consideration, a ct. of equity will rescind the contract & compel the vendor to return the purchase-money.—*POPE v.*

dismissed with costs, there being no proof of concealment by the vendor, although the dealings were inconsistent with any right of way.

(2) To set aside a purchase, perfected by conveyance & payment of the purchase money, for fraudulent concealment by the vendor of a defect in the title, where there was no warranty or statement that there was no defect; proof of concealment by the vendor's agent, is not sufficient, there must be proof of direct personal knowledge & concealment by the principal.

(3) A purchaser of an estate, having made no inquiry respecting the title from an agent for the sale, is not entitled to any relief for non-communication of any defect by him.

(4) Where a purchaser seeks to be relieved against the purchase on the ground of personal fraud by the vendor, & the alleged fraud is not proved, he is not entitled to relief on any other ground.—*WILDE v. GIBSON* (1848), 1 H. L. Cas. 605; 12 Jur. 527; 9 E. R. 897, H. L.; *revg.* S. C. *sub nom.* *GIBSON v. D'ESTE* (1843), 2 Y. & C. Ch. Cas. 542.

Annotations.—As to (2) *Consd.* *Brett v. Clowser* (1880), 5 C. P. D. 376; *Brownlie v. Campbell* (1880), 5 App. Cas. 925. *Apld.* *Jolliffe v. Baker* (1883), 11 Q. B. D. 255. *Consd.* *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326. *Apld.* *Public Trustee v. Lancaster Duchy*, [1927] 1 K. B. 516. *Refd.* *Boss v. Helsham* (1866), 4 H. & C. 642; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Carlsh v. Salt*, [1906] 1 Ch. 333; *Armstrong v. Jackson*, [1917] 2 K. B. 822. As to (4) *Apld.* *Price v. Berrington* (1851), 3 Mac. & G. 486. *Refd.* *Espey v. Lake* (1852), 10 Hare, 260; *Blisset v. Daniel* (1853), 18 Jur. 122; *Parr v. Jewell* (1855), 1 K. & J. 671; *Barnard v. Hunter* (1856), 5 W. R. 92; *Robson v. Devon* (1857), 29 L. T. O. S. 300; *Traill v. Baring* (1864), 4 De G. J. & Sm. 318. *Generally, Refd.* *Griggs v. Staplee* (1848), 2 De G. & Sm. 572; *Reynell v. Sprye* (1852), 1 De G. M. & G. 656; *Chadwick v. Chadwick* (1854), 23 L. T. O. S. 108; *Udell v. Atherton* (1861), 7 H. & N. 172. *Mentd.* *Marshall v. Sladden* (1849), 7 Hare, 428; *Benham v. Keane* (1861), 5 L. T. 261.

29671. — *Sufficiency of misrepresentation—Must be substantial.*—*LATHAM v. CROSBY* (1863), 10 Gr. 308.—CAN.

29672. — *—*—*CUMMINS v. CONGREGATIONAL CHURCH TRUSTEES* (1885), 4 Man. L. R. 374.—CAN.

29673. — *—*—*TEMPERANCE COLONISATION CO. v. FAIRFIELD* (1888), 16 O. R. 544; *affd.* (1890), 17 A. R. 205.—CAN.

29674. — *—*—*HIRTLE v. KAULBACH* (1890), 22 N. S. R. 336.—CAN.

29675. — *—*—*NICHOLSON v. PETERSON* (1908), 18 Man. L. R. 106.—CAN.

29676. — *—*—*JACKSON v. PEOPLE'S TRUST CO.* (1912), 22 W. L. R. 325; 3 W. W. R. 99.—CAN.

29677. — *—*—*McMEANS v. KIDDER* (1913), 23 W. L. R. 794; 10 D. L. R. 480; 4 W. W. R. 108; 23 Man. L. R. 111.—CAN.

29678. — *—*—*Held*: deft., through his agents had been guilty of material misrepresentation & pltf. had not lost his remedy by reason of the fact that he had not discovered the discrepancy until after the contract had been executed.—*WISHART v. BOND* (1913), 24 O. W. R. 199; 4 O. W. N. 931; 10 D. L. R. 776.—CAN.

29679. — *—*—*BOULTER v. STROOKS* (1912-13), 47 S. C. R. 440.—CAN.

2967x. — *—*—*—*—Where agreement for sale of land has been completed by conveyance, it is not open to purchaser, in absence of fraud, to complain of misrepresentation by vendor, except where the consideration for the conveyance has totally failed.—*HAMILTON v. MARGOLIS* (1914), 28 W. L. R. 504.—CAN.

2967xi. — *—*—*—*—An agreement to purchase land will not be rescinded where purchaser makes payments thereunder after the discovery of the falsity of innocent material misrepresentations.—*BRAUCHLE v. LLOYD* (1915), 30 W. L. R. 659; 21 D. L. R. 321; 7 W. W. R. 1343.—CAN.

2967xii. — *—*—*YOST v. INTERNATIONAL SECURITIES CO., LTD. & MACPHERSON, DANNECKER v. INTERNATIONAL SECURITIES CO., LTD. & MACPHERSON* (1918), 42 O. L. R. 572; 14 O. W. N. 96; 43 D. L. R. 28.—CAN.

2967xiii. — *—*—*BARRON v. KELLY* (B. C.), [1918] 2 W. W. R. 131; 41 D. L. R. 590; 56 S. C. R. 455.—CAN.

2967xiv. — *—*—*HORN-ING v. WINCHELL* (1920), 53 D. L. R. 75.—CAN.

2967xv. — *—*—*STANDARD TRUSTS CO. v. CANADA LIFE ASSURANCE CO. (Alta.)*, [1920] 1 W. W. R. 516; 51 D. L. R. 275.—CAN.

2967xvi. — *—*—*FREER v. GILDERS* (1921), 64 D. L. R. 271; 50 O. L. R. 217.—CAN.

2967xvii. — *—*—*DICK v. SWEET* (Sask.) (1922), 68 D. L. R. 772.—CAN.

2967xviii. — *—*—*GREEN-NIZEN v. TWIGG*, [1922] 2 W. W. R. 71; 65 D. L. R. 101; 63 S. C. R. 158.—CAN.

2967xix. — *—*—*CROW v. BIRMINGHAM (N.B.)*, [1923] 4 D. L. R. 626.—CAN.

2967xx. — *—*—*WOOL-WORTH (F.W.) CO., LTD. v. POOLEY* (1925), 53 B. C. R. 386.—CAN.

b. — *Must have been acted on.*—Where in an action for rescission of a contract on the ground of false representations the misrepres-

2967. — *Sufficiency of misrepresentation—Must be substantial.*—Bill filed by a purchaser to rescind a contract, pltf. alleging that he had been induced to enter into it by fraud & misrepresentation: it appeared that the advertisement out of which the contract arose was of the sale of six houses total rental £131 6s. *per annum* lease about seventy-five years at a moderate ground rent of £50 a year, but what pltf., who agreed to give £420 for the property, found himself liable to take was an underlease of the houses at a rent of £50. The Lord Chancellor, reversing the order appealed from, dismissed the bill without costs, being satisfied, that though there was a misdescription of the property, there was no such substantial misrepresentation as called upon the ct. to exercise its jurisdiction.

The term ground rent is well understood, & has a definite meaning: it is the sum paid by the owner or builder of houses for the use of land to build on, & is therefore much under what it lets for when it has been built on (LORD CRANWORTH, C.).—*BARTLETT v. SALMON* (1855), 6 De G. M. & G. 33; 26 L. T. O. S. 82; 1 Jur. N. S. 277; 4 W. R. 32; 43 E. R. 1142, L. C.

Annotation.—*Refd.* *Re Beyfus & Masters's Contract* (1888), 39 Ch. D. 110.

ii. Particular Instances.

2968. *Non-disclosure—Material part of property subject to defect of title.*—An estate having been sold, some part of which, material to the enjoyment of the rest, was subject to a defect of title known to the vendors, but not disclosed by the abstract, & unknown to the purchaser, the contract was rescinded, & the vendors were ordered to repay the purchase-money, with all costs & expenses

sentations are proved, the *onus* lies on deft. to show clearly that they were not acted on.—*MANKOVSKY v. JACOB (Man.)*, [1922] 2 W. W. R. 681; 68 D. L. R. 763.—CAN.

c. — *—*—*YOUNG v. BUTLER* (1902), 22 N. Z. L. R. 407.—N.Z.

d. — *—*—*BOODH SINGH DOODHOORIA v. GUNESH CHUNDER SEN* (1903), 12 B. L. R. P. C. 317; 19 W. R. 356.—IND.

e. — *Vendor accepting repudiation.*—Where a party contracts to purchase property & pays an instalment & afterwards repudiates the contract & sues for rescission, the ct. has no jurisdiction to restrain, by interim injunction, the vendor, who accepted the repudiation & retook his property, from dealing with it as he sees fit.—*CHRISTIE v. FRASER* (1901), 10 B. C. R. 291.—CAN.

PART XI. SECT. 4, SUB-SECT. 4.—A. (a) ii.

f. *Whether rescission available—Non-disclosure.*—*THOMSON v. FAISLEY* (1923), 50 N. B. R. 281.—CAN.

g. — *Secret commission to purchaser's agent.*—*BENDIGO, ETC. CO. v. CUNNINGHAM*, [1919] V. L. R. 387.—AUS.

h. — *Purchaser dealing with property after discovery of fraud.*—Where a party complaining of fraud in the execution of a contract filed a bill to have it rescinded, & it appeared that after discovering the alleged fraud the vendee had continued to deal with the property:—*Held*: vendee was not entitled to the relief prayed.—*BOWN v. WEST* (1846), 1 E. & A. 117.—CAN.

k. — *—*—*LARSON v. RAMMUSSEN (Alta.)*, [1913], 24 W. L. R.

Sect. 4.—Remedies of parties: Sub-sect. 4, A. (a) ii., & (b) i.]

incident to the purchase & conveyance.—**EDWARDS v. M'LEAY** (1818), 2 Swan. 287; 36 E. R. 625, L. C.

*Annotations:—***Apld.** *Attwood v. Small* (1840), 6 Cl. & Fin. 232. *Distd.* *Wilde v. Gibson* (1848), 1 H. L. Cas. 605; *Edwards Wood v. Marjoribanks* (1858), 3 De G. & J. 329. **Apld.** *Turner v. West Bromwich Union Grdns.* (1860), 3 L. T. 662; *Mostyn v. West Mostyn Coal & Iron Co.* (1876), 1 C. P. D. 145. **Follid.** *Hart v. Swaine* (1877), 7 Ch. D. 42. **Consd.** *Carlsh v. Salt*, [1906] 1 Ch. 335. **Refd.** *Hughes & Hamilton v. Gordon* (1819), 1 Bill. 287; *Perkins v. Ede* (1852), 16 Beav. 193; *Slim v. Croucher* (1860), 8 W. R. 347. **Mentd.** *Rawlins v. Wickham* (1858), 3 De G. & J. 304; *Conybeare v. New Brunswick, etc. Co.* (1860), 1 De G. F. & J. 578; *Gorsuch v. Cree* (1860), 8 C. B. N. S. 574; *Mathias v. Yettis* (1882), 46 L. T. 497.

2969. — Right of way.]—WILDE v. GIBSON, No. 2966, *ante*.

2970. — By agent—Defect in title.]—WILDE v. GIBSON, No. 2966, *ante*.

2971. — Leasehold property subject to lien.]—Plff. bought at an auction an interest in leasehold property for £151. The property was sold under a sheriff's order. Plff. might have known from the particulars of sale that there was a lien on the lease for £100. Deft. at the time of the sale knew of, but did not disclose, facts which he ought to have disclosed to plff. Plff. could not have known the facts but from deft., & if they had been disclosed by him, there might have been no biddings for the property:—**Held:** upon the principles of this ct. under the circumstances, the sale must be declared void as against plff. & the purchase-money refunded; deft. to pay the costs of the suit.—**SMITH v. HARRISON** (1857), 26 L. J. Ch. 412; 29 L. T. O. S. 11; 3 Jur. N. S. 287; 5 W. R. 408.

2972. — Vendor's Interest.]—A. having two parcels & B. one parcel of land, supposed to contain petroleum, it was agreed between them & C. that C. should pay them \$10,000 for the land if he succeeded in forming a co. for the purpose of working the oil springs, & in inducing such co. to pay him \$13,750 as the price of the land, out of which he was to keep for himself \$3,750. B. accordingly, assuming the character of owner, gave to C. a conditional promise to sell all the land to him for \$13,750, provided the offer was accepted within a certain time. A. wrote a letter, meant to be shown to, & which was shown to, persons intending to become members of the new co., & was proved to have influenced them, in which letter he recommended the purchase, not disclosing that he had any interest therein. A. & B. actively co-operated with C. throughout the whole transaction. The co., in ignorance of the combination, accepted the proposal, but having discovered the fraud, sued for a rescission of the contract:—**Held:** the contract must be wholly rescinded, the price repaid, & the land reconveyed. There being a doubt, owing to the expiration of the term for which the co. had been constituted, whether the co. was competent to receive the money & to execute a reconveyance the order

provided that the repayment should be made to the co., or to such other persons as were entitled in their right, on the reconveyance of the lands being made to the satisfaction of the colonial ct. Fraud being established against a party, it is for him, if he allege laches in the other party, to show when the latter acquired a knowledge of the truth & prove that he knowingly forbore to assert his right.—**LINDSAY PETROLEUM CO. v. HURD** (1874), L. R. 5 P. C. 221; 22 W. R. 492, P. C.

*Annotations:—***Consd.** *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218. **Refd.** *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196; *Anchor Trust Co. v. Bell*, [1926] Ch. 805. **Mentd.** *Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.* (1875), 10 Ch. App. 520, n.; *Bagnall v. Carlton* (1877), 6 Ch. D. 371; *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394; *Allcard v. Skinner* (1887), 36 Ch. D. 115; *Re Sharpe, Re Bennett, Masonic & General Life Assce. v. Sharpe*, [1892] 1 Ch. 154; *Aaron's Roofs v. Twiss*, [1896] A. C. 273; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812.

2973. Untrue representation—Remuneration for professional services.]—S. was aware that R. was entitled to property, but might not at first be aware that the interest of R. was not precarious, & impressed R. with the notion that it was so; S., however, became aware that the interest was not precarious, yet he did not inform R. of that fact, but on the contrary still represented that it was both precarious & could be established without difficulty, delay & expensive litigation. R. in such a state of circumstances sold one-half of the estate to S., the latter giving him an indemnity against all costs of recovering the property, & representing that men of business conducted cases on the arrangement that no law expenses were paid unless the proceedings were successful; but if they were, that law costs were paid out of the money recovered, & the party conducting the proceedings & furnishing the information was allowed half what was recovered to satisfy him for risk of paying law expenses. Subsequently, R. agreed to sell the other half for a stated sum. R. filed a bill to set aside the conveyance & to have the contract for the sale of the second moiety declared void, but died before the hearing, & the suit was revived by his devisee & extrix. S. filed a cross bill for the specific performance of the sale of the second moiety. In the first suit the solr. of S. was made a party, & was charged with a participation in the fraud. The ct. below set aside the conveyance & as the contract for the sale of the second moiety was based on the former conveyance it declared the same void, & ordered S. to pay the costs, but dismissed the original suit as against the solr., without costs. The ct. also dismissed the bill for specific performance, with costs. From this decree S. appealed:—**Held:** as R. did not know his rights when he executed the conveyance, nor when he signed the contract for the sale of the second moiety, & as the former was based on fraud & misrepresentation, & as the latter depended on the former, both must fail, & the decree must be affirmed with costs.—**REYNELL v. SPRYE, SPRYE v. REYNELL** (1852),

239; 4 W. W. R. 53; 10 D. L. R. 650.—**CAN.**

l. —.]—**GILETZ v. RUNHAM** (1913), 25 W. L. R. 389; 13 D. L. R. 616.—**CAN.**

m. —.]—A purchaser who elects to affirm a voidable contract for the sale of land, with full knowledge of all the facts, is precluded from afterwards setting up a right for rescission thereof.—**JACKSON v. IRWIN & BILLINGS CO., LTD.** (1914), 20 B. C. R. 487.—**CAN.**

n. — Knowledge of purchaser.]—**TENNERY v. STILES** (1848), 5 U. C. R. 254.—**CAN.**

o. — Breach of warranty.]—**GALE v. HUBERT** (1857), 6 Gr. 312.—**CAN.**

p. — Judgment sale—Prevention of completion by purchaser.]—A creditor obtained judgment against his debtor's exors. & issued thereon execution against the lands of deceased, which had been devised to a minor. The creditor interfered to prevent

competition at the sale, & then bought the property at one-half its value:—**Held:** his purchase was not maintainable in equity.—**Re DAVIS** (1870), 17 Gr. 603.—**CAN.**

q. — Failure of purchaser to investigate title after being put on inquiry.]—Where a vendor makes verbal statements in relation to property, the correctness of which the purchaser has the means of testing by reference to documents within his reach & does not choose to do so, he

1 De G. M. & G. 660; 21 L. J. Ch. 633; 42 E. R. 710, L. J.J.

Annotations:—*Reid*. Parker v. Clarke (1861), 7 Jur. N. S. 1267; *Rees v. De Bernardy*, [1896] 2 Ch. 437. **Mentd.** *Ex p. James* (1853), 3 De G. M. & G. 493; *Parr v. Jewell* (1855), 1 K. & J. 671; *Trall v. Baring* (1861), 4 De G. J. & Sm. 318; *Hilton v. Woods* (1867), L. R. 4 Eq. 432; *Arkwright v. Newbold* (1881), 17 Ch. D. 301; *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. 1; *Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620; *Parkinson v. College of Ambulance & Harrison*, [1925] 2 K. B. 1.

2974. — Profits of business.—On Nov. 11, 1889, resps. arranged for the sale of a brewery in Edinburgh to D. The purchase was to take place as from Nov. 15, 1889, at the price of £20,500, the price to be paid by Dec. 31, at which date a conveyance was to be executed either to D. or to any co. to which he might assign his interest. On Dec. 14 D. entered into an agreement to sell the brewery to applts.; the price to be paid to D. by applts. was £28,500. This contract purported to pass on all the rights of D. On Dec. 31 a conveyance was executed by resps. at the instance of D., in implement of the contract of Nov. 11, 1889, to applts., & D. ceased to have any interest in the brewery. In the contract of Nov. 11, 1889, were these conditions: "the arrangement proceeds upon the basis that the net profits of the brewery amounted during each of two years, ending Dec. 31, 1888, to £3,750, or thereabouts, upon an average." "In the event of its being ascertained that this is not the fact, the arrangement is to be at an end." The conveyance of Dec. 31 to applts. did not set out these stipulations. Also by the contract of Nov. 11, 1889, D. was to be at liberty to have all the books connected with the business examined. All the books were examined by accountants selected by D., & a profit near the stipulated amount was reported. More than a year after the conveyance to applts., it was discovered that the books had been improperly dealt with by a clerk in resps.' employment without the knowledge of resps. The alterations made the profits appear greater than they really were.

Under these circumstances, applts., with the concurrence of D., raised this action for reduction of the contract between resps. & D., & the conveyance by resps. to applts.; applts. offering to hand back the brewery. The ground of their contention was, that as between resps. & D. the amount of the profits was made the basis of the agreement, & that all the rights of D. were passed by him to applts. No action was taken to rescind the contract between D. & applts.:—**Held**: applts. & D. had no title to maintain the action, D. having no interest in the subject-matter, the brewery; & the disposition not embodying nor being intended to embody the stipulations of the original contract, applts. had no right as against resps.—**EDINBURGH UNITED BREWERIES v. MOLLISON**, [1894] A. C. 96; 58 J. P. 364, H. L. **Annotation:—***Reid*. *Abram S.S. Co. v. Westville Shipping Co.*, [1923] A. C. 773.

will not, on the facts turning out to be different from what they were represented, be entitled to any relief.—**CANTON v. BACON** (1874), 21 Gr. 21.—**CAN.**

r.—By one of joint purchasers.—Property having been sold to five persons who purchased jointly:—**Held**: one of the purchasers, establishing a misrepresentation, could not rescind the contract so far as he was alone concerned, & recover his share of the purchase-money.—**BRAUN v. HUGHES** (1885), 3 Man. L. R. 177.—**CAN.**

t.—Transfer of homestead—*Wife not examined.*—**FROST v. J.**—VOL. XL.

LIREK, [1927] 3 D. L. R. 916; [1927] 2 W. W. R. 550; 21 Sask. L. R. 603.—**CAN.**

a. —.—**MASSINGBERD v. MONTAGUE** (1862), 9 Gr. 92.—**CAN.**

PART XI. SECT. 4, SUB-SECT. 4.—A. (b) i.

2978 i. Whether rescission available—Mistake unilateral.—The mistake of one party to an agreement for the purchase of land as to the amount of land purchased, when the mistake is not known to the other party, & there is nothing in the language or conduct of the other party which led or contributed to the mistake, does not give

2975. Failure of vendor to investigate title after being put on inquiry—Sale of copyhold land as freehold.—**HART v. SWAINE**, No. 3018, *post*.

(b) Mistake.

i. In General.

Sec. generally, MISTAKE, Vol. XXXV., pp. 122–125, Nos. 242–264.

2976. Whether rescission available—Mistake merely formal.—**BINGHAM v. BINGHAM** (1748), 1 Ves. Sen. 126; 27 E. R. 934.

Annotations:—*Apprvd.* *Cooper v. Philbbs* (1867), L. R. 2 H. L. 149. **Consd.** *Jones v. Clifford* (1876), 3 Ch. D. 779. **Disid.** *Jolliffe v. Baker* (1883), 11 Q. B. D. 255. **Apprvd.** *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273. **Reid.** *Clifton v. Cockburn* (1834), 3 My. & K. 76; *Cochrane v. Willis* (1865), 1 Ch. App. 58; *Rogers v. Ingham* (1876), 3 Ch. D. 351; *Bettys v. Maynard* (1882), 46 L. T. 766; *Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675; *Debenham v. Sawbridge*, [1901] 2 Ch. 98. **Mentd.** *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911.

2977. —.—**]**—Though a formal mistake in a deed may be rectified by articles, of which it purports to be an execution, essential additions cannot be made to a conveyance from articles, of which it does not purport to be an execution; nor can the transaction be rescinded by the Ct.—**MOSELY v. VIRGIN** (1796), 3 Ves. 184; 30 E. R. 959, L. C.

Annotations:—**Mentd.** *Bracebridge v. Buckley* (1816), 2 Price, 200; *De Mattos v. Gibson* (1859), 4 De G. & J. 276.

2978. — Mistake unilateral.—An error entertained by one of the parties to a contract of sale as to the legal meaning of the contract is not by itself sufficient to invalidate his consent to the contract. Applt. made resp. an offer of his entailed estates at a certain price by a letter which contained this stipulation, "The sale is made subject to the ratification of the ct." The offer was accepted. This offer & acceptance, according to their proper construction, constituted an absolute & unconditional sale of the entailed estates:—**Held**: applt. could not claim to have the contract reduced merely because he understood it to be other than it really was.—**STEWART v. KENNEDY** (No. 2) (1890), 15 App. Cas. 108, H. L.

Annotations:—**Expld.** *Wilding v. Sanderson*, [1897] 2 Ch. 534. **Mentd.** *Shragar v. Dighton* (1923), 130 L. T. 642.

2979. — After completion of conveyance.—Premises were sold for the residue of a term of which both parties at the time supposed that eight years only were unexpired, & the price was fixed expressly on that supposition. It afterwards appeared that twenty years were in fact unexpired at the time of the sale. But a bill by the vendor to make the purchaser a trustee of the term for the twelve additional years was dismissed.—**OKILL v. WHITTAKER** (1847), 2 Ph. 338; 16 L. J. Ch. 454; 10 L. T. O. S. 1; 11 Jur. 681; 41 E. R. 73, L. C.

Annotations:—*Appr.* *Dunlop v. Dunlop*, [1897] 2 Ch. 534. **Consd.** *Allen v. Richardson* (1879), 13 Ch. D. 524. **Reid.** *Manson v. Thacker* (1878), 7 Ch. D. 620.

2980. —.—**]**—If the conveyance had been executed the purchaser must have taken all the

a right of rescission unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, & it would be unreasonable to do so.—**SLOUSKI v. HOPP** (1905), 15 Man. L. R. 548; 2 W. L. R. 363.—**CAN.**

2978 ii. —.—**]**—**CANCILLA v. ORR** (1914), 27 W. L. R. 122; 5 W. W. R. 1294; 16 D. L. R. 115; 21 Man. L. R. 355.—**CAN.**

2978 iii. —.—**]**—**ROBSON v. ROY (Alta.)** (1917), 35 D. L. R. 485.—**CAN.**

2979 i. — After completion of conveyance.—**ZORNER v. BURGER** (Man.) (1911), 18 W. L. R. 598.—**CAN.**

Sect. 4.—Remedies of parties: Sub-sect. 4, A. (b) i. & ii., & (c) i.]

consequences (PAGE WOOD, V.-C.).—*M'CULLOCH v. GREGORY* (1855), 1 K. & J. 286; 3 Eq. Rep. 495; 24 L. J. Ch. 246; 24 L. T. O. S. 307; 3 W. R. 231; 69 E. R. 466.

Annotations:—*Refd.* *Shoreditch Vestry v. Hughes* (1864), 10 L. T. 723; *Allen v. Richardson* (1879), 13 Ch. D. 524; *Re Clayton, Smith v. Clayton*, [1920] 1 Ch. 237.

2981. ———. Houses offered for sale were stated in the particulars to be held for ninety years from June 24, 1844, at a ground rent of £21. Condition 4 provided that the title should commence "with the lease under which the vendor holds dated July 11, 1845." Condition 5 stated that "the description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendor was in fact entitled to an underlease for the residue of the term of ninety years less two days at a peppercorn rent, & the owner of the two days could not be found:—*Held*: the representation that the property was held by lease when it was in fact held by underlease was a fatal misdescription, unless it was cured by condition 5, & condition 5 did not apply, for "error in the description of the property" meant a misdescription of the corporeal property, not a mistake in the description of the vendor's title, therefore a good title was not shown.—*Re BEYFUS & MASTERS'S CONTRACT* (1888), 39 Ch. D. 110; 59 L. T. 740; 53 J. P. 293; 37 W. R. 261; 4 T. L. R. 590, C. A.

Annotations:—*Refd.* *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Lee v. Rayson*, [1917] 1 Ch. 613.

2982. ———. **Necessity for fraud or misrepresentation amounting to fraud.**—*BROWNIE v. CAMPBELL*, No. 2965, *ante*.

2983. ———. **Necessity for unfair dealing.**—*MAY v. PLATT*, No. 2459, *ante*.

2984. ———. **What amounts to completion—Whether execution of bond to secure purchase-money.**—*HITCHCOCK v. GIDDINGS*, No. 2988, *post*.

2985. ———. **Mutual mistake.**—Deft. contracted to buy from pltf. freeholds & leaseholds under the condition that he should assume that E. who died in 1841, was seised in fee of the freeholds, & should not "require the production of or investigate or make any objection in respect of the prior title" thereto. He accepted the title, & before completion contracted to sell the lands, with a farm of his own adjoining the freeholds, to a sub-purchaser, who discovered, from an inclosure award prior in date to 1841, as to the effect of which both the pltf. & deft. had been under a misapprehension, that the freeholds had never belonged to E. but at the date of the contract belonged to deft. himself in fee, subject to a leasehold interest in pltf. Deft. then refused to complete, & pltf. filed her bill for specific performance, stating that she too had discovered that part of the lands she had contracted to sell as leaseholds belonged to her in fee simple, & offering mutual waiver or compensation:—*Held*: deft. was not precluded by the condition or the accept-

ance of title from taking the objection, & the ct. could not decree specific performance; but, although there was no fraud yet, there being a common mistake, deft. was entitled to an inquiry as to the title to the freeholds at the date of the contract. *Seem*: the ct. will, even in the case of a completed contract, give relief against a common mistake without fraud.—*JONES v. CLIFFORD* (1876), 3 Ch. D. 779; 45 L. J. Ch. 809; 35 L. T. 937; 24 W. R. 979.

Annotations:—*Consd.* *Allen v. Richardson* (1879), 13 Ch. D. 524. *Distd.* *Soper v. Arnold* (1887), 37 Ch. D. 96. *Consd.* *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190. *Refd.* *Bettyes v. Maynard* (1882), 46 L. T. 766; *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273; *Scott v. Alvarez* (1896), 64 L. J. Ch. 821; *Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675; *Debenham v. Sawbridge*, [1901] 2 Ch. 98.

2986. ———. (1) A condition of sale for compensation, if any error or misstatement shall appear to have been made in the particulars of sale or these conditions," does not apply to a defect in title.

(2) On a sale by the ct. a condition provided for compensation for "any error or misstatement" in the particulars or conditions. After conveyance it was discovered that the vendor had had no title to a portion of the property. All parties had acted *bonâ fide*, with reasonable ground for believing, subject to a possible doubt in the vendor's mind, that the title was a good one:—*Held*: the purchaser could obtain neither compensation under the condition, nor rescission on the ground of common mistake.

I do not think pltf. can succeed on the ground of mutual mistake & there are other & serious difficulties in his way. I do not see how he could under any circumstances, obtain repayment of his purchase-money from deft. trustee who has not had it (BYRNE, J.).—*DEBENHAM v. SAWBRIDGE*, [1901] 2 Ch. 98; 70 L. J. Ch. 525; 84 L. T. 519; 49 W. R. 502; 17 T. L. R. 441; 45 Sol. Jo. 466.

ii. *Particular Instances.*

See, generally, MISTAKE, Vol. XXXV., pp. 102-112.

2987. Mutual mistake — Title.—*BINGHAM v. BINGHAM* (1748), 1 Ves. Sen. 126; 27 E. R. 934.

Annotations:—*Appld.* *Cochrane v. Willis* (1865), 1 Ch. App. 58. *Apprvd.* *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149.

Consd. *Jones v. Clifford* (1876), 3 Ch. D. 779. *Distd.* *Jolliffe v. Baker* (1883), 11 Q. B. D. 255. *Consd.* *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273. *Refd.* *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; *Rogers v. Ingham* (1876), 3 Ch. D. 351; *Bettyes v. Maynard* (1882), 46 L. T. 766; *Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675; *Debenham v. Sawbridge*, [1901] 2 Ch. 98. *Mentd.* *Clifton v. Cockburn* (1834), 3 My. & K. 76.

2988. ———. Where a purchaser buys the interest of a vendor in a remainder in fee, expectant on an estate tail, if, at the time of the contract the tenant in tail had actually suffered a recovery of which both parties were ignorant till after the conveyance had been executed & an absolute bond given for securing payment of the purchase-money; this ct. will interfere to rescind the contract, on the equity that the vendor had no interest in the subject-matter at the time of the sale, & that on the ground of mistake, although there has been no

29821. ———. **Necessity for fraud or misrepresentation amounting to fraud.**—Pltf. had bought from deft. 47 acres, paid for it, & taken a conveyance, but subsequently discovered that 44 acres of it were covered with water; whereupon he filed a bill charging deft. with fraud. No evidence of any fraud having been given, & it rather appearing that both parties acted in ignorance, the bill was dismissed.—*CLARK v. BURNHAM*

(1851), 2 Gt. 644.—**CAN.**

29851. ———. **Mutual mistake.**—Where, on a sale of lands, there is a mutual mistake, going not necessarily to an essential, but to a material, substantial, & important element of the contract, the ct. will ordinarily order rescission, even though the contract has been completely executed, if it can do so on equitable terms.—*DE CLERVAL v. JONES* (1908), 8 W. L. R. 300; 1 Alta. L. R. 286.—**CAN.**

b. ———. *WISSNER DRILLING Co. v. TREMBLAY* (1909), 18 O. L. R. 439; 13 O. W. R. 544, 1017.—**CAN.**

PART XI. SECT. 4, SUB-SECT. 4.—A. (b) ii.

29871. Mutual mistake — Title.—*DOMINION BANK v. MARSHALL, MARSHALL v. CANADIAN PACIFIC LUMBER Co. (B. C.)* (1922), 65 D. L. R. 461; 63 S. C. R. 352; [1922] 2 W. W. R. 266.—**CAN.**

fraud from knowledge, or concealment of the fact on the part of the vendor, & they will not only order such a bond to be delivered up to be cancelled, but that all interest paid on it shall be refunded.

The execution of a bond for securing the payment of the purchase-money is not a completion of the contract; & where fraud is made out the ct. will relieve against it.—*HITCHCOCK v. GIDDINGS* (1817), Dan. 1; 4 Price, 135; Wils. Ex. 32; 146 E. R. 418.

Annotations :—*Distd. Clare v. Lamb* (1875), L. R. 10 C. P. 334; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255. *Refd. Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675.

2989. — **Amount of ground lease.**—*MORSHEAD v. FREDERICK* (1806), Sugden's Vendors & Purchasers, 14th ed. pp. 120, 814.

Annotation :—*Distd. Griffiths v. Jones* (1873), 21 W. R. 470.

2990. — **Ground rent of leasehold property.**—*MILLS v. ODDY* (1834), 6 C. & P. 728; 172 E. R. 1438, N. P.; *subsequent proceedings* (1835), 2 Cr. M. & R. 103.

Annotation :—*Mentd. Doe d. Bowdler v. Owen* (1837), 8 C. & P. 110.

2991. — **Existence of nuisance—Tenant using property as disorderly house.**—Property sold by auction under the description of an eligible freehold property for investment, comprising a house & shop let on a quarterly tenancy, was discovered before completion to be used by the tenant as a disorderly house. Neither the vendors nor the purchaser knew previously that the house was being improperly used. The agreement of tenancy contained a covenant by the tenant not to use the house as a disorderly house, & a proviso for re-entry in case of breach of covenant :—*Held* : this was not a ground for rescission of the contract.—*HOPE v. WALTER*, [1900] 1 Ch. 257; 69 L. J. Ch. 166; 82 L. T. 30; 16 T. L. R. 160, C. A.

Annotation :—*Consd. Re Leyland & Taylor's Contract* (1900), 83 L. T. 380.

2992. — **Existence of reversionary lease.**—A tenant for life sold a public-house, portion of a settled property. After conveyance it was found that the public-house was subject to a reversionary lease granted by the predecessor in title of the tenant for life, of which all parties were ignorant :—*Held* : this did not furnish any ground for rescission.—*Re TYRELL, TYRELL v. WOODHOUSE* (1900), 82 L. T. 675; 64 J. P. 665.

Unilateral mistake—As to qualities of subject-matter.—*See MISTAKE*, Vol. XXXV., pp. 107, 108, Nos. 123, 124, 126–131.

Material facts not honestly disclosed.—*See MISTAKE*, Vol. XXXV., pp. 113, 114, Nos. 180–184.

As to qualities of subject-matter.—*See MISTAKE*, Vol. XXXV., p. 105, Nos. 110–114.

Parties not ad idem—Purchaser intending to purchase property not intended to be sold.—*See MISTAKE*, Vol. XXXV., pp. 111, 112, Nos. 159–166.

(c) *Inequality in Position of Parties.*

i. *In General.*

See, generally, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 253–283; *CONTRACT*, Vol. XII., pp. 98–112.

2993. General rule.—The ct. will set aside a contract, where there appears to have been great inadequacy of consideration, at a distance of more than seven years from the date of the deed, on proof of the inadequacy, & that the purchaser

had knowledge of the value of the subject-matter & was in the confidence of the vendor, & ought therefore to have protected her by his advice from imposition, rather than have misled her for his own advantage.—*TAYLOR v. OBEE* (1816), 3 Price, 83; 146 E. R. 198.

2994. — *—* A tenant for life, with a remainderman in tail, both in distress, join in selling the estate for an inadequate consideration :—*Held* : it could not be considered as the sale of a reversionary interest, & subject to the rules relating to sales of such interests; but the sale was invalid, on account of the inadequacy of the consideration, coupled with the distress of the vendors, & their want of advice.—*WOOD v. ABREY* (1818), 3 Madd. 417; 56 E. R. 558.

Annotations :—*Apld. Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312. *Refd. Douglas v. Culverwell* (1862), 4 De G. F. & J. 20; *Re Unsworth* (1865), 12 L. T. 49; *James v. Ker* (1889), 40 Ch. D. 449; *Barnes v. Richards* (1902), 71 L. J. K. B. 311.

2995. — *—* Conveyance by plff., an eldest son, to defts. his brothers, of his interest in an estate, for an inadequate consideration, set aside, on the ground of plff.'s ignorance of his rights, & of the absence of a full & free disclosure of all the material facts known by defts., & of plff. being under pecuniary pressure & without proper legal advice.

An estate was devised to E. S. in tail. By her marriage settlement she retained a power of appointing the fee, & by her will she appointed it to her children, excluding the eldest, otherwise provided for. No fine or recovery was levied after her death. After her death, the eldest & the four younger sons agreed to divide the estate, & the eldest agreed to sell his share to the latter, & he accordingly conveyed all his interest. The conveyance was set aside on the grounds above mentioned.—*STURGE v. STURGE* (1849), 12 Beav. 229; 19 L. J. Ch. 17; 14 Jur. 159; 50 E. R. 1049.

2996. — *—* When a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, equity will require the father to be able to show that the son was really a free agent, & had adequate & independent advice.—*SAVERY v. KING* (1856), 5 H. L. Cas. 627; 25 L. J. Ch. 482; 27 L. T. O. S. 115; 2 Jur. N. S. 593; 1 W. R. 571; 10 E. R. 1016, H. L.

Annotations :—*Refd. Barnard v. Hunter* (1856), 28 L. T. O. S. 152; *Turner v. Collins* (1871), 7 Ch. App. 334, n.; *Pisani v. A.-G. for Gibraltar* (1874), L. R. 5 P. C. 516; *Alford v. Skinner* (1887), 36 Ch. D. 115; *Hoblyn v. Hoblyn* (1889), 60 L. T. 499; *De Witte v. Addison* (1899), 80 L. T. 207; *Moody v. Cox & Hatt* (1917), 116 L. T. 710.

2997. — *—* A. being under the impression that he was the absolute owner of an estate which he had not seen for twenty years, sold it to his agent for an annuity of £40 for the joint lives of himself & his wife & the life of the survivor of them. The estate was at the time settled on his wife for her separate use for life, A. being entitled only to the reversion in fee expectant on his wife's decease. The interest of the wife was wholly overlooked, both by herself & her husband. The husband pressed the sale forward, & being a solr. himself prepared the deeds, & was most anxious for the completion of the purchase. He died within a year after it was completed, having devised all his property to his wife. The consideration was grossly inadequate, the net yearly rental of the property being nearly £40. Upon a bill by the wife to obtain a re-conveyance of the

PART XI. SECT. 4, SUB-SECT. 4.—A. (o) i.

2993 i. General rule.—In order to have a valid contract or conveyance of property, there must be a reasonable degree of equity between the contracting parties.—*BARKER v. BARKER* (Sask.), [1919] 2 W. W. R. 735.—CAN.

Sect. 4.—Remedies of parties: Sub-sect. 4, A. (c) i. & ii., (d), & B.]

estate:—*Held*: the sale could not be supported; the agent residing on the spot & knowing the value of the estate, which the vendor did not; & although, assuming the annuity to be an adequate consideration for the reversion, the purchaser might keep the reversion on paying the consideration stipulated to be paid for the estate in possession, he was not entitled to retain his purchase either with an abatement from the consideration or at a value to be fixed by the ct.; & *pltf.* was entitled to a re-conveyance of the estate; & also to the costs of the suit.—*DALLY v. WONHAM* (1863), 33 Beav. 154; 32 L. J. Ch. 790; 9 L. T. 75; 9 Jur. N. S. 980; 11 W. R. 1090; 55 E. R. 326.

2998. —.—]—Wherever the mutual relation between two persons is such that confidence is necessarily reposed by one in the other, & the party in whom that confidence was reposed abuses it in order to obtain an advantage at the expense of the other party, he will not be permitted to retain that advantage, though, but for the confidential relation, the transaction could not have been impeached.

Semble : where, in such a case, an agreement for purchase was entered into, certain material information having been concealed from the vendor, the representatives of the latter have a right to rescission irrespective of the consideration of actual inadequacy in the price.—*TATE v. WILLIAMSON* (1866), 2 Ch. App. 55; 15 L. T. 549; 15 W. R. 321, 1 L. C.

Annotations:—*Aplid.* Moody v. Cox & Hatt, [1917] 2 Ch. 71.
Reid. Baker v. Loader (1872), L. R. 16 Eq. 49; Plowright
v. Lambert (1885), 52 L. T. 646; Silkstone & Haigh Moor
Coal Co. v. Edey, [1900] 1 Ch. 167.

2999. — —,]— Pltf. contracted to purchase from H. & C., who were trustees, a portion of their trust property. H. was a solr. & C. was his managing clerk. Throughout the transaction H. acted, through C., as solr. both for vendors & purchaser. C. failed to disclose to pltf. certain valuations previously obtained showing that the property was not worth the price which pltf. agreed to pay. Pltf. knew that the vendors were trustees. In the course of the negotiations pltf. offered & C. accepted a bribe. In an action by pltf. for rescission of the contract defts. counter-claimed for specific performance:—*Held*: H., as pltf.'s solr., was bound to disclose to him all material facts relating to the matter, & he was not relieved of that obligation by the fact that he owed a conflicting duty to his *cestui que trust*. By the claim for specific performance the contract, which might have been repudiated on the ground of the bribe, was affirmed, & pltf. was not therefore deprived of his equitable right to rescission on the independent ground of the non-disclosure by his solr. of material facts.—*MOODY v. COX & HATT*, [1917] 2 Ch. 71; 86 L. J. Ch. 424; 116 L. T. 740; 61 Sol. Jo. 398, C. A.

ii. *Particular Instances.*

See FRAUDULENT & VOIDABLE CONVEYANCES,
Vol. XXV., pp. 253-283.

Conveyances by lunatics.—*See* LUNATICS, Vol. XXXIII., p. 136, Nos. 127-130.

Purchase by co-partner—Necessity for full disclosure by vendor.] — See PARTNERSHIP, Vol. XXXVI., p. 466, No. 1293.

Purchase by executors.—*See* EXECUTORS, Vol. XXIV., pp. 567, 568, 689, Nos. 6055-6058, 7151-7156.

—See EXECUTORS, Vol. XXIV., p. 568, No. 6060.

Purchase by solicitor from client.] — See
SOLICITORS.

Purchase by trustees.]—*See* TRUSTS & TRUSTEES.
See, also, FRIENDLY SOCIETIES, Vol. XXV.,
 p. 318, No. 209, & compare MORTGAGE, Vol.
 XXXV., pp. 499-502, Nos. 2300-2330.

(d) *Adequacy of Purchase Price.*

3000. Whether ground for rescission.] —
PICKETT v. LOGGON, No. 2442, *ante*.

3001. ——. —WOOD v. ABREY, No. 2994, *ante*.

3002. —. — A private sale of a reversionary interest will not be set aside for mere inadequacy of price, as compared with arithmetical value determined by the calculation of an actuary, exclusive of every other circumstance: the latter value not being possible to be obtained in fact.

Therefore, where the value of a reversionary interest was calculated by M. at £928 8s., & the price paid was £630, which was more than two-thirds of the former, & as large a price as could be procured at the time; & there was no undue practice whatever imputable to the purchaser; a bill to set aside the sale was dismissed with costs.—

HEADEN *v.* ROSHER (1824), M'Cle. & Yo. 89; 148 E. R. 337.

Annotations.—**Distd.** Portmore *v.* Taylor (1831), 4 Sim. 182; Meller *v.* Hall, Hall *v.* Meller (1832), 1 L. J. Ch. 219; Newton *v.* Hunt (1833), 5 Sim. 511. **Refd.** Potts *v.* Curtis, Potts *v.* Lawrence (1832), You. 513; Aldborough *v.* Trye (1840), 7 Cl. & Fin. 436.

3003. —.]—A sale by an heir apparent of interests in possession & in reversion set aside, the consideration being inadequate, & advantage having been taken of the vendor's embarrassments.—**PORTMORE (EARL) v. TAYLOR** (1831), 4 Sim. 182; 9 L. J. O. S. Ch. 203; 58 E. R. 69; *affd.* (1832), 4 Sim. 216, n., L. C.

Annotations.—**Distd. King** v. Hamlet (1835), 9 Bll. N. S. 575. **Refd.** Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley (1859), 26 Beav. 614; Webster v. Cook (1867), 36 L. J. Ch. 753; Fry v. Lane, *Re* Fry, Whittet v. Bush (1888), 40 Ch. D. 312.

3004. ———. — *Boothby v. Boothby* (1849), 1 Mac. & G. 604; 2 H. & Tw. 214; 47 E. R. 1661, L. C.; *subsequent proceedings* (1852), 15 Beav. 212.

Annotations:—*Reid*. *Talbot v. Stanforth* (1861), 1 John. & H. 484; *Fry v. Lane*, *Re Fry*, *Whittell v. Bush* (1888), 40 Ch. D. 312.

3004a. ———.]—In consideration of a case of alleged fraud in the purchase of an estate it is material to inquire what relation the purchase-money paid bore to the value of the estate (LORD WESTBURY).—**SREEMANCHUNDER DEY v. GOPAULCHUNDER CHUCKERBUTTY** (1866), 11 Moo. Ind. App. 28; 20 E. R. 11, P. C.

Annotations:—*Mentid. Moonseeh Buzloor Ruheem v. Shumsoonnissa Begum Jodonath Bose v. Shumsoonnissa Begum* (1867), 11 Moo. Ind. App. 551; *Faez Buksh Chowdry v. Fukeeroodeen Mahomed Ahassunchowdry* (1871), 14 Moo. Ind. App. 234.

3005. —.]—DAILY v. WONHAM, No. 2997,
ante.

3000 iv. —.]—GURUSAMI v. SUBBA-
RAYA (1888), I. L. R. 12 Mad. 118.—
IND.

3000 v. —.]—MAHABIR PERSHAD SINGH v. DHANUKDHARI SINGH (1904), I. L. R. 31 Cal. 815.—IND.

PART XI. SECT. 4, SUB-SECT. 4.—
A. (d).

3000 i. *Whether ground for rescission.* — **DUFRESNE v. DUFRESNE** (1886), 10 O. R. 773. — **CAN.**

3000 li. ———.]—KOLP v. HUNTER

(Sask.) (1911), 19 W. L. R. 709.—
CAN.

3000 iii. —.]—GLADU & BLAIR v.
EDMONTON LAND Co. (1914), 29
W. L. R. 685; 7 W. W. R. 279; 8
Alta. L. R. 80; 19 D. L. R. 688.—
CAN.

3006. —[—Where a purchase is made from a poor & ignorant man at a considerable under-value the vendor having no independent advice a ct. of equity will set aside the transaction. This will be done even in the case of property in possession & *a fortiori* if the interest be reversionary. The circumstances of poverty & ignorance of the vendor & absence of independent advice throw upon the purchaser, when the transaction is impeached, the *onus* of proving that the purchase was fair, just, & reasonable.—*FRY v. LANE, Re FRY, WHITTET v. BUSH* (1888), 40 Ch. D. 312; 58 L. J. Ch. 113; 60 L. T. 12; 37 W. R. 135; 5 T. L. R. 45.

3007. —[—**Necessity for fraud.**—]*HOBERT v. HOBERT* (1683), 2 Cas. in Ch. 159; 22 E. R. 893.

3008. —[—**Inadequacy of value is not in itself sufficient to set aside a contract.**—]*GRIFFITH v. SPIATLEY* (1787), 1 Cox, Eq. Cas. 383; 29 E. R. 1213.

Annotations: **Distd.** *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77. **Consd.** *Copis v. Middleton* (1817), 2 Madd. 410.

3009. —[—Where a written agreement is entered into for the purchase of an estate at a price far beyond its value but without any circumstances of fraud or surprise the ct. will not decree a specific performance of such a contract, but, on the other hand, will not rescind it.—*DAY v. NEWMAN* (1788), 2 Cox, Eq. Cas. 77; 30 E. R. 36.

Annotations: **Apld.** *Faleke v. Gray* (1859), 4 Drew. 651. **Refd.** *Bower v. Cooper* (1813), 2 Hare, 408; *Hoddel v. Pugh* (1864), 10 Jur. N. S. 534. **Mentd.** *Dodd v. Lydall, Lydall v. Dodd* (1842), 1 Hare, 333.

3010. —[—**Inadequacy of price alone is not sufficient to set aside a contract or deed.**—]

Where, therefore, in a suit instituted to set aside a contract for the purchase of an estate, although great inadequacy of price was proved, yet, as the allegations of misrepresentation & fraud were not sufficiently established, the House refused to disturb the judgment of the Ct. of Ch. dismissing the complainant's bill in that Ct., & dismissed the appeal.—*CURSON v. BELWORTHY* (1852), 3 H. L. Cas. 742; 19 L. T. O. S. 233; 10 E. R. 294, H. L.; *affg. S. C. sub nom. CURSON v. BELLWORTHY*, 10 L. T. O. S. 125, L. C.

Annotation: **Refd.** *Douglas v. Culverwell* (1862), 1 De F. & J. 20.

[—**See MORTGAGE, Vol. XXV., pp. 373, 508–509, Nos. 1160–1162, 2400–2408; CONTRACT, Vol. XII., p. 205, Nos. 1644–1652; EXECUTION, Vol. XXI., p. 577, No. 1527; FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., p. 202, No. 401.**—]

Unconscionable bargains generally.—*See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 266–279.*

B. Parties.

3011. Who may enforce right of rescission—Devisee of vendor.—*Pltf.* claimed as heir-at-law of A., who, as the bill alleged, when in very embarrassed circumstances, had executed a voidable conveyance to his solr. The bill after stating a pretence on the part of defts., who claimed under the solr., that A. had confirmed the conveyance by his will, charged that he had died intestate as to the premises in question, & prayed that the conveyance & any testamentary disposition by him in confirmation thereof might be declared null & void. Plea, that A. by will, after reciting

the probability of the conveyance being disputed, had ratified & confirmed it, allowed.

Assuming that the conveyance was voidable, the interest which remained in A. after its execution was not a right of entry under the old law, but an equitable estate which was clearly devisable.—*STUMP v. GABY* (1852), 2 De G. M. & G. 623; 22 L. J. Ch. 352; 20 L. T. O. S. 213; 17 Jur. 5; 1 W. R. 85; 42 E. R. 1015, L. C.

Annotations: **Consd.** *Gresley v. Mousley* (1859), 4 De G. & J. 78. **Refd.** *Waters v. Thorn* (1856), 22 Beav. 547. **Mentd.** *Hindson v. Weatherill* (1854), 5 De G. M. & G. 301.

3012. —[—The right to set aside a voidable sale of real estate is not analogous to a right of entry at law, but is an equitable estate, which is devisable.—]*GRESLEY v. MOUSLEY* (1859), 4 De G. & J. 78; 28 L. J. Ch. 620; 33 L. T. O. S. 154; 5 Jur. N. S. 583; 7 W. R. 427; 45 E. R. 31, L. J.J.; *subsequent proceedings* (1862), 3 De G. F. & J. 433, L. J.J.

Annotations: **Distd.** *Turner v. Turner, Hall v. Turner* (1880), 28 W. R. 859. **Refd.** *Clamricarde v. Henning* (1861), 30 Beav. 175. **Mentd.** *Lyddon v. Moss* (1859), 1 De G. & J. 104.

3013. Against whom right of rescission may be enforced—Personal representatives of vendor.—*TREVELYAN v. WHITE, No. 3028, post.*

3014. —**Personal representatives of vendor's agent.**—A. was the solr. & land agent of B., who was desirous of selling an estate, & in a letter to A. expressed his readiness to sell it for 13,000 guineas. The estate consisted of two portions, & a land valuer, whose valuation was not shown to have been communicated by A. to B., put upon the two portions separate values which, added together, exceeded the 13,000 guineas. A. sold part of the estate to C. for a sum exceeding the valuer's estimate of that portion, & then purchased the other portion for a sum much less than that stated in the estimate, but which added to C.'s purchase-money, just made up to 13,000 guineas. A. pretended that the latter purchase was made by one of his relatives, & the conveyance from B. was executed to that relative, but immediately afterwards a conveyance was executed from the relative to A., & in that conveyance was a recital that the purchase-money was furnished by A. These facts were not discovered till thirty-seven years afterwards, & then B. filed his bill against the representatives of A., who had died seventeen years before, to set aside the latter conveyances, & to have an account:—*Held:* (1) the circumstances of the transaction were of a fraudulent nature, & therefore furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached; (2) the bill was sustainable, though disputes which had arisen between A. & B., as to their mutual accounts, had been referred in A.'s lifetime to a barrister, who was empowered to inquire into all matters of difference between them; & who, after awarding the payment of a certain sum by A. to B., had directed the execution of mutual releases of all matters in difference; & such releases had been executed.—*CHARTER v. TREVELYAN* (1844), 11 Cl. & Fin. 711; 8 Jur. 1015; 8 E. R. 1273, H. L.; *affg. S. C. sub nom. TREVELYAN v. CHARTER* (1835), 4 L. J. Ch. 209.

Annotations: **As to** (1) **Consd.** *Manby v. Bowlecke* (1857), 3 K. & J. 312; *Clamricarde v. Henning* (1861), 5 L. T. 168. **Refd.** *Vane v. Vane* (1873), 28 L. T. 320.

PART XI. SECT. 4, SUB-SECT. 4.—B.

c. Against whom right of rescission may be enforced—Assignee of purchaser.—*SOUTHWELL v. WILLIAMS & SCHANK* (1912), 21 W. L. R. 771; 2

30071. —**Necessity for fraud.**—When property is sold in execution of a decree fraudulently obtained, mere inadequacy of price, apart from participation in or knowledge of the

fraud, is not in itself a circumstance sufficient to justify the setting aside of the sale.—*CHITAMBAR SHRINIVAS BHAT v. KRISHNAPPA* (1902), 1 L. R. 26 Bom. 543.—**IND.**

Sect. 1.—Remedies of parties: Sub-sect. 1, C., D., E. & F.]

C. Extent of Rescission.

See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., p. 72, Nos. 697-704.

D. Ancillary Rights of Purchaser.

See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 73, 74, Nos. 708-720.

3015. Repayment of costs & expenses.]—FITZ-JAMES v. HIRSLEY (1590), Toth. 43 ; 21 E. R. 118.

3016. ----.]—EDWARDS v. M'LEAY, No. 2968, *ante*.

3017. —. — A contract rescinded on the ground of subsequent misconduct by the vendor & his solr. towards the purchaser.

The bill prayed that a contract for purchase might be rescinded, & for the repayment of the purchase-money, "with the costs, charges & expenses incident to the purchase":—*Held*: the auction duty was comprised in this prayer: & the contract being rescinded, the ct. ordered a direction to be inserted in the decree for its repayment by the vendor.—*BERRY v. ARMISTEAD* (1836), 2 Keen, 221; *Donnelly*, 63; 5 L. J. Ch. 370; 48 E. R. 613.

3018. —[A vendor sold land as freehold, received the purchase-money & conveyed the land as freehold. Afterwards the purchaser for the first time discovered that the property was really copyhold. The vendor alleged that he made the representation believing it to be true:—*Held*: assuming that he had made the representation *bonâ fide* the vendor had committed a legal fraud, the sale must be set aside & the purchase-money repaid with interest; & the vendor must pay all the expenses which the purchaser had incurred in consequence of the purchase.—*HART v. SWAINE* (1877), 7 Ch. D. 42; 17 L. J. Ch. 5; 37 L. T. 376; 26 W. R. 30.

Innovations:—**Consd.** Joliffe v. Baker (1883), 11 Q. B. 10.
255; Nash v. Wooderson (1884), 52 L. T. 49. **Distd.**
Soper v. Arnold (1887), 37 Ch. D. 96. **Refd.** Manson v.
Thacker (1878), 7 Ch. D. 620; Brett v. Clowser (1880), 5
C. P. D. 376; Brownlie v. Campbell (1880), 5 App. Cas.
925; Mathias v. Yetts (1882), 46 L. T. 497; Palmer v.
Johnson (1884), 13 Q. B. D. 351; Lagunas Nitrate Co. v.
Lagunas Syndicate, [1899] 2 Ch. 392.

3019. Repayment of purchase-money.] — EDWARDS v. M'LEAY, No. 2968, ante.

3020. —.]—BERRY v. ARMISTEAD, No. 3017, ante.

3021. — . — ADDIS v. CAMPBELL, No. 3014,
post.

3022. — With interest.]—HART v. SWAINE,
No. 3018, *ante*.

3023. Delivery up of deeds for cancellation.]—
BERRY v. ARMISTEAD, No. 3017, ante.

E. Accounts against Purchaser.

3024. What purchaser may be charged with—
Deterioration.]—*Ex p.* BENNETT (1805), 10 Ves.
381; 32 E. R. 893.

Annotations:—*Reid*, Sanderson v. Walker (1807), 13 Ves. 601. *Mentd*, Re Grundy, *Ex p.* Badcock (1829), Mont. & M. 231; *Re Grundy*, *Ex p.* Grylls, *Ex p.* Batten (1832), 2 Deac. & Ch. 290; *Re Brettell*, *Ex p.* Goren (1838), 7 L. J. Ch. 187; *Greenlaw v. King* (1840), 4 Jur. 622; *Hesse v. Briant* (1856), 6 De G. M. & G. 623; *Delves v. Delves* (1875), L. R. 20 Eq. 77; *Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co.*, [1914] 2 Ch. 488.

3025. — Rents which without wilful default

W. W. R. 697; 17 B. C. R. 209; 4 26 Gr. 42.—CAN.
D. L. R. 1.—CAN.

PART XI. SECT. 4, SUB-SECT. 4.—D.
d. Improvements.] — **McLAREN v.**
FRASER (1870), 17 Gr. 567.—CAN.

e. ———.]—ASTON v. INNIS (1878).

might have been received.]—The account of rents given against a purchaser for value, who, after being in possession, is evicted by a party having a better title, ought not to extend to such rents, as, without his default or neglect, might have been received, if no special case of fraud is made against him.—*Howell v. Howell* (1837), 2 My. & Cr. 478; 1 Jur. 492; 40 E. R. 722.

3026. — — — — —.]—A., a solr., purchased an estate from his client & took possession thereof; the sale was set aside:—*Held*: A. was chargeable with the rents which, without wilful default, he might have received although no special charge of wilful default was made by the bill.—*ADAMS v. SWORDER* (1864), 2 De G. J. & Sm. 44; 3 New Rep. 623; 33 L. J. Ch. 318; 10 L. T. 49; 10 Jur. N. S. 223; 12 W. R. 615, L. JJ.

Annotation :—**Refd.** *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500.

3027. — Occupation rent.]—A purchase being set aside for fraud, & the purchaser decreed to pay an occupation rent, receiving back his purchase-money with interest, there being a considerable excess of the rent above the interest, annual rests directed to be made in the accounts, until the excess of the rent should liquidate the principal.—**DONOVAN v. FRICKER** (1821), Jac. 165; 37 E. R. 813.

Annotation :—**Refd.** *Neesom v. Clarkson* (1815), 4 Hare, 97.

3028. — Rents & profits.—A decree was made against A. B., setting aside, as fraudulent, a purchase by an agent from his principal; & a reconveyance, & the usual accounts of rents & purchase-money were directed, in which an allowance was to be made for substantial repairs & lasting improvements. A. B. sold & conveyed part of the property, *pendente lite*, & died before the accounts were completed; a supplemental bill was filed against the purchasers & the heir & personal representatives of A. B.; the bill charged that the purchasers, in case of eviction, claimed compensation out of the estate of A. B. The conveyances, *pendente lite*, being set aside:—*Held*: the purchasers were entitled in this suit, as against their co-defts., the personal representatives of A. B., to an order for the repayment of their purchase-money, & were entitled as against plff. to an allowance for substantial repairs & lasting improvements, but no greater relief could be given them in this suit; the heir & personal representatives were proper parties to the supplemental bill.—**TREVELYAN v. WHITE** (1839), 1 Beav. 588; 48 E. R. 1069.

3029. What purchaser may be allowed—Costs of repairs & improvements—Though not substantial or lasting.]—*Ex p.* BENNETT (1805), 10 Ves. 381; 32 E. R. 893, L. C.

Annotations:—Reid, Sanderson v. Walker (1807), 13 Ves. 601. *Mentid*, Re Grundy, *Ex p.* Badcock (1829), Mont. & M. 231; *Re Grundy, Ex p.* Grylls, *Ex p.* Batten (1832), 2 Deac. & Ch. 290; *Re Brettell, Ex p.* Goren (1838), 7 L. J. Ch. 187; Greenlaw v. King (1843), 4 Jur. 622; Hesse v. Briant (1856), 6 De G. M. & G. 233; Delves v. Delves (1871), 11 Q.B. 291. *Transvaal Land Development Co.* v. Belgium (Transvaal) Land & Development Co., [1914] 2 Ch. 488.

3030. — Costs of lasting improvements—Valuation of old buildings pulled down & incapable of repair.]—In estimating lasting improvements, old buildings pulled down, if incapable of repair, to be valued as old materials only.—*ROBINSON v. RIDLEY* (1821), 6 Madd. 2 : 56 E. R. 988.

with — Deterioration.] — SHANAGAN v. SHANAGAN (1884), 7 O. R. 209.—CAN.

3027 i. — Occupation rent.] —
HAGERMAN v. SIDDALL & JOHNSON
 (Sask.), [1924] 2 D. L. R. 755.—
CAN.

3031. ———.—.]—TREVELYAN v. WHITE, No. 3028, *ante*.

3032. ———.—.]—A purchaser who has laid out money in *bond fide* improvements on lands purchased by him upon a sale which was invalid but not actually fraudulent, is entitled to an allowance for sums so expended by him. Therefore, where a railway co., authorised to purchase from tenants for life lands for the purposes of building warehouses, etc., & to resell such portions of the land as should not be required for that purpose, treated with A., the tenant for life for the time being, for the purchase of certain settled estates, & before the sale was completed, contracted, with A.'s knowledge, to resell part of the same land to B. & C., upon an understanding, which was carried into effect, that B. & C. should put up certain buildings & improvements thereon; & a new tenant for life & the remainderman filed a bill to set aside the sale:—*Held*: the sale must be set aside, but, in the absence of fraud, B. & C. were entitled to the repayment of the sums so expended in improvements, with interest at 5 per cent. from the death of the last tenant for life.—*STEPNEY v. BIDDULPH* (1865), 5 New Rep. 505; 12 L. T. 176; 13 W. R. 576.

Annotation:—*Refd.* Vyse v. Foster (1872), 27 L. T. 771.

3033. ———.—.]—HAYGARTH v. WEARING (1871), L. R. 12 Eq. 320; 40 L. J. Ch. 577; 24 L. T. 825; 36 J. P. 132; 20 W. R. 11.

Annotation:—*Refd.* Fry v. Lane, *Re* Fry, Whittet v. Bush (1888), 40 Ch. D. 312.

Accounts with rests.—*See* MORTGAGE, Vol. XXXV., pp. 651–655.

F. Defences.

See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 74–78, Nos. 726–762.

3034. What constitutes defence.—Representee's knowledge of truth.—In a case depending on alleged misrepresentation of value there cannot be a more effectual bar to pltf. than by showing that he was from the beginning cognisant of all the matters complained of, or after full information of them continued to deal with the property.—*VIGERS v. PIKE* (1842), 8 Cl. & Fin. 562; 8 E. R. 220, 11 L. L.

Annotation:—*Refd.* Erlanger v. New Sombbrero Phosphate Co. (1878), 3 App. Cas. 1218.

3035. ———.—.]—It is not now necessary, in order to set aside a contract, to prove that the person who obtained it, by material false representation, knew at the time the representation was made that it was false, or even made it recklessly & without care.

Pltf., a solr., published in the *Law Times* an advertisement headed "Law Partnership," stating that the advertiser, an elderly solr. of moderate practice, with extensive connections, shortly retiring, & having no successor, would first take as partner an efficient lawyer who would not object to purchase the advertiser's suburban residence, value £1,600. Deft. answered the advertisement, & had an interview with pltf., at which the latter stated that his business brought in about £300 a year. Deft. wrote saying that he should like to have some idea of the amount of business done for the last three years, & asking an interview for the purpose. At this interview pltf. produced three summaries showing a business of not quite £200 a year. Deft. asked how the

difference was made up, & pltf. showed him a number of papers which he said related to other business not included in the summaries. These papers, which deft. did not examine, showed only a most trifling amount of business, & the gross returns of the business were in fact only about £200 a year. Deft. shortly afterwards signed an agreement to purchase the house for £1,600, & paid a deposit, pltf. refusing to have any reference to the business inserted in the agreement. Deft. took possession, but finding, as he alleged, that the business was worthless, refused to complete. Pltf. brought his action for specific performance. Deft. put in a defence, in which he disputed the right to specific performance on the ground of misrepresentations as to the business, & by counterclaim claimed on the same ground to have the contract rescinded, & to have damages on the ground of the expenses he had been put to & the loss incurred by giving up his own practice. He did not in his counterclaim specifically state what representations had been made, nor allege that they were false to pltf.'s knowledge:—*Held*: (1) where one person induces another to enter into an agreement with him by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made had the means of discovering, & might with reasonable diligence have discovered, that it was untrue; (2) it is no defence in such an action that deft. made a cursory & incomplete inquiry into the facts, for if a material representation is made to him he must be taken to have entered into the contract on the faith of it: & in order to take away his right to have the contract rescinded if it is untrue, it must be shown either that he had knowledge of facts which showed it to be untrue, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation; therefore deft. was entitled to have the contract rescinded & the deposit returned, but as he had not pleaded knowledge on the part of pltf. that the statements as to the business were untrue, & had not specifically alleged the statements in his counterclaim, he could not recover damages.—*REDGRAVE v. HURD* (1881), 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251, C. A.

Annotations:—As to (2) *Consd.* Roots v. Snelling (1883), 18 L. T. 216; Smith v. Land & House Property Corp. (1881), 28 Ch. D. 7. *Refd.* Mahbas v. Yeats (1882), 16 L. T. 497; Whittington v. Scale-Hayne (1900), 82 L. T. 19. *Generally*, *Mentd.* Mullens v. Miller (1882), 31 W. R. 559; Smith v. Chadwick (1884), 9 App. Cas. 187; Hughes v. Twissden (1886), 55 L. J. Ch. 481; Newbigging v. Adam (1886), 34 Ch. D. 582; Karberg's Case, [1892] 3 Ch. 1; *Re* Liberian Government Concessions & Exploration Co. (1892), 9 T. L. R. 136; Aaron's Reefs v. Twiss, [1896] A. C. 273; Davis v. Ohry (1898), 14 T. L. R. 260; *Re* Law, Law v. Law (1904), 74 L. J. Ch. 169; Morino v. Mutual Reserve Life Insce. (1904), 21 T. L. R. 167; Nash v. Caltaorpe, [1905] 2 Ch. 237; Mair v. Rio Grande Rubber Estates, [1913] A. C. 853; Wells v. [1914] 3 K. B. 722; Armstrong v. Jackson, [1917] 2 K. B. 822; Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; Compagnie Chemin De Fer Paris-Orleans v. Leeston Shipping Co. (1919), 36 T. L. R. 68; Dawsons v. Bonnin, [1922] 2 A. C. 113.

3036. ———.— **Onus of proof.**—*LINDSAY PETROLEUM CO. v. HURD*, No. 2972, *ante*.

3037. ———.— **Inquiry by representee.**—*ATTWOOD v. SMALL*, No. 2964, *ante*.

3038. ———.— **Inquiry by agent.**—If the purchaser had at once taken the objection as to the

PART XI. SECT. 4, SUB-SECT. 4.—F.

3034 i. What constitutes defence.—Representee's knowledge of truth.—Knowledge on part of purchaser of the fact that vendor's chain of title was made

through a number of agreements for sale, & that he could not obtain title until each agreement holder had paid out his vendor & until the title holder was paid out, is no defence to an action

for rescission.—*SHIER v. HACKETT* (1915), 31 W. L. R. 757.—*CAN.*

3037 i. ———.— **Inquiry by representee.**—*HANNAH v. GRAHAM* (1908), 17 Man. L. R. 532.—*CAN.*

Secl. 4.—Remedies of parties: Sub-sect. 4, F. & G.] misdescription of this house as being in Pall Mall he would have been entitled to avoid the contract on that ground. But he did not do so, he proceeded to investigate the title & his solr. examined the title deeds, in a part of that very building which was the subject of the contract, & I think it is now too late for him to ask the ct. to rescind the contract on that ground (WOOD, V.-C.).—*STANTON v. TATTERSALL* (1853), 1 Sm. & G. 529; 1 Eq. Rep. 543; 21 L. T. O. S. 333; 17 Jur. 967 1 W. R. 502; 65 E. R. 231.

Annotation:—Consd. Torrance v. Bolton (1872), L. R. 14 Eq. 121.

3039. ——— *Cursory & incomplete inquiry.]*

—*REDGRAVE v. HURD*, No. 3035, *ante*.

3040. ——— *Impossibility of restitution in integrum.]*—It is, I think, clear on principles of general justice, that as a condition to a rescission there must be *restitutio in integrum*. The parties must be put *in statu quo* (LORD BLACKBURN).—*ERLANGER v. NEW SOMBRERO PHOSPHATE CO.* (1878), 3 App. Cas. 1218; 39 L. T. 269; 27 W. R. 65; *sub nom.* NEW SOMBRERO PHOSPHATE CO. v. *ERLANGER*, 48 L. J. Ch. 73, H. L.; *affg.* S. C. *sub nom.* NEW SOMBRERO PHOSPHATE CO. v. *ERLANGER* (1877), 5 Ch. D. 73, C. A.

Annotations:—Consd. Re Olympia, [1898] 2 Ch. 153. *Distd.* LAGUNAS NITRATE CO. v. LAGUNAS SYNDICATE, [1899] 2 Ch. 392. *Refd.* Bagnall v. Carlton (1877), 6 Ch. D. 371; Emma Silver Mining Co. v. Grant (1879), 11 Ch. D. 918; *Re* Pepperell, Pepperell v. Chamberlain (1879), 27 W. R. 410; *Re* Ambrose Lake Tin & Copper Mining Co., *Ex p.* Moss, *Ex p.* Taylor (1880), 49 L. J. Ch. 457; *Re* Cape Breton Co. (1885), 29 Ch. D. 795; Ladywell Mining Co. v. Brookes, Ladywell Mining Co. v. Huggons (1887), 35 Ch. D. 400; *Re* Gallard, *Ex p.* Gallard, [1897] 2 Q. B. 8; *Re* Rochefoucauld v. Boustead, [1897] 1 Ch. 196; Salomon v. Salomon, Salomon v. Salomon, [1897] A. C. 22; Gluckstein v. Barnes, [1900] A. C. 240; *Re* Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582; Burland v. Earle, [1902] A. C. 83; *Re* Leeds & Hanley Theatres of Varieties, [1902] 2 Ch. 809; A.-G. for Canada v. Standard Trust Co. of New York, [1911] A. C. 198; Onnum Electric Palaces v. Buines, [1911] 1 Ch. 332; Jubilee Cotton Mills v. Lewis, [1924] A. C. 958; Anchor Trust Co. v. Bell, [1926] Ch. 805. *Mentd.* Craig v. Phillips (1877), 7 Ch. D. 219; Phosphate Sewage Co. v. Hartmont (1877), 25 W. R. 743; Twycross v. Grant (1877), 2 C. P. D. 469; *Re* Rica Gold Washing Co. (1879), 27 W. R. 715; *Re* British Seamless Paper Box Co. (1881), 17 Ch. D. 467; *Re* Scottish Petroleum Co. (1881), 29 W. R. 372; *Re* Incorporated Law Soc. & Four Solicitors (1891), 7 T. L. R. 672; *Re* Sharpe, *Re* Bennett, Masonic & General Life Assoc. v. Sharpe, [1892] 1 Ch. 154; Larocque v. Beauchemin, [1897] A. C. 358; The Birnam Wood, [1907] P. 1; United Shoe Machinery Co. of Canada v. Brunel, [1909] A. C. 330; Armstrong v. Jackson, [1917] 2 K. B. 822; Hulton v. Hulton, [1917] 1 K. B. 813.

3041. ——— *Deterioration subject of compensation.]*—The L. co. was promoted & formed by the directors of the L. syndicate for the purpose of purchasing part of the property of the syndicate, consisting of nitrate works. The directors of the syndicate prepared & signed the memorandum & arts. of assocn. of the co., the arts. nominating them as directors & stating specifically that they were also the directors of the syndicate. They also prepared the co.'s prospectus & purchase contract, & affixed the seals of the syndicate & of the co. to the latter. The co.'s solrs. & secretary were also the same as those of the syndicate. Two years after the date of the contract & the completion of

the purchase the shareholders of the co., believing that their property had been purchased at an overvalue & that there had been misrepresentations in the contract & prospectus, appointed an independent board of directors who, after investigating the facts & with the sanction of a general meeting of the shareholders, brought an action against the syndicate & the directors for rescission of the contract & damages on the ground of misrepresentation, misfeasance, breach of trust, & concealment of material facts, but not alleging fraud. From the date of the contract & down to & also since the commencement of the action the co. had, first by its original directors & afterwards by its independent board, carried on business & worked the property the subject of the contract:—*Held*: the co. was not entitled to rescission or damages, for (a) at the date of the contract the co. had, by its memorandum & arts., notice that its directors were also the vendors or agents of the vendor syndicate, & the mere fact that its directors did not constitute an independent board was not a sufficient ground for setting aside the contract; (b) there had been no misrepresentation made to, or any material fact concealed from, any of the persons who were members of the co. at the date of the contract, those persons being the directors themselves; (c) although the contract & prospectus were, on the evidence, misleading in certain particulars which would have entitled the co. at the time to repudiate the contract, yet through the subsequent alteration of the property consequent on its being worked by the co., the position of the parties had been so changed that they could not be restored to their original position; & (d) defts., the directors, had not been guilty of such negligence or breach of trust as to render them liable in damages in law for the loss occasioned to the co., or in equity to make good the loss.—*LAGUNAS NITRATE CO. v. LAGUNAS SYNDICATE*, [1899] 2 Ch. 392; 68 L. J. Ch. 699; 81 L. T. 334; 48 W. R. 74; 15 T. L. R. 436; 43 Sol. Jo. 622; 7 Mans. 165, C. A.

Annotations:—Mentd. Re National Bank of Wales, [1899] 2 Ch. 629; Merchants' Fire Office v. Armstrong (1901), 17 T. L. R. 709; Exploring Land & Minerals Co. v. Kolek-mann (1905), 94 L. T. 234; Ammonia Soda Co. v. Chamberlain, [1918] 1 Ch. 266; Piercy v. Mills, [1920] 1 Ch. 77; *Re* City Equitable Fire Insce., [1925] Ch. 107.

— — — — — *See COMPANIES*, Vol. IX., pp. 355, 356, No. 2247.

3042. ——— *Impossibility of repayment of purchase-money.]*—*DEBENHAM v. SAWBRIDGE*, No. 2986, *ante*.

Laches.]—See Sub-sect. 4, C., post.

G. Effect of Delay.

See, generally, EQUITY, Vol. XX., pp. 524–541; & FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 281, 282, Nos. 1067–1074.

3043. *Whether right to rescission lost—Fraud.]*—Fraudulent conveyance set aside as against a purchaser with notice, notwithstanding a great length of time which had elapsed since the original transaction.—*ALDEN v. GREGORY* (1764), 2 Eden, 280; 28 E. R. 905, L. C.

3040 i. ——— *Impossibility of restitution in integrum.]*—*MILK FARM PRODUCTS & SUPPLY CO., LTD. v. BUIST* (1915–16), 8 O. W. N. 491; 9 O. W. N. 367; 35 O. L. R. 325.—*CAN.*

3040 ii. ——— *—]—PLAINVIEW FARMING CO. v. TRANSCONTINENTAL TOWNSITE CO.* (1915), 32 W. L. R. 499; 9 W. W. R. 247; 25 D. L. R. 594; 25 Man. L. R. 677, 803.—*CAN.*

3040 iii. ——— *—]—KEATLEY v. CHURCHMAN & REA* (Alta.), [1922] 2

W. W. R. 993; 65 D. L. R. 357.—*CAN.*

3040 iv. ——— *—]—Restitutio in integrum*, though not always, is in most cases a condition precedent to rescission of an agreement. The ct. will do what is practically just.—*HUDSON BAY INVESTMENT CO., LTD. v. THOMPSON* (Man.), [1924] 1 W. W. R. 933.—*CAN.*

3040 v. ——— *—]—Re CAIRNS & MCNAIRN*, [1927] 2 D. L. R. 444; 60

O. L. R. 191.—*CAN.*

PART XI. SECT. 4, SUB-SECT. 4.—G.

3043 i. *Whether right to rescission lost—Fraud.]*—In a suit to set aside, after the lapse of sixteen years, a conveyance, on the ground of fraud, the relief given against the purchaser was not extended to his minor child claiming an equity under articles executed before bill filed.—*PURCELL v. KELLY* (1815), Beat. 492.—*IR.*

3044. ——.].—A., who was entitled to a reversionary interest in a real estate, sold it to C. under circumstances which would have induced the ct. to set aside the transaction, on the ground of fraud. The tenant for life was aware of these circumstances, but some years afterwards purchased the reversion from C. for a fair consideration, which was paid to C., & C. induced A. to join in a recovery & in the conveyance to the tenant for life. A. continued in destitute circumstances up to his death. Nearly twenty years after the sale to C., a bill being filed by the eldest son of A. to obtain the estate, the several sales & conveyances were ordered to be set aside.—*ADDIS v. CAMPBELL* (1841), 4 Beav. 401; 10 L. J. Ch. 284; 49 E. R. 394.

3045. ——.].—*CHARTER v. TREVELYAN*, No. 3011, *ante*.

3046. ——.].—(1) Upon a bill filed by a remainderman in tail, to set aside a sale of lands, made nearly fifty years before under a decree—in a suit by a judgment creditor, to carry the trusts of a will into execution, & for the administration of testator's estate—on the ground of irregularities & error in the proceedings, & fraud in the sale:—*Held*: in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable.

(2) After a long lapse of time since the transactions complained of, there having been parties *in esse* competent to impeach them, fraud is not to be assumed on doubtful evidence; but if it be clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a ct. of equity, & in that case it is immaterial by what machinery or contrivance the fraudulent transactions may have been effected, whether by a decree in equity, or judgment at law, or otherwise.—*BOWEN v. EVANS* (1818), 2 H. L. Cas. 257; 9 E. R. 1090, H. L.

Annotation:—As to (2) *Consd. Re McCallum, McCallum v. McCallum*, [1901] 1 Ch. 113.

3047. ——.].—The owner in fee of an estate, in the year 1807, agreed to sell it to his solr. while the relation of solr. & client was continuing between them. The agreement, for particular reasons, was not finally carried out till 1823. In Dec. 1826, the relation of solr. & client ceased. The purchaser died in 1828, & the vendor died in 1829 without having taken any steps to impeach the transaction. In 1859 the trustees & *cestuis que trust* under the will of the vendor filed a bill to set aside the sale, on the ground that the estate was sold at an undervalue, while the relation of solr. & client subsisted between the parties:—*Held*: lapse of time was alone a bar to the suit, & the evidence showing that full value was given for the property, the bill was dismissed with costs.—*CLANRICARDE (MARQUIS) v. HENNING* (1861), 30 Beav. 175; 30 L. J. Ch. 865; 5 L. T. 168; 7 Jur. N. S. 1113; 9 W. R. 912; 54 E. R. 855.

Annotation:—*Refd. Molloy v. Mutual Reserve Life Insec.* (1906), 94 L. T. 756.

3048. ——.].—*When time begins to run.*—The fault of delay in seeking relief against a transaction charged as fraudulent only begins to affect the complaining party after he has knowledge or full means of knowledge of the circumstances alleged as constituting the fraud.—*BROWNE v. MCCLINTOCK* (1873), L. R. 6 H. L. 436; 22 W. R. 521, H. L.

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 520–522, Nos. 1762–1790.

3049. ——.].—*Long possession by purchaser—Sale by executor in suspicious circumstances.*—Exor. or

administrator where there are debts may sell testator's term specifically devised &, even in suspicious circumstances of fraud after long possession by the purchaser, or the person under whom he takes the ct. will not relieve.—*ANDREW v. WRIGLEY* (1792), 4 Bro. C. C. 125; 29 E. R. 812.

Annotations:—*Consd. Chalmer v. Bradley* (1819), 1 Jac. & W. 51. *Refd. Hill v. Simpson* (1802), 7 Ves. 152; *Beckford v. Wade* (1805), 17 Ves. 87; *McLeod v. Drummond* (1810), 17 Ves. 152; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1. *Mentd. Graham v. Drummond* (1896), 12 T. L. R. 319.

3050. ——.].—*Possession for twenty years—Purchase by executor in suspicious circumstances.*—Purchase by an exor. rescinded after twenty years by remainderman. The transaction having taken place under circumstances of disguise & concealment.—*WATSON v. TOONE* (1820), 6 Madd. 153; 56 E. R. 1050; *sub nom. WHATTON v. TOONE, WHATTON v. WHATTON, WHATTON v. BOND*, 5 Madd. 51.

Annotation:—*Refd. Silkstone & Haigh Moor Coal Co. v. Eddy*, [1900] 1 Ch. 167.

3051. ——.].—*Possession for seventeen years—Purchase by executor at undervalue.*—Bill, filed after seventeen years, to set aside a purchase of testator's estate by his exor., at an undervalue, dismissed, on the ground of the delay; although the sale, if recent, would have been set aside.—*BAKER v. READ* (1854), 18 Beav. 398; 52 E. R. 157; *affd.*, 3 W. R. 118, L. J.

3052. ——.].—*Possession for seven years—Purchase at undervalue.*—*TAYLOR v. OBBE*, No. 2993, *ante*.

3053. ——.].—*Possession for twenty-seven years—Without notice of insanity of vendor.*—Where a bill was filed in 1835 on the behalf of an alleged lunatic by his next friend, his son & presumptive heir, to set aside a sale made in 1809, on the ground of fraud, alleging that the vendor had been of unsound mind since 1789, & that the property was sold at an undervalue; in 1837 the vendor was, by inquisition, found lunatic from 1796, & a supplemental bill was filed by the committee, the son praying for the relief sought by the original bill:—*Held*: after the purchaser had been in possession twenty-seven years, without any proof that he had notice of the insanity of the vendor, & the allegations of fraud & inadequate consideration not having been proved, the ct. would not set aside the sale on the mere fact of the vendor having been afterwards found to have been insane anterior to the date of the sale.—*PRICE v. BERRINGTON* (1851), 3 Mac. & G. 486; 18 L. T. O. S. 56; 15 Jur. 999; 42 E. R. 348, L. C.

Annotations:—*Refd. Jacobs v. Richards, Jacobs v. Porter* (1854), 18 Beav. 300; *Elliot v. Ince* (1857), 7 De G. M. & G. 475; *York Glass Co. v. Jubb* (1925), 134 L. T. 36.

3054. ——.].—*Possession for seven months—Purchaser improving property.*—Delay of seven months in taking proceedings to set aside a sale, during which the purchaser was improving the property:—*Held*: no bar to pltf.'s right to relief.—*PEARSON v. BENSON* (1860), 28 Beav. 598; 54 E. R. 496; *affd.*, 28 Beav. 602, n., L. J.

3055. ——.].—*Possession for fourteen months—Position of purchaser unchanged.*—The husband of an administratrix is in a fiduciary position, & cannot purchase from a co-administratrix without the consent of all the *cestui que trusts*. Where one of such *cestui que trusts* objected to such a purchase, & after a lapse of about fourteen months took legal proceedings to set it aside:—*Held*: the purchaser not having been induced to change his position by reason of pltf.'s delay, pltf. was entitled to have such sale set aside, notwithstanding his delay.—*Re PEPPERELL, PEPPERELL v. CHAMBERLAIN* (1879), 27 W. R. 410.

Secl. 4.—Remedies of parties: Sub-sect. 4, (i.)

3056. — Untrue representation by vendor—Purchaser allowing vendor time to substantiate representation.]—When a purchaser discovers that a representation made to him by a vendor is untrue, if the vendor suggests that, if time be given him, the representation may be cured, & the purchaser put in as good a position as if the representation had been true; the purchaser, by giving the vendor time, does not lose his right to rely on the misrepresentation & determine the contract, if,

3057 i. —.—*McAlpine v. Young*, 2 Ch. Ch. 171.—**CAN.**

g. — Long possession by purchaser.]—*Harkin v. Rabidon* (1858), 6 Gr. 405; *rehcuring* (1859), 7 Gr. 243.—**CAN.**

h. — Possession for twelve years.]—Where defts. set up a defence to a bill, which if tenable would have formed sufficient ground for their having taken steps to set aside the transaction which it was now sought to enforce, but they had not done so, although twelve years had elapsed since the act was done which they questioned, & which it was shown they had all the while been aware of, the ct. ordered them to pay the costs

of the suit.—*Miller v. Ostrander* (1866), 12 Gr. 349.—**CAN.**

k. — Possession for eighteen months.]—A purchaser who has waited eighteen months after learning of a deficiency in the land bought is not entitled to rescission or damages.—*Franz v. Hansen* (Alta.), [1917] 2 W. W. R. 319.—**CAN.**

l. — Possession for twenty months—Vendors out of country.]—Delay from Nov. 1916, when purchaser first learned of the misrepresentation until July, 1918, when he brought action did not amount to an affirmation of the contract, as the agents through whom he bought & the vendors were Germans & had left the country

at the end of the time, the vendor fails to make good his suggestion.—*Tibbatts v. Boulter* (1895), 73 L. T. 534.

3057. —.—*Sibbering v. Balcarras* (Earl) (1850), 3 De G. & Sm. 735; 19 L. J. Ch. 252; 15 L. T. O. S. 245; 14 Jur. 753; 64 E. R. 682.

Annotations:—Distd. Browne v. McClintock (1873), L. R. 6 H. L. 456. **Refd. Harcourt v. White (1860), 28 Beav. 303; *Spackman v. Evans* (1868), L. R. 3 H. L. 171. **Mentd. Carey v. Cuthbert (1873), 22 W. R. 249.****

— — **Purchase by auctioneer.]—See AUCTION & AUCTIONEERS, Vol. III., p. 29, No. 215.**

after the outbreak of war & were absent during said period.—*Cobb v. Schattner*, [1919] 3 W. W. R. 1019; 49 D. L. R. 659.—**CAN.**

m. — Possession for eight years—Position of parties altered.]—*Loewen v. Duncan* (1921), 62 D. L. R. 152; 30 B. C. R. 295; [1922] 2 W. W. R. 1131.—**CAN.**

n. — Misrepresentation.]—Delay or laches of themselves do not constitute a defence to an action for rescission of a sale of land because of misrepresentation.—*Wright v. Weeks* (Alta.), [1919] 2 W. W. R. 27.—**CAN.**

o. Delay amounting to repudiation.]—*Burns v. Hopkins & Cameron* (Sask.), [1921] 2 D. L. R. 45.—**CAN.**

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SET-OFF AND COUNTERCLAIM.

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Part I.—Set-Off.

SECT. 1.—IN GENERAL.

See R. S. C., Ord. 19, r. 3.

1. **Distinguished from lien.**—*PENNEL v. AUSTIN* (1845), 4 L. T. O. S. 295.

Distinguished from counterclaim.—See Nos. 304–315, *post*.

2. **A defence.**—An action was brought claiming first, £10 for rent; secondly, £100 as damages for breach of covenant in a lease of premises; & thirdly, £30 for conversion of pltf.'s goods. Deft. pleaded, admitting that the rent was due, but denying the breach of covenant & conversion, & setting up a counterclaim for £100 damages for breach of covenant by pltf., & £15 for money due for the use & occupation of other premises. The action was referred to an arbitrator by an order made by consent upon the terms that "the costs of the action should abide the event of the award, & that the costs of the reference & award should be in the discretion of the arbitrator." The arbitrator found that pltf. was entitled to £10 for rent; that deft. had broken his covenant in the lease, & had been guilty of the conversion charged, & he awarded that pltf. was entitled to recover in respect of such breach of covenant & conversion the sum of £25, making together £35 awarded to pltf.; that pltf. had broken his covenant, & that deft. was entitled to recover in respect of that breach £20; & upon the whole matter he found that pltf. was entitled to recover in the action £15 & no more:—*Held*: the provision in the order of reference as to costs did not alter the rights of the parties, & that upon the true construction of Jud. Act, 1873 (c. 66), s. 67, pltf. was entitled to the costs on his claim, & deft. to his costs on the counterclaim.

Set-off & counterclaim are both the creation of statute, the common law not admitting of the action of pltf. against deft. being met by an independent claim of deft. against pltf., but leaving deft. to his cross-action. The effect of these two modes of proceeding must, therefore, be sought in the statutes by which they were introduced, & in their results; & when these are looked at, it will be seen how essentially these two forms of procedure differ. By the statutes of set-off this plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily & without difficulty ascertained. The plea can only be used in the way of defence to pltf.'s action, as a shield, not as a sword. Though deft. succeeded in proving a debt exceeding pltf.'s demand, he was not entitled to recover the excess; the effect was only to defeat pltf.'s action, the same as though the debt proved had been equal to the amount of the claim established by pltf., & no more. . . . In a case of set-off the claim being for liquidated damages, its existence & its amount must be taken to be known to pltf., who should have given credit for it in his action against deft. This reasoning does not apply to a counterclaim, the effect of which, as distinguished from a mere set-off, is altogether

different. It is, as I have already pointed out, to all intents & purposes an action by deft. against pltf. It is not confined to debts or liquidated damages. It is not even necessary that the claim should be analogous to that of pltf. A claim founded on tort may be opposed to one founded on contract, or *vice versa*. But the most striking difference is that the counterclaim operates, not merely as a defence, as does the set-off, but in all respects as an independent action by deft. against pltf. (*COCKBURN, C.J.*).—*STOOKE v. TAYLOR* (1880), 5 Q. B. D. 569; 49 L. J. Q. B. 857; 43 L. T. 200; 44 J. P. 748; 29 W. R. 49, D. C. *Annotations*:—*Consd.* *Beddall v. Maitland* (1881), 17 Ch. D. 171. *Apld.* *Takart v. Marcus* (1888), 36 W. R. 469. *Refd.* *Baines v. Bromley* (1880), 6 Q. B. D. 197; *Toke v. Andrews* (1882), 8 Q. B. D. 428; *Pearson v. Ripley* (1884), 50 L. T. 629; *Lund v. Campbell* (1885), 14 Q. B. D. 821; *Sharpe v. Haggith* (1912), 106 L. T. 13.

3. —.]—A set-off can only be set up where an action is brought; . . . what is the result of a plea of set-off? It is not a counterclaim or a cross-action, but a plea in bar (*LORD ESHER, M.R.*).—*SOVEREIGN LIFE ASSURANCE CO. v. DODD*, [1892] 2 Q. B. 573; 62 L. J. Q. B. 19; 67 L. T. 396; 41 W. R. 4; 8 T. L. R. 684; 36 Sol. Jo. 644; 4 R. 17, C. A.

Annotations:—*Refd.* *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546; *Paddy v. Clutton*, [1920] 2 Ch. 554; *R. City Life Assce., Grandfield's Case, Stephenson's Case*, [1926] Ch. 191.

4. —.]—It is well settled that an alien enemy may, in any proceeding against him, set up a set-off by way of diminution of the claim of pltf., that set-off being, of course, a defence. . . . On the other hand, an alien enemy cannot counterclaim (*SARGANT, J.*).—*Re STAHLWERK BECKER AKTIENGESELLSCHAFT'S PATENT*, [1917] 2 Ch. 272; 86 L. J. Ch. 670; 117 L. T. 216; 33 T. L. R. 339; 61 Sol. Jo. 479.

5. **Claim for liquidated damages.**—*STOOKE v. TAYLOR*, No. 2, *ante*.

Creation of statute.—See Nos. 15 17, *post*.

6. **Operates by way of excuse.**—Debt for goods sold & delivered. Plea that the goods were sold by M. being factor of pltf. & entrusted by him with the goods, as M.'s own goods by pltf.'s consent, & deft. did not know & had not the means of knowing, that the goods were not M.'s; & a set-off against pltf. of a debt due from M. to deft.:—*Held*: *de injuria* cannot be replied to a plea of set-off, which operates by way of excuse.—*SALTER v. PURCHELL* (1841), 1 Q. B. 209; 1 Gal. & Dav. 693; 11 L. J. Ex. 433; 113 E. R. 1110, Ex. Ch.; *reversg.* S. C. *sub nom.* *PURCHELL v. SALTER*, 1 Q. B. 197.

Annotations:—*Apld.* *Whitehead v. Walker* (1842), 7 Jur. 330. *Consd.* *Cowper v. Garbett* (1814), 13 M. & W. 33. *Refd.* *Scott v. Chappelow* (1842), 5 Scott. N. R. 148; *Scott v. Crawford* (1842), 5 Scott. N. R. 781; *Borrios v. Imperial Ottoman Bank* (1873), L. R. 9 C. P. 38. *Mentd.* *Bonzi v. Stowart* (1844), 7 Man. & G. 746; *Herbert v. Sayer* (1844), 5 Q. B. 965; *Bennett v. Bull* (1847), 11 Jur. 1067; *Bell v. Tuckett* (1871), 6 Jur. 82.

7. **Prevention of cross-actions between same parties.**—The statutes of set-off are confined to legal debts between the parties, the sole object

set-off & counterclaim are placed almost on an equal basis, practically one is co-extensive with the other. *BAHNE v. GREAT NORTHERN RY. CO.*, [1917] 1 W. W. R. 1225; 23 B. C. R. 484.—*CAN.*

d. **Operates by way of discharge.**—Set-off operates by the mutual

B B

PART I. SECT. 1.

a. **Distinguished from counterclaim.**—*Seem* to be in Ontario the law as to set-off is different from the English law, & here a set-off should not be treated as a counterclaim nor be pleaded as such.—*GERARDOT v. WELTON* (1900), 19 P. R. 162; *affd.*, 19 P. R. 201; 1.—VOL. XL.

20 C. L. T. 257.—*CAN.*

b. **Assimilation of set-off & counterclaim.**—*VICTORIA SAANICH MOTOR TRANSPORTATION CO. v. WOOD MOTOR CO., LTD.* (1915), 20 B. C. R. 537; 8 W. W. R. 1124; 31 W. L. R. 853.—*CAN.*

c. —.]—Under B. C. Rules

Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2.]

being to prevent cross-actions between same parties.—*ISBERG v. BOWDEN* (1853), 8 Exch. 852; 1 C. L. R. 722; 22 L. J. Ex. 322; 155 E. R. 1599.

*Annotations:—*Consd. *Watkins v. Clark* (1862), 12 C. B. N. S. 277; *Christie v. Taunton, Delmard, Lane, Re Taunton, Delmard, Lane*, [1893] 2 Ch. 175. *Refd.* *Oulds v. Harrison* (1854), 10 Exch. 572; *Wilson v. Gabriel* (1863), 4 B. & S. 243; *Stanger v. Miller* (1865), L. R. 1 Exch. 58; *Manley v. Berkett*, [1912] 2 K. B. 329.

8. Distinguished from settlement in account—In nature of part payment.]—Where there are cross money claims & the parties before action agree to strike a balance between them, that is not a set-off but a settlement in account in the nature of part payment, which can be set up under a plea of payment.—*LUNT v. WILSON* (1885), 1 T. L. R. 572, C. A.

9. Effect of setting up set-off—Debt not extinguished pro tanto—Two distinct debts till judgment.]—Where a set-off is claimed or pleaded in defence to an action for a debt, the debt sued on is not thereby extinguished to the extent of the debt sought to be set off, but two separate & distinct debts remain until judgment.

When a co., while a going concern, sues a shareholder for a call, & he sets up a defence of set-off & before judgment is obtained a winding up of the co. commences, the defence of set-off in the action does not prevent the application of the ordinary rule that the debt owing by the co. to the shareholder cannot be set off in proceedings in the winding up to obtain payment of the call.—*Re HIRAM MAXIM LAMP CO.*, [1903] 1 Ch. 70; 72 L. J. Ch. 18; 87 L. T. 729; 51 W. R. 74; 19 T. L. R. 26; 10 Mans. 329.

10. Not equivalent to accord & satisfaction.]—*RIBBLESDALE v. FORBES* (1916), 140 L. T. Jo. 483, C. A.

11. Right of alien to plead set-off.]—*Re STAHLWERK BECKER AKTIENGESELLSCHAFT'S PATENT*, No. 4, *ante*.

12. Defence of breach of warranty—Action for price of goods sold—Not set-off—Within county court rules.]—To a claim for the price of goods sold the defence of a breach of warranty is not a set-off within Ord. 10, r. 10, of the county court rules, 1903 & 1914; nor has it by the passing of Sale of Goods Act, 1893 (c. 71), become a statutory defence within r. 18 of Ord. 10; therefore notice of such a defence need not be given under Ord. 10.—*BRIGHT v. ROGERS*, [1917] 1 K. B. 917; 86 L. J. K. B. 804; 117 L. T. 61; 61 Sol. Jo. 370, D. C.

Relation of set-off to payment.]—See Sect. 5, *post*.

Admitted set-off—County court jurisdiction.]—See COUNTY COURTS, Vol. XIII., pp. 466, 467, Nos. 158-161.

Not taken into account—Whether malice in action for malicious prosecution.]—See MALICIOUS PROSECUTION, Vol. XXXIII., p. 487, No. 255.

SECT. 2.—HOW ARISING.

SUB-SECT. 1.—IN GENERAL.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 39 (1) (a); R. S. C., Ord. 19, r. 3.

13. No right at common law.]—... It must be remembered that at common law there was

originally no right of set-off at all, & that it was not till the statute of set-off in the beginning of the reign of Geo. 2 that there was any such right established; & when we look at the terms of those Acts of Parliament—there were two of them—it is plain they only applied to what was then an action at common law—and so it has been held—and that they only applied to the case of mutual debts, whatever they might be. That was followed by the cts. of equity & extended; that is to say, certain cases were held to be within the equity of the statutes, although not within their actual words. Cts. of equity allowed set-off, but the Ct. of Equity, following the spirit of the statutes, would not allow a man to set-off, even at law, where there was an equity to prevent his doing so; that is to say, where the rights, although legally mutual, were not equitably mutual (*JESSEL, M.R.*).—*Re WHITEHOUSE & Co.* (1878), 9 Ch. D. 595; 47 L. J. Ch. 801; 39 L. T. 415; 27 W. R. 181.

*Annotations:—*Refd. *Re General Works Co.*, *Gill's Case* (1879), 12 Ch. D. 755; *Re West of England & South Wales District Bank*, *Ex p. Braunwhite* (1879), 48 L. J. Ch. 463; *Re West of England & South Wales District Bank*, *Ex p. Hatcher* (1879), 27 W. R. 907; *Re Anglo-French Co-op. Soc.*, *Ex p. Pearce* (1882), 21 Ch. D. 498, n.; *Re Branksa Island Co.*, *Ex p. Bentinck* (No. 1) (1888), 1 Meg. 12; *Re Pyle Works* (1890), 44 Ch. D. 534; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95; *Monkwearmouth Flour Mill Co. v. Lightfoot* (1897), 13 T. L. R. 327; *Re Auriferous Properties*, [1898] 1 Ch. 691; *Re G. E. B.*, [1903] 2 K. B. 340.

—*STOOKE v. TAYLOR*, No. 2, *ante*.

15. Statutory right.]—*Re WHITEHOUSE & Co.*, No. 13, *ante*.

16. —.]—*STOOKE v. TAYLOR*, No. 2, *ante*.

17. —.]—Set-off was the creature of statute (*COZENS-HARDY, J.*).—*LISKEARD & LOOE RY. CO. v. LISKEARD & CARADON RY. CO. & FOSTER* (1901), 18 T. L. R. 1.

18. Equitable right.]—*RAWSON v. SAMUEL*, No. 105, *post*.

19. —.]—Where pltf. has a money demand against deft., & deft. has, in the name of his trustees, a money demand against pltf., of such a nature as, but for its being in the name of the trustees, would have formed the subject of a good legal set-off against pltf.'s demand, such latter demand is pleadable, by way of equitable set-off, in answer to pltf.'s demand.—*COCHRANE v. GREEN* (1860), 9 C. B. N. S. 448; 30 L. J. C. P. 97; 3 T. 475; 7 Jur. N. S. 548; 9 W. R. 124; 142 J. R. 176.

*Annotations:—*Consd. *Middleton v. Pollock* (1875), 44 L. J. Ch. 584. *Distd.* *Re Willis, Percival*, *Ex p. Morier* (1879), 12 Ch. D. 491. *Refd.* *Agra & Masterman's Bank v. Leighton* (1866), L. R. 2 Exch. 56; *Thornton v. Maynard* (1875), L. R. 10 C. P. 695; *Bennett v. White*, [1910] 2 K. B. 613; *Manley v. Berkett*, [1912] 2 K. B. 329.

20. — Demands in separate rights.]—(1) Cross-demands existing in separate rights are not in equity, except under special circumstances, allowed to be set off one against the other; & therefore an exor. & trustee of a legacy, who was also the residuary legatee, & had become a creditor of the husband & administrator of deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy to which the husband, having survived his wife, the legatee, was, as such administrator, entitled.

(2) *Semle*: the ct. has, on slight circumstances, presumed the existence of an agreement to set off one against another cross-demand, although existing in different rights; but such an agreement

destruction by the one debt of the other. — *POSTMASTER - GENERAL v. TANTE, POSTMASTER-GENERAL v. VAN*

VUREN, POSTMASTER-GENERAL v. PARSONS, MASTER OF THE SUPREME COURT v. ROTH, [1905] T. S. 582.—S. AF.

6. —.]—*RAINSFORD v. AFRICAN BANKING CORPN.*, [1912] C. P. D. 1106 —S. AF.

will not be presumed without some circumstances from which it might be inferred.

(3) Where one demand is equitable & the other legal there may be set-off in equity, if there would be set-off at law had both the demands been legal.—**FREEMAN v. LOMAS** (1851), 9 Hare, 109; 20 L. J. Ch. 564; 17 L. T. O. S. 252; 15 Jur. 648; 68 E. R. 435.

Annotations:—As to (1) **Apld.** *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29. **Refd.** *Cochrane v. Green* (1860), 9 C. B. N. S. 448; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686; *Stammers v. Elliot* (1868), 3 Ch. App. 195; *Bailey v. Finch* (1871), 41 L. J. Q. B. 83. *Generally, Mentd.* *Wilson v. Leslie* (1857), 5 W. R. 815.

21. — **One demand legal, one equitable.**—**FREEMAN v. LOMAS**, No. 20, *ante*.

22. — **By analogy to statutory rights.**—*Re WHITEHOUSE & Co.*, No. 13, *ante*.

SUB-SECT. 2.—BY AGREEMENT.

23. **Set-off not otherwise pleadable.**—**DARY'S CASE** (1677), *Freem. Ch.* 28; 22 E. R. 1037. *Annotation*:—**Mentd.** *R. v. Nuns* (1713), *Gillb.* 36.

24. — **—**—A debt owing by the wife *dum sola* cannot be set off to an action brought by the husband alone, unless he has promised to pay the debt after marriage, & thereby made it his own.—**WOOD v. AKERS** (1797), 2 Esp. 593; 170 E. R. 466, N. P.

25. — **—**—An allegation of an agreement to set off a specific joint debt against specific separate debts, previously accrued, is in substance proved by evidence of an agreement prior to the debts accruing, to set off all joint debts that should thereafter arise, against all separate debts that should thereafter arise.

These debts not being mutual, could not be set off under the general law, but the plea states, that there was an agreement with respect to these debts (**MANSFIELD, C.J.**).—**KINNERLEY v. HOSACK** (1809), 2 Taunt. 170; 127 E. R. 1042.

26. — **—**—In trover for certain ironwork, debt set up as a defence a lien on the ironwork, for work done to it at pltf.'s request:—**Held**: a claim of set-off to a larger amount on the part of pltf., was no answer to the lien, unless it had been agreed between the parties that the one should be deducted from the other.—**PINNOCK v. HARRISON** (1838), 3 M. & W. 532; 1 Horn & H. 114; 7 L. J. Ex. 137; 150 E. R. 1256.

27. — **—**—**FREEMAN v. LOMAS**, No. 20, *ante*.

28. — **—**—On a settlement of accounts between pltf. & deft., pltf. was found to have been overpaid by £1 11s. 5d., which sum, as the jury found, it was agreed should go to deft.'s credit in their future dealings. This claim, however, was barred by Stat. Limitations. Pltf. afterwards did work for deft. to the amount of £5 6s. 6d., & brought an action to recover that sum. Deft. paid £4 into ct.:—**Held**: he had a good answer to the balance of £1 6s. 6d. under never indebted.—**SMITH v. WINTER** (1852), 12 C. B. 487; 21 L. J.

C. P. 158; 19 L. T. O. S. 111; 16 Jur. 908; 138 E. R. 997.

29. **Implied from course of dealing.**—**DOWNAM v. MATTHEWS** (1721), *Prec. Ch.* 580; 2 Eq. Cas. Abr. 9, pl. 8; 24 E. R. 260.

Annotations:—**Refd.** *Whitaker v. Rush* (1761), *Amb.* 407; *Freeman v. Lomas* (1851), 9 Hare, 109. **Mentd.** *Dodding-ton v. Hallet* (1750), 1 Ves. Sen. 497; *Re Mathews, Ex p. Ockenden* (1754), 1 Atk. 235.

30. — **—**—Where by the custom of the hat trade the amount of the injury sustained by the hats in the process of dyeing is always to be deducted from the charge for dyeing, deft. is entitled to such deductions in an action brought by the dyer, without giving any notice of set-off, & although there has not been any previous adjustment of the amount of the damage.—**BAMFORD v. HARRIS** (1816), 1 Stark. 343; 171 E. R. 492, N. P.

31. **Slight evidence of agreement sufficient.**—Stoppage no payment at law; nor in equity, unless under special circumstances, & in case of mutual demands, where the balance only is the debt.

A very slender agreement for discounting or allowing the one debt out of the other will make it a payment (**JEKYLL, M.R.**).—**JEFFS v. WOOD** (1723), 2 P. Wms. 128; 2 Eq. Cas. Abr. 10, pl. 9; 24 E. R. 668.

Annotations:—**Consd.** *Gingell v. Purkins* (1850), 4 Exch. 720. **Refd.** *Barker v. Graham* (1773), 2 Wm. Bl. 869; *Ranking v. Barnard* (1820), 5 Madd. 32; *Campbell v. Graham* (1831), 1 Russ. & M. 453; *Courtenay v. Williams* (1844), 3 Hare, 539; *Jones v. Mossop* (1844), 3 Hare, 568; *Freeman v. Lomas* (1851), 9 Hare, 109; *Re Briant, Poulter v. Shackel* (1888), 39 Ch. D. 471; *Dingle v. Coppen*, *Coppen v. Dingle*, [1899] 1 Ch. 726.

32. — **Oral agreement.**—C. being indebted to S. & R. being indebted to S., & also to C., it was verbally agreed between the three that S. should transfer the debt due to him from C. to the account of R., & S. in pursuance of such agreement delivered to R. an account, in which he R. was charged with the debt due from C. to S.:—**Held**: C. was not thereby discharged.—**CUXON v. CHADLEY** (1824), 3 B. & C. 591; 5 Dow. & Ry. K. B. 417; 3 L. J. O. S. K. B. 63; 107 E. R. 853.

Annotations:—**Apld.** *Wharton v. Walker* (1825), 1 B. & C. 163. **Refd.** *Andrews v. Smith* (1835), 2 Cr. M. & R. 627; *Laversidge v. Broadbent* (1859), 1 H. & N. 603.

33. — **—**—A. & B. enter into a contract in writing to sell & purchase certain lands for a sum, & subject to conditions specified, & to the same conditions under which the same were offered for sale by auction. The purchaser then sets up a parol understanding, whereby a sum secured by a bond given by the vendor to him, was agreed to be set off against the purchase-money:—**Held**: such parol agreement was valid, & the conditions of sale referred to in the written agreement might be proved in chambers.—**ARCHER v. HALL** (1859), 7 W. R. 222.

34. **Existence of agreement presumed by court.**—**FREEMAN v. LOMAS**, No. 20, *ante*.

35. **Agreement must be shown to exist.**—**HUNT v. JESSEL**, No. 191, *post*.

36. **Based on custom—Necessity for plaintiff's**

PART I. SECT. 2, SUB-SECT. 2.

23 i. **Set-off not otherwise pleadable.**—Where there are unconnected cross-demands, equity does not in general interfere to set off one against the other, in the absence of any special circumstance or agreement, express or implied.—**SMITH v. MUIRHEAD** (1853), 3 Gr. 610.—**CAN.**

23 ii. — **—**—Setting off an unascertained sum against another is a mode of settlement which, if suggested to the parties as a compromise, may, with their assent, be a fit end of a

litigation, but cannot properly be made the basis of a decree between hostile litigants.—**BACHUN v. HAMID HOSSEIN, ABDOL AZEEZ v. HAMID HOSSEIN** (1871), 17 W. R. 113; 10 B. L. R. 45.—**IND.**

31 i. **Slight evidence of agreement sufficient.**—In the view of equity the setting off one demand against another between the same parties is extremely just; & where there is any technical difficulty in the way of its being done without an agreement, the ct. accepts slighter evidence of such an agreement than is usually required in order to

establish disputed facts.—**LUNDY v. McCULLA** (1865), 11 Gr. 368.—**CAN.**

35 i. **Agreement must be shown to exist.**—**LITTLE v. CAJE** (1876), 16 N. B. R. (3 Pug.) 386.—**CAN.**

35 ii. — **—**—The ct. will not, in the absence of direct evidence, presume an agreement for a set-off.—**BALDWIN v. BALDWIN** (1850), 3 I. Ch. R. 388.—**IR.**

35 iii. — **—**—**COWAN v. SHAW** (1878), 5 R. (Ct. of Sess.) 680; 15 Sc. L. R. 381.—**SCOT.**

1. **Agreement to set off costs against**
B B 2

Sect. 2.—How arising: Sub-sect. 2. Sect. 3: Sub-sects. 1 & 2.]

knowledge of custom.]—An alleged custom among stockbrokers that a member of the London Stock Exchange, who has sold shares on the instructions of a country broker, who is acting for an undisclosed principal, is entitled to set off against the price of the shares a debt due to him from the country broker in respect of previous Stock Exchange transactions is unreasonable, & therefore will not bind the principal of the country broker, unless he is proved to have known of the alleged custom, & agreed to be bound by it.—**BLACKBURN v. MASON** (1893), 68 L. T. 510; 9 T. L. R. 286; 37 Sol. Jo. 283; 4 R. 297, C. A.

Annotations:—Mentd. Crossley v. Magniac, [1893] 1 Ch. 594; Anderson v. Sutherland (1897), 13 T. L. R. 163.

37. Necessity for consideration.]—Deft. occupied offices belonging to pltf. society & he was also a customer of pltf. in the banking business carried on by them. Pltf. society went into liquidation in June, 1911, & at that time there was rent for two quarters due by deft. for the offices occupied by him. An arrangement was made in Sept. 1911, by the liquidator of pltf. society & deft. for a set-off, against the amount of rent due, of £38 3s. 3d., the amount of the dividends in the liquidation to which deft. was entitled on his current account. In Nov. 1911, it was decided by the High Ct. that the banking business carried on by pltf. society was *ultra vires*, & that consequently none of their customers could rely on any legal liability on the part of the society towards them. After this decision the Official Receiver refused to allow any set-off against the rent due from deft. & sued for the full amount. Deft. set up the arrangement of Sept. 1911, as a defence:—**Held:** there was no consideration for an agreement by way of set-off, since by the decision of Nov. 1911, there was no debt due from pltf. society to deft. at the time the arrangement was made.—**BIRKBECK BUILDING SOCIETY v. BIRKBECK** (1913), 29 T. L. R. 218, D. C.

SECT. 3.—ESSENTIAL CONDITIONS OF SET-OFF.

SUB-SECT. 1.—NATURE OF CLAIM.

38. Claims must arise in same right.]—Where there is a general trust of money for a society, a particular member cannot set off a private debt against a share he may be entitled to on a contingency.—**LEE v. CARTER** (1740), 2 Atk. 84; 26 E. R. 451, L. C.

Annotation:—Mentd. Roose v. Jones (1844), 14 L. J. Ch. 4.

rent.]—ELLIOTT v. BAINES (1851), 1 P. R. 64.—**CAN.**

g. Question of fact.]—Re JENKINS v. MILLER (1883), 10 P. R. 95.—**CAN.**

h. Admissibility of evidence.]—Evidence of a verbal agreement to allow the price of land sold by verbal agreement, to be set off against a note:—**Held:** inadmissible.—**McCOLLUM v. JONES** (1827), Tay. 442.—**CAN.**

PART I. SECT. 3, SUB-SECT. 1.

38 i. Claims must arise in same right.]—NATIONAL BANK OF AUSTRALASIA v. SWAN (1872), 3 V. R. (Law) 168.—**AUS.**

38 ii. —.]—MARTIN v. CLARK (1861), 20 U. C. R. 419.—**CAN.**

38 iii. —.]—The demand which the sheriff has against defts. as purchasers of goods sold under execution, not being a mere personal demand, but he being in a measure the agent of the pltf., defts. are not entitled to

set off his personal debt due to them against the claim against them by the sheriff in his official capacity.—**KINGSMILL v. BANK OF UPPER CANADA** (1863), 13 C. P. 600.—**CAN.**

38 iv. —.]—BLACK v. BLACK (1865), 11 Gr. 270.—**CAN.**

38 v. —.]—BENNER v. CURRIE (1875), 36 U. C. R. 411.—**CAN.**

38 vi. —.]—Money due by a member of an assocn. cannot be set off against money due to the assocn.—SEETON v. MERCHANTS BANK (1884), 18 N. S. R. (6 L. & G.), 113.—**CAN.**

38 vii. —.]—Held: a claim on behalf of trustees for rent in arrear, & for damages for non-repair, was not matter of set-off against damages recovered against one of the trustees for breach of covenant, they not being matters arising in the same right.—**AMBROSE v. FRASER** (1887), 14 O. R. 651.—**CAN.**

38 viii. —.]—ALLIS - CHALMERS - BULLOCK v. HUTCHINGS (1912), 41

39. —.]—BISHOP v. CHURCH, No. 231, *post*.

40. —.]—MEDLICOT v. BOWES, No. 233, *post*.

41. —.]—A debt cannot be set off against another, if they are in different rights.—WHITAKER v. RUSH (1761), Amb. 407; 27 E. R. 272.

Annotations:—Reid. Freeman v. Lomas (1851), 9 Hare, 109; *Re Jones*, Christmas v. Jones, [1897] 2 Ch. 190.

42. —.]—Assignment of breach of covenant in general words, although in the words of the covenant, held ill upon a demurrer to deft.'s plea, because the assignment did not show any particular act of pltf., or in what particular respect he had refused to act which amounted to a breach of his covenant. Such bad assignment not cured by pleading over a set-off of a demand, claimed in a different right from that in which pltf., who was an administratrix sued, to a declaration in covenant for unliquidated damages.—WARN v. BICKFORD (1819), 7 Price, 550; 146 E. R. 1058; *subsequent proceedings* (1821), 9 Price, 43.

Annotation:—Mentd. Falmouth v. Thomas (1832), 3 Tyr. 26.

43. —.]—No set-off allowed in this ct. in respect of legal demands, although there cannot be a set-off at law, the demands being in *autre droit*.—HARVEY v. WOOD (1821), 5 Madd. 459; 56 E. R. 971.

Annotation:—Reid. Hamp v. Jones (1840), 9 L. J. Ch. 258.

44. —.]—GALE v. LUTTRELL, No. 234, *post*.

45. —.]—FREEMAN v. LOMAS, No. 20, *ante*.

46. —.]—A. sued C. as extrix. jointly with B. & four others, & recovered judgment against them; & then under the judgment attached a debt owing by B. to C.'s testator, which B. paid:—Held:** the attachment of the debt was void, & payment of it by B. could not be set off in an action at the suit of C. as extrix. against B. to recover it.**

Qu.: where a joint judgment is obtained against several debtors, can debts due from one to another of them be attached under C. L. P. Act, 1854 (c. 125).—**CHAPMAN v. CALLIS** (1862), 6 L. T. 282.

47. —.]—STUMORE v. CAMPBELL & Co., No. 319, *post*.

48. — Clerk of racecourse refusing to pay stakes won by plaintiff—Plaintiff owing entrance fee in respect of another race.]—The clerk of the course at a race cannot set off a claim of an unpaid stake due from pltf. on one race against a stake of another race won by pltf.'s horse.—CHARLTON v. HILL (1831), 5 C. & P. 147; 172 E. R. 915, N. P.

49. — Several accounts of same customer—Debt due to bank on one account.]—PEDDER v. PRESTON CORPN., No. 219, *post*.

50. — Deductions from income tax—In respect of debts due from Crown under another transaction.]—The London County Council, having

N. B. R. 444; 13 D. L. R. 241; 13 E. L. R. 277.—**CAN.**

38 ix. —.]—BOYD v. NORRIS (1848), 3 Nfld. L. R. 50.—**NFLD.**

38 x. —.]—Cross demands arising in different rights cannot be made the subject of set-off.—BALDWIN v. BALDWIN (1850), 3 I. Ch. R. 388.—**IR.**

38 xi. —.]—LOUGHNAN v. O'SULLIVAN, [1922] 1 I. R. 103.—**IR.**

38 xii. —.]—Where the demands are not in the same right there can be no set-off.—NEWMAN v. SIMMS (1882), 6 Nfld. L. R. 422.—**NFLD.**

38 xiii. —.]—Where the demands place in respect of debts due between the same parties in their same capacities.—DE VILLIERS v. COMMAILLE (1845), 3 Mon. 544.—**S. AF.**

38 xiv. —.]—BEUKES v. STEYN (1874), Buch. 18.—**S. AF.**

38 xv. —.]—OUDTSHOORN TOWN COUNCIL v. SMITH, [1911] C. P. D. 558.—**S. AF.**

lent moneys to various local bodies, were paid by them interest in respect of such loans amounting in one year to a sum of £352,000, such sum being the full amount of the interest due, without any deduction by the borrowers in respect of income tax. Upon appeal against an assessment to income tax upon the said sum of £352,000, the London County Council contended that they were not liable to pay income tax in respect thereof, & further, that if they were so liable, they were entitled to deductions in respect of other transactions with persons other than those to whom they had lent moneys, & that the amount of such deductions ought to be taken into account upon the present assessment, & an allowance made in respect thereof:—*Held*: even if the London County Council were entitled to the deductions claimed, such deductions, being in respect of transactions wholly different from those dealt with by the present assessment, amounted, in fact, to a set-off, & could not now be taken into account, for there was no provision in Income Tax Acts by which an assessment to income tax in respect of one transaction could be reduced by a set-off as against the Crown in respect of another transaction.—*LONDON COUNTY COUNCIL v. GROVE* (1896), 61 J. P. 52; 45 W. R. 279; 13 T. L. R. 70; 41 Sol. Jo. 95; 3 Tax Cas. 508, C. A.

Annotation:—*Mentd.* Leeds Permanent Benefit Bldg. Soc. v. Mallandaine (1897), 66 L. J. Q. B. 467.

51. — **Costs of next friend of infant plaintiff**—**In administration action—Debt due to testator from next friend.**—The costs of a next friend of an infant in an administration action are treated as the costs of the infant, & accordingly they cannot be set off against a debt which the next friend owes to the estate.—*Re BARTON, HOLLAND v. KERSLEY* (1912), 56 Sol. Jo. 380.

52. **Claim must be actionable debt.**—A. & B. being engaged in a building speculation, A. sold to B. two of the unfinished houses for £2,000, & agreed that the payment should be made by B.'s expending the amount in finishing the houses. B. expended £335 & became bkpt. —*Held*: on a bill filed by A. against B. for a general account, that that sum must be taken as in part payment of the purchase-money, & as not constituting a debt from A. to B. & consequently not the subject of set-off.—*WOODGATE v. BURTON* (1855), 25 L. T. O. S. 89, L. C.

53. —.—The right of set-off depends, I think, upon there being an actionable debt (*COCKBURN, C.J.*).—*RAWLEY v. RAWLEY* (1876), 1 Q. B. D. 460; 45 L. J. Q. B. 675; 35 L. T. 191; 24 W. R. 995, C. A.

Annotation:—*Mentd.* McCreagh v. Cox & Ford (1923), 92 L. J. K. B. 855.

52 i. **Claim must be actionable debt.**—*WAKEFIELD v. GORRIE* (1847), 3 U. C. R. 159, 160.—*CAN.*

52 ii. —.—*STEEVES v. HOPPER* (1849), 6 N. B. R. (1 All.) 394.—*CAN.*

52 iii. —.—*ALDWELL v. HANATH* (1857), 7 C. P. 9.—*CAN.*

52 iv. —.—A debt. can only set up, by way of set-off, a demand for which he can bring an action.—*CANADIAN BANK OF COMMERCE v. NORTHWOOD* (1888), 5 Man. L. R. 342.—*CAN.*

52 v. —.—While there are some distinctions between set-off & counter-claim, as to both the rule applies that in order to give effect to them they must be recoverable claims to the same extent as if they were being sued on primarily.—*AYER v. KELLY* (1913), 12 R. L. R. 264; 11 D. J. R.

785; 41 N. B. R. 459.—*CAN.*

52 vi. —.—*Held*: the promise alleged in the plea was a mere *nudum pactum*, upon which no action could be maintained, & consequently, did not establish any right to the set off pleaded.—*NEWFOUNDLAND SAVINGS BANK v. McPHERSON* (1860), 4 Nfld. L. R. 459.—*NFLD.*

52 vii. —.—*Held*: as no debt existed in respect of which plff. could be sued there could not be a right of set-off.—*LOUGHNAN v. O'SULLIVAN*, [1922] 1 I. R. 160.—*IR.*

k. **Claim must be for liquidated amount.**—*ALLEN v. CHISHOLM* (1871), 33 U. C. R. 237.—*CAN.*

l. —.—*WATEROUS ENGINE WORKS Co. v. BALL* (1903), 7 Terr. L. R. 32.—*CAN.*

m. —.—The right of set-off

Debt & credit in same right—Bankruptcy.—*See BANKRUPTCY*, Vol. IV., pp. 300–308, Nos. 3566–3636.

SUB-SECT. 2.—DATE OF ORIGIN AND CONTINUANCE OF CLAIM.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 39 (1).

54. **Debt must exist at commencement of action.**—A promissory note given by plff. to deft. before an original sued out, but not due till afterwards, cannot be pleaded as a set-off in bar of plff.'s action, but must be pleaded *puis darrein continuance*.—*PILGRIM v. KINDER* (1744), 7 Mod. Rep. 463; 87 E. R. 1357.

55. —.—A. shipped goods on board the ship of B. on a voyage to India, & also went by the same ship as a passenger. The ship was wrecked near the Cape of Good Hope; the goods were spoiled, & A. returned to England. A., before he left England, gave B. a receipt for £250 as money advanced, including a sum of £95 as passage money paid to the captain, & another sum of £10 for freight of the goods, & B. afterwards received the amount of the insurance. In an action for money had & received, brought by A. against B. to recover the insurance money:—*Held*: (1) B. was entitled to set off the £95 unless it was shown that the passage money belonged to the ship owners, but B. could not set off the £10 for freight, as the ship did not complete her voyage to India; (2) B. could not set off any sum which he had paid to the order of A., if it was not actually paid before the bringing of the action, & if he had only made himself liable to pay it, that would not entitle him to set it off.—*LEMAN v. GORDON* (1838), 8 C. & P. 392.

56. —.—*Assumpsit* by payee against maker of a promissory note for £15 9s. 4d., payable on demand; averring a demand on a particular day. Plea, as to £3 parcel, a set-off due at the time when the note was demanded, & ever since; concluding with a verification & prayer of judgment: & as to £12 9s. 4d., residue, that at the time of the demand deft. tendered plff. £12 9s. 4d., & has always, from the time of making his said promise as to £12 9s. 4d. been ready & willing to pay that sum, & now brings the same into ct., etc., concluding with a verification & prayer of judgment. Replication to the first plea, a traverse that any set-off was due at the commencement of the suit, on which issue was joined; to the second, that before the making of the alleged tender, & before & at the time of the making of the demand & refusal hereinafter mentioned, a larger sum than £12 9s. 4d. to wit £15 9s. 4d. including the sum of

applies only where the claim on either side is liquidated.—*TOCHER v. THOMSON* (Man.) (1914), 27 W. L. R. 140; 16 D. L. L. 872.—*CAN.*

n. —.—According to the law of Jersey a claim by way of compensation or set-off is admissible, when it is for a liquid demand.—*DYSON v. GODFREY* (1881), 9 App. Cas. 726, P. C.—*JERSEY.*

PART I. SECT. 3, SUB-SECT. 2.

54 i. **Debt must exist at commencement of action.**—Jud. Act has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off.—*CHAMBERLAIN v. CHAMBERLIN* (1886), 11 P. R. 501.—*CAN.*

o. —.—**Judgment recovered after action brought.**—A judgment recovered by deft. against plff. after

Sect. 3.—Essential conditions of set-off: Sub-sects. 2 & 3. Sect. 4: Sub-sect. 1.]

£12 9s. 4d. was due upon the note & that before the tender, pltf. demanded payment of the sum of £15 9s. 4d. which so included the £12 9s. 4d. but deft. refused to pay the £15 9s. 4d.; & that at the time of such demand & refusal, no set-off or other just cause for non-payment thereof existed:—*Held*: on special demurrer the replication was good.—*COTTON v. GODWIN* (1840), 7 M. & W. 147; 9 Dowl. 703; 10 L. J. Ex. 243; 151 E. R. 715.

Annotations:—*Distd.* Brandon v. Newington (1842), 7 Jur. 60. *Consd.* Hesketh v. Fawcett (1843), 2 Dowl. N. S. 827. *Refd.* Dixon v. Clarke (1848), 5 C. B. 365.

57. ———.]—Deft. cannot set off, by plea to the further maintenance of the action, a debt which accrued after action brought, & before plea pleaded.

—*RICHARDS v. JAMES* (1848), 2 Exch. 471; 17 L. J. Ex. 277; 11 L. T. O. S. 225; 12 Jur. 464; 154 E. R. 577.

Annotation:—*Refd.* Brooks v. Jennings (1866), 14 L. T. 19.

58. ——— & plea pleaded.]—(1) A plea of set-off that pltf. was indebted to deft. at the time of the plea pleaded is bad; it should state that he was indebted at the commencement of the action. (2) It is no objection to a plea of set-off that deft. has brought an action against pltf. for same sum in which pltf. has paid the amount of the demand into ct.—*EVANS v. PROSSER* (1789), 3 Term Rep. 186; 100 E. R. 524.

Annotations:—*As to* (1) *Apld.* Le Bret v. Papillon (1804), 4 East, 502; Lee v. Levy (1825), 4 B. & C. 390. *Refd.* Basan v. Arnold (1810), 6 M. & W. 559; Fisher v. Ford (1840), 4 Jur. 1034; Wallace v. Kelsall (1840), H. & W. 25. *As to* (2) *Refd.* Briscoe v. Hull (1842), 7 Jur. 306.

59. ———.]—Deft. can set off those debts only which were due to him from pltf. at the time of action brought, as well as at the time of plea pleaded.—*BRAITHWAITE v. COLEMAN* (1835), as reported in 4 Nev. & M. K. B. 654.

60. ———.]—A plea of set-off stated that, at the time of the commencement of the action, pltf. was indebted to deft. in sums of money exceeding the debt claimed by pltf., but omitted to add, "& still is" indebted:—*Held*: on demurrer, the plea was bad.—*DENDY v. POWELL* (1838), 6 Dowl. 577; 3 M. & W. 442; 1 Horn & H. 107; 7 L. J. Ex. 154; 2 Jur. 352; 150 E. R. 1218.

Annotation:—*Apld.* Simpson v. Egginton (1855), 10 Exch. 845.

61. ———.]—*BENNETT v. WHITE*, No. 208, *post*.

62. ——— Judgment recovered after action brought—Before plea pleaded.]—(1) If pltf., in making up the record, makes the time of plea pleaded appear posterior to the date of the subject-matter pleaded, when it was not so in fact, the ct. will direct an amendment at pltf.'s cost if he resists.

(2) A judgment recovered after action brought & before plea pleaded is a good set-off.—*REYNOLDS v. BEERING* (1784), 4 Doug. K. B. 181; 3 Term Rep. 186, as, 30 E. R. 524.

Annotations:—*As to* (1) *Overd.* Evans v. Prosser (1789), 3 Term Rep. 186. *Consd.* Le Bret v. Papillon (1804), 4 East, 502. *Refd.* Lee v. Levy (1825), 3 L. J. O. S. K. B. 251; Basan v. Arnold (1840), 6 M. & W. 559.

63. ——— Accrual after judgment recovered.]—

the commencement of pltf.'s suit cannot be pleaded as a set-off, even though the verdict on which the judgment was founded was given before the commencement of such suit.—*HAMMOND v. MOTT* (1857), 8 N. B. R. (3 All.) 426.—*CAN.*

P. ———.]—*FIELD v. GALLOWAY* (1884), 5 O. R. 502.—*CAN.*

q. ———.]—A judgment re-

covered subsequent to the commencement of an action, cannot be given in evidence under a plea of set-off.—*JONES v. HORNE* (1852), 4 Ir. Jur. 203.—*IR.*

PART I. SECT. 3, SUB-SECT. 3.

68 i. Set-off available only between same parties.]—To entitle a party to set off one debt against another, it

A person against whom a verdict had been obtained, having afterwards acquired a demand to a greater amount against the party who obtained it, is not entitled to an injunction to restrain proceedings on the verdict.—*WHYTE v. O'BRIEN* (1824), 1 Sim. & St. 551; 57 E. R. 218.

Annotations:—*Distd.* Hamp v. Jones (1840), 9 L. J. Ch. 258. *Refd.* Itawson v. Samuel (1841), Cr. & Ph. 161.

64. ———.]—A motion by a landlord to restrain his tenant from enforcing a judgment for excessive distress, on the ground that a larger sum than the judgment debt had since the judgment become due to the landlord for arrears of rent & dilapidations, refused with costs.

Pltf. cannot be allowed to wait until a future debt has accrued due, & then set it off against the judgment (*PAGE WOOD, V.-C.*).—*MAW v. ULYATT* (1861), 31 L. J. Ch. 33; 5 L. T. 251; 26 J. P. 196; 7 Jur. N. S. 1300; 10 W. R. 4.

65. ——— Consideration received before action commenced.]—To an action, brought June 27, deft. pleaded, by way of set-off, a claim against pltf., which was not payable till Aug. 1, though the consideration had been received by pltf. before her action was commenced. Under a judge's order of July 27, "by consent of both sides, all matters in difference between the parties, including the claim of deft. in her set-off in the action," were referred to arbn.:—*Held*: the claim made in the set-off was properly entertained by the arbitrator as a matter in difference, though not payable till after the date of the action & the judge's order.—*PETCH v. FOUNTAIN* (1839), 5 Bing. N. C. 442; 7 Scott, 441; 8 L. J. C. P. 305; 3 Jur. 436; 132 E. R. 1169; *sub nom.* PETCH v. CONLAN, 7 Dowl. 426.

66. ——— Accrual after cause of action accrued.]—To an action of debt on a bond conditioned for the payment of the interest half-yearly, & the principal sum six months after notice, deft. pleaded a set-off exceeding the interest due, which set-off accrued before the commencement of the action, but after the interest became payable—with an allegation that notice to pay the principal had not been given:—*Held*: the plea was a good answer to the action, under 8 Geo. 2, c. 24, s. 5.—*LEE v. LESTER* (1849), 7 C. B. 1008; 7 Dow. & L. 137; 18 L. J. C. P. 312; 137 E. R. 399.

Annotation:—*Refd.* Johnson v. Diamond (1855), 11 Exch. 73.

67. ——— Continuing due until date of trial.]—A debt sought to be set off must continue due up to the time of trial; therefore it is a good replication to a plea of set-off, that after it was pleaded pltf. paid the debt.—*EYTON v. LITTLEDALE* (1849), 4 Exch. 159; 18 L. J. Ex. 369; 13 L. T. O. S. 325; 154 E. R. 1165.

Annotation:—*Refd.* Newington v. Levy (1870), L. R. 6 C. P. 180.

Company in liquidation.]—See COMPANIES, Vol. X., pp. 940-942, Nos. 6443-6452.

SUB-SECT. 3.—PARTIES.

68. Set-off available only between same parties.]—*HUNT v. JESSEL*, No. 191, *post*.

must be shown that the debts are due from & to the same parties respectively.—*WILSON v. SWITZER* (1859), 1 Ch. Ch. 160.—*CAN.*

68 ii. ———.]—*SYLVESTER v. McCUAIG* (1878), 28 C. P. 443.—*CAN.*

68 iii. ———.]—*MCDONALD v. NEVILLE* (1883), 16 N. S. R. (4 R. & G.) 191.—*CAN.*

69. — Plaintiff on record as nominal plaintiff.]—Where the parties to the record are at issue upon a plea of set-off by deft. it is not competent for those who represent pltf. to give evidence, showing that pltf. on the record is only the nominal pltf.; & that, as regards the real pltf., deft. has no set-off. Such an alteration of the parties to the action, if admissible in evidence, must be specially pleaded in reply to the plea.—*WILTON v. BUXTON* (1828), 7 L. J. O. S. K. B. 91.

70. — Payments made by defendant's trustees.]—Where payments have been made by deft.'s trustees to pltf., under the conditions of a deed, such payments are not the subject of set-off between deft. & pltf.—*ABBOTT v. BRUERE* (1839), 5 Bing. N. C. 598; 7 Scott, 753; 9 L. J. C. P. 81; 132 E. R. 1230.

71. — Set-off against obligor of bond—By obligee—Payment on bond due to stranger.]—*JOHNSON v. DIAMOND*, No. 113, *post*.

72. — Action by tenant for life—Trustees of will joined as plaintiffs.]—Premises were devised to trustees upon trust to pay the rents & profits thereof to a person for life with remainder over. The tenant for life granted a lease of the premises by which the lessee covenanted to keep the premises in repair. The lessee having committed a breach of the covenant to repair:—*Held*: the tenant for life, in granting the lease, was by reason of Settled Land Act, 1882 (c. 38), s. 53, in the position of a trustee for all parties entitled under the settlement; therefore, the damages were recoverable by the tenant for life as trustee for the trust estate, & the trustees under the will were entitled to be joined as pltf.s in the action; & deft. could not set up a set-off, against the tenant for life alone.—*MITCHELL v. ARMSTRONG* (1901), 17 T. L. R. 495.

Annotation.—*Mentd.* *Re Lacon's Settlement*, *Lacon v. Lacon*, [1911] 2 Ch. 17.

Claim in same right.]—*See* Sub-sect. 1, *ante*.

Joint & separate debts.]—*See* Sect. 4, sub-sect. 5, *post*.

SECT. 4.—WHEN SET-OFF AVAILABLE.

SUB-SECT. 1.—IN GENERAL.

73. Independent covenants.]—Covenants independent cannot be set off one against the other (*LORD MANSFIELD, C.J.*).—*ANON.* (1773), *Lofft*, 194; 98 E. R. 606; *sub nom.* *KINGSTON v. PRESTON*, cited in 2 Doug. K. B. at p. 689.

Annotations.—*Mentd.* *Jones v. Barkley* (1781), 2 Doug. K. B. 684; *Goodisson v. Nunn* (1792), 4 Term Rep. 761; *Glazebrook v. Woodrow* (1799), 8 Term Rep. 366; *Ritchie v. Atkinson* (1808), 10 East, 295; *Carpenter v. Cresswell* (1827), 4 Bing. 409; *Everett v. Desborough* (1829), 3 Moo. & P. 190; *Leiston Gas Co. v. Leiston-cum-Sizewell U. C.*, [1916] 2 K. B. 428.

74. Set-off of payment—Under threat—Threat of distress for rent—Defence available.]—Where

a party threatened with a distress for rent pays money, against the payment of which he might legally have defended himself, but does not do it, this shall not be deemed a payment by compulsion nor shall he be allowed to set it off against another demand.—*KITBBS v. HALL* (1791), 1 Esp. 84; 170 E. R. 287, N. P.

Annotations.—*Consd.* *Cadaval v. Collins* (1836), 6 Nev. & M. K. B. 324. *Refd.* *Lothian v. Henderson* (1803), 3 Bos. & P. 499; *Skeate v. Beale* (1840), 11 Ad. & El. 983; *Gulliver v. Cosens* (1845), 1 C. B. 788; *Higgs v. Scott* (1849), 7 C. B. 63; *Glynn v. Thomas* (1856), 26 L. T. O. S. 281; *Maskell v. Horner*, [1915] 3 K. B. 106. *Mentd.* *Morgan v. Palmer* (1824), 2 B. & C. 729; *Parker v. G. W. Ry.* (1844), 7 Man. & G. 253.

75. Action of sheriff for fee—Excessive demand—Set-off of excess.]—Action for money had & received lies to recover fees illegally demanded & paid to the sheriff, although indictment for extortion may be also sustainable, & consequently such illegal payments may be set off as money had & received against an action brought by the sheriff.—*DEW v. PARSONS* (1819), 2 B. & Ald. 562; 1 Chit. 295; 106 E. R. 471.

Annotations.—*Consd.* *Primrose v. Bradley* (1834), 4 Tyr. 995. *Refd.* *Maybery v. Mansfield* (1846), 9 Q. B. 754; *Freeman v. Jeffries* (1869), L. R. 4 Exch. 189. *Mentd.* *R. v. Gwyer* (1834), 2 Ad. & E. 216; *Innes v. Levi* (1835), 1 Hodg. 195; *Mevin v. Prince* (1839), 10 Ad. & El. 494; *Parker v. G. W. Ry.* (1844), 7 Man. & G. 253; *Steele v. Williams* (1853), 8 Exch. 625; *Glamorgan County Council v. Glasbrook*, [1924] 1 K. B. 879.

76. Contract in restraint of trade—Promissory note given for amount of forfeitures for breach.]—An agreement operating as a partial restraint of trade is void, unless supported by an adequate consideration; & a promissory note given to one of the parties to such agreement, for the amount of forfeitures incurred in breaches of it, held also to be void, & in the hands of such party, not the subject of set-off.—*YOUNG v. TIMMINS* (1831), 1 Cr. & J. 331; 1 Tyr. 226; 9 L. J. O. S. Ex. 68; 148 E. R. 1416.

Annotations.—*Mentd.* *Keppel v. Bailey* (1834), 2 My. & K. 517; *Hitchcock v. Coker* (1836), 2 Har. & W. 464; *R. v. Welsh*, etc., *Birmingham J.J.* (1853), 1 C. L. T. 319; *Re Wyld* (1860), 2 L. T. 810; *Gravely v. Barnard* (1874), L. R. 18 Eq. 518; *Maxim Nordenfett Guns & Ammunition Co. v. Nordenfett*, [1893] 1 Ch. 636.

77. Arbitration award held conclusive as to set-off.]—An order of reference was made in an action where the main point in dispute was, whether certain goods, the value of which, namely £246, defts. proposed to set off against pltf.'s claim, had been bought by pltf. of defts., or of A. B. The question stated in the order was, whether or not defts. were entitled to set off the sum of £246. The arbitrators, as was alleged, being unable to decide the main point, but finding that, at all events, a small deduction, £8 12s. was to be made from the £246 awarded, in the terms of the order of reference, that deft. was not entitled to set off £246. A rule was afterwards obtained for setting aside the award as not being final, but discharged. Pltf. then brought an action of debt on the award;

68 iv. —.]—*MURLI DHAR v. PAR-SOTAM DASS* (1867), 1 L. R. 2 All. 91.—*IND.*

68 v. —.]—*LYNN v. BELL* (1876), 1 L. R. 10 C. L. 487.—*IR.*

68 vi. —.]—*MAXWELL v. COYLE & WADSWORTH* (1899), 33 I. L. T. 131.—*IR.*

68 vii. —.]—*DE VILLIERS v. COM-MAILLE* (1845), 3 Men. 544.—*S. AF.*

PART I. SECT. 4, SUB-SECT. 1.

r. General rule.]—The right of set-off exists where there are cross-demands arising out of one & the same transaction, or when these are so connected in their nature & circumstances as to make it inequitable that pltf. should recover & deft. be driven

to a cross-suit.—*KISTNASAMY PILLAY v. MADRAS CORPN.* (MUNICIPAL COMRS.) (1868), 4 Mad. 120.—*IND.*

t. —.]—*NIJAZ GUL KHAN v. DURGA PRASAD* (1892), 1 L. R. 15 All. 9.—*IND.*

a. —.]—*NAND RAM v. RAM PRASAD* (1905), 1 L. R. 27 All. 145.—*IND.*

b. *Partial failure of consideration.]*—*WRIGHT v. COOK* (1842), 9 U. C. R. 605.—*CAN.*

c. *Open running accounts made up of divisible items.]*—*RUSSELL v. CONWAY* (1848), 5 U. C. R. 256.—*CAN.*

d. *Overpayments—Recovery of excess.]*—*SINCLAIR v. GALT TOWN COUNCIL* (1859), 17 U. C. R. 259.—*CAN.*

e. *Matter set up subject of cross-action.]*—*TURLEY v. EVANS* (1863), 13 C. P. 214.—*CAN.*

f. *Action for money lent—Set-off of acceptance by one plaintiff in satisfaction.]*—*YOUNG v. TAYLOR* (1866), 25 U. C. R. 583.—*CAN.*

g. *Summons to sign judgment.]*—Anything which could have been pleaded by a deft. under the old statutes of set-off, can now be brought forward in answer to an application for leave to sign judgment under the statute & will prevent an order being made allowing judgment to be signed.—*MANOQUE v. MASON* (1886), 3 Man. L. R. 603.—*CAN.*

h. *Debt based on breach of trust.]*—*Re Bolt & Iron Co., LIVINGSTONE'S*

Sect. 4.—When set-off available: Sub-sects. 1 & 2.]

& debts, pleaded a set-off to the amount of £237 10s. 6d.:—*Held*: they could not now set off the difference between the £246 & £8 12s. for that the award was conclusive as to the sum now sought to be set off, as well as that mentioned in the order of reference; & if the arbitrators had gone upon a mistaken ground, their decision could not be questioned in this form.—*JOHNSON v. DURANT* (1831), 2 B. & Ad. 925; 1 L. J. K. B. 47; 109 E. R. 1386.

Annotation:—*Mentd.* *Armitage v. Walker* (1855), 2 Jur. N. S. 13.

78. Action for trover—Set-off by defendant—Goods distrained for rent due by plaintiff—Rent paid by defendant.]—After verdict for pltf. in trover, the goods were seized in the hands of deft. for rent due to A., which pltf. was liable to pay. Deft. having paid the rent, the ct. allowed him to deduct the amount from the verdict found for pltf. —*PLEVIN v. HENSHALL* (1833), 10 Bing. 24; 2 Dowl. 743; 3 Moo. & S. 403; 2 L. J. C. P. 253; 131 E. R. 814.

Annotation:—*Mentd.* *Underwood v. Bank of Liverpool & Martins*, *Underwood v. Barclays Bank*, [1924] 1 K. B. 775.

79. ————]—A distress for rent was levied upon certain property, & cattle lent for hire by pltf. to the tenant were seized. Deft., the holder of a bill of sale upon the goods & chattels of the tenant, then paid off the distress, & seized the cattle in question under his bill of sale. Upon an action for trover & wrongful conversion:—*Held*: deft. was not entitled to set off & counterclaim the amount paid by him to relieve the cattle from the distress.—*JONES v. SIMMONS* (1881), 45 J. P. 666.

80. Covenant for sum payable under contract—Provision for deduction of sum to be ascertained by arbitration—Set-off of sum awarded by arbitrator.]—Declaration in covenant stated that, on a dissolution of partnership between pltf., deft. & another, deft., by a certain indenture, covenanted that he & the other party last mentioned would pay pltf., as the outgoing partner £6,800 by instalments; but five instalments, amounting to £4,800, parcel of the £6,800, were made subject to reduction, in a specified ratio, if the profits which the partnership had derived from connections of pltf. should fall short of a certain amount. Non-payment of the £4,800, as well as

of the other instalments, amounting to £2,000, was assigned as a breach. Plea: as to the £4,800, setting out the deed on oyer, that, by a further covenant, it was agreed that, if any difference should arise touching the sums to be deducted, it should be referred to J. P., an arbitrator, to award what amount, not exceeding £4,800, should be deducted; that such difference did arise, & thereupon pltf., deft. & the other parties submitted themselves to refer, & did refer, the said difference to J. P., who awarded that £4,800, being the whole amount of the said five instalments, should be deducted from the £6,800: & that deft., before the commencement of this action, in pursuance of the said award, claimed to deduct, & did deduct, the said £4,800, "from the said five instalments"; whereby the said £6,800, before the commencement of the suit, was reduced to £2,000, to be paid to pltf. pursuant to the indenture:—*Held*: the matter alleged was not merely an estoppel, but that the plea was a good plea in bar.—*PARKES v. SMITH* (1850), 15 Q. B. 297; 19 L. J. Q. B. 405; 15 L. T. O. S. 223; 14 Jur. 761; 117 E. R. 470; *subsequent proceedings*, *sub nom.* *SMITH v. PARKES* (1852), 16 Beav. 115.

Annotations:—*Apld.* *Comings v. Heard* (1869), L. R. 4 Q. B. 669. *Mentd.* *Collins v. Collins* (1858), 26 Beav. 306; *Re Ward & Secretary of State for War Department* (1862), 32 L. J. Q. B. 53; *Ex p. Glaysher* (1864), 3 H. & C. 442; *Wishart v. Fowler* (1861), 3 New Rep. 373; *Re Newton & Hetherington* (1865), 19 C. B. N. S. 341.

81. Action for specific performance.]—Deft. to a bill for specific performance of a clear contract for a specific sum cannot resist it by way of set-off on the ground that on an account between them in respect of antecedent transactions affecting the subject-matter, there would be a balance due to deft.—*PHIPPS v. CHILL* (1857), 3 Drew. 709; 61 E. R. 1074.

82. Collateral breach of agreement.]—In an action to obtain payment of a school bill, evidence of a collateral breach of agreement on the part of the schoolmaster cannot be given by deft. in order to reduce the amount of the bill, such a collateral breach being the subject of cross-action, & not of set-off.—*HENNEQUIN v. O'DOWD* (1870), 21 L. T. 803.

83. Claim incapable of being assigned.]—To a claim in an action brought to recover the arrears of a pension due by virtue of Incumbents Resignation Act, 1871 (c. 44), deft., by way of set-off & counterclaim, pleaded that a larger sum than the

CASE (1889), 14 O. R. 211; 16 A. R. 397.—CAN.

k. Litigant appearing in person —Set-off of disbursements & allowance for time & trouble.]—The judgment debtor appeared in person & argued his own case on appeal:—*Held*: he should be allowed to set off against the judgment debt his disbursements & a moderate allowance for his time & trouble on the argument.—*MILLAR v. MACDONALD* (1892), 14 P. R. 499.—CAN.

l. Debt to company — Payments made for goods delivered to company.]—*Re FORB, Ex p. THE LICREIVER, INDIAN TRUST v. ACADIA PULP CO.* (1904), 40 N. S. R. 621.—CAN.

m. In winding-up of company — Claim for goods supplied to company.]—Subscribers for shares in a co. are not entitled in the winding up to set off against their liability to pay up the shares claims for goods supplied to the co.—*Re JONES & MOORE ELECTRIC CO. & JONES & MOORE'S CASE* (1909), 18 Man. L. R. 549.—CAN.

n. — Price of patent sold to company.]—*Re WINNIFEG HEDGE & WIRE FENCE CO., WALLACE'S CASE* (Man.) (1912), 20 W. L. R. 337; 1 W. W. R. 853.—CAN.

o. Against purchase price—Arbitration condition precedent.]—*Held*: the holding of an arbn. to determine any deficiency was a condition precedent to the claiming of any set-off against the purchase price.—*CUDDEY v. CAMERON* (1910), 15 B. C. R. 432.—CAN.

p. Cross-claims arising from transactions independent of debt assigned.]—While Jud. Act, s. 58 (5), gives a right of equitable set-off, it does not include mere cross-claims arising from transactions independent of the debt assigned.—*SOVEREIGN BANK OF CANADA v. PARSONS* (1911), 19 O. W. R. 334; 2 O. W. N. 1459; 24 O. L. R. 387.—CAN.

q. Moneys attached under garnishee proceedings.]—*TOMPKINS v. KNEGG*, [1920] 3 W. W. R. 886.—CAN.

r. Indebitatus assumpsit.]—In all actions of *indebitatus assumpsit* a set-off may be pleaded.—*RUTHERFORD v. DICKINSON* (1871), 5 Nfld. L. R. 382.—NFLD.

t. Action of detinue.]—There can be no set-off in an action of detinue.—*PEACOCK v. ANDERSON* (1878), 4 N. Z. Jur. N. S. 67.—N.Z.

a. Effect of lien.]—The mere fact that the claim of one of the parties is secured by a lien does not prevent set-off from operating with regard to such claim.—*BURKHART & Co. v. JACOBSEN'S TRUSTEE* (1909), 26 S. C. 293.—S. AF.

b. Liquidated claim — Against judgment debt.]—A liquidated claim which is admitted may be set off against a judgment debt.—*RAINSFORD v. AFRICAN BANKING CORPN.*, [1912] C. P. D. 1106.—S. AF.

c. Set-off against claim for damages.]—Demandant's residence on the premises, in the family & at the expense of the heir-at-law, for part of the time between the death of her husband & her recovering judgment, is not admissible in evidence as a set-off to her damages for detention.—*ROBINET v. LEWIS* (1830), Dra. 272.—CAN.

d. —.]—*STUBBS v. JOHNSON* (1876), 38 U. C. R. 466.—CAN.

e. —.]—No set-off is allowed, as a general rule, against a claim for damages.

Where, however, a statement of claim in an action for damages expressly credits deft. with the amount which deft. asserts, a right to set off

amount of pension was due to him from pltf. upon a judgment, & he claimed to recover the balance:—*Held*: as there can be no set-off to a pension created, under Incumbents Resignation Act, 1871 (c. 44), the set-off & counterclaim must be dismissed.—*GATHERCOLE v. SMITH* (1881), 7 Q. B. D. 626; 50 L. J. Q. B. 681; 45 L. T. 106; 29 W. R. 577, C. A.

84. Action for account only—No claim for recovery of money.]—In a suit for an account of sales of timber by deft. on behalf of pltf.:—*Held*: pltf. had failed to prove the contracts upon which she sued; *qu.*: whether a set-off could be pleaded against such a claim, but no issue having been raised or applied for in regard to it, the cross-appeal was dismissed.—*NAN KARAY PHAW v. KO HTAW AH, KO HTAW AH v. NAN KARAY PHAW* (1886), L. R. 13 Ind. App. 48, P. C.

Set-off against arbitration award.]—*See* ARBITRATION, Vol. II., pp. 570, 578, Nos. 2010, 2087.

Sale by auction—Action by auctioneer against purchaser—Set-off between owner & purchaser.]—*See* AUCTION & AUCTIONEERS, Vol. II., pp. 40, 41, Nos. 286–289.

Action by sheriff for poundage—Set-off by execution creditor—Costs of sale by appraisalment.]—*See* EXECUTION, Vol. XXI., p. 616, No. 2038.

Set-off by garnishees.]—*See* EXECUTION, Vol. XXI., p. 640, Nos. 2201–2204.

SUB-SECT. 2.—ACTIONS ON BONDS.

See, now, Judicature Act, 1925 (c. 49), s. 39 (1) (a); R. S. C., Ord. 19, r. 3.

85. Action for penalty—Set-off not equivalent to penalty.]—*STEPHENS v. LOFTY* (1733), 2 Barn. K. B. 338; Kel. W. 139; 94 E. R. 538.

86. Bond for payment of annuity.]—Set-off may be pleaded to a bond for payment of an annuity.—*COLLINS v. COLLINS* (1759), 2 Burr. 820; 2 Keny. 530; 97 E. R. 579.

Annotations:—*Consd.* *Rodgers v. Maw* (1816), 15 M. & W. 414. *Apld.* *Lee v. Lester* (1819), 7 C. B. 1008. *Dtd.* *Attwood v. Attwood* (1853), 2 E. & B. 23. *Refd.* *Lonsdale v. Church* (1788), 2 Term Rep. 388; *Walcot v. Goulding* (1799), 8 Term Rep. 126; *Willoughby v. Swinton* (1805), 6 East, 550; *Johnson v. Diamond* (1855), 11 Exch. 73. *Mentd.* *Mackworth v. Thomas* (1800), 5 Ves. 329; *Smith v. Bond* (1833), 10 Bing. 125; *Cope v. Bennett, Harris, Third Party* (1911), 55 Sol. Jo. 521.

87. Set-off of penalty—Whether whole penalty may be set off.]—The whole penalty cannot be pleaded by way of set-off.—*NEDRIFFE v. HOGAN* (1760), 2 Burr. 1024; 97 E. R. 687.

88. —.]—It is a settled rule, that a sum of money given under an agreement by way of penalty cannot be pleaded as matter of set-off.

In an agreement for the performance of several arts., wherein the parties bound themselves "in the penal sum of £500 to be recoverable as & by way of liquidated damages":—*Held*: a plea of set-off, in respect of this £500 alleged to have accrued from a breach of the agreement, was bad, as it was in the nature of a penalty, & not of liquidated damages.—*DAVIES v. PENTON* (1827), 6 B. & C. 216; 9 Dow. & Ry. K. B. 369; 5 L. J. O. S. K. B. 112; 108 E. R. 433.

Annotations:—*Mentd.* *Boys v. Ancell* (1839), 2 Arn. 9; *Horne v. Flintoff* (1842), 9 M. & W. 673; *Magee v. Lavell* (1874), L. R. 9 C. P. 107.

89. Set-off of matters outside the bond.]—A plea of set-off for money due on a recognisance & also for money due upon promises pleaded to an action of debt on bond, as if to an action of *assumpsit*:—*Held*: to be a nullity, & pltf. might sign judgment.—*PENFOLD v. HAWKINS* (1814), 2 M. & S. 606; 105 E. R. 508.

90. Bond conditioned to do act other than payment of money.]—Deft., an attorney, having pleaded a plea of set-off to an action on a bond in a penal sum, conditioned to re-invest in the same stock a sum of money lent to him by the sale of stock—which plea was supported by giving in evidence a taxed bill of costs covering the amount of the debt averred in the plea to be due from him to pltf. on the bond, & having obtained a verdict on the issue joined by replication to that plea, the ct. made absolute a rule requiring cause to be shown why the judgment should not be entered up for pltf., *non obstante veredicto*, on the ground that such a bond is not within the statutes of set-off, & therefore, as such a plea ought not to have been put on the record, that it must be treated as a nullity. But they refused to award a writ of inquiry of damages, which was prayed as a consequence of the rule, leaving pltf. to proceed on the judgment so obtained as she should be advised.—*GILLINGHAM v. WASKETT* (1824), 13 Price, 434; *McCle*. 198; 147 E. R. 1040.

Annotations:—*Refd.* *Blair v. Ormond* (1851), 17 Q. B. 423; *Johnson v. Diamond* (1855), 11 Exch. 73.

91. Bond conditioned for indemnity.]—Count on a bond for £100, conditioned to indemnify pltf. against certain actions; breach, that pltf. was sued on one of them, & obliged to pay £9 10s. 5d., & was not indemnified. Plea, set-off of an amount averred to be equal to pltf.'s claim; but the plea did not show what amount was due on the bond. Demurrer:—*Held*: set-off could not be pleaded to a bond conditioned for indemnity; & a plea of set-off to a bond, under 8 Geo. 2, c. 24, s. 5, is not good, unless it shows what amount is justly due on the bond; & for both reasons the plea was bad.—*ATTWOOLL v.*

such right is thereby admitted, & the case is an exception to the above rule.—*WIGHTMAN v. RBY*, [1925] 2 D. L. R. 789; [1925] 1 W. W. R. 952; 19 Sask. L. R. 507.—*CAN.*

f. Set-off of claim for damages—Unliquidated damages.]—In a suit for foreclosure upon a mtge. given by the purchaser for part of the purchase money, damages or loss sustained by failure of title or by incumbrances or charges on the property sold, cannot, under the covenants for title, form the subject of set-off to the amount secured by the mtge., before the amount is ascertained by action or otherwise.—*HAMILTON v. BANTING* (1867), 13 Gr. 484.—*CAN.*

g. —.]—*K. B. Rule 137* does not permit the pleading of a claim for unliquidated damages by way of set-off, at least where the damages do not flow out of & are not

inseparably connected with the transactions giving rise to the claim sued on.—*IMPERIAL BANK OF CANADA v. ANNABLE (G. M.) CO., LTD.*, [1925] 1 D. L. R. 946; [1925] 1 W. W. R. 588; 19 Sask. L. R. 288.—*CAN.*

h. —.]—*Held*: by the law of Newfoundland the Govt. were entitled to set off a counterclaim for unliquidated damages for breach of contract.—*NEWFOUNDLAND GOVERNMENT v. NEWFOUNDLAND ICE CO.* (1888), 13 App. Cas. 199, P. C.—*NFLD.*

k. —.]—*RAM DYAL v. RAMDHUN DASS* (1867), 3 Agra, 43.—*IND.*

l. —.]—A claim for unliquidated damages cannot be set off until prosecuted to judgment.—*BASKETT v. GIBB'S BEACH GOLD-DREDGING CO., LTD.* (1901), 21 N. Z. L. R. 201.—*N.Z.*

m. —.]—*COLONIAL GOVERN-*

MENT v. BONNER (1904), 21 S. C. 317.—*S. AF.*

n. —.]—*MANUEL'S TRUSTEE v. NORDEN* (1845), 3 Men. 526.—*S. AF.*

PART I. SECT. 4, SUB-SECT. 2.

o. Action for penalty.]—In an action of debt for the penalty of an arbn. bond, in which pltf. assigns as the only breach the non-payment of a certain liquidated sum awarded by the arbitrators to be paid to him by deft., a set-off may be pleaded; & such set-off is pleadable to the sum so awarded, & not to the penalty of the bond.—*SHAW v. WILSON* (1838), 2 N. B. R. (Ber.) 585.—*CAN.*

91.1. Bond conditioned for indemnity.]—*MOODY (SHERIFF) v. BULL* (1857), 7 C. P. 15.—*CAN.*

p. Submission bond.]—A set-off of a sum certain is a good plea in

Sect. 4.—When set-off available: Sub-sects. 2 & 3, A.]

ATTWOOLL (1853), 2 E. & B. 23; 1 C. L. R. 242; 22 L. J. Q. B. 287; 21 L. T. O. S. 99; 1 W. R. 325; 118 E. R. 677; *sub nom.* **ATTWOOL v. ATWOOL**, 17 Jur. 789.

Annotations:—Distd. **Brown v. Tibbetts** (1862), 6 L. T. 385. **Refd.** **Johnson v. Diamond** (1855), 11 Exch. 73.

92. Pleading set-off—Sufficiency.—In an action on a bond, debt. must set forth in the plea what is really due on the bond, before he is entitled to set off any cross demand under 8 Geo. 2, c. 24, s. 5, & such averment is traversable.—**SYMONS v. KNOX** (1789), 3 Term Rep. 65; 100 E. R. 458.

Annotations:—Distd. **Gillingham v. Waskett** (1824), M'Cle. 198. **Refd.** **Grimwood v. Barrit** (1795), 1 Term Rep. 460; **Marks v. Lahce** (1837), 4 Scott, 137. **Mentd.** **A.-G. v. Jefferys** (1824), 13 Price, 545.

93. ———.—In an action on a bond debt. must set forth in the plea the sum really due on the bond before he is entitled to set off any cross demand on 8 Geo. 2, c. 24, s. 5.—**GRIMWOOD v. BARRIT** (1795), 0 Term Rep. 460; 101 E. R. 648.

Annotations:—Refd. **Cousins v. Paddon** (1835), 2 Cr. M. & R. 547; **Marks v. Lahce** (1837), 3 Bing. N. C. 408. **Mentd.** **A.-G. v. Jefferys** (1824), 13 Price, 545; **A.-G. v. Hawkes** (1830), 1 Tyr. 3.

94. ———.—**LEE v. LESTER**, No. 66, *ante*.

95. ———.—**ATTWOOLL v. ATTWOOLL**, No. 91, *ante*.

96. ———.—A plea of set-off for money due upon a bond, with a penalty, must show the actual state of the account upon the bond between the parties.—**DURHAM (BP.) v. ALLNUTT** (1851), 16 L. T. O. S. 411.

SUB-SECT. 3.—CLAIMS FOR DAMAGES.

A. Before Judicature Acts.

97. Set-off of claim for damages—Damages not yet recovered.—Damages not yet recovered cannot be set off.—**FREEMAN v. HYETT** (1762), 1 Wm. Bl. 394; 96 E. R. 224.

98. ———.—**Unliquidated damages.**—In covenant, unliquidated damages arising from the breach of other covenants to be performed by pltf., cannot be pleaded by way of set-off.—**HOWLET v. STRICKLAND** (1774), 1 Cowp. 56; 98 E. R. 965.

99. ———.—To an action of covenant for rent by a landlord, debt. cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the covenants in the lease.—**WEIGALL v. WATERS** (1795), 6 Term Rep. 488; 101 E. R. 663; *previous proceedings, sub nom.* **WATERS v. WEIGALL**, 2 Anst. 575.

Annotation:—Refd. **Hammond v. Toulman** (1798), 7 Term Rep. 612.

100. ———.—Where an action was brought on a bill of exchange which had been given for goods sold & delivered, & the party to whom the goods were sold alleged that he had been fraudulently deceived in his contract, the goods delivered being inferior both in quality & quantity to what he had ordered:—**Held**: he could not maintain a bill for an account & for an injunction to restrain the action, inasmuch as his object was to reduce the amount of the bill of exchange, by the damages which he claimed for the alleged breach of contract, & as this is not the

subject of set-off at law, it cannot be the subject of account in equity.—**GLENNIE v. IMRI** (1839), 3 Y. & C. Ex. 436; 3 Jur. 432; 160 E. R. 773.

Annotation:—Refd. **Stewart-Moore v. Sprague** (1917), 34 T. L. R. 113.

101. ———.—To an action for money lent, debt. being under terms of trying at the ensuing sittings, the ct. refused to allow him to plead, as a defence on equitable grounds, the following pleas: as to £10,000 parcel, etc., that the claim of pltf. was in respect of moneys advanced by pltf. to debt. upon security of goods consigned by debt. to pltf.; that at the time of such advancing it was agreed between pltf. & debt., that pltf. should cause the goods so consigned to be sold on account of debt. for the best prices which could be got for the same, & out of the proceeds retain the amount of the moneys so advanced; that pltf. might have sold the goods for prices more than sufficient to reimburse them the moneys so advanced, but pltf. wrongfully & in violation of the agreement sold the goods for prices less than the best prices which might have been got for the same, & by reason of such wrongful act pltf. were prevented from reimbursing themselves the amount of the moneys so advanced out of the proceeds of the sales; as to the sum of £5,400 parcel, etc., that debt. consigned to pltf. divers goods, to be by pltf. sold at New York for certain commission to pltf. on that behalf, at prices not less than the best market price; that pltf. not regarding their duty in that behalf wrongfully sold the goods for prices less than the best market price, whereby debt. sustained losses amounting to £5,400; that afterwards it was agreed between pltf. & debt. that they should set off the amount of such losses against so much money as might be due from debt. to pltf.; that the amount of such losses is equal to the said sum of £5,400 parcel, etc., which was due from debt. to pltf.; that debt. has always been ready & willing to set off the amount of such losses against the said sum of £5,400 parcel, etc. *Qu.*: whether the subject-matter of the pleas afforded any defence on equitable grounds.—**ATTERBURY v. JARVIE** (1857), 2 H. & N. 114; 26 L. J. Ex. 178; 29 L. T. O. S. 128; 157 E. R. 47.

102. ———.—To a declaration for freight & portage for the conveyance of goods, debts. pleaded by way of equitable defence as to £47 0s. 6d., parcel, etc., that pltf.'s claim was for work done by him as a lighterman; that in the course of such employment pltf. agreed to convey on a certain river a quantity of coal of debts.; that the coal was utterly lost through the negligence & improper conduct of pltf., & that the cost price of the coal so lost was £47 0s. 6d. which debts. claim equitably to set off against the sum pleaded to, & say that the said sums are equal in amount:—**Held**: the subject-matter of the plea could not be pleaded by way of equitable defence, but merely afforded ground for a cross-action.—**STIMSON v. HALL** (1857), 1 H. & N. 831; 26 L. J. Ex. 212; 28 L. T. O. S. 325; 5 W. R. 367; 150 E. R. 1436.

Annotation:—Refd. **Dakin v. Oxley** (1864), 15 C. B. N. S. 646.

103. ———.—A declaration stated that, by indenture, A. in consideration of the rents & covenants on the part & behalf of S., his exors.,

debt on a submission bond, assigning as a breach the non-payment of a sum certain awarded.—**LINDFORD v. MUSGROVE** (1842), 6 O. S. 642.—**CAN.**

a. Replevin bond.—To an action on a replevin bond by the assignee of the sheriff, a set-off forms a good

defence, the penalty being considered as the debt.—**MCKELVEY v. MCLEAN** (1874), 34 U. C. R. 635.—**CAN.**

r. ———.—**BATES v. MACKAY** (1882), 1 O. R. 34.—**CAN.**

t. Agreement by deceased executor

to accept goods in payment of money due on bond.—**BATH (EXECUTOR) v. DENNISON** (1878), 12 N. S. R. (3 R. & C.) 303.—**CAN.**

a. Bond guaranteeing repayment of advances by bank.—**MARE v. WHITEWAY** (1900), 8 Nfld. L. R. 384.—**NFLD.**

administrators & assigns, to be paid, done performed, demised to B., his exors., administrators & assigns, a certain messuage & lands for a term of sixty-three years; with liberty to B., his exors., administrators & assigns, to make any erections or buildings on any part of the premises B. for himself, his heirs, exors. & administrators not saying assigns, covenanted that he, his heirs exors., administrators or assigns would pay the rent reserved; & that he, his exors. or administrators would repair the messuage & farm, out-houses, barns, stables & all other erections & buildings which should or might be thereafter erected during the term on the demised premises & the same being so repaired, that B., his exors., administrators & assigns would at the end of the term yield up. The declaration then stated that the interest of B. in the demised premises, by assignment, vested in defts.; & that pltf. became seised of the reversion, subject to the said term. First breach; that defts. did not repair the messuage, etc., & other buildings which were during the term built on the demised premises. Second breach; that defts. yielded up to pltf. the premises out of repair; second plea; to the breaches, on equitable grounds, that while defts. were possessed of the demised premises, by indenture they demised them to pltf. for a term less by thirty days than their own term; that pltf. covenanted to repair & yield up in repair, defts. finding certain timber & iron work. The plea then alleged that the want of repair complained of by pltf., was caused by his default & was a breach of his covenant; & that defts. were ready to find timber & iron work; & that they were entitled to recover from pltf. the same amount of damages as he sought to recover from them. The plea concluded by offering to set off the damages; third plea; as to not repairing & yielding up in repair certain buildings erected on the premises during the term; that the said buildings were not in being at the time of making the indenture, & were built after the commencement of the term. & were then entirely new erections & not built in the place of anything standing on the land at the time of the demise. On demurrer to these pleas:—*Held*: the second plea was not good as an equitable defence; or as a defence at law, in avoidance of circuity of action, inasmuch as the covenants were not co-extensive, & the damages could not be identical.—*MINSHULL v. OAKES* (1858), 2 H. & N. 793; 27 L. J. Ex. 194; 4 Jur. N. S. 169; 157 E. R. 327.

Annotations:—*Mentd.* Williams v. Earle (1868), 9 B. & S. 740; Dewar v. Goodman, [1908] 1 K. B. 94; *Re* Stephenson, Poole v. Stephenson, [1915] 1 Ch. 802.

104. ———.]—Declaration for money lent, money paid, & commission for pltf's. having for & at the request of deft., provided the money for paying, & paid divers bills of exchange. Plea on equitable grounds that deft. assigned to pltf's. for sale, & as security for the payment of the said moneys, & of certain accommodation acceptances of pltf's. goods described in certain bills of lading which deft. also assigned to pltf's. as security as aforesaid, & in order that pltf's. might, out of the proceeds of the said goods & by proper sales thereof, pay & satisfy the said moneys & acceptances. Allegation that pltf's. took possession of the goods & bills of lading, & took such bad care of part of the said goods that the same were deteriorated in value, & were sold by pltf's., at lower prices than they might have been, & pltf's. also negligently sold the said goods below the market price, & received the proceeds thereof. Further allegation that the said goods might, &

ought to have realised by the sales thereof more than sufficient to have paid & satisfied the said moneys & acceptances, & that through the mere negligence, etc., of pltf's., the security of the said goods became lost to deft., & the said goods & the proceeds thereof, became & were insufficient to discharge the said acceptances & moneys:—*Held*: the plea was bad as amounting to a set-off of unliquidated damages, & it could not be supported as a plea of the general issue.—*BEST v. HILL* (1872), L. R. 8 C. P. 10; 42 L. J. C. P. 10; 27 L. T. 490; 37 J. P. 230; 21 W. R. 147.

Annotation:—*Refd.* White v. Witt (1876), 21 W. R. 727.

105. *Set-off against claims for damages.*]—The ct. will not restrain proceedings in an action at law to recover damages for breach of a contract, until an account of the mercantile dealings & transactions had between the parties, shall have been taken in a suit in equity, instituted by defts. at law, & the result of such account shall have been ascertained. Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against the adversary's demand.—*RAWSON v. SAMUEL* (1841), Cr. & Ph. 161; 10 L. J. Ch. 214; 3 Jur. 947; 41 E. R. 451, L. C.

Annotations:—*Consd.* Gordon v. Pym (1843), 3 Hare, 223; S. E. Ry. v. Brogden (1851), 18 L. T. O. S. 309. *Apld.* Best v. Hill (1872), L. R. 8 C. P. 10. *Refd.* Dodd v. Lydall, Lydall v. Dodd (1842), 1 Hare, 333; Bury v. Allen (1845), 1 Coll. 589; Fisher v. Baldwin (1853), 11 Hare, 352; Stimson v. Hall (1857), 1 H. & N. 831; Agra & Masterman's Bank v. Hoffman (1864), 5 New Rep. 211; Watson v. Mid Wales Ry. (1867), L. R. 2 C. P. 593; Middleton v. Pollack, *Ex p.* Nugee (1875), L. R. 20 Eq. 29; White v. Witt (1876), 21 W. R. 727; *The* Milan Tram. Co., *Ex p.* Theys (1884), 25 Ch. D. 587. *Mentd.* Harvey v. Palmer (1851), 4 De G. & Sm. 425; Gibson v. Goldsmid (1854), 3 Eq. Rep. 106; Johnson v. Lytle's Iron Agency (1877), 5 Ch. D. 687.

106. ———. *Unliquidated damages.*]—Where goods are sold, to be paid for by a bill of exchange at a given date, to an action commenced within that time for refusing to give such bill, deft. cannot set off a debt due to him from pltf.

Pltf.'s demand is for unliquidated damages, to which a set-off is wholly inapplicable (*LORD ELLENBOROUGH*).—*HUTCHINSON v. REID* (1813), Camp. 329; 170 E. R. 1400, N. P.

107. ———.]—Where damages are unliquidated & there is not a mutuality, there cannot be a set-off; therefore, where pltf. declared in covenant for a total loss on a policy of assurance effected in his own name, & averred the interest in one count to be in himself, & in another in himself & others, to which defts. pleaded that a less sum was due on the policy than for a total loss, & set off moneys due to them on pltf.'s bond, which was made to them before they had notice that any other than pltf. was interested in the policy:—*Held*: these pleas were ill.—*GRANT v. ROYAL EXCHANGE ASSURANCE CO.* (1816), 5 M. & S. 439; 105 E. R. 1111.

Annotation:—*Refd.* Morley v. Ingalls (1837), 5 Scott, 314.

108. ———.]—In an action of covenant for not indemnifying against taxes no plea of set-off can be sustained.

Pltf. might have brought an action of debt, but was not compelled to do so. He is entitled to have damages for any injury which may have arisen from the non-payment of the taxes, & which damages must be ascertained by the jury. It cannot be taken as liquidated, & therefore there is no pretence for the set-off (*per* CUR.).—*COOPER v. ROBINSON* (1818), 2 Chit. 161.

109. ———.]—A person having obtained several very valuable articles without paying for them, the tradesmen, on hearing that he was reputed to be a swindler, went to his house, gained admittance, & broke open an inner door, & took

Sect. 4.—When set-off available: Sub-sect. 3, A. & B.: sub-sect. 4.]

away part of the goods. He brought an action of trespass, the jury gave him a verdict, & the ct. refused to reduce the damages by allowing the tradesmen to set-off against it the amount of the debts due to them.—*HAWKINS v. BAYNES* (1823), 1 L. J. O. S. K. B. 167.

110. ———.]—Pltf. having purchased goods of deft., secretly absconded with the goods before he paid for them; deft. followed him, & forcibly retook the goods:—*Held*: in trespass for taking them, the measure of damage was the value of the goods, & the jury could not consider the debt due from pltf. to deft. or treat it as reduced by the retaking.—*GILLARD v. BRITTAN* (1841), 8 M. & W. 575; 1 Dowl. N. S. 424; 11 L. J. Ex. 133; 151 E. R. 1168.

Annotations:—Consd. Edmonson v. Nuttall (1864), 17 C. B. N. S. 280; *Johnson v. L. & Y. Ry.* (1878), 3 C. P. D. 499. *Mentd. Lee v. Cooke* (1857), 2 H. & N. 584.

111. ———.]—A plea of mutual credit by way of set-off, cannot be pleaded to a declaration by assignees, charging debts. with having received a sum of money from bkpt. for the purpose of meeting a certain acceptance, & neglecting so to apply it, whereby bkpt.'s estate sustained damage, the claim being for unliquidated damages.—*BELL v. CAREY* (1849), 8 C. B. 887; 19 L. J. C. P. 103; 137 E. R. 757; *sub nom. BILL v. COREY*, 14 L. T. O. S. 254.

Annotations:—Distd. Re Albert Life Assce., Parly's Case (1871), 23 L. T. 841. *Mentd. Owen v. Routh* (1851), 18 Jur. 356.

112. ———.]—*Assumpsit*, to recover a partial loss on a valued policy of insurance on goods on a voyage to a market; premium 60s. per cent., to return 23s. 9d. if landed in the United Kingdom. Plea, set-off for premiums:—*Held*: a bad plea, as the action was for unliquidated damages.—*CASTELLI v. BODDINGTON* (1852), 1 E. & B. 66; 22 L. J. Q. B. 5; 20 L. T. O. S. 64; 17 Jur. 457; 1 W. R. 20; 118 E. R. 361; *affd. sub nom. BODDINGTON v. CASTELLI* (1853), 1 E. & B. 879, Ex. Ch.

Annotations:—Refd. Westoby v. Day (1853), 2 E. & B. 605; *Johnson v. Diamond* (1855), 11 Exch. 73. *Mentd. Rose v. Buckett* (1901), 84 L. T. 670.

113. ———.]—C., at the request of D., commenced an action, in which C. had no interest, against I., upon D. giving C. a bond whereby D. bound himself to C. in the penal sum of £200 subject to the condition that if D. should pay to I., deft. in the action such costs as C., pltf. in the action, should in due course of law be liable to pay in case he should discontinue become nonsuit, or a verdict should pass against him, such costs to be first taxed, or in case of a judgment obtained by deft. for his costs of defence; & also should permit C. during the pendency of the action, or of any liability to him arising therefrom, to retain & apply any of D.'s moneys that might come into C.'s hands towards the discharge of any costs or liabilities which C. might be put to or incur by reason of his permitting the action to be carried on in his name, or from any injury to him thereby from the default or omission of D. to pay the same, the bond should be void, etc. C. was nonsuited in the action, & I. had judgment to recover his costs:—*Held*: D.'s liability under the bond to pay such costs did not constitute a "debt" within the garnishee clauses of C. L. P. Act, 1854 (c. 125), & could not be attached as such by the judgment creditor.

A question has been raised whether this is a debt within the Statutes of Set-off, & I quite agree that a debt which can be set off is capable

of being attached under these clauses; but it is clear that the obligee of this bond could not have made it the subject of a set-off, for the obligor is not bound to pay a certain sum to him, but something to a stranger; & in case of the non-performance of the condition the jury would have to assess the amount of damages which the obligee had sustained. In no sense therefore can it be considered as a bond to pay a sum of money to the obligee, & consequently it is not a debt which could be set off; & I think, that, if it is not a debt within the Statutes of Set-off, it cannot be attached (*PARKE, B.*).—*JOHNSON v. DIAMOND* (1855), 11 Exch. 73; 3 C. L. R. 1010; 24 L. J. Ex. 217; 25 L. T. O. S. 85; 1 Jur. N. S. 938; 3 W. R. 407; 156 E. R. 750.

114. ———.]—**Claim for indemnity in respect of money paid.**—An attorney may set off the amount of his costs, although he has not delivered a bill of such costs one month before the action. Declaration on an agreement, by deft., to indemnify pltf. against the costs which pltf. might be obliged to pay in a certain suit, conducted by deft. as the attorney of pltf., with an allegation that pltf. was compelled to pay in such suit a certain sum for costs; & breach, that deft. had not indemnified pltf., or paid such sum:—*Held*: a plea of set-off, pleaded to so much of the declaration as related to pltf.'s claim in respect of the payment of the said sum for costs, was a good plea.—*BROWN v. TIBBITS* (1862), 11 C. B. N. S. 855; 31 L. J. C. P. 206; 6 L. T. 385; 10 W. R. 465; 142 E. R. 1031. *Annotation:—Distd. Itawley v. Rawley* (1876), 1 Q. B. D. 460.

B. Since Judicature Acts.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 39 (1) (a); R. S. C. Ord. 19, r. 3.

115. **Set-off of claim for damages—Unliquidated damages.**—The statement of claim alleged that pltf. sued as assignee by deed of a debt due from deft. to the assignor on a building contract. Deft. pleaded, by way of set-off & counterclaim, that he was entitled to damages for breaches of contract by the assignor to complete & deliver the buildings at the specified time whereby deft. lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor:—*Held*: deft. was not entitled to recover any damages against pltf., but was entitled by way of set-off or deduction from pltf.'s claim to the damages which he had sustained by the non-performance of the contract by the assignor; & the form of defence must be amended accordingly.—*YOUNG v. KITCHIN* (1878), 3 Ex. D. 127; 47 L. J. Q. B. 579; 26 W. R. 403.

Annotations:—Apprvd. Newfoundland Government v. Newfoundland Ry. (1887), 13 App. Cas. 199. *Distd. Stoddart v. Union Trust*, [1912] 1 K. B. 181. *Appld. Lawrence v. Hayes*, [1927] 2 K. B. 111. *Refd. Reeves v. Pope*, [1914] 2 K. B. 284.

116. ———.]—In an action in rem by appts. in the Exch. Ct. of Canada, British Columbia Admiralty District, to enforce payment of the balance due on the mtge. of a ship, granted in respect of the price of construction, which it was agreed should be treated as money lent, resps., the registered transferees of the ship, pleaded by way of equitable defence that they were entitled to set off a sum of money expended by them, which was sufficient to prevent their being in default under the mtge. at the date of the action. It appeared that the set-off was claimed as a defence *pro tanto* so far as it was for a diminution in value of the ship by reason of its having been built negligently & defectively & not in

accordance with contract:—*Held*: under the Admty. jurisdiction as it formerly existed neither applts. nor resps. could have enforced their claims in an Admty. Ct. But of Admiralty Court Act, 1861 (c. 10), s. 11, extends that jurisdiction so as to include the claim of applts., which was in respect of a mtge. duly registered under Merchant Shipping Act, 1894 (c. 60); while resps.' defence, though pleaded by way of set-off, in reality involved a cross-claim for unliquidated damages under a contract distinct from the mtge. sued upon, which the ct. had no jurisdiction to entertain whether the claim was against the ship or plffs.—*Bow, McLACHLAN & Co. v. SHIP CAMOSUN*, [1909] A. C. 597; 79 L. J. P. C. 17; 101 L. T. 167; 25 T. L. R. 833, P. C.

117. ——— *As between original parties.*—[Formerly] unliquidated damages could not by law be the subject of set-off. That law . . . has now been altered. Unliquidated damages may now be set off as between the original parties, & also against an assignee if flowing out of & inseparably connected with the dealings and transactions which also give rise to the subject of the assignment (*LORD HOBBHOUSE*).—*NEWFOUNDLAND GOVERNMENT v. NEWFOUNDLAND RY. CO.* (1888), 13 App. Cas. 199; 57 L. J. P. C. 35; *sub nom.* A.-G. FOR NEWFOUNDLAND *v. NEWFOUNDLAND RY. CO.*, 58 L. T. 285; 4 T. L. R. 292, P. C.

Annotations:—*Apld.* *Samuel, Samuel v. West Hartlepool Steam Navigation Co.* (1907), 12 Com. Cas. 203; *Baker v. Adams* (1910), 102 L. T. 248. *Distd.* *Stoddart v. Union Trust*, [1912] 1 K. B. 181; *Itceves v. Pope*, [1914] 2 K. B. 284. *Refd.* *Christie v. Taunton, Delmard, Lane, Re Taunton, Delmard, Lane*, [1893] 2 Ch. 175; *Lawrence v. Hayes*, [1927] 2 K. B. 111. *Mentd.* *Re Milton, Milk v. Towers*, [1918] 1 Ch. 37.

As against assignee.—*See* Nos. 198–202, *post*.

On other transactions—Against third person.—In an action for trover & for goods sold & delivered debt. cannot set off a claim for unliquidated damages which he has against a third party on another transaction, although the third party happens to be plff.'s principal.—*TAGART & Co. v. MARCUS & Co.* (1888), 36 W. R. 469, D. C.

119. ——— ———— *Bow, McLACHLAN & Co. v. SHIP CAMOSUN*, No. 116, *ante*.

120. ——— *Against cestui que trust of trustee plaintiff.*—*BANKES v. JARVIS*, No. 416, *post*.

121. *Set-off against claim for damages—Unliquidated damages.*—*PELLAS v. NEPTUNE MARINE INSURANCE CO.*, No. 368, *post*.

122. ——— ———— *BAKER v. ADAM*, No. 188, *post*.

123. ——— ———— *MCCREAGH v. JUDD*, [1923] W. N. 174, D. C.

SUB-SECT. 4.—CONTRACT CONDITIONED FOR PAYMENT OF LIQUIDATED SUM.

124. *Sum payable on non-completion of work by certain day—Whether set-off available.*—If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, & a bond is prepared in the name of

both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, & the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, & may be set off by the obligee in an action brought against him by the obligor who executed.

If . . . the parties have entered into a joint & several bond, it becomes the separate debt of both & therefore may be set off against either (*ASH-HURST, J.*).—*FLETCHER v. DYCHE* (1787), 2 Term Rep. 32; 100 E. R. 18.

Annotations:—*Distd.* *Morley v. Ingls* (1837), 4 Bing. N. C. 58. *Consd.* *East Anglian Rys. v. Lythgoe* (1851), 10 C. B. 726. *Apld.* *Owen v. Wilkinson* (1858), 5 C. B. N. S. 526. *Refd.* *Attwood v. Attwood* (1853), 22 L. J. Q. B. 287. *Mentd.* *Astley v. Weldon* (1801), 2 Bos. & P. 346; *Barton v. Glover* (1815), Holt, N. P. 43; *Reilly v. Jones* (1823), 8 Moore, C. P. 244; *Bonsall v. Byrne* (1867), 16 W. R. 372; *R. v. Marylebone County Court Judge & G. W. Ry.*, *Ex p.* Phillips, [1907] 2 K. B. 664.

125. ——— *Non-completion due to defendant's own act.*—Plffs., on Apr. 19, 1836, entered into a written contract to build, for the sum of £1,700, a brewery for debts., so far as regarded the carpenters' work, within the space of four months & a half next ensuing the date of the agreement; & in default of completing the same within the time thereinbefore limited, to forfeit to debts. £40 per week for each week that the completion of the work should be delayed beyond Aug. 31 the amount to be deducted from the said sum of £1,700 as liquidated damages. Plffs. did not begin the work for four weeks after the date of the agreement, in consequence of debts. not being able to give them possession; they were afterwards delayed one week by the default of their own workmen, & four weeks by the default of the masons, etc., employed by debts.; & the work was not completed till five weeks after the time limited:—*Held*: debts. were not entitled to deduct from the £1,700 any sum in respect of the delay, either for the one or the four weeks.—*HOLME v. GUPPY* (1838), 3 M. & W. 387; 150 E. R. 1195.

Annotations:—*Apld.* *Thornhill v. Neats* (1860), 8 C. B. N. S. 831; *Russell v. Sa da Bandeira* (1862), 13 C. B. N. S. 149; *Westwood v. Secretary of State for India in Council* (1863), 1 New Rep. 262. *Consd.* *Dodd v. Churton*, [1897] 1 Q. B. 562. *Mentd.* *Stadhard v. Lee* (1863), 3 B. & S. 364; *Roberts v. Bury Improvement Comrs.* (1870), L. R. 5 C. P. 310; *United States Shipping Board v. Durrell*, [1923] 2 K. B. 739.

126. ——— ———— *To an action for work & labour, debt. pleaded that the work was done under an agreement in writing whereby plffs. agreed to build for him six houses, & completely finish & give up the premises to him on or before Mar. 20, 1859, under a penalty of £1 for each house for each & every week the works should remain incomplete & possession withheld from debt. after that date, the amount of the penalty to be paid out of the moneys which might become due to plffs. under the agreement, that the houses remained incomplete & possession was withheld from debt. for twelve weeks after & beyond the day stipulated, wherefore debt. claimed to deduct £72. To this plea plffs. replied, that, after the making of the agreement in the plea mentioned, & before any of the alleged penalties had been incurred, it was mutually agreed that plffs. should perform certain other work in & upon the said*

to build a mill, for £1,150; " & for the faithful performance of all covenants, the parties bind themselves in the penal sum of £250, as fixed & settled damages to be paid by the failing party".—Held: a penalty, not liquidated damages, & not the subject of the set-off.—BROWN v. TAGGART (1853), 10 U. C. R. 183.—*CAN.*

PART I. SECT. 4, SUB-SECT. 4.

124i. *Sum payable on non-completion of work by a certain day—Whether set-off available.*—*WILLIAMSON v. MURDOCH* (1912), 14 W. A. L. R. 54.—*AUS.*

124 ii. ——— ———— *SYMONDS v. FISHWICK* (1886), 19 N. S. R. (7 R. & G.) 437; 7 C. L. T. 438.—*CAN.*

124 iii. ——— ———— *HORTON v.*

TOBIN (1887), 20 N. S. R. (8 R. & G.) 169; 8 C. L. T. 377.—*CAN.*

124 iv. ——— ———— *WATTS v. MCLEAY* (1911), 19 W. L. R. 916.—*CAN.*

124 v. ——— ———— *WHITE v. ENSOR* (1892), 11 N. Z. L. R. 586.—*N.Z.*

b. *Sum payable on breach of any covenant—Set-off of penalty.*—*Agree-*

Sect. 4.—When set-off available: Sub-sects. 4 & 5.]

houses in addition to the work in the first agreement mentioned, such additional work to be done within a reasonable time; that the work under the second agreement was so mixed up with the work in the first agreement mentioned, being part & parcel thereof, that it became impossible to complete the work in the first agreement mentioned until the work under the second agreement was also completed, as deft. at the time of making the last-mentioned agreement well knew; & that pltf. had performed all the work under both agreements within a reasonable time:—*Held*: a good legal answer to the claim for penalties, on the ground of waiver.—*THORNHILL v. NEATS* (1860), 8 C. B. N. S. 831; 2 L. T. 539; 141 E. R. 1392.

Annotations:—*Mentd.* *Williams v. Agius*, [1914] A. C. 510; *Morris v. Baron*, [1918] A. C. 1; *British & Bevingtons v. North Western Cachar Tea Co.*, [1923] A. C. 48.

127. ————.]—A vessel not having been completed by the day stipulated for its delivery, deft. claimed to set off a large sum in respect of the penalty of £5 per day provided for by the contract, but the arbitrator found that a considerable portion of the delay in the completion of the vessel was attributable to the disputes & objections on the part of deft. which, upon the construction put upon the contract by the ct., were untenable:—*Held*: pltf. was not liable for the penalties.—*RUSSELL v. SA DA BANDEIRA* (Viscount) (1862), 13 C. B. N. S. 149; 32 L. J. C. P. 68; 9 Jur. N. S. 718; 143 E. R. 59; *sub nom.* *SCOTT RUSSELL v. SA DA BANDEIRA* (Viscount), 7 L. T. 804; 1 Mar. L. C. 289.

Annotations:—*Distd.* *Tew v. Newbold-on-Avon United District School Board* (1884), Cab. & El. 260. *Refd.* *Dodd v. Churton*, [1897] 1 Q. B. 562. *Mentd.* *British Columbia Saw-Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Roberts v. Bury Improvement Comrs.* (1870), L. R. 5 C. P. 310; *Yzquierdo v. Clydebank Engineering & Shipbuilding Co.*, [1902] A. C. 524; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146.

128. ————.]—Pltf. contracted to complete the erection of certain buildings for defts. within a fixed time, & in default to pay to defts. as liquidated damages, £3 for every day from the time fixed for completion, until the work should be completed; & also within the same time, unless an extension of time were granted, to complete all alterations, additions, etc., which might be ordered by defts.' agents:—*Held*: pltf. were bound to pay the £3 for each day that elapsed from the time fixed for completion until the works were completed, even where the alterations & additions, etc., ordered by defts.' agents, were so mixed up with the building to be erected, that performance of the contract within the prescribed time became impossible.—*JONES v. ST. JOHN'S COLLEGE, OXFORD* (1870), L. R. 6 Q. B. 115; 40 L. J. Q. B. 80; 23 L. T. 803; 19 W. R. 276.

Annotations:—*Consd.* *Tew v. Newbold-on-Avon United District School Board* (1884), Cab. & El. 260. *Distd.* *Dodd v. Churton*, [1897] 1 Q. B. 562. *Refd.* *Walker v. L. & N. W. Ry.* (1876), 1 C. P. D. 518; *Sattin v. Poole* (1901), 2 Hudson's B. C. 4th ed., 306. *Mentd.* *Howell v. Coupland* (1874), L. R. 9 Q. B. 462.

129. ————.]—*Non-performance of independent covenant by defendant.*—In an action of debt to recover a sum of money under two deeds of covenant, the declaration alleged, that, by an indenture of Dec. 19, 1837, in consideration of the sum of £258,029 10s. 6d., pltf. covenanted with defts. to make & complete a certain portion of a certain railway, & to provide bars or rails & chairs, on or before May 1, 1840—that afterwards, by another indenture of Mar. 23, 1839, in consideration of the further sum of £15,000, pltf. covenanted with defts., that he, pltf., being provided by

them with railway bars or rails & chairs for temporary & permanent use, would complete the said portion of the said railway, & the line of the permanent railway, on or before June 1, 1840; provided, that, if said pltf. should not complete the said railway by the said June 1, 1840, he should pay to said defts. the sum of £300 for the said June 1 & the like sum for every succeeding day, until the whole should have been completed, but so that the total amount to become forfeitable should not exceed the sum of £15,000. Breach, that defts. detained from, & did not pay pltf. a large sum, to wit, £20,000, parcel of the sum due to pltf. Plea, as to £7,500, parcel of the said sum of £20,000, that the said sum of £7,500, is parcel of the said sum of £15,000 agreed to be retained by defts.; that pltf. did not complete the said railway on or before June 1, 1840, nor until twenty-four days after, whereby pltf. then became liable to pay to said defts. the sum of £300 for June 1, & the like sum for every such succeeding twenty-four days during which the railway remained incomplete, by reason of which defts.' deducted & retained the said sum of £7,500 out of the moneys payable by them to pltf. Replication, that pltf. did not become nor was liable to pay defts. *modo et formâ*. At the trial, it was proved that pltf. did not finish the railway until twenty-four days after June 1, but that defts. had not provided pltf. with the bars, rails, & chairs in sufficient quantity to enable him to complete it by that day. The learned judge told the jury that defts. were bound, as a condition precedent to their right to deduct the £7,500, to furnish pltf. with such bars, rails, & chairs:—*Held*: that was a misdirection; that the covenants were independent; & the furnishing of the bars, rails, & chairs was not a condition precedent to the right of defts. to make the deduction; & the only question being whether the railway was completed on June 1, the plea was established.—*MACINTOSH v. MIDLAND COUNTIES RY. Co.* (1845), 14 M. & W. 548; 3 Ry. & Can. Cas. 780; 14 L. J. Ex. 338; 5 L. T. O. S. 537; 153 E. R. 592.

130. ————.]—Declaration in debt stated a building contract under seal, by which pltf. covenanted to complete buildings by Oct. 23, & deft. to pay him £418 on the completion, & it was further covenanted that, if deft. should order any extra work, he should pay pltf. its value, or, if he ordered any diminution or omission, pltf. should allow the value out of the £418. Also that, if the buildings should not be finished on Oct. 23, pltf. should pay the penalty of £1 per day for every subsequent day employed, as liquidated damages. Provided that, if deft. should require any additional work, pltf. should be allowed so much extra time beyond Oct. 23, as might be necessary for completing the same. Pltf. averred that deft. ordered extra work, which required thirty-one days of additional time, & the value of which was £84; & that the contract would have been fulfilled by Oct. 23, but for such orders, & he demanded the £418, minus a sum for diminutions, & £84, for the extra work. Deft. pleaded, as to £22 parcel of the debt in the declaration mentioned, that the extra time necessary for completing the additional work was nine days only, but that pltf. had exceeded the time ending Oct. 23, by thirty-one days, whereby he became liable to pay deft. £22 according to the deed; which £22 deft. offered to set off:—*Held*: on general demurrer, the clause for payment of £1 per day applied to the covenant for extra time in respect of extra work, as well as to the clause which fixed a day for completing the contract as originally defined; & deft. might

deduct, in the form of set-off £1 per day for the number of days by which pltf. had exceeded the necessary time for completing the extra work.—*LEGG v. HARLOCK* (1848), 12 Q. B. 1015; 18 L. J. Q. B. 45; 12 L. T. O. S. 291; 13 Jur. 229; 116 E. R. 1151.

131. — Action for extra work—Set-off of penalty.]—By arts. of agreement for altering & repairing a warehouse for a fixed price, it was stipulated that in the event of the work not being completed in three months, the builder should forfeit & pay to the person with whom he contracted to do the work £5 weekly & every week, such penalty to be deducted from the amount which might remain due on the completion of the work:—*Held*: in an action brought for extra work, the employer was entitled, after having paid the contract price, to set off the penalty against the extra work; & he had a double remedy, either to deduct it or recover it.—*DUCKWORTH v. ALISON* (1836), 1 M. & W. 412; 2 Gale, 11; Tyr. & Gr. 742; 5 L. J. Ex. 171; 150 E. R. 494.

Annotation:—*Consd.* *East Anglian Rys. v. Lythgoe* (1851), 10 C. B. 726.

132. — — — — —.]—A contract for building a steam vessel contained a provision that the engineer for the time being should have power to direct additions, deductions, alterations, & deviations, to & from the contract work, & should have power to extend the time for completion of the contract, & that unless he did so, the time should be deemed not extended by reason of such extra works, & that the value of all such “additions, deductions, alterations, & deviations, should be ascertained, & added to or deducted from the amount of the contract price.” It also contained a provision that £5 should become due as liquidated damages for every day beyond the time specified in the contract, on which the work remained uncompleted. There was also a clause for the reference of all differences “relating, amongst other things, to any additions, deductions, alterations, or deviations, made in the work” to the engineer. In an action brought in respect of certain extra works:—*Held*: a replication that deft. had, by directing extra works, rendered the performance of the contract work impossible within the appointed time, was a good answer to a claim to deduct penalties for its non-performance, although the engineer had not extended the time for its completion.—*WESTWOOD v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1863), 1 New Rep. 262; 7 L. T. 736; 11 W. R. 261.

Annotations:—*Distd.* *Jones v. St. John's College, Oxford* (1870), L. R. 6 Q. B. 115; *Tew v. Newbold-on-Avon United District School Board* (1884), Cab. & El. 260. *Apld.* *Dodd v. Churton*, [1897] 1 Q. B. 562. *Refd.* *Stadhard v. Lee* (1863), 3 B. & S. 364. *Mentd.* *Roberts v. Bury Improvement Comrs.* (1870), L. R. 5 C. P. 310.

SUB-SECT. 5.—JOINT AND SEPARATE DEBTS.

133. General rule.]—Joint & separate debts cannot be set off against each other at law.—*Ex p. TWOGOOD* (1805), 11 Ves. 517; 32 E. R. 1189, L. C.

Annotation:—*Consd.* *Addis v. Knight* (1817), 2 Mer. 117.

134. — — — — —.]—*Re CAMPION, Ex p. BROWN* (1842),

2 Mont. D. & De G. 718; 11 L. J. Bcy. 43; 6 Jur. 1021, Ct. of R.

135. Set-off of separate debt—Joint & several liability of plaintiff—On bond.]—*FLETCHER v. DYCHE*, No. 124, *ante*.

136. — — — — — On promissory note.]—A joint & several promissory note of A. & three others may be set off against a claim of A. in an action by him against the payee upon a money demand.—*OWEN v. WILKINSON* (1858), 5 C. B. N. S. 526; 28 L. J. C. P. 3; 5 Jur. N. S. 102; 141 E. R. 213.

137. — — — — — Against joint debt.]—A. was employed as storekeeper by B. & C., who were joint adventurers in a mine, & he was authorised to draw bills on B. for money laid out on account of the mining co. The bills were discounted by a banker, & the payment of them was guaranteed to him by B. & C. B. having been arrested, A., in order to provide funds to procure B.'s discharge, drew on B. a bill purporting to be on account of the mining co. The banker discounted the bill, & paid the amount to B. C. was afterwards compelled to take up the same in consequence of his guarantee. In an action brought by A. against B. & C. for his salary, it was held that C. could not set off the amount of the bill.—*JONES v. FLEEMING* (1827), 7 B. & C. 217; 6 L. J. O. S. K. B. 113; 108 E. R. 704.

138. — — — — —.]—T. & W. had a joint banking account with C. & co., & T. had also a private account with them. C. & co. stopped payment on Apr. 22, 1843, when there was a balance due to them from T. & W. on their joint account, but they were in debt to T. on his private account. The bankers continued to receive their own notes from customers in payment of balances due to the bank, & they also, at the request of customers & others, transferred balances due to such customers to the credit of other customers who were indebted to the bank; & on May 25, 1843, T. & W. gave the bankers notice to transfer the balance due to T. to the joint account of T. & W., but this they neglected to do, & on May 31, a fiat issued against them:—*Held*: T. & W. could not claim, as against the assignees, to set off the balance due to T. against that due to the bankers on the joint account.—*WATTS v. CHRISTIE* (1849), 11 Beav. 516; 18 L. J. Ch. 173; 13 L. T. O. S. 297; 13 Jur. 214, 845; 50 E. R. 928.

Annotation:—*Refd.* *Farley v. Turner* (1857), 5 W. R. 666.

139. — — — — — Separate debt due from joint creditor.]—There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors. P., the solr. of K. & R., who were trustees of a marriage settlement, received on their behalf the sum of £1,000, & represented that he had invested the whole of it on mtge. He did invest on mtge. two sums of £2,200 & £850, part thereof; but he never invested the balance of £950. The debt of £2,200 was, with the knowledge of K. & R., paid off & received by P., & retained by him for reinvestment; but no reinvestment was ever made. P. died insolvent:—*Held*: neither of the sums of £2,200 & £950 due from his estate could be set off against a separate debt due to the estate from K.—*MIDDLETON v. POLLOCK, Ex p. KNIGHT & RAYMOND* (1875), L. R. 20 Eq. 515; 44 L. J. Ch. 618.

PART I. SECT. 4, SUB-SECT. 5.

133.1. General rule.]—Except under special circumstances, a debt due to or from several persons jointly cannot be set off against a debt from or to one of such persons separately.—*BURRELL v. BURRELL'S TRUSTEES*, [1916] S. C. 729.—*SCOT*.

c. Set-off of separate debt—Joint & several liability of plaintiff.]—Where a sum of money is owing jointly & severally by A. & B. to C., & two lesser sums are owing severally to A. & B. by C., a set-off is allowable in so far as the indebtedness of A. & B. to C. is several, there being sufficient mutu-

ality.—*PAULSON & GOODMAN v. MURRAY (Man.)* (1922), 68 D. L. R. 643; 32 Man. L. R. 327; [1922] 2 W. W. R. 654.—*CAN.*

d. — — — — —.]—A separate debt cannot be set off against a joint & several debt.—*NEW FLEMING SPIN-*

Sect. 4.—When set-off available: Sub-sects. 5 & 6.
Sect. 5.]

140. ———.] — Pltfs. were twelve in number, & were owners of a ship called the *J.*; by defts.' default she became unable to fulfil a contract to carry 240 emigrants from *B.* to *A.* Defts. were aware of this contract; five of pltfs. were part owners of a ship called the *H.*, & five of them were part owners of a ship called the *O.* 202 out of the 240 emigrants were carried to *A.* in the *H.*, & 25 more in the *O.* Pltfs. having sued to recover damages in respect of the loss happening to them through being prevented from carrying the 240 emigrants in the *J.*, defts. contended that the gain to individual pltfs. from carrying the 202 emigrants in the *H.* & the 25 emigrants in the *O.* must be taken into account in mitigation of damages:—*Held*: the damages could not be so reduced, because even if there had been but one owner of the *J.*, & the same person had been sole owner of the *H.* & the *O.*, the profits made by him as owner of the two latter could not be deducted from the damages sustained by him as owner of the former; & because the contention of defts. was in substance an attempt to set off against joint damage a several benefit.—*JEBSEN v. EAST & WEST INDIA DOCK CO.* (1875), *L. R.* 10 (C. P. 300; 44 *L. J. C. P.* 181; 32 *L. T.* 321; 23 *W. R.* 624; 2 *Asp. M. L. C.* 505.

Annotations:—*Mentd.* The Marpessa, [1891] *P.* 403; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. of London*, [1912] *A. C.* 673; *Jamal v. Moola Dawood*, [1916] 1 *A. C.* 175; *Hill v. Showell* (1918), 87 *L. J. K. B.* 1106; *City Tailors v. Evans* (1921), 91 *L. J. K. B.* 379.

141. ———.] **Separate debt owed separately by co-debtor.**—Action on a covenant to pay all liabilities which pltf. might incur under a deed of assignment made between pltf. & other parties. Deft. pleaded that the covenant was the joint & several covenant of himself & *W.*, & that before action pltf. was indebted to *W.* in an amount exceeding pltf.'s claim against deft.; & that *W.* had assigned pltf.'s debt to himself & deft. in equal shares as tenants in common. As to one-half of pltf.'s claim deft. claimed to set off one-half of the debt so assigned, & as to the other half, deft. said that he was entitled to be exonerated by his co-surety *W.*, & to call upon him to contribute in equal shares to the payment of pltf.'s claim, & was entitled to set off the share remaining vested in *W.* against this part of pltf.'s claim:—*Held*: the defence was no answer to pltf.'s claim.—*BOWYEAR v. PAWSON* (1881), 6 *Q. B. D.* 540; 50 *L. J. Q. B.* 495; 29 *W. R.* 664, *D. C.*

— **Debt incurred by partner set off against joint debt due to partnership.**—*See PARTNERSHIP*, Vol. XXXVI., p. 369, Nos. 465, 466.

Debt incurred by partner set off against claim by partnership.—*See PARTNERSHIP*, Vol. XXXVI., p. 406, Nos. 763-765.

142. Set-off of joint debt—Against separate debt.—*V.*, a customer of the banking house of *D.* & co., transferred to *N.*, a partner in the firm, a sum of stock by way of security for money borrowed of them, & gave notes for the amount, payable on the stock being retransferred to him. He paid off these notes, & afterwards borrowed a further sum on the joint note of himself & his son, without calling for a retransfer. The stock so transferred having been blended with other stock, of which *N.* was in like manner possessed

by way of security for other customers, was sold by the partnership, & the produce applied to the use of the partnership, except a small balance still remaining in the name of *N. D.*, another of the partners, afterwards died, & the partnership was carried on without any alteration of firm till the surviving partners became bkpt. On the bill of *V.* against the assignees of the bkpts., & against the representatives of *D.* it was decided that he was entitled to the stock remaining in the name of *N.*, the other creditors in respect of stock transferred having been satisfied their demands as, being sufficiently appropriated, to set off, against the joint note of himself & his son, so much of the money received by the partnership out of the sale of the remainder of the stock as was equal to the amount of such joint note; to prove the residue as a debt against the estate of the bkpts.; & to receive from *D.*'s estate the amount of the deficiency.

A joint debt cannot be set off against a separate debt at law; but may, in equity, under particular circumstances; as where there is a clear series of transactions in which joint credit has been given.—*VULLIAMY v. NOBLE* (1817), 3 *Mer.* 593; 36 *E. R.* 228, *L. C.*

Annotations:—*Expld.* *Middleton v. Pollock*, *Ex p. Knight & Raymond* (1875), *L. R.* 20 *Eq.* 615. *Refd.* *Jones v. Mossop* (1844), 3 *Hare*, 568. *Mentd.* *Braithwaite v. Britain* (1836), 1 *Keen*, 206; *Winter v. Innes* (1838), 4 *My. & Cr.* 101; *Chapman v. Beckinton* (1842), 3 *Q. B.* 703; *Lodge v. Prichard* (1863), 1 *De G. J. & Sm.* 610.

143. ———.]—*A.* has a joint demand against *B. & C.*, who are also creditors of *A.* *B.* by letter having made himself separately liable to *A.* on account of the demand originally joint, cannot either at law or in equity set off the joint debt due from *A.* to himself & *C.*—*Re FISHER*, *Ex p. Ross* (1817), *Buck*, 125, *L. C.*

144. ———.]—Under the replication of *nil debet* to a plea of set-off, pltf. may object that the debt sought to be set off is not due from himself alone, but from himself & a third party.—*ARNOLD v. BAINBRIDGE* (1853), 9 *Exch.* 153; 23 *L. J. Ex.* 59; 156 *E. R.* 66.

145. ———.]—*C.* & *S.* were two trustees of an estate administered by the *ct. C.* became bkpt. after 1869. A balance of £896 was found due from *C.* to the estate & a balance of £745 was found due from the estate to the two trustees jointly:—*Held*: the debt due from the estate to the two trustees could not be set off against the debt due from one.—*McEWAN v. CROMBIE* (1883), 25 *Ch. D.* 175; *sub nom.* *McEWAN v. CROMBIE*, *PORTER v. GRANT*, 53 *L. J. Ch.* 24; 49 *L. T.* 490; 32 *W. R.* 115.

Annotation:—*Mentd.* *Stanlar v. Evans*, *Evans v. Stanlar* (1886), 56 *L. J. Ch.* 581.

146. ———.]—In the winding up of a co. the liquidator sought to set off against a debt due by the co. to a creditor a debt alleged to be due to the co. by a partnership firm of which his creditor was a member:—*Held*: alleged debt of the partnership firm being a joint & not a joint & several debt could not be set off against the separate debt due by the co. to the partner.—*Re PENNINGTON & OWEN, LTD.*, [1925] *Ch.* 825; 95 *L. J. Ch.* 93; 134 *L. T.* 66; 41 *T. L. R.* 657; 69 *Sol. Jo.* 759; [1926] *B. & C. R.* 39, *C. A.*

147. ———.] **Defendant sole surviving creditor.**—A debt due to two partners may be set off in an action brought against the survivor.—*SLIPPER v. STIDSTONE* (1793), 1 *Esp.* 47; 170

NING & WEAVING CO. v. KESSOWJI NAIK (1885), 1 *L. R.* 9 *Bom.* 373.—*IND.*

142i. Set-off of joint debt—Against

separate debt.—A joint debt cannot be set off against a separate debt, unless the amount of such joint debt to which deft. is entitled as between him & his

partners is clear.—*Re SLOSS, Ex p. ROBISON BROTHERS, CAMPBELL & SLOSS, LTD.* (1893), 19 *V. L. R.* 710.—*AUS.*

E. R. 275, N. P.; *subsequent proceedings* (1794), 5 Term Rep. 493.

148. ——— **Specific joint debts set off against specific separate debts—Evidence of agreement in general terms.**—*KINNERLEY v. HOSSACK*, No. 25, *ante*.

149. ——— **Plaintiff being trustee of defendant in joint transaction.**—*MACDONALD v. BODE* (1876), 20 Sol. Jo. 241; *Bitt. Prac. Cas.* 102; 2 *Char. Cham. Cas.* 2.

Annotation:—*Distd. Naylor v. Farrer* (1878), 26 W. R. 809.

150. ——— **Against joint debt.**—A plea of set-off alleged that the debt claimed from deft. was due by him & L. jointly, & then proceeded to allege that pltf. was indebted to deft. & L., which deft. & L. are ready & willing & hereby offer to set off. On special demurrer, on the grounds that the statute of set-off applied only to mutual debts between pltf. & deft., exclusively of any third person, & that the plea was double, in averring both that the promises were made by deft. & L., & in also alleging set-off, the plea was held good.—*STACKWOOD v. DUNN* (1842), 3 Q. B. 822; 3 Gal. & Dav. 115; 12 L. J. Q. B. 3: 114 E. R. 723; *sub nom. STOCKWOOD v. DUNN*, 6 Jur. 993.

Annotation:—*Distd. Isberg v. Bowden* (1853), 8 Exch. 852.

Joint and several debtors & creditors in bankruptcy.—*See BANKRUPTCY*, Vol. IV., pp. 390, 391, Nos. 3566–3583.

SUB-SECT. 6.—PARTICULAR INSTANCES.

See Sect. 10, post.

SECT. 5.—SET-OFF IN RELATION TO PAYMENT.

151. **Whether set-off amounts to payment.**—*CURSON v. AFRICAN CO.* (1682), 1 Vern. 121; 23 E. R. 358.

Annotations:—*Refd. Freeman v. Lomas* (1851), 9 Hare, 109; *Bailey v. Finch* (1871), L. R. 7 Q. B. 34.

152. ——— **Downam v. Matthews** (1721), *Prec. Ch.* 580; 2 *Eq. Cas. Abr.* 9, pl. 8; 24 E. R. 260.

Annotations:—*Refd. Whitaker v. Rush* (1761), *Amb.* 407; *Freeman v. Lomas* (1851), 9 Hare, 109. *Mentd. Dodding-ton v. Hallet* (1750), 1 Ves. Sen. 497; *Re Mathews, Ex p. Ockenden* (1754), 1 Atk. 235.

153. ——— **Jeffs v. Wood**, No. 31, *ante*.

154. ——— **Since the new rules of Hilary term, 1833, a deft., under a plea of non assumpsit to a declaration on an account stated, cannot give in evidence another account stated subsequently to that specified in the particulars of demand; but he must plead payment or a set-off.**—*FIDGETT v. PENNY* (1834), 1 Cr. M. & R. 108; 2 Dowl. 714; 4 Tyr. 650; 3 L. J. Ex. 355; 149 E. R. 1014.

Annotation:—*Mentd. Moore v. Eddowes* (1835), 7 C. & P. 203.

155. ——— **A delivery of goods, bona fide made in payment of a debt, is within Bankrupts Act, 1824 (c. 16), s. 82. The true test is, whether the delivery of the goods took place under such circumstances as in point of law would amount to a payment of the debt, so that it might have been**

pleaded as a payment; for if it could only be pleaded as a set-off, that would not be sufficient. If that part of the debt in respect of which it was given is wiped off, that is a payment (*ALDERSON, B.*).—*CANNAN v. WOOD* (1837), 2 M. & W. 465; *Murp. & H.* 76; 1 Jur. 498; 6 L. J. Ex. 112; 150 E. R. 840.

Annotations:—*Refd. Backhouse v. Jones* (1839), 8 Scott, 148; *Martin v. Reid* (1862), 11 C. B. N. S. 730; *Langton v. Waring* (1865), 18 C. B. N. S. 315.

156. ——— **Deft. being indebted to pltf. on a bill of exchange for £25 and being unable to pay the full amount, left £9 10s. in cash, & a bill for £17 in renewal of the balance at pltf.'s house in discharge of the debt. A few days afterwards he met pltf., who then refused to take the bill in renewal, & stated that he should retain the cash as payment of another debt, which he said was due. Deft. then demanded back the money in addition to the bill; but pltf. refused to return it. Pltf. shortly afterwards sued deft. on the original bill:—*Held*: (1) the receipt & retainer of the money by pltf. was evidence of payment; (2) it did not amount to a payment, but to a set-off.**—*THOMAS v. CROSS* (1852), 7 Exch. 728; 21 L. J. Ex. 251; 19 L. T. O. S. 114; 155 E. R. 1142.

Annotation:—*Refd. It. Boswell, Merritt v. Boswell*, [1906] 2 Ch. 3

157. ——— **RIBBLESDALE v. FORBES** (1916), 140 L. T. Jo. 483, C. A.

158. **Effect of payment of debt subject of set-off—After set-off pleaded.**—*Qu.*: the effect of receiving the payment of a debt, which has been made the subject of a set-off, after such set-off has been pleaded, or notice thereof given with the plea of the general issue.—*JACKSON v. GODARD* (1832), 1 Cr. & M. 46; 2 L. J. Ex. 42; 149 E. R. 308.

Annotation:—*Refd. Dendy v. Powell* (1838), 7 L. J. Ex. 154.

159. **Must be separately pleaded.**—*FIDGETT v. PENNY*, No. 154, *ante*.

160. ——— **Payment cannot be given in evidence under a plea of set-off for money paid.**—*COOPER v. MORECROFT* (1838), 3 M. & W. 500; 1 Horn & H. 105; 7 L. J. Ex. 143; 2 Jur. 809; 150 E. R. 1243.

161. **Evidence of payment of sum set-off.**—If pltf. replies *numquam indebitatus* to a plea of set-off, & deft. proves his plea, pltf. will not be at liberty under his replication to show that the sum proved, or even any part has been paid.—*BROWN v. DAUBENEY* (1836), 4 Dowl. 585; 1 Har. & W. 646.

Annotation:—*Folld. Harvey v. Holtman* (1843), 12 L. J. Q. B. 185.

162. ——— **On replication, to a plea of set-off in an action of debt, that pltf. "never was indebted in manner & form," etc., pltf. cannot prove payment. To let in such proof, he should reply that he was not, nor is, indebted.**—*STOCKBRIDGE v. SUSSAMS* (1842), 3 Q. B. 239; 2 Gal. & Dav. 591; 11 L. J. Q. B. 217; 6 Jur. 437; 114 E. R. 499.

163. ——— **Where pltf. replies to a plea of set-off that "he was not, nor is, indebted to deft. in manner & form," he is at liberty to give evidence of payment to support the replication.**—*HARVEY v. HOLTMAN* (1843), 12 L. J. Q. B. 185; 7 Jur. 398.

What amounts to payment.
CONTRACT, Vol. XII., pp. 454–473, Nos. 3674–3869.

PART I. SECT. 5.

151 i. **Whether set-off amounts to payment.**—If a deft. gives a notice & particulars of set-off, which are principally made up of goods furnished pltf., it shows *prima facie* that it was not intended as a payment.—*WHITE v. DAWSON* (1850), 7 N. B. R. (2 All.)

51.—CAN.

151 ii. ——— **NOTMAN v. CROOKS** (1842), 10 U. C. R. 105.—CAN.

151 iii. ——— **BARLOW v. CLARK** (1847), 5 N. B. R. (3 Kerr) 485.—CAN.

e. **Effect of payment of debt subject of set-off.**—*WIGAN v. NIXON* (1848), 1

ALL. 97.—CAN.

161 i. **Evidence of payment of sum set-off.**—*MCLELLAN (EXECUTOR) v. MCMAHUS* (1843), 1 U. C. R. 271.—CAN.

161 ii. ——— **FREDERICTON BOON CO. v. MCPHERSON** (1870), 13 N. B. R. (2 Han.) 8.—CAN.

SECT. 6.—EFFECT OF DELAY, MISTAKE, OR ILLEGALITY.

164. Whether set-off available — Delay.]—ARNOLD v. RICHARDSON (1699), 1 Eq. Cas. Abr. 8; 21 E. R. 833.

165. ———.]—In an action by the assignees of a bkpt. underwriter against a broker, for premiums due to the bkpt., *semble*, the broker cannot set off a loss on a policy effected by him as agent, without a commission *del credere*, where there has been no adjustment; though the loss took place before the bkpcy.

The party, who was well acquainted with the facts of his own case, upon a full knowledge of them, for a long time admitted that he had no claim; & after lulling the other party to sleep, he ought not to be permitted to establish his set-off (GIBBS, C.J.).—BAKER v. LANGHORN (1816), 6 Taunt. 519; 2 Marsh. 215; 128 E. R. 1136.

166. ———.]—The paymaster of a military corps had given credit in account to an officer in that corps from Jan. 1, 1817, to Nov. 5, 1820, for certain increased pay, erroneously supposed to be granted by a general order of Aug. 27, 1806, to an officer of his situation, & a statement of that account was delivered to the officer in 1821. In Dec. 1816, the paymasters were informed by the Board of Ordnance that the increased pay granted by the order of 1806 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer until 1821, & subsequently to that time they continued to receive his pay:—*Held*: in an action brought by his personal representative to recover such pay, it was not competent to the paymaster to retain any of such sums of money on account of the sums which they had credited him for by way of increased pay, & which they had allowed him to consider his own for so long a period of time.—SKYRING v. GREENWOOD (1825), 4 B. & C. 281; 6 Dow. & Ry. K. B. 401; 107 E. R. 1064.

Annotations:—*Consd.* Deutsche Bank (London Agency) v. Beriro (1895), 73 L. T. 669; Baker v. Courage (1909), 101 L. T. 854. *Refd.* Higgs v. Scott (1849), 7 C. B. 63; Parrott v. Anderson (1851), 7 Exch. 93; Cave v. Mills (1862), 7 H. & N. 913; De Cordova v. De Cordova (1879), 4 App. Cas. 692; Daniell v. Sinclair (1881), 6 App. Cas. 181; Holt v. Markham, [1923] 1 K. B. 504; Jones v. Waring & Gillow, [1926] A. C. 670; British & North European Bank v. Zalzein, [1927] 2 K. B. 92. *Mentd.* Bate v. Laurence (1844), 2 Dow. & L. 83; R. v. Treasury Lords, *Re* Queen Dowager's Annuity (1851), 20 L. J. Q. B. 305; Townsend v. Crowdy (1860), 8 C. B. N. S. 477; Swan v. North British Australasian Co. (1862), 7 H. & N. 603; Miles v. Scotting (1885), Cab. & El. 491; Vagliano v. Bank of England (1889), 5 T. L. R. 489; R. v. Blenkinsop, [1892] 1 Q. B. 43.

— **Statute of Limitations.]—***See* LIMITATION OF ACTIONS, Vol. XXXII., p. 324, Nos. 90–97.

167. ——— Mistake—Set-off of money paid in ignorance of fact.]—WORCESTER & BIRMINGHAM CANAL CO. v. SOUTHAM (1843), 2 L. T. O. S. 151.

Annotation:—*Refd.* Parker v. G. W. Ry. (1844), 2 L. T. O. S. 420.

168. ——— Illegality—Demand for malt sold by illegal measure.]—Where malt had been sold by B. to A. by an illegal measure, & after such sale a settlement of accounts took place between the

parties, in an action by A. against B. for work & labour:—*Held*: the latter was entitled to set off his demand for the malt.—OWENS v. DENTON (1835), 1 Cr. M. & R. 711; 5 Tyr. 359; 4 L. J. Ex. 68; 149 E. R. 1266.

Annotation:—*Consd.* Swan v. Bank of Scotland (1836), 10 Bl. N. S. 627.

SECT. 7.—PLEADING AND PRACTICE.

See Part III., *post*.

SECT. 8.—DEFENCES TO SET-OFF.

See Part III., Sect. 1, sub-sect. 3, *post*.

SECT. 9.—WAIVER OF SET-OFF.

169. Whether set-off can be waived—Previous action for recovery of debt set off.]—It is no objection to the set-off of a debt, that debt. had commenced an action for the recovery of that debt, before pltf.'s cause of action accrued.—KNIBBS v. HALL (1794), Peake, 276; 170 E. R. 155, N. P.

Annotation:—*Expld.* Briscoe v. Hill (1842), 7 Jur. 306.

170. ——— Creditor borrowing from debtor—Express promise to pay.]—If a creditor borrows money of his debtor, for which he gives a security, this shall not prevent him from setting off the debt due to himself, even though he expressly promised to pay the sum lent to him by his debtor.—LECHMERE v. HAWKINS (1798), 2 Esp. 625; 170 E. R. 477, N. P.

Annotation:—*Apprvd.* Taylor v. Okey (1806), 13 Ves. 180.

171. ———.]—Set-off, where a creditor had borrowed from the debtor under an express promise to pay.—TAYLOR v. OKEY (1806), 13 Ves. 180; 33 E. R. 263, L. C.

172. ——— Agreement not to set off.]—An agreement by a broker, that he will sell goods for his principals, & pay over the proceeds, without setting off a debt due from the principals to him, is not binding. But if he also agrees not to set off a debt due from a prior firm, which, by a previous letter, the principals had agreed to pay him, the principals having assumed the funds of that firm; the letter & the agreement must be set against each other, & the broker will not be allowed to set off that debt against the proceeds of the goods.—M'GILLIVRAY v. SIMSON (1826), 2 C. & P. 320; 9 Dow. & Ry. K. B. 35; 5 L. J. O. S. K. B. 53; 172 E. R. 145.

Annotations:—*Dtd.* Young v. Bank of Bengal (1836), 1 Deac. 622. *Refd.* Buchanan v. Findlay (1829), 9 B. & C. 738.

173. ——— Deposit of insurance policy with creditor by way of security—Return of policy to debtor—For purpose unconnected with debt.]—A debtor who, for money advanced had given to his creditor his promissory note, & as a collateral security had deposited with him a policy of assurance, & who had, on the other hand, a right of

PART I. SECT. 6.

164 i. Whether set-off available — Delay.]—CAMPBELL v. GZOWSKI (1850), 7 U. C. R. 412.—CAN.

164 ii. ———.]—SMITH v. MUIRHEAD (1853), 3 Gr. 610.—CAN.

164 iii. ———.]—A party neglecting to set off his claim at law, cannot afterwards apply to the Ct. of Ch. to have the benefit of it.—CAMERON v. McDONALD (1859), 7 Gr. 402.—CAN.

164 iv. ———.]—TAYLOR v. COMMERCIAL BANK TRUSTEES (1897), 8 Nfld. L. R. 6.—NFLD.

f. ——— Illegality.]—NEW BRUNSWICK OIL WORKS CO. v. PARSONS (1861), 20 U. C. R. 531.—CAN.

g. ———.]—CAPE TOWN TOWN COUNCIL v. TABLE BAY HARBOUR BOARD (1906), 23 S. C. 639.—S. AF.

PART I. SECT. 9.

h. Whether set-off can be waived.]—

SIMPSON v. KERR (1873), 33 U. C. R. 345.—CAN.

k. ———.]—MUNICIPAL CONSTRUCTION CO. v. REGINA CORPN. (1912), 20 W. L. R. 405; 1 W. W. R. 958; 5 Sask. L. R. 78.—CAN.

l. ———.]—HAZARIMAL v. NAMDEV (1908), 1 L. R. 32 Bom. 379.—IND.

m. What amounts to waiver.]—SCHIERHOUT v. UNION GOVERNMENT (MINISTER OF JUSTICE), [1926] App. D. 286.—S. AF.

set-off in respect of goods sold, applied to creditor to have the policy delivered up, for a purpose unconnected with the debt, & replaced by another security. The policy was accordingly delivered up:—*Held*: debtor's right of set-off was not thereby displaced.—*MOORE v. JERVIS* (1845), 2 Coll. 60; 63 E. R. 637.

174. — Agent appointed trustee of estate—Funds in hands of agent not to be liable for advances made to estate.—*I.*, consignee of a West India estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down incumbrances. I. was also private agent & banker for B., with the understanding that B. was not, nor were his funds, to be liable for advances made by I. for the estate; I. becoming embarrassed, was declared bkpt., & assignees were appointed:—*Held*: on a bill filed by B. & the other owners of the estate, to remove I. from the possession & management, a sum found due from I. to B. on their private dealings, might be set off against a sum found due to I. in respect of his advances & payments for the estate.—*BAILLIE v. EDWARDS* (1848), 2 H. L. Cas. 74; 9 E. R. 1020, H. L.; *reversg. S. C. sub nom. BAILLIE v. INNES* (1845), 14 L. J. Ch. 341, L. C.

175. — Special remedy given by contract.—*MINTER v. REIGATE URBAN DISTRICT COUNCIL* (1903), 67 J. P. Jo. 101.

176. Whether set-off is compulsory.—If A. agrees to do work for a certain sum of money & afterwards B. purchases some of the materials, which are worked up by A., the money expended on that account must be set off & cannot be given in evidence on the general issue.—*ALLINSON v. DAVIES* (1796), Peake, Add. Cas. 82; 170 E. R. 202.

177. — Right to bring independent action.—There is no compulsion upon a debt. to make a set-off, & if he pleases he may bring a cross-action; provided he & his attorney choose to incur the odium of an obstinate & litigious character, & the censure of the ct., which will follow, unless good reason can be shown for not pleading such set-off.—*GREEN v. LAW* (1805), 2 Smith, K. B. 668.

178. ——Where debt. has a set-off against pltf., of which he gives notice under the statute but does not appear at the trial to offer evidence of it, pltf. may either take a verdict for the whole sum he proves to be due to him subject to be reduced to the sum really due on a balance of accounts, if debt. will afterwards enter into a rule not to sue for the set-off; or he may take a verdict for the smaller sum, with a special indorsement on the profits as a foundation for the ct. to order a stay of proceedings, if another action should be brought for the amount of the set-off.—*LAING v. CHATHAM* (1808), 1 Camp. 252; 170 E. R. 947, N. P.

Annotations:—*Consd.* Eastmure v. Laws (1839), 5 Bing. N. C. 444. *Refd.* Beswick v. Capper (1849), 7 C. B. 669.

179. ——A person who advances to a deserted wife money to enable her to supply herself with necessaries, has no demand, enforceable at law, against the husband for the advances, but has a remedy in equity against him for so much of the money as is actually applied by the wife in paying for necessaries:—*Held*: accordingly, where pltf. who had deserted his wife filed his bill to enforce a judgment against real estate of debt., debt. was entitled to set off the amount of sums which before & after the judgment had been advanced by debt. to the wife for the purpose of providing her with necessaries, & had been applied by her for that purpose.

In the present case pltfs.' demand & debts.' cross demand are wholly unconnected with each other, & debt. had no answer in bar of pltfs.' demand. Therefore, if he had a legal set-off he was not bound to avail himself of it. . . . The equitable set-off might equally be reserved (*LORD CAMPBELL, C.*)—*JENNER v. MORRIS* (1861), 3 De G. F. & J. 45; 30 L. J. Ch. 361; 3 L. T. 871; 25 J. P. 419; 7 Jur. N. S. 375; 9 W. R. 391; 45 E. R. 795, L. C. & L. J.

Annotations:—*Refd.* Deare v. Soutten (1869), L. R. 9 Eq. 151. *Mentd.* *Re* Wood, Davidson v. Wood (1863), 8 L. T. 476; Lewis v. Alleyne (1888), 4 T. L. R. 251.

180. ——In an action for damages for the non-performance & improper performance of certain work which pltf. had employed debt. to do, the defence set up was that debt. had sued pltf. for the price of the work alleged to have been improperly done, & pltf. had settled by paying the whole amount then sued for; & that, as pltf. might have given the non-performance & the defective performance complained of in evidence in reduction of damages, pltf. was precluded from bringing a cross-action for them:—*Held*: though pltf. might have used the causes of action for which he sued in reduction of the claim in the former action, yet he was not bound to do so, but might maintain a separate action for them.—*DAVIS v. HEDGES* (1871), L. R. 6 Q. B. 687; 40 L. J. Q. B. 276; 25 L. T. 155; 20 W. R. 60, D. C.

Annotations:—*Expld.* Caird v. Moss (1886), 33 Ch. D. 22. *Consd.* Bright v. Rogers, [1917] 1 K. B. 917. *Refd.* *Re* Hilton, *Ex p.* March (1892), 67 L. T. 594; Bow, McLachlan v. Ship Camosun, [1909] A. C. 597.

181. ——Pltfs. advanced to one of their customers the sum of £1,000, upon the security of a joint & several promissory note payable on demand, signed by B. & debt. who was the solr. of both parties, & upon the deposit of the deeds of certain property belonging to B. On depositing the deeds B. signed a memorandum prepared by debt.'s articulated clerk, stating that the deposit was to cover any general balance not exceeding £1,000, then or thereafter to be due to pltfs., & undertaking to execute a legal mtge. The negotiations for the mtge. falling through, pltfs. agreed to the loan standing over, on condition that B. paid interest at the rate of 6 per cent., in lieu of 5. This arrangement was made without the knowledge of debt. About this time pltfs. held between £1,400 & 1,600 to the credit of B. The interest upon the loan was debited to his current account but not the loan itself. Ultimately a legal mtge. of the property was executed by B. securing any sum not exceeding £1,500, which might thereafter be due upon his general account with pltfs., together with interest at the rate of 6 per cent. In negotiating this mtge. debt.'s partner acted on behalf of pltfs., but a new solr. acted for B. Demand for payment of the promissory note having been made to B. without effect, pltfs. now sued debt. for payment thereof:—*Held*: the bank were not bound to set off the note against any balance in their hands to debtor's credit.—*YORK CITY & COUNTY BANKING CO. v. BAINBRIDGE* (1880), 43 L. T. 732; 45 J. P. 158.

SECT. 10.—PARTICULAR INSTANCES.

SUB-SECT. 1.—THE CROWN.

Set-off not available against Crown.—See CONSTITUTIONAL LAW, Vol. XI., p. 530, No. 339.

Set-off against petition of right.—See CROWN PRACTICE, Vol. XVI., p. 243, Nos. 386-388.

Sect. 10.—Particular instances: Sub-sects. 2, 3

SUB-SECT. 2.—AFFREIGHTMENT CONTRACTS.
See SHIPPING.

SUB-SECT. 3.—AGENCY.

Authority of agent to receive payment by way of set-off, etc.]—See AGENCY, Vol. I., pp. 368-370.

Agent's right to set off sums due to him by principal.]—See AGENCY, Vol. I., pp. 452-454, Nos. 1417-1426.

Where principal is creditor—Debtor seeking to set off as against principal debt from agent to debtor.]—See AGENCY, Vol. I., pp. 570-575, Nos. 2140-2171.

Set-off by agent against third party—Debt due by third party to principal.]—See AGENCY, Vol. I., p. 679, Nos. 2892-2894.

Debt due by principal to agent.]—See AGENCY, Vol. I., p. 679, No. 2895.

Set-off by third party against agent—Debt due by principal to third party.]—See AGENCY, Vol. I., pp. 679, 680, Nos. 2896-2899.

SUB-SECT. 4.—ASSIGNEES.

See Law of Property Act, 1925 (c. 20), s. 136.

182. Whether assignee takes subject to right of set-off—Assignment of bond.]—A. being bound in a bond to B. the bond is assigned by B. to C. in satisfaction of a debt due from B. to C. B. becomes a bkpt., & C., not being able to sue at law in B.'s name brings a bill against A. to be paid the money due on the bond. Whether A. out of the money due on the bond shall retain a debt due to himself from B.—PETERS v. SOAME (1701), 2 Vern. 428; 23 E. R. 874.

*Annotations:—*Reid. Young v. Bank of Bengal (1836), 1 Deac. 622; Freeman v. Lomas (1851), 9 Hare, 109.

183. Assignee of chose in action.]—Assignees of a chose in action are liable to all the equities which attach to the thing assigned as against the assignor.

A retiring partner received security from the continuing partners for his share, & which he assigned to third parties:—*Held*: the assignees took subject to the right of equitable set-off of the continuing against the retiring partner.—SMITH v. PARKES (1852), 16 Beav. 115; 51 E. R. 720.

*Annotations:—*Distd. Watson v. Mid Wales Ry. (1867), L. R. 2 C. P. 593. *Consd.* Newfoundland Government v. Newfoundland Ry. (1888), 13 App. Cas. 199. *Refd.* *Re* Itawbone (1857), 3 Jur. N. S. 837; *Re* National Alliance Assce., Ashworth's Case (1862), 7 L. T. 61; Baker v. Adam (1910), 102 L. T. 248.

184. Assignee without notice of claim.]—At two general meetings of the shareholders of a joint stock co., two separate sums of 500 guineas were voted to the directors as a remuneration for their trouble, & to one of the directors, L., two deposit notes, signed by three other of the directors were given. By these notes it was certified that the sums therein specified, being the amounts to which L. was entitled as his share in the two sums of 500 guineas, had been that day deposited with the co., & that the undersigned thereby undertook that the sums should be

repaid to L. with interest at 6 per cent. L., the director, deposited the notes with pltf., & also assigned them to him by deed as a collateral security for a debt. Notice of the assignment was given to the co. L. afterwards compounded with his creditors, & on pltf. filing a bill against the co. for payment of the residue of his debt, the co. contended that the issue of the notes was illegal under 7 & 8 Vict. c. 110, & if not, that they had a set-off against pltf. in respect of subsequent calls:—*Held*: pltf. had made good his claim, & was entitled to a decree against the co. with costs.—WOODHAMS v. ANGLO-AUSTRALIAN & UNIVERSAL FAMILY LIFE ASSURANCE CO. (1861), 3 Giff. 238; 5 L. T. 628; 8 Jur. N. S. 148; 10 W. R. 290; 66 E. R. 397.

*Annotation:—*Consd. *Re* South Essex Gaslight & Coke Co., Hulett's Case (1862), 2 John. & H. 306.

185. Claim arising under same contract.]—Defts., who were tenants of an exhibition ground, entered into a contract with C. by which C. undertook to equip part of the ground & was to receive half of certain takings. C. was also to pay part of the cost of advertising, & if defts. had to pay any part of C.'s share thereof they were to have a lien on his share of the receipts for admission, but this lien was not to operate until payment of a mtge. by which C. mortgaged to pltf. his share in the profits. Defts. were also to supply C. with electricity, for which he was to pay, the accounts to be rendered weekly. On a motion by pltf. to restrain defts. from parting with moneys received for admission defts. claimed to set off from the share of receipts due to pltf. as C.'s mtgees.' money due from C., to defts. for electricity:—*Held*: although as a general principle a claim arising under the same contract might be set off against an assignee of a party thereto, yet as defts. recognised the mtge. as part of the venture, & as the lien was not to operate till after the discharge of the mtge., defts. had no right of set off against pltf. until after its discharge.—PHENIX ASSURANCE CO., LTD. v. EARL'S COURT, LTD. (1913), 30 T. L. R. 50, C. A.

186. Agreement to recognise right of assignee.]—PHENIX ASSURANCE CO., LTD. v. EARL'S COURT, LTD., No. 185, *ante*.

187. Assignee of insurance policy.]—PELLAS v. NEPTUNE MARINE INSURANCE CO., No. 368, *post*.

188. —.]—(1) A claim for a total loss upon a policy of insurance is a claim for unliquidated damages in the nature of an indemnity.

(2) In an action by the assignee of a policy, claims against the assignor for losses on other policies cannot be set off, as the right of set-off by way of defence to an assignee's claim is limited to defences arising out of the contract contained in the policy assigned.—BAKER v. ADAM (1910), 102 L. T. 248; 11 Asp. M. L. C. 368; 15 Com. Cas. 227.

189. What may be set off—Against assignee of chose in action—Debt which could have been set off as against assignor.]—Where there are cross demands between two parties of such a nature that, if both were recoverable at law, they would be the subject of legal set-off, then, if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity.

PART I. SECT. 10, SUB-SECT. 4.

n. Whether assignee takes subject to right of set-off.]—BRIGHAM v. SMITH (1870), 17 Gr. 512.—CAN.

o. —.]—HOGAN v. BAATZ, HOGAN

v. BAATZ & TAYLOR (Y. T.) (1905), 1 W. L. R. 513.—CAN.

p. —.]—BRITISH PACIFIC TRUST CO. v. BAILLIE (1914), 20 B. C. R. 199.—CAN.

q. —.]—BURMAN v. ROSIN, ROSIN

v. BURMAN (1915), 9 O. W. N. 274; 35 O. L. R. 134.—CAN.

r. —.]—MARITIME MANUFACTURERS & CONTRACTORS CO., LTD. v. BERRINGER (1920), 52 N. S. R. 169.—CAN.

As equity recognises the assignee of a debt as the creditor, & as these demands, if both were recoverable at law, would be the subject of set-off; so, if equity has jurisdiction of the subject-matter, it will enforce the set-off (LORD COTTENHAM, C.).—CLARK v. CORT (1840), Cr. & Ph. 154; 10 L. J. Ch. 113; 41 E. R. 449, L. C.

*Annotations:—***Distd.** Hunt v. Jessel (1854), 18 Beav. 100. **Apld.** Cochran v. Green (1860), 9 C. B. N. S. 448. **Expld.** Middleton v. Pollock, *Ex p.* Nugee (1875), L. R. 20 Eq. 29. **Consd.** Thornton v. Maynard (1875), L. R. 10 C. P. 695; Alcoy & Gandia Ity. & Harbour Co. v. Greenhill (1897), 76 L. T. 542. **Refd.** Dodd v. Lydall, Lydall v. Dodd (1842), 1 Hare, 333; *Re* Agra & Masterman's Bank, *Ex p.* Anderson (1866), 36 L. J. Ch. 73.

190. ————**]**—In 1892 *pltf.* & her husband effected in their joint names a policy of assurance on their joint lives to be payable upon the death of whichever of them should first die. They had previously agreed that each should pay one-half of the annual premiums, & in some years the premiums were so paid, but the husband from time to time, became unable to pay his moiety & then *pltf.* at his request paid it for him out of her own moneys. They both concurred in creating charges upon the policy, & subsequently the husband executed a deed of assignment for the benefit of his creditors, assigning all his property, but not specifically mentioning the policy, to *deft.* as trustee. No notice of this deed was given to the insurance co. At the time of the husband's death the aggregate of the premiums paid by *pltf.* on his behalf exceeded in amount one moiety of the balance of the policy moneys remaining after payment of the joint charges. Upon a summons to determine the respective rights & interests of *pltf.* & *deft.*:—**Held:** *pltf.* being the legal owner of the policy *deft.* whose only claim was in equity must do equity; & *pltf.* was entitled to set off her claim against her husband for the portion of the premiums paid on the policy by her at his request.—*Re* MCKERRELL, MCKERRELL v. GOWANS, [1912] 2 Ch. 648; 82 L. J. Ch. 22; 107 L. T. 404; 6 B. W. C. C. N. 153.

191. ————**Debts accrued due since notice of assignment.]**—A trading firm assigned their estate, stock, debts due to the firm, etc., to trustees, upon trust for sale & distribution, with power to carry on the business; but the trustees did not thereby undertake to discharge the liabilities of the firm. The deed of assignment contained a proviso making it void, if the firm became *bkpt.* before a certain day. *Pltfs.*, who were at the date of the assignment creditors of the firm, afterwards became indebted to the trustees, who continued to carry on the business. The firm becoming *bkpt.* before the day named:—**Held:** *pltf.* had no right to a set-off; but the result would have been different, if *pltf.*, instead of creditors, had been debtors at the date of the assignment, & had afterwards become creditors of the trustees.

No right of set-off, therefore, can arise out of an agreement which is not proved to have existed (ROMILLY, M.R.).—HUNT v. JESSEL (1854), 18 Beav. 100; 2 W. R. 219; 52 E. R. 40.

192. ————**]**—G. had contracted to build a ship for *deft.* to be paid for by four instalments. G. owed money to *pltf.*, & before the completion of his contract with *deft.*, & when only two instalments had been paid, gave *pltf.* an order upon *deft.* for *deft.* to pay *pltf.* £100 out of moneys due or to become due to G. from *deft.* To enable G. to complete his contract *deft.* subsequently made advances to G. to a greater amount than £100, & at the completion of the vessel G. had no more to receive on account of the contract:—

Held: the order was a good equitable assignment of the money when it became due, & *deft.* could not set off advances subsequently made to enable G. to complete his contract.—BRICE v. BANNISTER (1878), 3 Q. B. D. 569; 47 L. J. Q. B. 722; 38 L. T. 739; 26 W. R. 670, C. A.

*Annotations:—***Refd.** Buck v. Robson (1878), 3 Q. B. D. 686; Fisher v. Calvert (1879), 27 W. R. 301; May v. Lane (1894), 13 W. R. 58. **Mentd.** *Re* Whitting, *Ex p.* Hall (1879), 10 Ch. D. 615; British Wagon Co. v. Lea (1880), 5 Q. B. D. 149; *Re* Jones, *Ex p.* Nichols (1883), 22 Ch. D. 782; *Re* Toward, *Ex p.* Trustee (1884), 54 L. J. Q. B. 126; Walker v. Bradford Old Bank (1884), 12 Q. B. D. 511; Percival v. Dunn (1885), 29 Ch. D. 128; Barnetts, Hoares v. South London Tram. Co. (1886), 2 T. L. R. 848; Drew v. Josolyne (1887), 18 Q. B. D. 590; Western Wagon & Property Co. v. West, [1892] 1 Ch. 271. Durham v. Robertson, [1898] 1 Q. B. 765; Mercantile Bank of London v. Evans (1898), 79 L. T. 496; Torkington v. Magee, [1902] 2 K. B. 427; Brandts v. Dunlop Rubber Co., [1904] 1 K. B. 387; Skipper & Tucker v. Holloway & Howard, [1910] 2 K. B. 630; Glegg v. Bromley & Glegg (1912), 81 L. J. K. B. 1081; *Re* Gunsbourg, *Ex p.* Trustee (No. 1) (1919), 88 L. J. K. B. 479; *Re* Westerton, Public Trustee v. Gray, [1919] 2 Ch. 104; *Re* Wait, [1927] 1 Ch. 606.

193. ————**Intention of parties.]**—When an equitable chose in action has been assigned, debtor cannot set off against the assignee a debt which has accrued due to him from the assignor since the notice of assignment, though resulting from a contract entered into previously, unless from the nature of the transaction it appears to have been intended between the original parties that the one should be set off against the other.

The assignees of a Lloyd's bond sued the makers in the name of the original bondholder; the makers sought to set off arrear of rent due from the original bondholder, which had accrued due since notice of the assignment, upon a lease granted after the making of the bond, but before notice of assignment. On equitable pleadings stating these facts:—**Held:** *defts.* could not set off the arrears of rent.—WATSON v. MID WALES RY. CO. (1867), L. R. 2 C. P. 593; 36 L. J. C. P. 285; 17 L. T. 94; 15 W. R. 1107.

*Annotations:—***Apld.** *Re* Milan Tram. Co., *Ex p.* Theys (1882), 22 Ch. D. 122. **Consd.** A.G. for Newfoundland v. Newfoundland Ry. (1888), 58 L. T. 285. **Apld.** Christie v. Taunton, Delmar, Lane, *Re* Taunton, Delmar, Lane, [1893] 2 Ch. 175. **Consd.** *Re* City Life Assoc., [1926] Ch. 191. **Refd.** Higgs v. Assam Tea Co. (1869), L. R. 4 Exch. 387; Harter v. Colman (1882), 19 Ch. D. 630.

194. ————**What constitutes notice.]**—A limited co. agreed to sell to H. & co. 7,000 barrels out of their stock at 3s. 6d. each. H. & co. paid for them; but the co. fell into difficulties, its stock of barrels was exhausted, & as to more than 4,000 it failed to deliver them. The co. had to the knowledge of H. & co. issued debentures in the usual form of floating securities on all the property of the co. The debenture holders obtained the appointment of a receiver at which time H. & co. owed the co. a liquidated sum for rent, & had the above claim against the co. in respect of the barrels:—**Held:** H. & co. could set off this demand against what they owed to the co., & the knowledge of the existence of the debentures as a floating security, at the time when the debt due to them was contracted was not such notice of an assignment as to prevent a set-off binding the debenture holders.—BIGGERSTAFF v. ROWATT'S WHARF, LTD., HOWARD v. ROWATT'S WHARF, LTD., [1896] 2 Ch. 93; 65 L. J. Ch. 536; 74 L. T. 473; 44 W. R. 536, C. A.

*Annotations:—***Refd.** Nelson v. Faber, [1903] 2 K. B. 367. **Mentd.** *Re* Roundwood Colliery Co., Lee v. Roundwood Colliery Co., [1897] 1 Ch. 373; *Re* Bank of Syria, Owen & Ashworth's Claim, Whitworth's Claim, [1900] 2 Ch. 272; Premier Industrial Bank v. Carlton Manufacturing Co. & Crabtree, [1909] 1 K. B. 106; *Re* Fireproof Doors, Umney v. Fireproof Doors, [1916] 2 Ch. 142; Day v. Pullinger Engineering Co., [1921] 1 K. E. 7; Underwood v. Bank of Liverpool, Underwood v. Barclay's Bank, [1924] 1 K. B.

Sect. 10.—Particular instances: Sub-sects. 4 & 5.]

775; *Kreditbank Cassell G.m.b.H. v. Schenkens*, [1926] 2 K. B. 450; *Houghton v. Notherd, Lowe & Wills*, [1927] 1 K. B. 246.

195. ——— **Covenants to pay annuity—Sums advanced on account of annuity.**—A person entitled to an annuity under a deed assigned the annuity. The assignee filed a bill to recover some arrears of the annuity, deft. the covenantor, filed an affidavit stating that he had claims against the original covenantor more than the amount claimed by the bill:—*Held*: deft. had, by his affidavit, precluded himself from raising the point that pltf.'s demand was merely legal, & pltf. was entitled to proceed in equity, but deft. might set off any sums *bond fide* advanced or paid on account of the annuity previous to the notice of assignment.—*LAWRANCE v. BELL* (1866), 14 W. R. 753.

196. ——— **Insurance policies—Set-off in respect of other policies.**—*PELLAS v. NEPTUNE MARINE INSURANCE CO.*, No. 368, *post*.

197. ——— **Set-off.**—*BAKER v. ADAM*, No. 188, *ante*.

198. ——— **Claim for damages.**—*YOUNG v. KITCHIN*, No. 115, *ante*.

199. ——— **Set-off.**—*NEWFOUNDLAND GOVERNMENT v. NEWFOUNDLAND RY. CO.*, No. 117, *ante*.

200. ——— **Set-off.**—Defts. entered into a contract for the purchase of a newspaper for a sum of £1,000, of which £200 was paid on the completion of the contract, & the balance of £800 was to be payable by certain instalments. Defts. were induced to enter into the contract by fraudulent misrepresentation made to them by the vendor. The vendor for valuable consideration assigned the balance of the purchase-money by deed absolutely to pltf., & notice in writing of that assignment was given to defts. Pltf. at the time of that assignment had no notice of the fraud on the part of the vendor. In an action by pltf. against defts. for the debt of £800 so assigned, defts. pleaded, by way of defence, in substance, that they were induced to enter into the contract for the purchase of the newspaper by the fraud of the vendor, & that by reason thereof they had sustained damage exceeding £800, & no money was due from them at the date of the assignment to pltf., & in the event of their being held liable to pay the sum claimed by pltf., they counter-claimed against the vendor damages for fraud to an equal amount. Defts. were not in a position, & did not claim, to rescind the contract for the purchase of the newspaper. At the trial the jury found that defts. had been induced to enter into the contract for purchase of the newspaper by the fraud of the vendor, & had thereby sustained damage to the amount of £800. The judge on those findings gave judgment for defts. on pltf.'s claim & judgment for defts. against the vendor for £800 damages upon the counterclaim, but stayed execution on the latter judgment:—*Held*: upon the above-mentioned facts, defts.

could not set up the claim to £800 damages for the fraud of the vendor by way of defence against the claim of pltf., & pltf. was entitled to judgment against defts. for £800.—*STODDART v. UNION TRUST, LTD.*, [1912] 1 K. B. 181; 81 L. J. K. B. 140; 105 L. T. 806, C. A.

201. ——— **Set-off.**—Where a receiver had delivered goods to appts. under contracts made by the co. before his appointment, & had assigned amounts due from appts. for goods so delivered to resp. bank, & had afterwards cancelled the contracts with appts.:—*Held*: appts. were entitled to set off the damages which they had sustained by the breach of the contracts.—*PARSONS v. SOVEREIGN BANK OF CANADA*, [1913] A. C. 160; 82 L. J. P. C. 60; 107 L. T. 572; 29 T. J. R. 38; 20 Mans. 94, P. C.

202. ——— **Set-off.**—The rule that an assignee of a chose in action can set off a claim for damages against the assignor arising out of the same transaction has no application as between a lessee & a mtgee. of the reversion.—*REEVES v. POPE*, [1914] 2 K. B. 284; 83 L. J. K. B. 771; 110 L. T. 503; 58 Sol. Jo. 248, C. A.

203. ——— **Arrears of rent—As between mortgagee of reversion & lessee.**—*REEVES v. POPE*, No. 202, *ante*.

——— **See, further, CHOSSES IN ACTION**, Vol. VIII., pp. 491-495.

204. ——— **Money due under mortgage—Claim by assignees of insolvent debtor—Against purchaser of insolvent's mortgaged interest.**—Where the assignees of an insolvent debtor had permitted him to remain for many years in the possession of a copyhold estate, which shortly after the insolvency had been ineffectually offered for sale, & during such possession the insolvent had affected to mortgage the property by surrender as his own:—*Held*: a purchaser of such estate at a sale by auction from the assignees could not set off the money due to him from the insolvent on the alleged mtge.—*COLE v. COLE* (1848), 12 L. T. O. S. 237, L. C.

205. ——— **Judgment in cross-actions—Assignment of interest by party to action—To third party.**—Although, where one of the parties in two cross-actions has assigned his interest to a third party, there may be no right to set off the judgments, yet, where the assignee, being the real pltf. in one action, is also the real deft. in the other, there is such right of set-off.—*STANDEVEN v. MURGATROYD*, *MURGATROYD v. STANDEVEN* (1858), 27 L. J. Ex. 425.

206. ——— **Debt due from assignor of freight—Original owner of goods—Claim by holders of bill of lading.**—The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods, who was also the assignor of the freight.—*WEGUELIN v. CELLIER* (1873), L. R. 6 H. L. 286; 42 L. J. Ch. 758; 22 W. R. 26, H. L.

207. ——— **Debt from plaintiff to third person—Assignment by third person to defendant.**—Deft.

1981. **What may be set-off—Against assignee of chose in action—Claim for damages.**—To an action by an assignee of an account for the price of lumber & staves delivered by the assignor to deft., under two certain contracts therefor, deft., under R. S. O., 1877, c. 116, ss. 7, 10, & Jud. Act, ss. 12, 16, & rule 127, can set up as a defence a claim for damage for the non-delivery by the assignor to deft. of certain other timber & staves specified in the contracts, & for the inferior quality of those delivered.—*EXCHANGE BANK v. STINSON* (1881), 32 C. P. 158.—CAN.

1982. ——— **Set-off.**—If a mort-

gage co. undertake with the mtgor. to keep alive an insurance on the mortgaged property, but fail to do so, they are liable in damages to the mtgor., if ignorant of such failure, for the amount of such insurance in case the property is burned after the policy lapses, & the mtgor. has a right, under King's Bench Act, s. 39, to set off such damages against the mortgage debt in the hands of an assignee in trust, in the absence of proof of notice of the assignment having been given to him before the fire.—*CAMPBELL v. CANADIAN CO-OPERATIVE INVESTMENT CO.* (1907), 6 W. L. R. 153; 16 Man. L. R. 464.—CAN.

1983. ——— **Set-off.**—King's Bench Act, 1902, s. 39 (f), only permits, as against an assignee, a set-off of anything which would be recognised in a court of equity as a proper subject of set-off, & a counterclaim for unliquidated damages arising out of a cause of action in no way connected with the claim assigned is not a defence or set-off which would at any time have been recognised.—*MCMAHON v. WILSON* (1908), 17 Man. L. R. 567; 8 W. L. R. 106.—CAN.

t. ——— **Independent claim against assignor.**—In an action by the

cannot plead by way of set-off a bond debt of pltf. assigned to deft. by another, to whom & for whose use it was originally given.—*WAKE v. TINKLER* (1812), 10 East, 36; 104 E. R. 1002.

Annotations:—*Consd. Isberg v. Bowden* (1853), 8 Exch. 852; *Watkins v. Clark* (1862), 12 C. B. N. S. 277.

208. ———.—[1] In an action to recover a debt due from deft. to pltf., deft. is entitled to set off a debt originally due from pltf. to a third person who has assigned it to deft.

(2) The form of plea . . . is "that pltf., at the commencement of this suit, was & still is indebted to deft. in an amount equal to pltf.'s claim" . . . that was . . . & always has been the proper form (*FARWELL, L.J.*).—*BENNETT v. WHITE*, [1910] 2 K. B. 643; 79 L. J. K. B. 1133; 103 L. T. 52, C. A.

Annotation:—*As to* (1) *Refd. Mathieson's Trustee v. Burrup*, *Mathieson*, [1927] 1 Ch. 562.

Set off by & against assignees in bankruptcy.—*See* BANKRUPTCY, Vol. IV., pp. 389 *et seq.*

Assignees of mortgagee.—*See* Sub-sect. 15, *post.*

Assignee of partnership.—*See* Sub-sect. 17, *post.*

SUB-SECT. 5.—BANKER AND CUSTOMER.

See, generally, BANKERS, Vol. III., pp. 293-295.

209. What may be set off—Debt due to bank by customer—On bond to one of partners of bank.—It seems that money due for advances made by a banker to his customer upon a bond given by the customer to one of the partners, in trust for the rest may be set off in an account current between them.—*CROSSE v. SMITH* (1813), 1 M. & S. 545; 105 E. R. 204.

Annotations:—*Mentd. Harris v. Richardson* (1831), 4 C. & P. 522; *Allen v. Edmonson* (1848), 2 Car. & Kir. 547.

210. ———.—**Debt not yet accrued.**—A's bankers, for nine or ten years previous to his death, had been in the habit of accommodating him with a loan of £1,000 upon the security of his promissory note, which was renewed every three months, the bankers, upon those occasions, discounting the note by placing the amount of it to the credit of A., as cash paid in by him, & debiting him on the other side with the discount. A. also, about two months prior to his death, accepted, payable at his bankers, a bill drawn by B. on A. for £467: this bill having been paid away by B., was discounted by the bankers for a holder who did not indorse it, & the bankers were the holders when the bill became due. On the morning the bill became due, before the arrival of the post, the bankers who had then in their hands, £1,421 of A.'s money, wrote off the bill to the debit of A.'s account; the same day's post informing them of A.'s death two days before, they called upon B. to pay, & B. paid them £40 on account of the bill, on a representation from them that £40 would be wanting to make A.'s account right. At this time the last promissory note for £1,000, given by A. to the bankers, had fifty-three days to run, but the bankers immediately entered that note, as well as the bill of exchange, to the debit of A.'s account, allowing

on the other side a rebate of discount for the time the note had to run. The exors. of A., having, before the fifty-three days expired, sued the bankers for the balance in their hands at the time of A.'s death:—*Held*: the bankers might set off against the demand of the exors. the £467 written off on the bill of exchange, but not the £1,000 on the promissory note.—*ROGERSON v. LADBROKE* (1822), 1 Bing. 93; 7 Moore, C. P. 412; 130 E. R. 39; *sub nom. ROBINSON v. LADBROKE*, 1 L. J. O. S. C. P. 6.

211. ———.—[1]—Deft. discounted with his bankers, pltf.s, & was liable to them on bills not yet mature, but of which the acceptors were in difficulties, or had stopped payment. Pltf.s. refused to honour deft.'s cheque, & deft. brought an action to recover the balance of his account. Afterwards several of the bills were dishonoured:—*Held*: pltf.s. were entitled to an injunction to restrain the action.—*AGRA & MASTERMAN'S BANK, LTD. v. HOFFMANN* (1864), 5 New Rep. 214; 34 L. J. Ch. 285; 11 L. T. 701; 11 Jur. N. S. 335; 13 W. R. 226.

212. ———.—[1]—Testator borrowed £6,500 from his bankers, to be repaid on a specified day. He died before the day of payment, & at his death a sum of £629 was standing to his credit on his current drawing account:—*Held*: the £629 must be treated as a set off against the sum due on the loan account, & was not to be dealt with as an asset in the hands of the exors.—*THOMAS v. HOWELL* (1874), as reported in L. R. 18 Eq. 198; 30 L. T. 244; 22 W. R. 676.

Annotations:—*Distd. Halse v. Rumford* (1878), 47 L. J. Ch. 559. *Mentd. Re Corcoran, Corcoran v. Riddell* (1892), 62 L. J. Ch. 267; *Nickall v. Fawkes* (1905), 50 Sol. Jo. 126; *In the Estate of Southerden, Adams v. Southerden*, [1925] P. 177.

213. ———.—**On bill of exchange discounted by bank—As indorsers.**—A bill of exchange drawn by A. was accepted payable at a bank. A., who was a customer of the bank, discounted the bill with them, & the bank re-discounted it, & indorsed it over to a third party. On the day when the bill became due it was presented at the bank for payment by the holder, & there being no funds of the acceptor then in their hands, the bank having paid it instead of debiting the acceptor's account with the amount, carried it to a separate account as an unpaid bill. The acceptor having provided funds in the course of the day, the bank sent notice of its dishonour to the drawer on the next morning, & debited his account with it. In an action by A. against the bank for money lent, in which defts. set off the amount of the bill, the jury found that the bank paid the bill as indorsers of it, & not as agents of the acceptor:—*Held*: the jury were justified in assuming that the bank treated the bill as dishonoured & paid it in their character of indorsers, & not as agents of the acceptor; & they were entitled to set it off.—*POLLARD v. OGDEN* (1853), 2 H. & B. 459; 22 L. J. Q. B. 439; 21 L. T. O. S. 152; 18 Jur. 39; 1 W. R. 387; 118 E. R. 839.

214. ———.—[1]—Defts. acted as bankers for a firm up to Feb. 3, 1914, when the firm being insolvent by deed assigned all their property to pltf. as trustee for their creditors. The deed

assignee of a debt, the debtor-deft. is entitled to set off a debt due to him by the assignor at the date of the assignment, even when the amount claimed to be set off is due under a transaction independent of & unconnected with, the claim assigned to pltf.—*ARUNA-CHELLAM CHETTI v. SUBRAMANIAN* (1906), 1 L. R. 30 Mad. 235.—*IND.*

PART I. SECT. 10, SUB-SECT. 5.

a. What may be set off—Debt due to bank by customer—Against money due on another account.—*ALLIANCE BANK OF SIMLA v. MOHAN LAL* (1927), 1 L. R. 8 Lah. 105.—*IND.*

b. ———.—[1]—*ROY v. CANADIAN BANK OF COMMERCE* (1918), 24 B. C. R.

397; 38 D. L. R. 742.—*CAN.*

—A bank has a right of set-off in respect of a deposit or balance to the credit of a customer, but such a right cannot be exercised where a debt is statute-barred & not recoverable.—*Re MORRIS, CONVEYS v. MORRIS*, [1922] 1 L. R. 81.—*IR.*

Sect. 10.—Particular instances: Sub-sects. 5, 6 & 7.]

provided that payments to creditors should be made upon the basis of a bkpcy. distribution of the property & that secured creditors should have the same rights as under a bkpcy. At the date of the deed the firm had £2,934 to the credit of their current account in debt. bank, & the bank held certain shares as security for an advance to the firm. These shares were subsequently sold by the bank & realised £812 in excess of the amount of the advance to the firm. Before Feb. 3, 1914, the firm had discounted with the bank a number of bills of exchange, which matured after that date, & in respect thereof the firm became debtors of the bank to the amount of £19,941. In an action by pltf. as trustee under the deed to recover from the bank the two sums of £2,934 & £812, the bank claimed a lien on those sums & also to set off a sufficient portion of £19,941 against those sums:—*Held*: the bank's claim was right on both points.—*BAKER v. LLOYDS BANK, LTD.*, [1920] 2 K. B. 322; 89 L. J. K. B. 912; 123 L. T. 330; [1920] B. & C. R. 128.

—*See, also, BANKERS, Vol. III., pp. 293–294, Nos. 920–923.*

215. — Trust moneys—Bankers without notice of trust.—Where a co. received from resps. trust moneys paid them to the credit of a separate account between it & applt. bank, & failed:—*Held*: in an action by resps., as the bank was not shown to have received the moneys as trust funds, or to have received during the currency of the account notice of their trust character, the bank was entitled to set them off against its own claim against the co. in liquidation.—*UNION BANK OF AUSTRALIA, LTD. v. MURRAY-AYNSLEY*, [1898] A. C. 693; 67 L. J. P. C. 123, P. C.
Annotation:—*Appld.* Bank of New South Wales v. Goulburn Valley Butter Co., [1902] A. C. 543.

216. — Against money due on another account—Money in fact belonging to other persons.—In the absence of notice of fraud a banker is entitled to set off what is due to a customer on one account against what is due from him on another, although the former may in fact belong to other persons.

A trader carried on his own business in conjunction with that of a co. of which he was managing director, & by himself or his nominees held all the shares. The co.'s account & the trader's account were in the same bank, & blank cheques were given to the bank manager in respect of each account to be filled in with amounts necessary for the purpose of adjustment of the two accounts. Blank cheques of the co. were improperly filled in by the trader with amounts which were credited in his account:—*Held*: in the absence of notice on the part of the bank of the state of accounts between the trader & the co., the bank was not liable to refund the money.—*BANK OF NEW SOUTH WALES v. GOULBURN VALLEY BUTTER CO., PROPRIETARY*, [1902] A. C. 543; 71 L. J. P. C. 112; 87 L. T. 88; 51 W. R. 367; 18 T. L. R. 735, P. C.

217. — Balance due to customer from bank—Against claim of bank on bond—Bond assigned to third party—Notice.—(1) Principles stated as to the right of set-off, where a bond is given by a customer to his bankers, in the following different instances—(a) where the firm remains unaltered; (b) where it is changed; (c) where the bond is assigned to the new firm; (d) where it is assigned to a stranger; (e) where notice of the assignment is given; & (f) where it is omitted to be given.

If a customer borrows money from his bankers, & gives a bond to secure it, & afterwards, on his

general banking account, a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond exists, both at law & in equity.

If the firm were altered, & the bond assigned by the original obligees to the new firm, & notice of that assignment given to debtor, & if, after this, a balance were due to him from the new firm, the assignees of the bond, then no right of set-off would exist at law, because the assignment of the chose in action would be inoperative at law, & the obligees of the bond, & debtor on the general account, would be different persons; but as, in equity, the persons entitled to the bond, & debtors on the general account, would be the same persons, a right of set-off would exist in this ct., & the customer would, in equity, be entitled to set off the balance due to him against the bond debt due from him.

If, after the bond had been given, it had been assigned to strangers, & no notice of that assignment had been given to original debtor, the obligor of the bond, then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of the firm, then the right of set-off would still remain at law, where the obligees of the bond & debtors on the general account would be the same persons, & in equity also, if the matter of account were brought here, as the assignees of the chose in action would be bound by the equities affecting their assignors.

But if notice of that assignment had been given to original debtor, no right of set-off would exist, in this ct., for the balance subsequently due from the bankers to the obligor, because the persons entitled to the bond would, as the obligor knew, be different persons from debtors to him on the general account, with whom he had continued to deal.

If the assignment of the bond had been made to the new firm, with notice to the obligor, they would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees.

If, after the alteration of the firm, & after the assignment of the bond to the new firm, with notice to debtor or obligor of that assignment, an assignment had been made of the bond to strangers, & no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity, as against the first assignees, of whose assignment he had notice; & the second assignees would, in equity, be bound by it, because the assignees of the bond take it subject to all the equities which affect the assignors.

A change of the title of the firm in a banker's pass-book, & entries therein to the credit of the new firm of the interest of securities given by the customer to the original firm, held to be notice of the assignment to the new firm of the securities given by the customer to the old firm.

(2) Bankers, to whom a customer had given a bond, assigned it over to third parties, who gave no notice to the obligor:—*Held*: notwithstanding the assignment, the customer's right continued, of setting off moneys due to him from his bankers against the bond.—*CAVENDISH v. GEAVES* (1857), 24 Beav. 163; 27 L. J. Ch. 314; 29 L. T. O. S. 256; 3 Jur. N. S. 1086; 5 W. R. 615; 53 E. R. 319.

Annotation:—Generally, *Refd.* *Pellas v. Neptune Marine Insc.* (1879), 5 C. P. D. 34.

218. — Bond assigned to successors of bank—Notice.—*CAVENDISH v. GEAVES*, No. 217, ante.

219. ———— Against claim of bank on another account.]—The corpn. of P., who besides their municipal character filled those of managers of the public baths & washhouses under Baths & Washhouses Act, 1846 (c. 74), & of the local board of health under Public Health Act, 1848 (c. 63), kept three separate accounts at their banker's, viz. (a) "The corpn. of P. Account." (b) "The Corpn. Baths & Washhouses Revenue Account." (c) "The P. Local Board of Health Account." Upon the first account they were indebted to the bank, & upon the other two the bank was indebted to them in an equal amount. In an action brought by the banker to recover the balance due to him on account (a):—*Held*: the corpn. were entitled to set off the debts due to them on the other two accounts.—*PEDDER v. PRESTON CORPN.* (1862), 12 C. B. N. S. 535; 31 L. J. C. P. 291; 6 L. T. 540; 9 Jur. N. S. 496; 10 W. R. 773; 142 E. R. 1251.

Annotation:—*Mentd.* *Anthony v. Brecon Markets Co.* (1872), 26 L. T. 979.

220. ———— On executorship account.]—A banking firm stopped payment in July, 1870, & were at once adjudged bkpt. At the time of the stoppage deft. had an account with the bank, which he had overdrawn about £300. At the end of 1869 a Mrs. A. had died, appointing deft. sole exor. of her will, & leaving a balance of about £600 in the hands of the bank. This balance was at once transferred by the bank from the account of Mrs. A. to the account of deft., "exor. of the late Mrs. A." In the interval before the stoppage deft. had drawn out about £200 of this account, & paid in about £100, leaving a balance in deft.'s favour of about £500. Deft. was left sole residuary legatee by Mrs. A.'s will. There were several pecuniary legacies which deft. had paid at the date of the stoppage of the bank; but there was a sum of £800 to be invested for the benefit of certain persons, & an annuity of £100, charged on the real & personal estate; & at the date of the bkpcy. deft. had not specifically provided for these two bequests, but there were in the hands of deft., besides the balance in the bank, other personal assets of testatrix; & after providing for these bequests, there would have been a surplus of £1,900, to which deft. was entitled as residuary legatee. Pltf., as trustee of bkpts.' estate, having brought an action against deft. to recover the amount of his overdrawn account, deft. sought to set off the balance in his favour on the exorship. account:—*Held*: the transfer of the balance of deceased's account to the account of deft., as exor., was equivalent to deft. drawing out the whole amount & paying the same amount in to a fresh account, & created a personal debt for money lent between deft. & the bank; the effect of it being opened as an exorship. account was to affect the bank with notice if there were any equities attaching to the fund; but under the circumstances, there were no such equities as to prevent deft. treating the balance as a fund to which he was beneficially as well as legally entitled; & consequently, deft. was entitled to set it against pltf.'s claim.—*BAILEY v. FINCH* (1871), L. R. 7 Q. B. 34; 41 L. J. Q. B. 83; 25 L. T. 871; 20 W. R. 294.

Annotation:—*Distd.* *Re Willis, Ex p. Morier* (1879), 12 Ch. D. 491.

221. ———— Credit on trust account—Against debt in private account.]—G., a county treasurer, used

to pay the county moneys into the B. Bank, but kept his private account at the N. & P. Bank, & carried over the police rates to this account by cheques drawn on the B. Bank. In Feb. 1869, he opened a separate account with the N. & P. Bank, headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The cheques which he drew upon it were all headed "Police Account" & appeared to have been drawn only for county purposes. For the purposes of interest the N. & P. Bank treated the accounts as one account, & the interest on the balance in his favour was carried to the credit of his private account. At the time when the police account was opened, the manager of the bank knew that G. was county treasurer, & understood that he had been in the habit of paying county moneys into the bank. On Apr. 8, 1870, G. absconded, his private account being overdrawn, & the police account being in credit:—*Held*: the bank was not entitled to set off the one account against the other, but the county magistrates were entitled to recover the balance standing to G.'s credit on the police account.—*Re GROSS, Ex p. KINGSTON* (1871), 6 Ch. App. 632; 40 L. J. Bey. 91; 25 L. T. 250; 19 W. R. 910, L. J.J.; *affg.* S. C. *sub nom. Re GROSS, Ex p. ADAIR*, 21 L. T. 198.

Annotations:—*Consd.* *Bailey v. Finch* (1871), L. R. 7 Q. B. 34. *Reid.* *Bailey v. Johnson* (1871), L. R. 6 Exch. 279; *Re Mawson, Ex p. Harcastle* (1881), 11 L. T. 523; *Bank of New South Wales v. Goulburn Valley Butter Co.*, [1902] A. C. 543; *Cuthbert v. Roberts, Lubbock* (1908), 100 L. T. 62. *Mentd.* *Greenwell v. National Provincial Bank* (1883), Cab. & El. 56; *Coleman v. Bucks & Oxon Union Bank*, [1897] 2 Ch.

As to set-off on failure of bank.]—*See* BANKERS, Vol. III., pp. 301, 302, Nos. 962-966.

SUB-SECT. 6. —BANKRUPTCY.

NOTE.—The following volume, page & number references are to *Bankruptcy*, Vols. IV. & V.

Sale by assignee.]—*See* Vol. IV., p. 222, No. 2075.

Set-off by agent against bankrupt principal.]—*See* Vol. IV., p. 230, No. 2155.

Set-off by indorser against acceptor of negotiable instrument.]—*See* Vol. IV., p. 287, No. 2086.

Secured creditors—Application of security to interest.]—*See* Vol. IV., p. 379, No. 2492.

Mutual credit.]—*See* Vol. IV., pp. 389-420, Nos. 3561-3787.

Joint separate estates.]—*See* Vol. IV., pp. 418, 452-454, Nos. 4054, 4090-4108.

Distribution of estate & payment of dividend.]—*See* Vol. IV., pp. 494, 495, Nos. 4449-4460.

Administration of estates of deceased insolvents.]—*See* Vol. IV., p. 505, Nos. 4557-4558.

Bankrupt having limited interest.]—*See* Vol. V., p. 700, No. 6146.

SUB-SECT. 7. —COMPANIES.

NOTE.—The following volume, page & number references are to *Companies*, Vols. IX. & X.,

Satisfaction of calls.]—*See* Vol. IX., pp. 337, 338, Nos. 2132-2135.

Liabilities of directors—Satisfaction.]—*See* Vol. IX., p. 484, Nos. 3177, 3178.

219 i. ———— Balance due to customer from bank—Against claim of bank on another account.]—*KENT v. MONROE* (1904), 25 C. L. T. 40; 8 O. L. R. 23; 4 O. W. R. 468.—CAN.

221 i. ———— Credit on trust account—Against debt in private account.]—A banker has no right to set off a balance to the credit of a customer as trustee against a debit in his private capacity.

—*DANIELS v. IMPERIAL BANK OF CANADA* (1914), 30 W. L. R. 133; 7 W. W. R. 666; 19 D. L. R. 166; 8 Alta. L. R. 26.—CAN.

Sect. 10.—Particular instances: Sub-sects. 7 & 8, A. & B.]

Set-off of calls due against bill of costs of company solicitor.]—*See* Vol. IX., p. 551, No. 3639.

Set-off by debenture-holder—Against goods sold.]—*See* Vol. X., p. 755, No. 4723.

Winding up by court.]—*See* Vol. X., pp. 906, 929, 936–942, Nos. 6182, 6183, 6364, 6416–6455.

Voluntary winding up.]—*See* Vol. X., pp. 998, 999, Nos. 6925–6934.

Winding up under supervision of court.]—*See* Vol. X., pp. 1050, 1051, Nos. 7344–7349.

Insurance companies.]—*See* Vol. X., pp. 1089, 1090, Nos. 7624–7627.

Statutory company for public purposes.]—*See* Vol. X., p. 1136, No. 8018.

SUB-SECT. 8.—EXECUTORS.

A. Actions by Executors.

222. What may be set off—Debt due from plaintiff in personal capacity.]—*HUTCHINSON v. STURGES* (1741), Willes, 261; Bull, N. P. 179; 125 E. R. 1163.

*Annotations:—***Reid.** *Gillingham v. Waskett* (1824), M'Cle. 198; *Schofield v. Corbett* (1836), 11 Q. B. 779; *Mardall v. Thelluson* (1852), 21 L. J. Q. B. 410.

223. ——— Executor beneficially entitled to amount due in character of executor.]—N. & C. were exors. of a will & trustees of the residuary real & personal estate of testator who died in 1859. N. & F. were tenants for life of the residuary estate in equal shares. In Jan. 1873, C. was residing abroad, & N., being about also to go abroad, gave to P., the solr. of the exors. & trustees, an authority on behalf of both trustees to receive the rents of the real estate & pay the outgoing. Under this authority P. received the rents, & at his death a considerable sum was due from him in respect thereof. P.'s estate proved insolvent, & the usual creditor's decree was made for administration. Subsequently to the decree F. assigned to N. all F.'s interest in the sum due from P. N. was indebted to A. & B. as trustees for P. in a sum the repayment of which was secured by a mtge. of real estate belonging to N., & this sum was paid into ct. in the suit to a separate account, under an order made without prejudice to any question as to set-off. N. afterwards presented a petition claiming to be entitled to set off the debt due from P. against the mtge. debt, & seeking to have the amount of the debt due from P. paid out of the fund standing to the separate account:—**Held:** (1) as regards F.'s interest there could be no set off, inasmuch as it was not assigned to N. until after the decree; (2) the debt due from P. being either due to both trustees & exors., or if due to N. alone, due to him in his character of trustee & exor., could not be set off against a debt due from him individually.—*MIDDLETON v. POLLOCK, Ex p. NUGEE* (1875), L. R. 20 Eq. 29; 44 L. J. Ch. 584; 33 L. T. 240; 23 W. R. 766.

*Annotation:—***As to (2) Reid.** *Re Jones, Christmas v. Jones*, [1897] 2 Ch. 190.

224. ———.]—*Re DICKINSON, BUTE (MARQUIS) v. WALKER, Ex p. HOYLE, SHIPLEY & HOYLE*, [1888] W. N. 94.

225. ———.]—Ptlf., as purchaser of leasehold property, obtained judgment for specific performance against deft., as administratrix of

intestate, with costs to be paid by her personally. Deft. had a beneficial interest, to the extent of one-fourth, in intestate's estate, & it was alleged that except a mtge. there were no unpaid debts of intestate, & that the purchase-money payable by ptlf. represented the whole of intestate's estate. The judgment not having been passed & entered, ptlf. moved for the addition of a direction enabling him to deduct the costs due to him from deft. from so much of the purchase-money as represented her beneficial interest in intestate's estate:—**Held:** though a set-off of costs against purchase-money might be allowed in a case where the debt due to & the debt due from the vendor were so due in the same capacity, ptlf. here could not be allowed to bring into account all or any part of an unascertained sum to which deft. might be beneficially entitled in the administration of her intestate's estate, as against the purchase-money which was due to her in her representative capacity.—*PHILLIPS v. HOWELL*, [1901] 2 Ch. 773; 71 L. J. Ch. 13; 85 L. T. 777; 50 W. R. 73; 4 C. Sol. Jo. 12.

226. ——— Debt due from plaintiff jointly with defendant—To third party.]—A. sued C. as extrix. jointly with B. & four others, & recovered judgment against them; & then under the judgment attached a debt owing by B. to C.'s testator, which B. paid:—**Held:** the attachment of the debt was void, & payment of it by B. could not be set off in an action at the suit of C. as extrix. against B. to recover it.—*CHAPMAN v. CALLIS* (1862), 6 L. T. 282.

227. ——— Ground rent paid in respect of premises—Against claim for rents received in respect of the same premises.]—If a stranger receives rent due to testator in his lifetime & afterwards, by desire of the tenant in possession, pays the demand of ground rent, due at the same time, for the same premises, he may deduct such payment in an action by the exor. for the rents received, but not a payment of ground rent arising after the death of testator.—*WILKINSON v. CAWOOD* (1797), 3 Anst. 905; 145 E. R. 1077.

*Annotation:—***Reid.** *Stephens v. Hotham* (1855), 1 K. & J. 571.

228. ——— Debt due from testator in his lifetime.]—To *assumpsit* for money received to the use of ptlf. as administrator, & on an account stated with him as administrator, with promises to him as administrator, deft. cannot plead a set-off for money due from the intestate in his lifetime.—*SCHOFIELD v. CORBET* (1836), 11 Q. B. 779; 6 Nev. & M. K. B. 527; 116 E. R. 660.

*Annotation:—***Reid.** *Rees v. Watts* (1855), 11 Exch. 410.

229. ———.]—G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mtgees. After the death of G. the mtgees. received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy:—**Held:** they had no right to set off the balance against the exor. in respect of arrears of the annuity.—*Re GREGGSON, CHRISTISON v. BOLAM* (1887), 36 Ch. D. 223; 57 L. J. Ch. 221; 57 L. T. 250; 35 W. R. 803.

*Annotations:—***Consd.** *Re Gedney, Smith v. Grummitt*, [1908] 1 Ch. 804. **Distd.** *Re Thorne*, [1914] 2 Ch. 438. **Reid.** *Watkins v. Lindsay* (1898), 67 L. J. Q. B. 362.

230. ——— Debt due from plaintiff in representative capacity.]—An exor. proving against the estate of a bkpt. for a debt due to his testator's

PART I. SECT. 10, SUB-SECT. 8.—A.

2221. What may be set off—Debt due from plaintiff in personal capacity.]—*DONALD v. JUKES*, [1919] 1 W. W. R. 169; *revid.* (1920), 60 S. C. R. 652; [1921] 2 W. W. R. 208.—**CAN.**

estate extinguishes the debt as effectually as if it were due to him in his own right; he cannot, therefore, set it off against a claim of the bkpt. to a share in the residuary estate of testator.—**STAMMERS v. ELLIOTT** (1868), 3 Ch. App. 195; 37 L. J. Ch. 353; 18 L. T. 1; 16 W. R. 489, L. C. Annotations:—**Apld.** *Armstrong v. Armstrong* (1871), L. R. 12 Eq. 614. **Distd.** *Re Palmer, Palmer v. Clarke* (1894), 13 R. 220. **Refd.** *Re Whitehouse, Whitehouse v. Edwards* (1887), 37 Ch. D. 683; *Re Bluns, Lee v. Bluns* (1896), 65 L. J. Ch. 830; *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905; *Re West Coast Gold Fields, Rowe's Trustee's Claim*, [1906] 1 Ch. 1; *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806; *Re Melton, Milk v. Towers*, [1918] 1 Ch. 37.

See, further, EXECUTORS, Vol. XXIV., pp. 722-725.

B. Actions against Executors.

231. What may be set off—Debt due to defendant as executor—Against debt due from defendant personally.—B., a residuary legatee, & surviving extrix, of her husband, to whom C. & O. had given a joint bond, C. died, & pltf. was indebted on her own private account to O. who is a bkpt.; the bill brought against his assignees for an injunction, & to set off what was become due to her as extrix, against the debt from herself to bkpt. Injunction denied, for as such a set-off could not be done at law, there is no instance of its being allowed here; for the debts are due in different rights, & 2 Geo. 2, c. 22, does not comprehend it.—**BISHOP v. CHURCH** (1748), 3 Atk. 691; 26 E. R. 1197, L. C. Annotations:—**Consd.** *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29. **Refd.** *Ball v. Storie* (1823), 1 Sim. & St. 210; *Freeman v. Lomas* (1851), 9 Hare, 109.

232. —————Deft. was receiver & manager of the estate of G., deceased, as well as his exor. G. had guaranteed a loan made by pltf. to J. G., in respect of which, in default of payment by J. G. deft. had paid the sum of £550, for which he obtained judgment against J. G. In the course of his management of the farms of J. G., deft. bought lambs of J. G., for which he owed £45, a debt which J. G. assigned to pltf. In an action for the £45 brought by pltf. as such assignee deft. sought, by way of set-off & counterclaim, to set up the unsatisfied judgment for £550 against J. G., the assignor, on the ground that he was acting as receiver & manager of G.'s estate in buying the lambs, & that he was entitled to set off a debt due to him as exor. against a debt due from him as receiver in respect of the same estate.—**Held:** as between deft. & J. G., the assignor, the liability in respect of the lambs was a purely personal one, & deft. was therefore not entitled to set off against it a debt due to the estate.—**NELSON v. ROBERTS** (1893), 69 L. T. 352, D. C.

233. ———— Debt due to executor personally—Against debt due from estate.—No set-off allowed where the demand is *in autre droit*.

If an action at law is brought against an exor. for a demand due from testator, he cannot set off against that a debt due from pltf. to him (**LORD HARDWICKE, C.**).—**MEDLICOT v. BOWES** (1749), 1 Ves. Sen. 207; 27 E. R. 985, L. C.

Annotations:—**Refd.** *Blamire v. Geldart* (1809), 16 Ves. 314; *Freeman v. Lomas* (1851), 9 Hare, 109; *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29.

234. —————(1) A. being indebted to B. in a sum of £1,000 executed a bond to him

for securing that amount & interest. B. subsequently died, having made his will, & appointed C. & D. his exors. & residuary legatees: an apportionment of B.'s residuary estate being made the bond is allotted to C. as part of his share: C. being the steward of A., & having a running account with him, enters the bond in that account. C. dies intestate, leaving a widow, who takes out administration to his estate, & also administration, *de bonis non* to B.; & as such last mentioned administratrix, she filed a bill as a specialty creditor against the representatives of A.:—**Held:** in this suit, the representatives of A. could not make a set-off against the demand, in respect of sums which they alleged to have been omitted, or improperly charged in the account of C., but must file a cross bill.

(2) There can be no set-off, either at law or in equity, where either of the debts is a debt *in autre droit*.—**GALE v. LUTTRELL** (1826), 1 Y. & J. 180; 148 E. R. 636, Ex. Ch.

Annotation:—As to (1) **Refd.** *Alliance Bank of London & Liverpool v. Holford, Holford v. Alliance Bank of London & Liverpool* (1864), 16 C. B. N. S. 460.

235. ———— Debt due from defendant personally—Against sums paid as executor.—The widow of testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; & before the error was discovered or her right disputed she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds & an account:—**Held:** the suit was maintainable for the rents received during her continuance in possession; as the defence of Stat. Limitations was not raised upon the pleadings, the account should be taken from the time when pltf.'s title first accrued; & pltf. was not at liberty to set off the amount of such rents against payments made by the widow in her character of extrix, those payments being, by virtue of a special trust, a primary charge upon the estates of which, subject to the widow's life interest, pltf. was devisee.—**MONYPENNY v. BRISTOW** (1832), 2 Russ. & M. 117; 1 L. J. Ch. 88; 39 E. R. 339.

Annotations:—**Mentd.** *Hughes v. Turner* (1835), 3 My. & K. 666; *Yarnold v. Wallis* (1840), 4 Y. & C. Ex. 169; *Doe d. York v. Walker* (1844), 12 M. & W. 591; *Skinner v. Ogle* (1845), 4 Notes of Cases, 74; *Hughes v. Hosking* (1856), 11 Moo. P. C. C. 1; *Re Earl's Trust* (1858), 4 K. & J. 673; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

236. ———— Debt due to executor as such since testator's death—Against debt due from testator in lifetime.—An exor. sued, as such, for a debt which accrued to pltf. from testator in his lifetime cannot set off a debt, alleged to be equal to the damages sued for, for money had & received to deft.'s use, as exor., & money due on an account stated with him, as exor., since the death of testator; the debt sued for & the debt sought to be set off not being mutual within 2 Geo. 2, c. 22, s. 13.—**MARDALL v. THELLUSSON** (1856), 6 E. & B. 976; 28 L. T. O. S. 160; 5 W. R. 25; 119 E. R. 1127, Ex. Ch.; *sub nom.* **MARDALL v. SABINE & THELLUSON**, 3 Jur. N. S. 314.

237. ———— Promissory note given by legatee—As collateral security for debt of third party to estate.—At the death of testator A. owed him £350, for the purchase of his business. After

PART I. SECT. 10, SUB-SECT. 8.—B.

236i. What may be set off—Debt due to executor as such since testator's death—Against debt due from testator in lifetime.—Administrator sued for intestate's debt cannot set off debt due

to him as administrator.—**NATIONAL BANK OF AUSTRALASIA v. SWAN** (1872), 3 V. R. (Law) 168.—**AUS.**

236 ii. —————Action against exors., on a note by testator payable to S. or bearer, & by him transferred to pltf.

was transferred to pltf. after the death of testator, & that S. at the commencement of the suit was & still is indebted to defts. as exors. in an amount equal to the note, for, etc.—**Held:** plea bad.—**SMITH v. NICHOLSON** (1859), 19 U. C. R. 27.—**CAN.**

Sect. 10.—Particular instances: Sub-sect. 8, B. sub-sects. 9, 10 & 11.]

testator's death A. sold the business to a legatee for £350, & the legatee gave the exors. his promissory note as a collateral security for A.'s debt:—*Held*: the exors. had no right to set off the debt against the legacy nor any right of retainer as against the mtgee. of the legacy.—*SMEE v. BAINES* (1861), 29 Beav. 661; 31 L. J. Ch. 63; 4 L. T. 573; 7 Jur. N. S. 902; 9 W. R. 802; 54 E. R. 784.

238. — Charge on legacy by legatee—Rent of property leased to legatee—As against mortgagee of legacy.]—A trustee or exor., when he receives notice that a legatee has charged his legacy, is bound to withhold all further payments to that legatee. All right of set-off & adjustment of equities between the legatee & the exor. existing at the date of the notice have priority over the charge, but the trustees can create no new charges or rights of set-off after that time.

Exors. granted a lease of part of testator's property to a legatee, who afterwards incumbered his legacy. Notice of the charge having been given to the exors.:—*Held*: they had, as against the mtgee., a right to set off the rent due from the legatee at the date of the notice, but not the subsequent rents.—*STEPHENS v. VENABLES* (No. 1) (1862), 30 Beav. 625; 54 E. R. 1032.

Annotation:—Apld. Re l'ain, Gustavson v. Haviland, [1919] 1 Ch. 38.

239. — Debt due to estate—Against debt due from estate.]—Testator held £2,000 belonging to his nephew on which for eight years he paid interest, notwithstanding the nephew owed him £1,000 on his promissory note. Though the nephew had paid no interest on the note, & had given no acknowledgment of the debt:—*Held*: although the remedy for recovering the £1,000 was barred by Stat. Limitations still the right of the exors. to set it off against the £2,000 remained.—*GEE v. LIDDELL* (No. 2) (1866), 35 Beav. 629; 12 Jur. N. S. 541; 14 W. R. 853; 55 E. R. 1011.

Annotation:—Refd. Rawley v. Rawley (1876), 1 Q. B. D. 460.

240. — — — — —.]—Real estate was devised to trustees for a term of years to secure a capital sum & interest thereon in favour of M., & subject thereto, to the use of F. for life. F. was let into possession by the trustees, but failed to keep down the interest upon the charge. M. bequeathed a legacy to F. which the exors. retained as a set-off against the unpaid interest:—*Held*: F. was entitled to the legacy, there being no debt as against him, & no right of set-off in respect of the arrears of interest.—*Re MORLEY, MORLEY v. SAUNDERS* (1869), L. R. 8 Eq. 591; 38 L. J. Ch. 552; 21 L. T. 132; 17 W. R. 959.

Costs of bankrupt representative indebted to estate.]—See EXECUTORS, Vol. XXIV., p. 832, Nos. 8640–8643.

— Statute-barred debts—Against debtor beneficiary.]—See EXECUTORS, Vol. XXIII., pp. 440, 441, Nos. 5101–5109.

239 i. — Debt due to estate—Against debt due from estate.]—LOECKER v. LOECKER (1917), 13 O. W. N. 273; 41 O. L. R. 296; 41 D. L. R. 138.—CAN.

d. — Sum actually due on bond debt.]—In an action against an administrator on a promissory note given by the intestate, he pleaded *plene administravit*, & gave notice of a bond debt due, & outstanding, & no assets *ultra*:—*Held*: the sum actually due on the bond, & not the penalty, was the amount which debt. was entitled to set

off against the assets in hand.—*SHERLOCK v. MCGEE* (1814), 4 N. B. R. (2 Kerr) 508.—CAN.

e. — Amount advanced in lifetime of testator.]—TORRANCE v. CHEWETT (1866), 12 Gr. 407.—CAN.

f. — By executor de son tort.]—In an action by a creditor against an exor. *de son tort*, he cannot set off a debt due from pltf. to his testator.—*CAMERON v. CAMERON* (1873), 23 C. P. 289.—CAN.

g. — Overpayments made to legatees under mistake of fact.]—BARRETT

Legacies to debtors generally.]—See EXECUTORS, Vol. XXIII., pp. 435–441.

See, further, EXECUTORS, Vol. XXIV., pp. 739–741.

SUB-SECT. 9.—HUSBAND AND WIFE.

241. What may be set off—Debt due to husband—In right of wife—Against debt due from him personally.]—PAYNTER v. WALKER (1764), Bull. N. P. 179.

242. — Wife's ante-nuptial debt—Claim by husband—Husband's promise to pay after marriage.]—WOOD v. AKERS, No. 2, *ante*.

243. — — — — — On promissory note given to wife.]—(1) Where a promissory note is given to a married woman, the husband may sue on it in his own name only, & then a debt due to the maker from the wife *dum sola*, cannot be set off.

(2) The indorsee of an overdue promissory note is liable, in an action against the maker, to all equities arising out of the note transaction itself, but not to a set-off in respect of a debt due from the indorser to the maker of the note, arising out of collateral matters.—*BURROUGH v. MOSS* (1830), 10 B. & C. 558; 109 E. R. 558; *sub nom. BURROUGH v. MOSS*, 5 Man. & Ry. K. B. 296; 8 L. J. O. S. K. B. 287.

Annotations:—As to (1) Refd. Howard v. Oakes (1848), 3 Exch. 136. *As to (2) Apld. Stein v. Yglesias* (1834), 1 Cr. M. & R. 565. *Consd. Goodall v. Ray* (1835), 4 Dowl. 76. *Apld. Whitehead v. Walker* (1842), 10 M. & W. 696; *Olds v. Harrison* (1854), 10 Exch. 572; *Re Overend, Gurney, & Co. v. Swan* (1868), L. R. 6 Eq. 344. *Distd. Re Anglo-Greek Steam Navigation Co., Carrall & Haggard's Claim* (1869), 4 Ch. App. 174. *Refd. Holmes v. Kidd* (1858), 33 L. T. O. S. 207.

244. — Debt due from husband—To administrator—Action by wife against husband & administrator.]—Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband, & the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was declared, he was not entitled to retain; but that pltf.'s share was subject to a further provision in favour of her & her children; the settlement on her marriage being inadequate to the fortune she then possessed; & it was referred to the master to see a proper settlement made on her & her children; regard being had to the extent of her fortune & the settlement already made upon her.—*ELIBANK (LADY) v. TOLIEU* (1801), 5 Ves. 737; 31 E. R. 832, L. C.

Annotations:—Consd. Re Briant, Poulter v. Shackel (1888), 39 Ch. D. 471. *Refd. Hanson v. Keating* (1844), 4 Hare, 1. *Mentd. Murray v. Elibank* (1806), 13 Ves. 1; *Green v. Otte* (1823), 1 Sim. & St. 250; *Sturgis v. Champneys* (1839), 5 My. & Cr. 97; *Wortham v. Pemberton, Newenham v. Pemberton* (1847), 1 De G. & Sm. 644; *Gibson v. Goldsmid* (1854), 1 Jur. N. S. 1; *Re Erskine's Trusts* (1855), 1 K. & J. 302; *Duncombe v. Greenacre* (1860), 2 De G. F. & J. 509; *Gleaves v. Paine* (1863), 1 De G. F. & Sm. 87; *Wallace v. Auldjo* (1863), 2 Drew. & Sm. 216.

245. — — — — — Against claim to chose in action belonging to wife before marriage—Action by bankrupt husband's assignees.]—The assignees of a bkpt. may maintain an action in their own names

v. CLARK (1890), 20 O. R. 522; *affd.*, 18 A. R. 435.—CAN.

h. — Amount of legacy—Against mortgage due by legatee to estate.]—RE HOLLAND (1902), 22 C. L. T. 164; 3 O. L. R. 406; 1 O. W. R. 73.—CAN.

PART I. SECT. 10, SUB-SECT. 9.

k. What may be set off—Debt due from husband.]—Where a husband & wife have been hired jointly, & the wife sues separately for her share of the wages, an amount due to debt. by the husband for goods sold & delivered to

only, for a chose in action belonging to the wife of bkpt. before marriage, as a promissory note given to her *dum sola*. In such action, deft. cannot set off a debt due to him from bkpt.—*YATES v. SHERRINGTON* (1843), 11 M. & W. 42; 2 Dowl. N. S. 803; 12 L. J. Ex. 216; 152 E. R. 708; *revid.* on other grounds, *sub nom.* *SHERRINGTON v. YATES* (1844), 12 M. & W. 855, Ex. Ch.

Annotation :—*Mentd.* *Richbell v. Alexander* (1861), 10 C. B. N. S. 324.

246. ——— *Claim by husband & wife in respect of wife's separate estate—Reduced into husband's possession.*—*Pltf.*, through the instrumentality of deft., a solr., borrowed a sum of money upon the security of life insurances, & also of a mtge. upon the wife's separate estate. This mtge. was executed by both pltf.s, but the husband alone covenanted for the repayment of the money. The objects for which the money was raised were only, as deft. knew, to pay a certain debt which the husband owed, & to build some cottages upon the wife's separate estate. Deft., upon the written authority of both pltf.s, received the money from mtgee., & paid the husband's debt, the costs of the mtge., & a small sum to pltf.s, but he claimed to retain the balance, which was the amount sued for in this action, that amount being due to him from the husband alone for previous professional services:—*Held*: the wife being in part the meritorious cause of action the husband had the power to give his wife an interest in the contract with deft., & to join her in an action upon it; & deft. could not set off the husband's debt.—*JONES v. CUTHBERTSON* (1873), L. R. 8 Q. B. 504; 42 L. J. Q. B. 221; 28 L. T. 673; 21 W. R. 919, Ex. Ch.

247. ——— *Debt due to wife before marriage—Claim against husband.*—A debt from a bkpt to a married woman, *dum sola*, cannot be set off against a debt from her husband to bkpt.—*Ex p. BLAGDEN* (1815), 19 Ves. 465; 34 E. R. 589; *sub nom.* *Re HEARN, Ex p. BLAGDEN*, 2 Rose, 249, L. C.

Annotations :—*Refd.* *Cherry v. Boulton* (1839), 4 My. & Cr. 442; *Beyer v. Adams, Re Law, Hopetoun's Claim* (1857), 30 L. T. O. S. 9; *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546.

248. ——— ————*]*—A. rented land of B., who was trustee of certain property, a part of which was this land, the rents of which B. was to pay in certain shares; one of those shares belonged to the wife of A. B. had in his hands a greater amount due to A. in right of his wife than the rent amounted to:—*Held*: this could not be set off against the rent without a special agreement to that effect.—*WILLSON v. DAVENPORT* (1833), 5 C. & P. 531; 172 E. R. 1085, N. P.

249. ——— *Husband's share of trust stock under settlement—Against debt from husband under separate covenant in same settlement.*—By the settlement the husband covenanted that if his wife should die in his life time without having issue to survive her thirty days, he would within three months after her decease transfer £500 bank annuities to the trustees "for the sole use & property of the nearest & next of kin" of the wife. The husband having become bkpt. in his wife's life time:—*Held*: his moiety of the trust stock

could not be retained or set off in satisfaction of his covenant.—*BRANDON v. BRANDON* (1819), 2 Wils. Ch. 14; 3 Swan. 312; 37 E. R. 209.

Annotations :—*Refd.* *Re Marsh, Ex p. Gonne* (1837), 6 L. J. Bcy. 57. *Mentd.* *Hinckley v. MacLarens* (1832), 1 My. & K. 27; *Elmsley v. Young* (1835), 2 My. & K. 780; *Withy v. Mangles* (1843), 10 Cl. & Fin. 215; *Stoddart v. Nelson* (1855), 4 W. R. 109.

250. ——— *Money advanced to wife of creditor—For purchase of necessities—Wife deserted.*—*JENNER v. MORRIS*, No. 179, ante.

251. ——— *Debt due to appointees of wife—Against debt due to judgment creditor of husband.*—Three estates, when put into settlement, were subject two of them to two mtges. amounting to £2,400, & the third to a third for £3,000. The husband being tenant for life, became insolvent in 1841. In 1840 a judgment was recovered against him & duly registered. From 1841 the interest on the £3,000 fell into arrear, whilst the mtgees. of the £2,400 entered & received rents in excess of interest:—*Held*: inasmuch as, when the judgment was recovered, no sum had been paid by the tenant for life in discharge of principal, & he had become insolvent before any part of the profits received by the mtgees. could be applied in part payment of the principal, the judgment creditor was subject to the same equities as affected the tenant for life; & the appointee of the wife's moiety was entitled to have the arrears during the life of the tenant for life set off against the accumulations before the judgment creditor was entitled to stand as an incumbrancer against the wife's moiety.—*SCHOLEFIELD v. LOCKWOOD* (1863), 4 De G. J. & Sm. 22; 3 New Rep. 177; 33 L. J. Ch. 106; 9 L. T. 400; 9 Jur. N. S. 1258; 12 W. R. 114; 46 E. R. 822, L. C.

SUB-SECT. 10.—INFANTS.

Set-off of debt arising on promise of infant—No ratification on majority.—*See* INFANTS, Vol. XXVIII., p. 162, No. 198.

SUB-SECT. 11.—INSURANCE CONTRACTS.

252. *Set-off between broker & underwriter—Action for premiums—Set-off of loss due under policy.*—In an action for premiums by an underwriter against an insurance broker, a loss may be set off that has happened upon a policy subscribed by pltf. to deft., which the latter effected with a *del credere* commission.—*WIENHOLT v. ROBERTS* (1811), 2 Camp. 586; 170 E. R. 1260, N. P.

Annotations :—*Consd.* *Luckie v. Bushby* (1853), 13 C. B. 864. *Refd.* *Peele v. Northcote* (1817), 1 Moore, C. P. 178.

253. ——— ————*]*—Where a broker effected policies of assurance in the name of his principal under a *del credere* commission:—*Held*: he could not set off losses which happened on these policies in an action by the underwriter to recover premiums, although the losses claimed were total, & the broker had accounted for them with his principal.—*CUMMING v. FORESTER* (1813), 1 M. & S. 494; 105 E. R. 185.

Annotations :—*Consd.* *Morris v. Cleashy* (1816), 4 M. & S. 566; *Peele v. Northcote* (1817), 1 Moore, C. P. 178. *Distd.* *Luckie v. Bushby* (1853), 13 C. B. 864. *Refd.* *Thomson v. Redman* (1843), 2 Dowl. N. S. 1028.

him & his wife, cannot be set-off against such claim.—*R. v. BOND, Ex p. Woodhead* (1879), 5 V. L. R. (L.) 130.—*AUS.*

1. ——— ————*]*—*HIRTLE v. KING* (1909), 43 N. S. R. 440; 6 E. L. R. 573.—*CAN.*

PART I. SECT. 10, SUB-SECT. 11. M. Set-off between insurer & in-

sured—Claim on policy—Against note for premium.—An insurance co. accepted a note for the premium, & the policy contained the following clause: "In case of loss, such loss is to be paid in thirty days after proof of loss; the amount of the note given for the premium, if unpaid, being first deducted." A partial loss having occurred:—*Held*: the assured had a

right in equity to set off the amount against the note.—*BERRY v. COLUMBIAN INSURANCE CO.* (1866), 12 Gr. 418.—*CAN.*

n. Set-off of freight against insurance on cargo—Freight paid by agent of underwriters.—*MCNELL & Co. v. DUDER* (1872), 5 Nfld. L. R. 488.—*NFLD.*

Sect. 10.—Particular instances: Sub-sects. 11 & 12.]

254. — Action for money paid on fraudulent loss—Set-off of money paid to assured.]—Three underwriters, on a representation of a loss, pay their subscriptions, amounting to £600, into the hands of the broker, who, by their joint authority, pays over £300. The loss turns out to be fraudulent, & one of the underwriters brings an action against the broker, to recover back his £200:—*Held*: the broker was entitled to set off the £300 paid over, against this demand, & the ct. could not enter into the account to see what each party was entitled to, respectively; either the other underwriters should have joined in the action, or pltf. should have resorted to a ct. of equity.—*SILVA v. LINDER* (1816), 2 Marsh. 437.

— **Effect of death of underwriter.]—**See AGENCY, Vol. I., pp. 690, 691, Nos. 2994-2995; INSURANCE, Vol. XXIX., p. 77, Nos. 358-361.

— **Effect of bankruptcy of underwriter.]—**See BANKRUPTCY, Vol. IV., pp. 391-393, 410, Nos. 3584-3597, 3717.

— **Effect on right of assured to recover.]—**See INSURANCE, Vol. XXIX., pp. 295, 296, Nos. 2412-2421.

255. Set-off between broker & assured—Money due from broker—Set-off of commission due to broker.]—Bill by an insurance broker for a discovery & account of money had & received by him in that capacity on account of debts., & money due to him for commission, etc., & for promissory notes indorsed to him, & to restrain an action, as brought contrary to the universal custom of the business. Demurrer allowed: the subject being matter of set-off & capable of proof at law.—*DINWIDDIE v. BAILEY* (1801), 6 Ves. 136; 31 E. R. 979, L. C.

Annotations:—Mentd. Bowles v. Orr (1836), 1 Y. & C. Ex. 464; Teed v. Beere (1859), 28 L. J. Ch. 782; Shepard v. Brown (1862), 4 Giff. 208; Hemings v. Pugh (1863), 4 Giff. 456; Smith v. Leveaux (1863), 1 Hem. & M. 123.

256. — Loss paid to broker by underwriter.]—*ELLIOTT v. BROWN* (1838), 7 L. T. 46.

— **Set-off between insurer & assured—Premiums & losses.]—**See INSURANCE, Vol. XXIX., pp. 76, 77, Nos. 351-357.

— **Effect of bankruptcy of assured.]—**See BANKRUPTCY, Vol. IV., pp. 403, 404, Nos. 3673-3676.

— **Claim on policy against money due to company—Winding up of insurance company.]—**See COMPANIES, Vol. X., pp. 1089, 1090, Nos. 7624-7627.

— **Loss against non-payment of contributions to mutual assurance company.]—**See INSURANCE, Vol. XXIX., pp. 432, 434, Nos. 3365, 3375.

PART I. SECT. 10, SUB-SECT. 12.

257i. Judgment against judgment.]—*ROBERTSON v. MEYERS* (1851), 2 Gr. 431.—*CAN.*

257 ii. —.]—*MERRILL v. BEATY* (1858), 15 U. C. R. 446.—*CAN.*

257 iii. —.]—*ATKINSON v. KEITH* (1862), 10 N. B. R. (5 All.) 305.—*CAN.*

257 iv. —.]—*CHICHESTER v. GORDON* (1867), 4 P. R. 92.—*CAN.*

257 v. —.]—The right of setting off one judgment against another is not a legal right, but is given by the equitable jurisdiction of the ct., with reference to the circumstances of the case. The cases where a rule has been refused are cases where there has been an absolute judgment on one side & not on the other, but a judgment depending upon a contingency.—*McDONALD v. LAWRENCE* (1868), 7 N. S. R. (1 G. & O.) 411.—*CAN.*

257 vi. —.]—*Re LINDEN v. BUCHANAN* (1869), 29 U. C. R. 1.—*CAN.*

257 vii. —.]—*BROWN v. NELSON* (1884), 11 P. R. 121.—*CAN.*

257 viii. —.]—*NETTING v. HUBLEY*, *HUBLEY v. NETTING* (1894), 26 N. S. R. (14 R. & G.) 497.—*CAN.*

257 ix. —.]—*SWILLING v. ARNOLD*, *SWILLING v. GLASS* (N. W. T.) (1905), 2 W. L. R. 48.—*CAN.*

257 x. —.]—*ELFORD & CORNISH v. THOMPSON* (1912), 19 W. L. R. 809; 1 W. W. R. 409; 1 D. L. R. 1; 5 Sask. L. R. 96.—*CAN.*

257 xi. —.]—*STRACHAN v. MCGINN* (Sask.) (1913), 23 W. L. R. 66; 3 W. W. R. 759; 9 D. L. R. 448.—*CAN.*

257 xii. —.]—*BUREAU v. LAURENCELLE* (Alta.) (1913), 24 W. L. R. 335; 11 D. L. R. 283.—*CAN.*

257 xiii. —.]—*COSTE v. McLAWS*,

SUB-SECT. 12.—JUDGMENTS.

257. Judgment against judgment.]—Verdict against pltf. in a prior action, may be set off against his present demand.—*BASKERVILLE v. BROWN*, *BROWN v. BASKERVILLE* (1761), 2 Burr. 1229; 1 Wm. Bl. 293; 97 E. R. 804.

Annotations:—Refd. Reynolds v. Beering (1784), 4 Doug. K. B. 181; Evans v. Prosser (1789), 3 Term Rep. 186; Briscoe v. Hill (1842), 10 M. & W. 735; Richards v. James (1848), 11 L. T. O. S. 225; Eyton v. Littledale (1849), 4 Exch. 159.

258. —.]—A judgment debt due from B. & others, in action of trespass, in which B. was chiefly concerned, & bound to indemnify his co-defts., was set off against a judgment debt due to B. from pltf.—*BOURNE v. BENETT* (1827), 4 Bing. 423; 1 Moo. & P. 141; 130 E. R. 831.

259. — Plaintiff having separate demand against one defendant.]—The ct. will permit defts. to set off a judgment, recovered by them against pltf., against a judgment obtained by pltf. against them, notwithstanding pltf. may also have a separate demand on one of defts.—*GLAISTER v. HEWER* (1798), 8 Term Rep. 69; 101 E. R. 1271.

260. — Interests of third persons intervening.]—A judgment recovered by A. against B. & C. will not be set off, on application to the general jurisdiction of the ct., against another judgment recovered against A. by the assignees of B. under an Insolvent Debtors' Act, the interest of third persons intervening, who have peculiar trusts by the statute.—*DOE v. DARTON* (1802), 3 East, 149; 102 E. R. 554.

Annotation:—Refd. West v. Pryce (1825), 10 Moore, C. P. 154.

261. —.]—A. having obtained a verdict against B. & co., his bankers, for the amount of his cash balance & nominal damages for dishonouring his cheque, & B. & co. having brought actions against A. upon bills of exchange to a larger amount which they had discounted for him, the judge stayed the execution in A.'s action until the fifth day of the following term. B. & co.'s actions in the meantime ripened into judgments. The ct. allowed the judgments to be set off against each other, subject to the lien, if any, of A.'s attorney, notwithstanding A. had in the meantime become bkpt., & thus the interests of third parties had intervened.—*ALLIANCE BANK OF LONDON & LIVERPOOL, LTD. v. HOLFORD*, *HOLFORD v. ALLIANCE BANK OF LONDON & LIVERPOOL, LTD.* (1864), 16 C. B. N. S. 460; 143 E. R. 1207.

262. — Judgments of different courts.]—Deft. was allowed to enter satisfaction on the roll upon a judgment obtained against him in this ct. on his acknowledging satisfaction for the amount upon a judgment obtained by him in common

[1925] 2 D. L. R. 1078; [1925] 2 W. W. R. 131.—*CAN.*

257 xiv. —.]—*HURRY DYAL GUHO v. DIN DOYAL GUHO* (1883), 1 L. R. 9 Calc. 479; 13 C. L. R. 93.—*IND.*

257 xv. —.]—*RAM SUKH DAS v. TOTA RAM* (1891), 1 L. R. 14 All. 339.—*IND.*

257 xvi. —.]—Where one decree is sought to be set off against another, the decree against which the set-off is asked for must be before the ct. for execution.—*CHAJMAL DAS v. LAL DHARAM SINGH* (1902), 1 L. R. 24 All. 481.—*IND.*

262 i. — Judgments of different courts.]—*ROGERS v. LEDDEN* (1842), 4 N. B. R. (2 Kerr) 59.—*CAN.*

o. — Execution issued.]—It is too late to set off one judgment against another after an execution issued upon one of them has been satisfied.—

pleas against pltf. for a larger amount, although he had pltf. in custody in execution of that judgment.—*SIMPSON v. HANLEY* (1813), 1 M. & S. 696; 105 E. R. 259.

Annotations:—*Expld.* Taylor v. Waters (1816), 5 M. & S. 103. *Consd.* Thompson v. Parish (1859), 5 C. B. N. S. 685. *Refd.* Bridges v. Smyth (1831), 8 Bing. 29.

263. ———.]—*Held*: a judgment for pltf. in this ct. might be set off against a judgment for deft. in K. B. although pltf. was dead, & the judgment was assets in the hands of her administrator.—*BRIDGES v. SMYTH* (1831), 8 Bing. 29; 1 Dowl. 242; 1 Moo. & S. 93; 1 L. J. C. P. 33; 131 E. R. 311.

Annotations:—*Mentd.* Green v. Cobden (1837), 4 Scott, 486; Miles v. Bough (1845), 1 New Pract. Cas. 311.

264. ———.]—*High Court & county court.*—Deft. allowed to set off a county ct. judgment debt against a judgment debt of the Ct. of Exch.—*SANDYS v. LOUIS* (1875), Bitt. Prac. Cas. 64; 1 Char. Cham. Cas. 81.

265. ———.]—*Parties interested in same right.*—One judgment may, upon motion, be set off against another judgment between the same parties in a different ct. provided the parties are interested in their respective judgments in the same right.—*BRISTOWE v. NEEDHAM* (1844), 7 Man. & G. 648; 8 Scott, N. R. 366; 135 E. R. 261.

Annotation:—*Refd.* David v. Rees, [1904] 2 K. B. 435.

266. ———.]—*Claim recovered against Crown.*—Though execution cannot issue against the Crown, a claim recovered against it may be set off against a claim recovered by it, & judgment may be given for the difference only.—*HETTHEWAGE SIMAN APPU v. QUEEN'S ADVOCATE* (1884), 9 App. Cas. 571; 53 L. J. P. C. 72; *sub nom.* HETTHEWAGE APPU v. QUEEN'S ADVOCATE (CONSOLIDATED APPEALS), *QUEEN'S ADVOCATE v. HETTHEWAGE APPU*, 51 L. T. 401, P. C.

Annotation:—*Mentd.* Farnell v. Bowman (1887), 12 App. Cas. 643.

267. Judgment against debt.]—*REYNOLDS v. BEERING*, No. 62, ante.

268. ———.]—Where a prisoner in execution is discharged by the consent of his creditor upon giving a fresh security to satisfy the judgment, & that security is afterwards defeated on account of

a mere informality, the judgment is satisfied, & cannot be set off against a demand of the prisoner.—*JAQUES v. WITTH* (1787), 1 Term Rep. 557; 99 E. R. 1249.

Annotations:—*Refd.* Birch v. Sharland (1787), 1 Term Rep. 715; Tanner v. Hague (1797), 7 Term Rep. 420; Baker v. Ridgway (1824), 2 Bing. 41; Atkinson v. Bayntun (1835), 1 Bing. N. C. 444; Haines v. East India Co. (1856), 6 Moo. Ind. App. 467; Cattlin v. Kernot (1858), 3 C. B. N. S. 796.

269. ———.]—B. cannot, in an action brought against him by A., set off a judgment recovered by him against A., for which A. is charged in execution.—*TAYLOR v. WATERS* (1816), 5 M. & S. 103; 105 E. R. 989.

Annotation:—*Distd.* Thompson v. Parish (1859), 5 C. B. N. S. 685.

270. Judgment against agreement to pay sum in order.]—By order of *nisi prius*, a verdict having been entered for pltf. & pltf. having by the order agreed to pay deft. £70, the ct. allowed that sum to be set off against pltf.'s judgment.—*NEWTON v. NEWTON* (1832), 8 Bing. 202; 1 Dowl. 264; 1 Moo. & S. 366; 1 L. J. C. P. 79; 131 E. R. 378.

Annotation:—*Appld.* Doe d. Swinston v. Sinclair (1836), 2 Hodg. 111.

271. Judgment against verdict recovered.]—The amount of a verdict recovered cannot be set-off against the amount of a judgment.—*GARRICK v. JONES, JONES v. GARRICK* (1833), 2 Dowl. 157.

272. Judgment against costs—Payable under order.]—Taking deft. in execution is not an absolute extinguishment of the debt, so as to preclude pltf. from applying to the equitable discretion of the ct. to set off interlocutory costs due to deft. in the same suit; though, *semble*, costs due to deft. in a separate & distinct action cannot be so set off.

Pltfs. obtained judgment against deft. & took him in execution. Deft. applied to a judge to discharge him from custody, on the ground of irregularities in pltf.'s proceedings; & pltfs. obtained a cross-summons for leave to amend. The two summonses were heard together, & the judge made an order "that pltfs. be at liberty to amend, & that they should pay to deft. his

BRADLEY v. HOPLEY (1828), 1 N. B. R. (Chlp.) 147.—*CAN.*

p. ———.]—*Judgment obtained by principal against creditor.*—Against judgment obtained by creditor against surety.]—A surety cannot claim to have a judgment obtained by his principal against pltf. set off against a judgment obtained by pltf. against him as surety.—*GRAY v. SMITH* (1839), 6 O. S. 62.—*CAN.*

q. ———.]—*Preservation of lien.*—Where the ct. allows one judgment to be set off against another, it must be subject to the attorney's lien generally, & not merely to the extent of the taxed costs in the particular suit.—*ROGERS v. LEDDEN* (1842), 4 N. B. R. (2 Kerr) 59.—*CAN.*

r. ———.]—One of several debts. In a judgment was allowed to set off against it the amount of a judgment which he had recovered against pltf. saving to the attorney his lien for costs.—*FORTUNE v. HICKSON* (1842), 1 U. C. R. 408.—*CAN.*

t. ———.]—*TIPPETE v. HAACKE* (1852), 1 P. R. 365.—*CAN.*

u. ———.]—*REED v. SMITH* (1853), 1 P. R. 321.—*CAN.*

v. ———.]—*Held*: though deft.'s rule did not in terms ask to have his judgment set off subject to the lien of pltf.'s attorney for costs, it was in the power of the ct. to grant the application subject to such lien.

—*ABEL v. LIGHT* (1866), 11 N. B. R. (6 All.) 518.—*CAN.*

w. ———.]—*Held*: a special lien, given upon the proceeds of a judgment pending an appeal from such judgment, must prevail against an application to set off judgments.

—*ROSS v. MCLAY* (1877), 7 P. R. 97.—*CAN.*

d. ———.]—*Held*: the judgments recovered by pltfs. & debts. must be treated as judgments in separate actions, & in setting off the judgments the claim for costs of debts' solrs. upon the judgment against pltfs. should be protected.—*CANADIAN PACIFIC RY. Co. v. GRANT* (1885), 11 P. R. 208.—*CAN.*

e. ———.]—*WORDEN v. RAWLINS* (1897), 1 N. B. Eq. Rep. 450.—*CAN.*

f. ———.]—*LEVI, BLUMENSTIEL & Co. v. EDWARDS* (1906), 11 O. L. R. 30; 6 O. W. R. 734.—*CAN.*

g. ———.]—*Several defendants.*—*Judgment against one.*—*PENTLAND v. BELL & AITKEN* (1856), 13 U. C. R. 455.—*CAN.*

h. ———.]—*Effect of assignment.*—A rule to set off a judgment recovered by deft. against pltf. against the judgment in this cause, was discharged with costs, because pltf. had assigned this judgment *bond fide* to a third party, & deft. had notice thereof.—

MILLER v. THOMPSON (1852), 1 P. R. 245.—*CAN.*

k. ———.]—*ORR v. SPOONER* (1860), 19 U. C. R. 601.—*CAN.*

l. ———.]—*THOMPSON v. MILLER* (1854), 4 Gr. 481.—*CAN.*

m. ———.]—Set-off of cross-judgments refused pltf.'s judgment having been assigned.—*He SMITH v. MILLER* (1866), 3 P. R. 385.—*CAN.*

n. ———.]—*GRANT v. MCALPINE* (1881), 46 U. C. R. 284.—*CAN.*

o. ———.]—*GREENE v. HARRIS* (1887), 16 S. C. R. 714.—*CAN.*

aa. ———.]—The fact that a judgment for a claim & costs which is subject to the right of set-off is assigned to the judgment creditor's solr. does not prevent an order for set-off being made.—*ANDERSON v. STASIUK* (No. 2), [1927] 1 D. L. R. 533; [1927] 1 W. W. R. 44; 21 Sask. L. R. 271.—*CAN.*

bb. ———.]—*Judgment not actually signed.*—Deft. had recovered a judgment against pltf. in replevin, & issued execution, but nothing was realised on it; pltf. afterwards obtained a verdict against deft. in *assumpsit*, & was entitled to sign judgment:—*Held*: deft. had a right to set off his judgment against the damages recovered by pltf., though pltf.'s judgment was not actually signed.—*ABEL v. LIGHT*

Sect. 10.—Particular instances: Sub-sects. 12, 13 14, 15 & 16.]

costs of & occasioned by the application to amend, & also by deft.'s application to set aside the proceedings." The ct., in exercise of its equitable jurisdiction, ordered that the costs payable to deft., under the judge's order, which they held to be "interlocutory costs" within rule 63, Hilary, 1853, should be set-off against pltf.'s judgment.—*THOMPSON v. PARISH* (1859), 5 C. B. N. S. 685; 28 L. J. C. P. 153; 32 L. T. O. S. 356; 5 Jur. N. S. 986; 7 W. R. 210; 141 E. R. 276.

*Annotations:—***Refd.** *O'Brien v. Lewis* (1863), 3 De G. J. & Sm. 606. **Mentd.** *Jauralde v. Parker* (1861), 3 L. T. 751.

273. Judgment against damages for breach of covenant—Costs of suit.]—Pltf. a landlord was liable to deft. his tenant for the costs of an injunction suit for alleged breach of covenant, which suit had been dismissed. He had subsequently recovered judgment against deft. in an action for rent:—**Held:** he was entitled to set off his judgment debt against the damages, but not against the costs of the suit.—*THROCKMORTON v. CROWLEY* (1866), L. R. 3 Eq. 196.

*Annotations:—***Refd.** *Roberts v. Buée* (1878), 8 Ch. D. 198; *Re Harrauld, Wilde v. Walford* (1883), 52 L. J. Ch. 435.

274. Judgment against claim for instalments on sale of business.]—The owner of a business sold it to deft. on terms of payment by instalments, & then assigned the benefit of the agreement to pltf. Before notice of assignment was given to deft., the latter obtained judgment for a sum of money against the assignor as damages for breach of warranty of the above sale. In an action by pltf., as assignee, against deft. for payment of instalments due under the assigned agreement, deft. claimed to set off the amount of the judgment. Pltf. contended that deft.'s right to damages in respect of the breach of warranty had merged in the judgment, & that the latter could not be set off against his claim:—**Held:** the set-off was valid.—*LAWRENCE v. HAYES*, [1927] 2 K. B. 111; 96 L. J. K. B. 658; 137 L. T. 149; 91 J. P. 141; 43 T. L. R. 379, D. C.

Satisfaction of solicitor's lien for costs.]—*See SOLICITORS.*

SUB-SECT. 13.—LANDLORD AND TENANT.

275. By lessee—Payment in lieu of tithe against arrears of rent.]—Where in an agreement between deft. & D. under which deft. entered upon D.'s land, D. then being lessee of a part of the great tithes on the land demised, it was agreed that

deft. should pay £375 yearly rent & all rates, taxes, & assessments, & also the vicarial tithes:—**Held:** deft. in an action for rent by pltf., who had purchased the demised farm from D., was not entitled under Tithe Act, 1836 (c. 71), s. 80, to set off a payment made by him to the bishop, on account of rentcharge in lieu of tithes, after the lease of the tithes to D. had expired.—*FORBES v. ELDERFIELD* (1855), 26 L. T. O. S. 71; 4 W. R. 15; 19 J. P. Jo. 803.

In proceedings for distress.]—*See DISTRESS*, Vol. XVIII., pp. 317–321, Nos. 518–549.

Repairs executed by sub-lessee against liability for repairs.]—*See LANDLORD & TENANT*, Vol. XXXI., p. 341, No. 4838.

Against liability for rent.]—*See LANDLORD & TENANT*, Vol. XXXI., pp. 244–248, Nos. 3830–

Value of fixtures against indemnity—Action by assignee for breach of covenant.]—*See LANDLORD & TENANT*, Vol. XXXI., p. 419, No. 5655.

By underlessee—Against liability for rent.]—*See LANDLORD & TENANT*, Vol. XXXI., pp. 218, 249, Nos. 3873–3880.

By landlord—In bankruptcy proceedings.]—*See BANKRUPTCY*, Vol. IV., pp. 259, 400, 414, Nos. 2455, 3640, 3647, 3742.

Arrears of rent against damages for irregular distress.]—*See DISTRESS*, Vol. XVIII., p. 390, No. 1301.

Agricultural compensation against arrears of rent.]—*See LANDLORD & TENANT*, Vol. XXXI., p. 262, No. 4034.

SUB-SECT. 14.—MASTER AND SERVANT.

Set-off against wages.]—*See MASTER & SERVANT*, Vol. XXXIV., pp. 89, 90, Nos. 657–660.

Jurisdiction of justices.]—*See MASTER & SERVANT*, Vol. XXXIV., pp. 111, 112, Nos. 831, 832.

Claim for wages in lieu of notice—Against claim for money had & received.]—*See MASTER & SERVANT*, Vol. XXXIV., pp. 67, 68, No. 446.

Claim for board & lodging of apprentice—Against claim for wages.]—*See CUSTOM & USAGES*, Vol. XVII., p. 73, No. 744.

Against claim by father of apprentice for money lent.]—*See MASTER & SERVANT*, Vol. XXXIV., p. 519, No. 4368.

Proviso in articles for compensation on dismissal—Set-off of remuneration as liquidator.]—*See COMPANIES*, Vol. X., p. 929, No. 6364.

Proceedings under Workmen's Compensation Acts—Setting off overpayments of compensation.]—

(1866), 11 N. B. R. (6 All.) 518.—**CAN.**

Judgment for injunction & costs & costs of appeal therefrom—Against judgment on counterclaim for debt & costs.]—A party obtaining judgment for an injunction & costs & the costs of an appeal therefrom is entitled to an order for set-off as against a judgment on a counterclaim for debt & costs.—*ANDERSON v. STASIUK* (No. 2), [1927] 1 D. L. R. 533; [1927] 1 W. W. R. 44; 21 Sask. L. R. 271.—**CAN.**

t. To whom application made.]—An application to have one judgment set off against another is properly made in chambers.—*STANDARD TRUSTS Co. v. DAVIES & STYER* (Sask.), [1927] 3 W. W. R. 512.—**CAN.**

a. Judgment purchased after return of execution.]—The ct. will not set off a judgment purchased by deft.

against a pltf. after the return of an execution against him.—*ELLIOTT v. CROCKER* (1849), 1 P. R. 13.—**CAN.**

b. Judgment purchased from third party.]—A judgment purchased by deft. from a third party cannot be set off against the costs of the day, given to pltf. upon an application to postpone the trial, secured by the personal undertaking of deft.'s attorney to pay these costs, & upon which pltf.'s attorney has a lien.—*BENNETT v. TREGENT* (1874), 6 P. R. 171.—**CAN.**

c. Judgment against stranger to cause—Prêle-nom.]—Deft. cannot set up by way of compensation to a claim due to pltf. a judgment, purchased subsequent to the date of the action, against one who is not a party to the cause, & for whom pltf. is alleged to be a *prêle-nom*.—*BURY v. MURRAY* (1894), 24 S. C. R. 77.—**CAN.**

d. Judgment in one action—Against costs in another action.]—A

Judge of the Supreme Ct. may make an order allowing a judgment in favour of one party in one action to be set off against the costs of trial & appeal awarded to the other party in another action.—*BANK OF HAMILTON v. ATKINS & ATKINS* (1924), 33 B. C. R. 315; [1924] 1 W. W. R. 1157.—**CAN.**

e. Judgment not finally made up.]—*Re ROE* (1857), 29 L. T. O. S. 265.—**IR.**

PART I. SECT. 10, SUB-SECT. 13.

1. By lessee—Taxes voluntarily paid against rent.]—*MCANNANY v. TICKELL* (1864), 23 U. C. R. 499.—**CAN.**

g. By landlord—Rents & profits against value of improvements.]—Under H. S. O. 1877, c. 95, s. 4, pltf. is entitled to an account of the rents & profits to be set off against the value of improvements.—*MCCARTHY v. AR-* (1881), 31 C. P. 405.—**CAN.**

See MASTER & SERVANT, Vol. XXXIV., p. 432, Nos. 3519, 3520.

— **Setting off costs.**—See MASTER & SERVANT, Vol. XXXIV., p. 488, Nos. 4023-4028.

Set-off by & against shipowner.—See ADMIRALTY, Vol. I., pp. 137, 184, Nos. 447, 448, 975, 978; & generally, SHIPPING.

SUB-SECT. 15.—MORTGAGORS AND MORTGAGEES.

276. By mortgagee—Against mortgagor—What may be set off.—A simple contract debt due to the mtgee. from the mtgor. allowed to be set off against the moneys received by the former between the time when he entered into possession & the time when having bought up the mtge., he became mtgee. in possession.—PATCH v. WILD (1861), 30 Beav. 99; 5 L. T. 14; 7 Jur. N. S. 1181; 9 W. R. 844; 54 E. R. 826.

— **See** MORTGAGE, Vol. XXXV., pp. 640, 641, No. 3711.

277. Against mortgagee—Mortgage of share by co-owner—Set-off of occupation rent due on partition.—In a partition action where it had been certified by the master that a certain sum was due from H., a co-owner of the property forming the subject of the action in respect of occupation rent, he not having been tenant of his co-owners. Upon a sale of the property:—*Held*: the sum so certified could not be set off as against a mtgee. of H.'s share though it might have been set off against him personally.—HILL v. HICKIN, [1897] 2 Ch. 579; 66 L. J. Ch. 717; 77 L. T. 127; 46 W. R. 137; 41 Sol. Jo. 696.

Annotation:—*Reid*, Kenrick v. Mountstevens (1899), 48 W. R. 141.

By mortgagor — Against mortgagee.—See MORTGAGE, Vol. XXXV., p. 641, Nos. 3712, 3713.

278. — Against transferee—Transfer without privity of mortgagor.—Where a mtge. is transferred without the privity of the mtgor., the transferee takes subject to the state of accounts between the mtgor. & the mtgee. at the date of the transfer, & whatever the mtgor. can claim in the way of set-off against the mtgee. he can claim equally against the transferee.—TURNER v. SMITH, [1901] 1 Ch. 213; 70 L. J. Ch. 144; 83 L. T. 704; 49 W. R. 186; 17 T. L. R. 143; 45 Sol. Jo. 118.

Annotations:—*Reid*, Powell v. Browne (1907), 97 L. T. 854; De Lisle v. Union Bank of Scotland, [1914] 1 Ch. 22.

— **See** MORTGAGE, Vol. XXXV., pp. 380, 381, Nos. 1241, 1242.

PART I. SECT. 10, SUB-SECT. 15.

276 i. By mortgagee—Against mortgagor—What may be set off.—METALS, LTD. v. FROST (Alta.), [1919] 2 W. W. R. 247.—**CAN.**

h. — Against lien for purchase-money of land.—COOK v. MASON (1876), 24 Gr. 112.—**CAN.**

k. Against mortgagee — Rents & profits against improvements.—MCKIBBON v. WILLIAMS (1897), 24 A. R. 122.—**CAN.**

l. — Compensation for waste.—RAGHU NATH DASS v. ASHRAF HUSAIN KHAN (1867), 1 L. R. 2 All. 252.—**IND.**

m. ——The mtgor. is entitled to set-off or deduct the amount of costs payable to him under the decree against or from the mortgage debt payable by him.—SIDU v. BALI (1892), 1 L. R. 17 Bom. 32.—**IND.**

278 i. By mortgagor—Against transferee—Transfer without privity of mortgagor.—Where a mtgo. is transferred without the privity of the mtgor.,

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By devisee of equity of redemption—Arrear of interest on legacy from mortgagee to mortgagor—Against interest due on mortgage.—See MORTGAGE, Vol. XXXV., p. 668, No. 4030.

Lessee and mortgagee of reversion.—See No. 202, ante.

SUB-SECT. 16.—NEGOTIABLE INSTRUMENTS.

279. Action by indorsee against maker—Set-off by maker—Fraudulent indorsement.—To a declaration against the maker of a promissory note, indorsed by W. to pltf., deft. pleaded a set-off due to him from W. before the indorsement to pltf. & that W. in order to deprive deft. of his set-off fraudulently indorsed to pltf., in order to enable pltf. to sue on the said note as agent of W., & that there was no consideration for the indorsement to pltf. & that pltf. sued as agent of W. according to the said fraud. Replication, *de injuriâ*:—*Held*: good, as the substance of the plea was, that the indorsement to pltf. was fraudulent.—TOLHURST v. NOTLEY (1848), 11 Q. B. 406; 17 L. J. Q. B. 97; 12 Jur. 43; 116 E. R. 529.

Liability of indorsee to set-off—Negotiation of overdue & dishonoured instruments.—See BILLS OF EXCHANGE, Vol. VI., pp. 169, 200-202, Nos. 1063, 1234-1239, 1242.

280. Action by holder against drawer—Right of joint acceptor to prove set-off.—The joint acceptor of a bill of exchange is not competent to prove a set-off in an action by the holder against the drawer.—MANWARING v. MYTTON (1815), 1 Stark. 83; 171 E. R. 409, N. P.

281. Action by indorsee against acceptor—Set-off of claim by acceptor against drawer.—*Assumption* by indorsee against acceptor of a bill of exchange. Pleas, first, that before & at the time of the indorsing of the bill by the drawer, the drawer was & still is indebted to deft. to an amount exceeding the amount of the bill, & that, after the bill became due, in order to deprive deft. of his right of set-off, in respect of the said debt, he fraudulently, & without any consideration, indorsed the bill to enable pltf. to sue deft. thereon. Secondly, that the drawer, before indorsement, applied to the Insolvent Debtors Ct. for relief, whereby the right to the bill vested in his assignees:—*Held*: both these pleas were issuable pleas.—WATKINS v. BENSUSAN (1842), 9 M. & W. 422; 11 L. J. Ex. 378; 6 Jur. 347; 152 E. R. 179.

Annotations:—*Consd.* Oulds v. Harrison (1854), 10 Exch. 572. *Reid*, Mayhew v. Blofield (1847), 1 Exch. 469.

the transferee takes subject to the state of account between the mtgor. & mtgee. at the date of the transfer, but not subject to any independent debt in no way connected with the mtge.—SUBRAMANIA AYYAR v. SUBRAMANIA PATTAR (1917), 1 L. R. 40 Mad. 683.—**IND.**

n. — Amount for services rendered as purchasing agent.—NORTHARD & LOWE Co. v. DURNON, [1927] 2 D. L. R. 892; 59 N. S. R. 310.—**CAN.**

o. Against assignee of equity of redemption—Rents & profits against improvements.—BUCHANAN v. McMULLEN (1877), 25 Gr. 193.—**CAN.**

PART I. SECT. 10, SUB-SECT. 16.

p. Action by holder against drawer—Set-off of breach of duty by agents.—WOODROFFE & Co. v. MOSS, [1915] V. L. R. 237.—**AUS.**

q. — Set-off for goods sold & delivered—Special agreement as to payment.—To an action on a note defts.

pleaded a set-off for goods sold & delivered, but the evidence showed that the set-off claimed was for goods sold to pltf. by deft. on a special agreement that pltf. should pay a third party for them, & not deft.:—*Held*: the goods so delivered could not form the subject matter of a set-off.—MATTHEWSON v. CARMAN (1846), 1 U. C. R. 266.—**CAN.**

r. — Set-off of joint & several note of plaintiff & others—Suit brought against makers.—MOORE v. ANDREWS (1863), 13 C. P. 405.—**CAN.**

t. — Note for purchase-money—Claim for damages for failure to resell owing to mortgage.—On a sale of lands the purchaser gave his note for the balance of purchase-money, & received a conveyance containing the usual covenants. There was a mtge. on the property at the time for a sum less than the note, & the purchaser claimed to set off against the note damages he had sustained by being unable to resell the land in consequence of the mtge.:—*Held*: not allowable.

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282. ———.]—To an action on a bill of exchange for £20, drawn by J. L., & indorsed to pltf., & accepted by deft., deft. pleaded, that, before & at the time of the indorsement, J. L. was indebted on £1 13s. 1d. to deft., & that J. L. held the bill on the terms that the sum so due should be set off against the amount of the bill; & that J. L., in fraud of deft., & in collusion with pltf., indorsed the bill to them, who sued as agents merely of J. L.:—*Held*: the plea was not issuable.—*MAYHEW v. BLOFIELD* (1847), 1 Exch. 469; 154 E. R. 199.

283. Accord & satisfaction by one joint maker of promissory note—Effect on set-off against other joint promissor.—C. as security for B. joined him in a promissory note to A. payable two months after date. On the note becoming due, B. was unable to take it up, & applied to A. to allow a renewal; A. consented, & received the discount for a further period of two months. On B.'s saying he would procure the new note as soon as he could see the surety, A. observed that it did not signify, it might stand over, as it would save the stamp. C. declined to agree to this, & a new note was prepared & repeatedly tendered to A. who, however, did not take it, alleging that he had not got the old note with him, & that he was busy, & consequently B. retained the new note, & A. continued to hold the old one:—*Held*: if A. agreed with B. that the old note was satisfied by the payment of the discount & a renewed note, & if the old note was held by A. for B., & B. held the new note for A. the old note could not be pleaded by way of set-off to an action by C. against A. & on the above facts there was evidence for the jury that the old note was so satisfied.—*SNEAD v. SMITH* (1851), 17 L. T. O. S. 289.

284. Set-off against accommodation indorser—Right of indorser to notice of dishonour.—Pltf. &

deft. were shareholders of a co., when deft. agreed to advance certain money to A. B., the manager, for the purposes of such co., upon having the bond of the said A. B., with the guarantee of pltf. for its repayment. In order to carry out such agreement, & in lieu of such bond & guarantee, a bill of exchange was given, which was drawn by such manager upon & accepted by himself as agent & on behalf of such co., & indorsed by pltf. to whose order it was made payable:—*Held*: pltf. was entitled to notice of dishonour; & therefore, for want of such notice, deft. could not make the bill the subject of a set-off.—*MALTASS v. SIDDLE* (1859), 6 C. B. N. S. 494; 28 L. J. C. P. 257; 33 L. T. O. S. 124; 5 Jur. N. S. 1169; 7 W. R. 449; 141 E. R. 549.

Default in payments to loan society—Right of set-off of earlier payment—Against promissory note given as security.—See *LOAN SOCIETIES*, Vol. XXXII., p. 557, No. 10.

SUB-SECT. 17.—PARTNERS.

285. Set-off between partners—Claim on private debt—Set-off of partnership debt.—As to the equity of set-off for partnership debts paid by a continuing partner, against a legal debt due from him to a retired partner, upon a bond for a private loan. One of two partners, as bankers, lent to his partner a sum of money on the joint & several bond & covenant of the borrower & another person in 1821, & died in 1833; the obligor continued to pay interest till 1843, when he died, & his exor. paid interest up to 1847. On the death of the obligee in 1833, some settlement of the banking affairs was come to between his exor. & the surviving partner & another subsequently admitted, which the exor. alleged was final, but which was disputed. The exor. of the obligee then became a partner & other changes subsequently took place

—*STEVENSON v. HODDER* (1869), 15 Gr. 570.—*CAN.*

a. — *Set-off of cheque payable to bearer initialed by cashier.*—*COMMERCIAL BANK v. FLEMING* (1872), 14 N. B. R. (1 P. G.) 36.—*CAN.*

b. — *Set-off of damages for misrepresentation.*—*GEORGIAN BAY LUMBER CO. OF ONTARIO v. THOMPSON* (1874), 35 U. C. R. 64.—*CAN.*

c. — *Set-off of payments made by defendant at request of payee.*—*KENT v. SPECTOR* (Man.) (1907), 6 W. L. R. 14.—*CAN.*

d. *Against maker & indorser jointly—Set-off of separate debt to maker or indorser.*—If the holder of a note sue the maker & indorser in a joint action, the separate debt of pltf. to the maker or indorser cannot be set off under a joint plea of set-off.—*PATERSON v. HOWISON & MCGAN* (1846), 2 U. C. R. 139.—*CAN.*

e. — *Set-off by two of indorsers—Set-off more than claim.*—In an action against maker & indorsers of a note, upon a plea of set-off by two of the indorsers:—*Held*: the jury could only give them a verdict, but could not find for them any sum beyond the note.—*NOWLAN v. SPAWN* (1858), 16 U. C. R. 334.—*CAN.*

f. — *Collateral transactions.*—In an action against the maker & indorser:—*Held*: neither could plead separately a set-off not arising out of or connected with the note.—*HUGHES v. SNURE* (1863), 22 U. C. R. 597.—*CAN.*

g. — *Set-off for work done.*—*COMMERCIAL BANK v. HARRIS* (1868), 27 U. C. R. 526.—*CAN.*

h. *Note due after service of writ.*]

—A promissory note made by pltf. to deft., falling due after the service of pltf.'s writ, but before declaration filed, may be set off in the action.—*THORNE v. HAIGHT* (1842), 3 Ont. Dig. 6362.—*CAN.*

k. *Note for sum payable in specific articles.*—A note for the payment of a certain sum in specific articles becomes a money debt after the time for delivering the articles has elapsed, & a set-off is admissible in an action upon it.—*STEVES v. HOPPER* (1849), 6 N. B. R. (1 All.) 394.—*CAN.*

l. *Bill of exchange stamped after acceptance & indorsement.*—Deft. pleaded as a set-off to pltf.'s claim a bill of exchange accepted by pltf. & indorsed to him. Pltf. replied that the bill at the time of its acceptance & indorsement was not stamped according to law. Deft. demurred:—*Held*: the replication was good.—*BUTLER v. EVANS* (1873), 9 N. S. R. 171.—*CAN.*

m. *Note given for composition—Set-off of payments on overdue notes held as collateral security.*—When pltf. proved his claim against the insolvent's estate he held, as collateral security, certain overdue notes, which he did not mention & he afterwards received certain payments on them:—*Held*: such payments could not be allowed as a set-off in this action under R. S. O. 1877, c. 50, s. 142.—*FITCH v. KELLY* (1879), 44 U. C. R. 578.—*CAN.*

n. *Trustee holding money in trust for parties acquiring overdue note of one of parties—Set-off of balance in hand against amount of note.*—A person, whilst holding a sum of money in trust for A. & B., pending the decision of a

suit of A. against B., may acquire an overdue promissory note of one of the parties &, upon the settlement of the suit, may then set off any balance found to be in his hands for such party against the amount of the note, whether he holds such note for his own benefit or that of another; provided he has no notice of any assignment of such balance by such party in favour of some third person.—*SIFTON v. COLDWELL* (1897), 11 Man. L. R. 653.—*CAN.*

o. *Set-off against deposit at bank—Note under discount not matured.*—*ONTARIO BANK v. ROUTHIER* (1900), 32 O. R. 67.—*CAN.*

p. *Note for price of horse—Set-off of damages for breach of warranty.*—In an action on a promissory note given for the price of a horse deft. may set off damages for breach of warranty.—*EXECUTORS' & ADMINISTRATORS' TRUST CO. v. HOEHN*, [1917] 2 W. W. R. 291; 34 D. L. R. 287; 10 Sask. L. R. 135.—*CAN.*

q. *Unliquidated claim.*—Set-off of an unliquidated claim against a claim on a promissory note is not permissible.—*MAUNG KYAN NGA v. M. A. R. T. A. R. ARUNACHALAM PILLAY* (1927), 1 L. R. 5 Man. 520.—*IND.*

r. —.]—*MAYNE v. McALLISTER* (1830), 3 Ir. L. Rec. 1st. ser. 346.—*IR.*

PART I. SECT. 10, SUB-SECT. 17.

285i. Set-off between partners—Claim on private debt—Set-off of partnership debt.—*BOCKFINGER v. MURRAY* (Y. T.) (1905), 1 W. L. R. 260.—*CAN.*

t. — *Set-off of partnership matter*

in the firm, each new firm taking on itself all the former liabilities & assets. In 1847 the firm in which the exor. had continued a partner became bkpt. In a suit for the administration of the estate of the obligor certain creditors of the firm, on promissory notes given prior to 1833, whose debts had been adopted by the successive firms, were admitted as separate creditors of his estate. The exor. of the obligee was admitted as a creditor for the loan, & no equitable set-off for contribution was allowed, none having been established in respect of the said estate of the obligee being separately liable to creditors, although it was probable that, in winding up the partnership affairs, some claim by the obligor's estate against the estate of the obligee might be established. In an administration suit a creditor's claim was admitted as a claim only by the master's report, to which the creditor did not except. Shortly afterwards the result of a suit tended to establish his debt; after more than a year creditor petitioned to be admitted as a creditor against the estate:—*Held*: he might be admitted, without being charged with the costs, which had not been increased by the delay.—*LEE v. FLOOD, Exp. Lott* (1854), 2 Sm. & G. 250; 2 W. R. 348; 65 E. R. 386.

.]—*See* PARTNERSHIP, Vol. XXXVI., p. 426, No. 945.

286. Set-off against assignee of partnership—Debt due from partnership before assignment.]—A., B., C. & D. are in partnership together, & C. & D. also trade on their separate account. The partnership of A. & co. becomes indebted to C. & D. & to satisfy such debt they indorse a note given to them. In an action by C. & D. as indorsees of that note, debtor may set off any demand he has against A. & co.—*PULLER v. ROE* (1793), Peake, 260; 170 E. R. 149, N. P.

Claim by partnership—Set-off of separate claim against one partner.]—*See* PARTNERSHIP, Vol. XXXVI., pp. 367, 406, 513, Nos. 446, 763–769, 1817.

Claim against partner on separate debt—Set-off of partnership debt.]—*See* PARTNERSHIP, Vol. XXXVI., pp. 374, 407, Nos. 514, 770.

Claim against receiver of partnership—Set-off of claim for remuneration.]—*See* PARTNERSHIP, Vol. XXXVI., p. 489, No. 1538.

Set-off in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 389–391, 415, 448, 449, Nos. 3563–3583, 3748, 4054; Vol. V., p. 743, No. 6415.

SUB-SECT. 18.—SALE OF GOODS.

287. Action for price—Set-off for goods sold & not delivered.]—If A. agree to make a waggon for B. & make it accordingly, but refuse to deliver it unless the money is paid on delivery, the money which was to be paid for the waggon may be set off to any demand of B. against A. as goods bargained & sold.—*DUNMORE v. TAYLOR* (1791), Peake, 56; 170 E. R. 77, N. P.

288. — Buyer holder of bill on which seller liable as acceptor.]—In *assumpsit* for goods sold & delivered, debt. may set off money due upon

pltf.'s acceptance of which debt. has become holder since the sale & before delivery of the goods, though he has agreed to give pltf. ready money for them.—*CORNFORTH v. RIVETT* (1814), 2 M. & S. 510; 105 E. R. 471.

Annotations:—*Reid, McGillivray v. Simson* (1826), 9 Dow. & Ry. K. B. 35; *Clarke v. Fell* (1833), 4 B. & Ad. 404.

289. — Set-off of goods paid for but returned.]—B. had, on a previous bill delivered, been paid for a livery suit which he had furnished & immediately taken back from the coachman:—*Held*: A. was entitled to be allowed the amount paid for this suit on a plea of set-off for money had & received pleaded in an action for the amount of a subsequent account for clothes.—*HUNTER v. BERKELEY (COUNTRESS)* (1836), 7 C. & P. 413, N. P.

290. — Set-off of insurance moneys received by seller—Insurance for benefit of seller.]—Pltfs., refiners of sugar, sold to debt., a broker, a certain number of "titlers" or sugar loaves then lying in their warehouse. A sold note delivered to the buyer, contained a description of the numbers & marks on the titlers, & also the following terms, viz., "Prompt one month . . . goods at seller's risk for two months." It was the practice to weigh titlers so sold when & not until the brokers or their sub-purchasers came to remove them from the refiner's premises; but an estimated price calculated on their approximate weight was paid on the "prompt" day, & the difference between the sum then paid & the actual price adjusted after the weighing was accomplished. The approximate price of the titlers in question was accordingly paid at prompt. They remained on the premises after the expiration of two months from the sale, & were subsequently destroyed by fire together, with a quantity of unsold sugar. Pltfs. having insured all the contents of their warehouses by floating policies covering goods on the premises, "sold & paid for, but not removed," received the sum insured from the insurance office, but the amount was not enough to compensate them for the loss of their own goods. They had no agreement with their customers to insure sugar sold, but not taken away.

An action having been brought by pltfs. against debt. for the price of the sugar sold to him:—*Held*: he could not set off any part of the money paid by the insurance office to pltfs., against the price, as the insurance was not effected for his benefit, & was only sufficient to cover their own loss.—*MARTINEAU v. KITCHING* (1872), L. R. 7 Q. B. 436; 41 L. J. Q. B. 227; 26 L. T. 836; 20 W. R. 769.

Annotation:—*Mentd.* The Parchim, [1918] A. C. 157.

291. Breach of contract after delivery of instalment—Set-off of instalment against claim for payment of debt.]—A. being indebted to B., the latter agreed to accept the amount by instalments, C. undertaking to guarantee the payment of them. On the day after the first instalment became due C. remitted to B. the amount, partly in bills not then due, & partly in bank notes. B. wrote, acknowledging the receipt of the bills & notes, & said they should be placed to A.'s account. At the time of making the agreement, A. contracted to sell & deliver to B. a large quantity of bark. He delivered a small part only, & failed to complete

upon adjustment of accounts—*Plaintiff claiming property brought into partnership.*—*McDONALD v. POWER* (1878) 12 N. S. R. (3 R. & C.) 340.—*CAN.*

a. *Claim against partner—Set-off against claim of partnership.*—*HOWES v. KINSEY* (N. W. T.) (1906), 3 W. L. R. 183.—*CAN.*

b. *Claim by retiring partner against partnership—Set-off of private debt to partnership.*—*McEWAN v. MIDDLETON* (1866), 5 Macph. (Ct. of Sess.) 159; 39 Sc. Jur. 87.—*SCOT.*

PART I. SECT. 10, SUB-SECT. 18.

a. *Action for price—Set-off for goods sold & delivered.]*—*CROUCHER v. GUNN*

(1881), 14 N. S. R. (2 R. & G.) 370; 2 C. L. T. 107.—*CAN.*

d. — *Set-off for advertisement in newspaper.*—*OLAND v. BERTRAM* (1887), 19 N. S. R. (7 R. & G.) 512; 8 C. L. T. 61.—*CAN.*

e. — *Set-off for wages.]*—*NEUDORF TRADING Co. v. WANLESS* (N. W. T.) (1907), 6 W. L. R. 377.—*CAN.*

Sect. 10.—Particular instances: Sub-sects. 18, 19 20, 21 & 22.]

his contract. B. never returned the part delivered:—*Held*: A. was entitled to set off the value of that part against B.'s demand.—*SHIPTON v. CASSON* (1826), 5 B. & C. 378; 8 Dow. & Ry. K. B. 130; 4 L. J. O. S. K. B. 199; 108 E. R. 141.

292. Set-off of claim under rules of Produce Brokers Association—Against claim for special damage.]—By two contracts made in Nov. 1918, the sellers, W. H. & co. sold to the buyer 3½ tons Ceylonese essence of citronella, c.i.f. Marseilles. The contracts contained (*inter alia*), provisions as follows: "Delivery: shipment from Ceylon beginning of Dec. Terms: terms of the General Produce Brokers' Assocn. London." One of the terms of the Assocn., Rule 9 (*f*), provided that "whenever . . . the seller has failed to fulfil the terms of the contract the buyer shall close by invoicing back the produce to the seller at once, at a price & weight to be fixed by arbn., which price shall be not less than 2 per cent., & not more than 10 per cent. over the estimated market value of the shipment contracted for on the day on which the default occurs, the difference to be due in cash in seven days." The sellers committed a breach of both contracts by failing to ship the citronella at the time agreed. Negotiations took place between the parties; the buyer informed the sellers that he had already resold the citronella to buyers in France, but he would be willing to extend the time for shipment if his buyers in France would consent to such extension. The French buyers agreed that, subject to their being allowed an abatement of the price, they would accept delivery if shipment was made not later than Jan. 23, 1919, & on this being communicated to them, the sellers undertook to ship by that date. The sellers again made default. The parties went to arbn., the buyer claiming as special damage the profit which he would have made if he had been able to carry out his contract of resale to his buyers in France, & the sellers contending that no special damage was recoverable & that in any event a sum of money was payable to them by the buyer under Rule 9 (*f*). The umpire stated a case under Arbitration Act, 1889 (c. 49), s. 7:—*Held*: in a case in which a buyer was entitled to recover special damage, Rule 9 (*f*) did not operate to give a defaulting seller the right to recover a sum from the buyer which could be set off against the sum payable as special damage.—*Re BOURGEOIS & WILSON, HOLGATE & Co.* (1920), 25 Com. Cas. 280, C. A.

Annotation:—*Distd. Lancaster v. Turner*, [1924] 2 K. B. 222.

Reduction of price on breach of warranty.]—*See SALE OF GOODS, Vol. XXXIX.*, pp. 472, 473, Nos. 956–963.

SUB-SECT. 19.—SALE OF LAND.

293. Action for specific performance—Set off of mortgage debt—Against unpaid purchase money.]

PART I. SECT. 10, SUB-SECT. 19.

1. Set-off of balance of unpaid purchase-money secured by mortgage.]—After a conveyance, incumbrances upon the property sold were discovered, created by a former owner, but of which neither the vendor nor the purchaser had been previously aware. The covenants given by the vendor only extended to his own acts & the acts of those claiming under him:—*Held*: the vendor was not bound to pay off the incumbrances, & therefore that the purchaser was not entitled to

set off against them a balance of his purchase money remaining unpaid & secured by mortgage.—*Re BUCK, PECK v. BUCK* (1873), 6 P. R. 98.—**CAN.**

g. Set-off of deficiency on re-sale against amount found due for improvements.]—Order granted, allowing the amount of the deficiency on re-sale to be set off *pro tanto* against the amount found due for improvements.—*ONTARIO BANK v. SIRR* (1875), 6 P. R. 277.—**CAN.**

h. Purchaser with notice of mortgage—Set-off of amount due on pur-

—A. became purchaser at an auction of certain estates, for which he was to pay a sum of £2,700. He paid the usual deposit of £270. The conditions of sale provided that interest at 4 per cent. should be paid on the balance of the purchase-money. He was previously mtgee. of the same estate, with other property, secured for the repayment of £2,000 at 5 per cent. interest. Under the contract for sale the purchaser entered into possession of the estate, without having waived any objections there might be to the title. As mtgee., he was in possession of the principal title deeds. A considerable period of time, nearly ten years, elapsed without the formal conveyance being executed, the evidence of title not having been completed. No account of the interest due on the mtge., or on the deposit, had been come to:—*Held*: the necessary accounts should be taken upon the principle that at the time the purchaser took possession, the amount due on the mtge. was to be considered as a payment or set-off, *pro tanto*, against the amount of the purchase-money; with a direction to charge 4 per cent. only on the balance of the purchase-money.—*WALLIS v. BASTARD* (1853), 4 De G. M. & G. 251; 2 Bq. Rep. 508; 22 L. T. O. S. 162; 17 Jur. 1107; 2 W. R. 47; 43 E. R. 503, L. C. & L. JJ.

294. —Set-off of rent received by purchaser in possession.]—A dispute arose between the trustees for deceased vendor & a purchaser, the purchaser claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill & obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land whilst the purchase-money remained unpaid, & in the meantime the rest of the land was allowed to lie waste:—*Held*: the purchaser must be allowed to set off against the interest payable by him the amount of rent which might have been received, & the amount of deterioration.—*PHILLIPS v. SILVESTER* (1872), 8 Ch. App. 173; 42 L. J. Ch. 225; 27 L. T. 840; 21 W. R. 179, L. C.

Annotations:—*Reid, Plews v. Samuel*, [1904] 1 Ch. 464. *Mentd. Royal Bristol Permanent Bldg. Soc. v. Bomash* (1887), 35 Ch. D. 390; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Clarke v. Ramuz*, [1891] 2 Q. B. 456; *Leppington v. Freeman* (1891), 65 L. T. 145; *Newman v. Maxwell* (1899), 80 L. T. 681.

295. —Agreement to set off debt of vendor against purchase-money—Purchaser without knowledge of bankruptcy.]—A. contracted to do certain work in connection with some houses debtor was building. In Feb. 1908, £100 became due to A. on the architect's certificate, which debtor could not pay. Debtor subsequently suggested that A. should buy four of the houses & so satisfy the amount due under that certificate & also under a further certificate which would shortly be given. About the middle of June A. signed two contracts for the purchase of four houses. The first contract was for three houses on which the £100 was treated as a deposit. The other contract was for the fourth house. On the making of the contracts

chaser's mortgage for unpaid purchase money—Covenant by vendor to pay off mortgage.]—Where lands are sold upon which there is a subsisting mtge., of which the purchaser is aware, & the vendor covenants that he will pay it off, the purchaser cannot set off against such mtge. the amount due upon a mtge. given by himself for unpaid purchase money, which has been transferred to a *bond fide* purchaser.—*WOOD v. PAGE* (1879), 26 Gr. 305.—**CAN.**

k. Set-off of amount of incum-

it was verbally arranged that the £100 & the amount due under the final certificate should be set off against the purchase-money. On July 7 debtor's solrs. approved the conveyance, & on July 11 A. heard that debtor had committed an act of bkpcy. on June 30, & on Oct. 12, a receiving order was made. Debtor had mortgaged the houses, & A. having paid off the mtge., took possession of the houses:—*Held*: there were mutual dealings between the parties & with in sect. 38 of the Bankruptcy Act, 1883 (c. 52), s. 38, & A. could set off the amount of the two certificates against the purchase-money, & was entitled to a conveyance of the equity of redemption of the houses from the trustee in bkpcy.—*Re TAYLOR, Ex p. NORVELL*, [1910] 1 K. B. 562; 79 L. J. K. B. 610; 102 L. T. 84; 17 Mans. 145; *sub nom. Re TAYLOR, Ex p. SUTCLIFFE*, 26 T. L. R. 270; 54 Sol. Jo. 271, C. A.

Annotations:—*Apld. Re City Life Assce.*, [1926] Ch. 191. *Refd. Ellis's Trustee v. Dixon-Johnson*, [1924] 2 Ch. 451.

SUB-SECT. 20.—SHIPPING.

See, generally, SHIPPING.

Seaman's wages.—*See ADMIRALTY*, Vol. I., pp 137, 184, Nos. 447–449, 975–978; & SHIPPING.

SUB-SECT. 21.—SOLICITORS.

See SOLICITORS.

SUB-SECT. 22.—SURETIES.

296. Set-off by surety against creditor—What may be set off—Contract for sale of goods—Difference in price.]—A surety agreed to guarantee the payment of goods supplied by pltf. to B. under a contract with Govt. At the time the guarantee was given negotiations only were on foot, but soon after the Govt. contract was made with B., & also the sub-contract between B. & pltf. Each contract provided that the arts. were to be supplied within given periods; but, in point of fact, the arts. were not supplied by pltf. to B. or by B. to Govt., until long after the fixed period. Govt., however, had the option, & waived the delay, & paid B. the contract price. B. not having paid pltf., pltf. sued the surety on the guarantee, & the surety sought to show that the price given by B. in the contract with pltf. was a high one on account of the shortness of the time within which the goods were to be delivered, & that the market price at the time the goods were delivered was much lower, & he claimed to set off the difference between the two prices in this action:—*Held*: the surety could not set off the difference in price.—*OASTLER v. POUND* (1863), 1 New Rep. 393; 7 L. T. 852; *sub nom. OASTLER v. ROUND*, 11 W. R. 518.

—*See GUARANTEE*, Vol. XXVI., pp. 110, 111, Nos. 767–774.

297. — Action by creditor to realise

brance concealed by vendor.—*LOVELACE v. HARRINGTON* (1879), 27 Gr. 178.—*CAN.*

1. Rescission by reason of default or abandonment—Set-off of damages for breach of contract & fair interest or rental for use & occupation.]—*Scmble*: upon rescission by reason of default & abandonment, of the purchaser, the purchaser is entitled to be refunded

instalments of purchase-money paid by him, but the vendor can set off damages occasioned by the purchaser's breach of contract, & a sum of money equivalent either to fair interest on the purchase-money or to a fair rental for use & occupation.—*TAVENDER v. EDWARDS* (1908), 8 W. L. R. 308; 1 Alta. L. R. 333.—*CAN.*

m. Set-off of occupation rent.]—

ALLAN v. HOPPEL (1913), 26 W. L. R. 248; 5 W. W. R. 712; 14 D. L. R. 811; 7 Alta. L. R. 65.—*CAN.*

PART I. SECT. 10, SUB-SECT. 22.

n. Set-off by surety against creditor—Private account against clerk improperly set off in previous action.]—*FRANKLIN v. GREAM* (1860), 20 U. C. R. 84.—*CAN.*

other security—Equitable mortgage by deposit.]—A father put his sons in possession of land of which the father was equitable owner, subject to a vendor's lien. The sons paid the father for buildings previously erected by him, & built others at considerable expense. The sons afterwards, pretending to have the father's consent, deposited the contract for the land to secure present & future advances from their bankers, & shortly afterwards became bkpt. The bankers then required a conveyance from the father, which he refused, alleging that the contract had been improperly abstracted from him, that the demand of the bank was his first intimation of the transaction. The father having been before the deposit surety for his sons in an independent matter & having after their bkpcy. been called upon to pay, & having in consequence assigned his property to trustees for creditors:—*Held*: he would have had a set-off against the lien in the hands of the sons, but not as against the bank.—*UNITY JOINT-STOCK MUTUAL BANKING ASSOCN. v. KING* (1858), 25 Beav. 72; 27 L. J. Ch. 585; 31 L. T. O. S. 128; 4 Jur. N. S. 470; 6 W. R. 264; 53 E. R. 563.

Annotations:—*Consd. Millard v. Harvey* (1864), 11 L. T. 360. *Refd. Plimmer v. Wellington Corpn.* (1881), 9 App. Cas. 699.

—**Loss of security by negligence of creditor.]—***See GUARANTEE*, Vol. XXVI., p. 190, No. 1469.

298. Set-off by creditor against surety—Claim against surety's security—Surety without notice of claim.]—The money payable on a policy of insurance on the life of A. deposited with the insurance co. as a security for a loan to B. is to be paid to the surety of B. satisfying the loan, & cannot be set off against a debt due by A. to the insurance co. of which B.'s surety had no notice.—*Re JEFFERY'S POLICY* (1872), 20 W. R. 857.

—*See GUARANTEE*, Vol. XXVI., p. 104, Nos. 718–720.

299. Set-off between surety & debtor—Bankruptcy of debtor—Set-off against dividends recovered.]—Where a creditor having a guarantee for a part of his debt, proves under a commission of bkpcy. against his debtor's estate for the whole, the guarantor is entitled to have the dividends distributed rateably over the whole debt, & to set off the amount of the dividends relating to that part which he is liable to pay.—*RAIKES v. TODD* (1838), 8 Ad. & El. 846; 1 Per. & Dav. 138; 1 Will. Woll. & H. 619; 8 L. J. Q. B. 35; 112 E. R. 1058.

Annotations:—*Consd. Bower v. Marris* (1841), Cr. & Ph. 351. *Refd. Ellis v. Emmanuel* (1876), 1 Ex. D. 157. *Mentd. Kennaway v. Treleavan* (1839), 5 M. & W. 498; *Lang v. Nevill & Druce* (1841), 6 Jur. 217; *Allnut v. Ashenden* (1843), 12 L. J. C. P. 124; *Johnston v. Nicholls* (1845), 1 C. B. 251; *Chapman v. Sutton* (1846), 2 C. B. 634; *Bainbridge v. Wade* (1850), 16 Q. B. 89; *Thackwell v. Gardiner* (1851), 5 De G. & Sm. 58; *Caballero v. Slater* (1854), 23 L. J. C. P. 67; *Oldershaw v. King* (1857), 2 H. & N. 399.

—*See, also, GUARANTEE*, Vol. XXVI., pp. 138, 139, Nos. 1014–1021.

Set-off by surety for trustee on bankruptcy—Set-off of sums due to trustee for remuneration.]—*See BANKRUPTCY*, Vol. IV., p. 243, No. 2301.

Set-off by indemnifier.]—*See GUARANTEE*, Vol. XXVI., p. 244, Nos. 1898–1902.

Sect. 10.—Particular instances: Sub-sects. 23 & 24.

Part II. Sect. 1.]

SUB-SECT. 23.—TRUSTEES AND CESTUI QUE TRUST.

See TRUSTS & TRUSTEES.

SUB-SECT. 24.—WORK AND LABOUR, CONTRACTS FOR.

300. What may be set-off—Value of work performed by employer.]—Where a person is employed to do certain work for a certain sum, & part of the work is afterwards done by the employer, the amount of the latter work is matter, not of set-off, but of deduction. Where, therefore, in debt for work & labour, deft. pleaded, never indebted except as to £37 6s. 8d., payment of £36 3s. before action, & payment of £1 3s. 8d. into ct., & pltf. joined issue on the first & second pleas, & took the £1 3s. 8d. out of ct., & at the trial deft. proved an agreement to do the work for £40, & that he had paid £36 3s. on account, independently of the £1 3s. 8d. paid into ct., & to cover the balance, £2 13s. 4d., he proved that he had employed workmen to finish the work, & had paid them the last mentioned sum:—*Held*: the evidence was admissible under the plea of never indebted, & the £2 13s. 4d. could not be pleaded as a set-off.—*TURNER v. DIAPER* (1841), 2 Man. & G. 241; 2 Scott, N. R. 447; 133 E. R. 736.

Annotation:—*Reid*. *Seeger v. Duthie* (1860), 8 C. B. N. S. 45.

301. — Expenditure in repair of negligent work.]—A. contracted to build a shed for B. Terms, everything to be completed to satisfaction of B.'s engineers, payment 90 per cent. on completion of work, 10 per cent. to be held over for six months to answer defects in work. A. sent in his bill in Feb. as for completed shed with a letter containing these words, "as the shed will be completed before the close of the month," & was paid 90 per cent. of the price. In Oct.

B., who had done repairs to the shed, which A. declined to do, offered to pay the residue, after deducting the cost of such repairs. In an action by A. for the whole of the residue:—*Held*: defts. were not estopped by the payment in Feb. from showing that the work was not completed, nor from going into the amount of the defective work; the amount paid by defts. for repairs was not the subject of a set-off; there was evidence to go to a jury of work done by A. since Feb. & till Oct. six months had not elapsed since the completion of the work.—*MOSS v. LONDON & NORTH WESTERN RY. CO.* (1874), 22 W. R. 532.

302. — Deduction for work performed negligently.]—If A. employ B. to make bricks for him at a stipulated price per thousand, & B. do so, & some of the bricks be so badly made as to be good for nothing, A. will be entitled to make a deduction for those badly made bricks out of the stipulated price, & may make such deduction in an action brought by B. for the stipulated price; but if the bricks be badly made in a trifling degree, only so as merely to be less valuable than they otherwise would have been, A., in an action for the stipulated price, will not be entitled to make any deduction on this account.—*PARDOW v. WEBB* (1842), Car. & M. 531, N. P.

303. — Action to recover overpayment—On failure to complete work—Value of work done.]—Pltf. in the county ct. sought to recover £47 18s. 4d. under the following circumstances. Deft. had done work for pltf. under a contract to the value of £219 2s. 4d. During the progress of the work, pltf. had from time to time made payments in respect of it, which, together with £14 paid to deft.'s workmen for wages, amounted to £267 0s. 8d., thus exceeding the value of the work done by £47 18s. 4d., the amount claimed in the action. The money overpaid by pltf. was to be repaid by the doing of work; but deft. stopped the works before they were completed:—*Held*: the value of the work done was not the subject of a set-off, & pltf. could recover the money in the county ct.—*RIGBY v. WHEELER* (1854), 18 J. P. 298.

PART I. SECT. 10, SUB-SECT. 24.

301 i. What may be set-off—Expenditure in repair of negligent work.]—*ALLEN v. DEANE* (1910), 14 W. L. R. 622.—**CAN.**

302 i. — Deduction for work performed negligently.]—*CUTLER v. MORSE* (1888), 12 P. R. 594.—**CAN.**

302 ii. ——*SANDERSON v. ASHFIELD* (1889), 13 P. R. 230.—**CAN.**

o. — Money paid under agreement.]—In *assumpsit* for work & labour, etc., deft. attempted to prove by way of set-off money received from him by pltf., in pursuance of an agreement to which they were mutually

bound, & which was to be paid by pltf. into a bank, being tolls received by deft. as keeper of a gate rented by him, & for which pltf. had become security for him:—*Held*: not the subject of set-off.—*DENISON v. DONNELLY* (1846), 2 U. C. R. 391.—**CAN.**

p. — Payment for cutting wood at so much per cord.]—A set-off for money due for cutting wood, upon a special agreement under seal, to give deft. so much per cord for cutting:—*Held*: a liquidated demand, & the subject of set-off.—*GEDDES v. MCCracken* (1849), 5 U. C. R. 573.—**CAN.**

q. ——In *assumpsit*, deft. may

show, under a notice of set-off for work & labour & on account stated, that he did work for pltf. under a contract under seal; that he did extra work, & that after the completion of the work he settled with pltf.; that mutual accounts were stated between them, & that a balance was found to be due to deft.—*HOLMES v. BILLINGS* (1862), 10 N. B. R. (5 All.) 232.—**CAN.**

r. — Goods sold & delivered.]—*STEPHENS & IRVING v. AWALT* (1910), 9 E. L. R. 262.—**CAN.**

t. — Amount due for goods sold on commission.]—*AMIR ZAMA v. NATHU MAL* (1886), 1. L. R. 8 All. 396.—**IND.**

Part II.—Counterclaim.

SECT. 1.—IN GENERAL.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 39; R. S. C., Ord. 19, r. 3, Ord. 21, r. 10.

304. Nature of counterclaim—Creation of statute.—*STOOKE v. TAYLOR*, No. 2, ante.

305. — Whether independent action.—*STOOKE v. TAYLOR*, No. 2, ante.

306. ——*MOLLOY v. KILBY*, No. 440, post.

307. ——*—*—(1) Relief can be given on a counterclaim in respect of a cause of action accrued to deft. subsequently to the issue of the writ in the original action. *Semble*, a counterclaim is an independent action & not part of the original action, though for convenience the two are tried together.

(2) It is to my mind evident that there is no intention to confine the claim made by the counterclaimants to damages or to an action of the same nature as the original action (*FRY, J.*).—*BEDDALL v. MITTLAND* (1881), 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484.

Annotations:—As to (1) Apud McGowan v. Middleton (1883), 11 Q. B. D. 464. *Refd.* *Andrew v. Aitken* (1882), 51 L. J. Ch. 784; *Take v. Andrews* (1882), 8 Q. B. D. 428; *Fraser v. Cooper, Hall* (1883), 31 W. R. 714. *As to (2) Refd.* *Gray v. Webb* (1882), 21 Ch. D. 802. *Generally, Mentd.* *Scott v. Brown* (1884), 51 L. T. 746; *Jones v. Foley*, [1891] 1 Q. B. 739; *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720.

308. ——*—*—Deft. may not serve a third party out of the jurisdiction with a counterclaim; although he may, if necessary, commence a fresh action against him.

A counterclaim cannot be said to be a writ or notice of a writ (*POLLOCK, B.*).—*POTTERS v. MILLER* (1883), 31 W. R. 858.

309. ——*—*—*HEWITT & Co. v. BLUMER & Co.* (1886), 57 L. J. Q. B. 196, n.; 3 T. L. R. 221, C. A.

Annotations:—Refd. *Shrapnel v. Lalng* (1888), 20 Q. B. D. 334; *Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500; *Sharpe v. Hagith* (1912), 106 L. T. 13.

310. ——*—*—Ord. 65, r. 12, by which pltf., who recovers a sum not exceeding £50 in an action of contract, is entitled only to costs on the county ct. scale unless the ct. or a judge otherwise orders, does not apply to the case of a counterclaim. Where therefore pltf. recovered £48 on his claim, & also succeeded upon a counterclaim for £123:—*Held*: for the purposes of taxation the claim & counterclaim must be treated as independent actions; the costs of the counterclaim followed the ordinary rule as to costs & pltf. was entitled to have the costs of his defence to the counterclaim taxed on the High Ct. scale.—*AMON v. BOBBETT* (1889), 22 Q. B. D. 543; 58

L. J. Q. B. 219; 60 L. T. 912; 37 W. R. 329, C. A.

Annotations:—Consd. *Westacott v. Bevan*, [1891] 1 Q. B. 774. *Apud.* *Levi v. Anglo-Continental Gold Reefs of Rhodesia*, [1902] 2 K. B. 481.

311. ——*—*—Pltf. claimed £742 for work done under a contract to repair defts.' ship. Defts. paid £500 into ct., with a denial of liability, & counterclaimed damages for pltf.'s delay in completing the work according to the contract. Pltf. proceeded with the action, & in the result £465 was found to be due to him on his claim, & £210 to defts. on their counterclaim:—*Held*: (1) the sum paid into ct. was not property "recovered or preserved" by the exertions of pltf.'s solr. within Solicitors Act, 1860 (c. 127), s. 28, so as to entitle him to charge the whole sum with payment of his costs; (2) the claim & counterclaim must be treated as one action for the purpose of determining the solr.'s right to a charging order for his costs; (3) the sum recovered in an action was the balance remaining in favour of pltf. after deducting from the amount found to be due on his claim the amount found to be due to defts. on their counterclaim, & therefore pltf.'s solr. was only entitled to a charging order in respect of that balance.—*WESTACOTT v. BEVAN*, [1891] 1 Q. B. 774; 60 L. J. Q. B. 536; 65 L. T. 263; 39 W. R. 363; 7 T. L. R. 290, D. C.

Annotations:—As to (1) Refd. *Knight v. Knight*, [1925] Ch. 835. *As to (2) Refd.* *Stumore v. Campbell*, [1892] 1 Q. B. 314.

312. ——*—*—*STUMORE v. CAMPBELL & Co.*, No. 319, post.

313. ——*—*—A counterclaim is not to be treated as a separate action for all purposes (*VAUGHAN WILLIAMS, L.J.*).—*Re A BANKRUPTCY NOTICE* (1906), 96 L. T. 133, C. A.

314. — Treated as statement of claim in cross-action.—(1) The discontinuance by pltf. of an action brought by him against deft. does not put an end to a counterclaim pleaded by that deft., for although a counterclaim is not a cross-action, yet it is to be treated as though it were in fact a statement of claim in a cross-action.

(2) If pltf. does not deliver a pleading within a proper time, deft. has a right to ask for judgment (*BRETT, M.R.*).—*McGOWAN v. MIDDLETON* (1883), 11 Q. B. D. 464; 52 L. J. Q. B. 355; 31 W. R. 835, C. A.

Annotations:—As to (1) Refd. *Re Brown, Ward v. Morse* (1883), 52 L. J. Ch. 524; *Caroli v. Hirst* (1883), 48 L. T. 759; *Sykes v. Sacerdoti* (1885), 53 L. T. 150; *Lewin v. Trimming* (1888), 21 Q. B. D. 230; *Amon v. Bobbett* (1889), 22 Q. B. D. 543. *Generally, Refd.* *Fraser v. Cooper, Hall* (1883), 31 W. R. 715; *Delobbel Filipo v. Varty* (1893), 62 L. J. Q. B. 398; *Alcoy & Gandia Ry. & Harbour Co. v. Greenhill, Greenhill v. Alcoy & Gandia Ry. & Harbour*

calling a claim made by deft. a counterclaim cannot make it one.—*GIRARDOT v. WELTON* (1900), 19 P. R. 162; *affd.*, 19 P. R. 201; 20 C. L. T. 257.—*CAN.*

305 vii. ——*—*—*FRIEL v. STINTON* (1901), 5 Terr. L. R. 252.—*CAN.*

305 viii. ——*—*—A counterclaim, for the purpose of taxation of costs, is to be treated as a cross-action.—*SISTERS OF CHARITY v. FORREST* (1911), 20 Man. L. R. 301; 16 W. L. R. 395; *affd.* 16 W. L. R. 647.—*CAN.*

305 ix. ——*—*—*COX v. CANADIAN BANK OF COMMERCE (Man.)* (1913), 23 W. L. R. 376; 3 W. W. R. 397, 1011; 9 D. L. R. 846.—*CAN.*

PART II. SECT. 1.

305 i. Nature of counterclaim—Whether independent action.—Although for some purposes a claim & counterclaim form but one action, yet the costs of the counterclaim are to be taxed separately from the costs of the action, counterclaim being, for the purposes of taxation, to be treated as a cross-action.—*EMERSON v. GEARIN* (1888), 12 P. R. 399.—*CAN.*

305 ii. ——*—*—*IRWIN & Co. v. BROWN* (1888), 12 P. R. 639.—*CAN.*

305 iii. ——*—*—A claim & counterclaim are treated as distinct actions up to execution.—*SMITH v.*

HANSEN (1892), 2 B. C. R. 153.—*CAN.*

305 iv. ——*—*—A counterclaim is not an action within Queen's Bench Act, 1895, not being a civil proceeding commenced by statement of claim.—*BERGMAN v. SMITH* (1896), 11 Man. L. R. 364.—*CAN.*

305 v. ——*—*—A claim & counterclaim are to be treated as separate actions.—*HAGGERT v. BRAMPTON CORPN.* (1897), 17 P. R. 477.—*CAN.*

305 vi. ——*—*—The counterclaim of a deft., properly so-called, is a claim by deft. for a relief which cannot be obtained by him in the action; &

Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2.

Co., Trustees, Executors & Securities Insee. Corpn. v. Alcoy & Gandia Ry. & Harbour Co. (1895), 73 L. T. 452.
Mentd. Kent County Council v. Folkestone Corpn. (1905), 74 L. J. K. B. 352.

315. — Amounts to defence—R. S. C., Ord. 24, r. 3.]—WOOD v. GOODWIN, [1884] W. N. 17; Bitt. Rep. in Ch. 167.

— **In Admiralty cases.]—**See ADMIRALTY, Vol. I., pp. 183, 184, Nos. 967, 968.

— **A legal proceeding within Arbitration Act, 1889 (c. 49).]**—See ARBITRATION, Vol. II., p. 302, No. 316.

Distinguished from set-off.]—See Nos. 2-4, *ante*.

316. Amount need not equal amount of plaintiff's claim.]—Where debt. in an action in one of the Divs. of the Hight Ct. of Justice other than the Ch. Div. relies on an equity, to have a deed set aside as part of his defence, the Div. in which the action is may give effect to the equity so far as is incidental to the purposes of the defence. It is not essential to a good counterclaim that it should show a claim to an amount equalling pltf.'s claim.

A lease having been granted by deed in terms from which the law implies a covenant for title, & the lessor proving to have no title to part of the demised premises:—**Held:** the lessee might refuse to take possession of such part of the demised premises & elect to keep the remainder, & might in an action for rent due under the lease claim damages for breach of the implied covenant by way of counterclaim.—MOSTYN v. WEST MOSTYN COAL & IRON CO., LTD. (1876), 1 C. P. D. 145; 45 L. J. Q. B. 401; 34 L. T. 325; 40 J. P. 455; 24 W. R. 401; 2 Char. Pr. Cas. 43.

Annotations:—**Mentd.** Breslauer v. Barwick (1876), 36 L. T. 52; Baynes v. Lloyd, [1895] 2 Q. B. 610; Budd-Scott v. Daniell, [1902] 2 K. B. 351; Carlisle v. Salt, [1906] 1 Ch. 335; Markham v. Paget, [1908] 1 Ch. 697.

SECT. 2.—AVAILABILITY OF COUNTERCLAIM

SUB-SECT. 1.—IN GENERAL.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 39; R. S. C., Ord. 21, rr. 10-17.

317. Claim capable of independent action.]—BIRMINGHAM ESTATES CO. v. SMITH, No. 405, *post*.

318. —.]—If no action could be brought it would be very difficult to say that a counterclaim could be maintained or even that a set-off could be set up (CAVE, J.).—LANCASHIRE & YORKSHIRE RY. CO. v. GREENWOOD (1888), 21 Q. B. D. 215; 58 L. J. Q. B. 16; 59 L. T. 930.

Annotations:—**Mentd.** Liverpool Corn Trade Assn. v. L. & N. W. Ry., [1891] 1 Q. B. 120; New Union Mills Co. v. G. W. Ry., [1896] 2 Q. B. 290; L. & N. W. Ry. v. Donellan, L. & N. W. Ry. v. Billington (1898), 78 L. T. 575.

319. —.]—Pltf., as execution creditor, applied to attach money in the hands of defts., the garnishees. The money had been deposited by the judgment debtor with defts. for a special purpose that had failed. Defts. claimed that judgment debtor was indebted to them for law costs in a larger sum than that deposited with them, & that they would be entitled to counter-

claim for the amount due to them:—**Held:** since, on the failure of the special purpose for which it was deposited with defts., the money remained in their hands subject to a trust to repay it to judgment debtor, they could not have set up their claim to costs in answer to a demand for the return of the money, & therefore it was a debt due from them to judgment debtor which could be attached.

Counterclaim is really in the nature of a cross-action. This ct. has determined that, where there is a counterclaim, in settling the rights of parties, the claim & counterclaim are, for all purposes except execution, two independent actions (LORD ESHER, M.R.).—STUMORE v. CAMPBELL & CO., [1892] 1 Q. B. 314; 61 L. J. Q. B. 463; 66 L. T. 218; 40 W. R. 101; 8 T. L. R. 99; 36 Sol. Jo. 90, C. A.

Annotations:—**Distd.** Runtz v. Longbourne (1892), 8 T. L. R. 568. **Refd.** Levi v. Anglo-Continental Gold Refs. of Rhodesia, [1902] 2 K. B. 481; Kinnaird v. Field, [1905] 2 Ch. 361; Sharpe v. Hargrith (1912), 106 L. T. 13.

320. —.]—In 1893, an Act was passed enabling pltf. co. to take compulsorily (*inter alia*) the property to which this action related. In 1894 the owner of the property let it to debt. for a term of years by a lease containing the usual covenant for quiet enjoyment. In 1895 the co. purchased the reversion of the property, subject to the lease. After this the co. proceeded with their works, & in so doing caused structural injury to debt.'s house; they also for some time rendered the access to his premises less convenient, by erecting hoardings which blocked up half the thoroughfare along the street in which his house stood, & by taking a great number of carts along that street. They also for three or four days encumbered a passage along which he had a right of way so that he could not use it. It was not alleged that the co. had exceeded their statutory powers or exercised them negligently. The co. sued debt. for rent, & he counterclaimed for damages for breach of the covenant for quiet enjoyment:—**Held:** the covenant for quiet enjoyment was in force & was binding on the co., & they were liable to make compensation for any breach of it, but no action would lie against them for any breach of it committed in the reasonable & careful exercise of their statutory powers, the only remedy of the tenant for such breaches being under the compensation clauses of Railways Clauses (Consolidation) Act, 1845 (c. 20), & Lands Clauses (Consolidation) Act, 1845 (c. 18), & the counterclaim, therefore, had been properly dismissed.—MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. ANDERSON, [1898] 2 Ch. 394; 67 L. J. Ch. 568; 42 Sol. Jo. 609; *sub nom.* ANDERSON v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO., MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. ANDERSON, 78 L. T. 821; 14 T. L. R. 489, C. A.

Annotations:—**Consd.** Long Eaton Recreation Ground Co. v. Mid. Ry., [1902] 2 K. B. 574. **Refd.** Phelps v. City of London Corpn., [1916] 2 Ch. 255. **Mentd.** Tebb v. Cave, [1900] 1 Ch. 642; Metropolitan Water Board v. Solomon, [1908] 2 Ch. 214; Jones v. Consolidated Anthracite Collieries & Dynevor, [1916] 1 K. B. 123.

321. Must be within jurisdiction of court.]—BOW, McLACHLAN & CO. v. SHIP CAMOSUN, No. 116, *ante*.

PART II. SECT. 2, SUB-SECT. 1.

317 i. Claim capable of independent action.]—A debt. can only set up, by way of counterclaim, a demand for which he can bring an action.—CANADIAN BANK OF COMMERCE v. NORTHWOOD (1888), 5 Man. L. R. 342.—**CAN.**

317 ii. —.]—OPPENHEIMER v.

BACKMAN & KER MILLING CO. (1902), 23 C. L. T. 62; 32 S. C. R. 699.—**CAN.**

317 iii. —.]—AYER v. KELLY (1913), 12 E. L. R. 264; 11 D. L. R. 785; 41 N. B. R. 459.—**CAN.**

317 iv. —.]—TEAGLE & SON v. TORONTO BOARD OF EDUCATION (1912), 22 O. W. R. 254; 3 O. W. N. 1332; 3 D. L. R. 874.—**CAN.**

317 v. —.]—A debt. cannot counterclaim where he cannot bring an independent action.—McCONNOCHE v. EWING (1892), 13 N. Z. L. R. 719.—**N.Z.**

321 i. Must be within jurisdiction of court.]—**Held:** debt. could not recover anything on a counterclaim pleaded by him, except money paid into ct.,

322. —.]—This at least is certain that no counterclaim can be given effect to as a defence unless the ct. dealing with the original action has also jurisdiction in the matter of the counterclaim (LORD DUNEDIN).—WILLIAMS BROTHERS v. ED. T. AGUS, LTD., as reported in [1914] A. C. 510; 83 L. J. K. B. 715; 110 L. T. 865; 19 Com. Cas. 200, C. A.

*Annotations:—*Mentd. Janal v. Moolla Dawood, [1916] 1 A. C. 175; Weir v. Dobell, [1916] 1 K. B. 718; Lebeaupin v. Crispin, [1920] 2 K. B. 714; Slater v. Hoyle & Smith, [1920] 2 K. B. 11; Montevideo Gas & Drydock Co. v. Chan Line Steamers (1921), 37 T. L. R. 541; Sheikh Mohammad Habib Ullah v. Bird (1921), 37 T. L. R. 405; Taylor v. Bank of Athens, Pinnock v. Bank of Athens (1922), 91 L. J. K. B. 776.

323. In answer to petition of right.]—The Crown was allowed to set up a counterclaim in a petition of right commenced before Nov. 1, 1875.—THOMAS v. R. (1875), W. N. 218; Bitt. Prac. Cas. 25; 1 Char. Cham. Cas. 71.

324. Whether sounding in damages or not.]—BEDDALL v. MAITLAND, No. 307, ante.

325. —.]—GRAY v. WEBB, No. 331, post.

326. —.]—Effect of Judicature Acts.]—(1) T. purchased some debts due by a co. from H. who purchased them from the original creditors. Before the debts were assigned to T. the liquidator took out a summons in the winding up of the co. to make H. liable for a misfeasance, & subsequently to the assignment an order was made that H. who was an original director of the co., should pay the liquidator £2,000, "the nominal value of the eighty-five shares in the co. received by H. from the promoter of the co." :—Held: as the co. had elected to take the value of the shares, their claim against H. was not a debt but damages, & therefore the £2,000 could not be set off against the dividends payable to T. in respect of the debts.

(2) R. S. C., Ord. 19, r. 3, 1875, is only a rule of procedure, & was not intended to give rights against third persons which did not exist before. It was held, therefore, not to affect the question of set-off.

An argument which I must especially notice is that since Jud. Acts, 1873 (c. 66) & 1875 (c. 77), under R. S. C., Ord. 19, r. 3, "a debt in an action may set off or set up by way of counterclaim against claims of pltf., any right or claim, whether such set-off or counterclaim is sound in damages or not" & that consequently the liquidator has now this right of set-off, even though he might not have had it before these statutes. In my opinion, that rule was not intended to give rights against third persons which did not exist before, but is a rule of procedure designed to prevent the necessity of bringing a cross-action in all cases where the counterclaim may conveniently be tried in the original action (KAY, J.).—*Re MILAN*

the amount being below the jurisdiction of the ct.—HUGHAN v. McCOLLUM (1887), 20 N. S. R. (8 R. & G.) 202.—CAN.

321 ii. —.]—RUTHERFORD v. FURDY (CAN.), 21 N. S. R. (9 R. & G.) 43.—CAN.

321 iii. —.]—SHUTTLEWORTH v. SEYMOUR (1914), 28 W. L. R. 282; 6 W. W. R. 7 Sask.

321 iv. —.]—BROWNS v. BROWNS (Alta.), [1919] 3 W. W. R. 903; 48 D. L. R. 72.—CAN.

321 v. —.]—A counterclaim for the rescission of a contract for the sale of land on the ground of misrepresentation is beyond the jurisdiction of the District Ct., it not being a "personal action in contract or tort" within District Cts. Act, s. 27 (a).—BYERS v. SINGLETON, [1921] 2 W. W. R. 71;

65 D. L. R. 736; 14 Sask. L. R. 195.—CAN.

321 vi. —.]—LOVE v. KARPO (Man.), [1923] 1 W. W. R. 799.—CAN.

321 vii. —.]—BRODSKY v. TODD, [1924] 2 D. L. R. 423; [1924] 1 W. W. R. 1186; 31 Man. L. R. 92.—CAN.

321 viii. —.]—PASCALL (JAMES) LTD. v. ESCOTT (W. H.), LTD., [1926] 2 D. L. R. 573; [1926] 2 W. W. R. 21; 35 Man. L. R. 538.—CAN.

321 ix. —.]—HAMELIN & HURLBURT v. PHILLIPS (Sask.), [1927] 4 D. L. R. 1107; [1927] 3 W. W. R. 504.—CAN.

323 i. In answer to petition of right.]—There cannot be a counterclaim to a petition of right.—SPIERS v. R. & CORBOULD (1896), 4 B. C. R. 388.—CAN.

324 i. Whether sounding in damages

TRAMWAYS CO., *Ex p.* THEYS (1882), 22 Ch. D. 122; 52 L. J. Ch. 29; 48 L. T. 213; 31 W. R. 107; *affd.* (1884), 25 Ch. D. 587.

*Annotations:—*As to (1) **Consd.** Newfoundland Government v. Newfoundland Ry. (1888), 13 App. Cas. 199. *Generally, Reftd.* *Re Gillespie, Ex p. Reid* (1885), 14 Q. B. D. 963; *Alcoy & Gandia Ry. & Harbour Co. v. Greenhill* (1897), 76 L. T. 542; *Re Auriferous Properties*, [1898] 2 Ch. 428; *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546; *Re Goy, Farmer v. Goy*, [1900] 2 Ch. 149; *Fryer v. Ewart*, [1902] A. C. 187; *Re Brown & Gregory, Shephard v. Brown & Gregory, Andrews v. Brown & Gregory*, [1904] 1 Ch. 627; *Re Leeds & Hanley Theatres of Varieties*, [1904] 2 Ch. 45; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161; *Re Pink, Elvin v. Nightingale*, [1927] 1 Ch. 237. **Mentd.** *Watney, Combe, Reid v. Ewart* (1902), 86 L. T. 212; *Re Webb* (Smithfield, London), [1922] 2 Ch. 369.

327. Effect of Statute of Limitations—When counterclaim barred.]—Stat. Limitations, s. 3, bars a counterclaim on a cause of action which arose more than six years before the delivery of the counterclaim though less than six years before the issue of the writ in the action.—LOWE v. BENTLEY (1928), 44 T. L. R. 388.

In Admiralty actions.]—See ADMIRALTY, Vol. I., pp. 183, 184, 188–190, Nos. 967–978, 1020–1043.

SUB-SECT. 2.—AGAINST WHOM AVAILABLE.

A. Plaintiff.

328. Plaintiff must be party.]—HARRIS v. GAMBLE, No. 479, post.

329. Two or more plaintiffs suing jointly—Separate counterclaims against individual plaintiff.]

—When two or more pltf. sue for a joint claim, deft. may, under the Jud. Act, 1873 (c. 66), s. 24, ss. 3, 7, R. S. C., Ord. 16, rr. 1, 3, 4, 6, 13, & R. S. C., Ord. 19, r. 3, set up against each individual pltf. separate counterclaims sounding in damages. Two railway cos. having, as joint lessees of a railway, sued for statutory tolls, deft. set up against each co. separate counterclaims for damages in respect of delay in the delivery of goods. Pltfs. applied under R. S. C., Ord. 19, r. 3, to strike out the counterclaims, but no reasons were alleged why they could not be conveniently disposed of in the action:—Held: the counterclaims ought not to be struck out.—MANCHESTER & SHEFFIELD RY. CO. v. BROOKS (1877), 2 Ex. D. 243; 46 L. J. Q. B. 244; 36 L. T. 103; 25 W. R. 413.

330. If claim arising in same right.]—R. S. C., Ord. 17, r. 5, which empowers a claim against a person as exor. to be joined with a claim against him personally, does not include a counterclaim, & deft. will not be allowed in an action by pltf. in his own right to join a counterclaim against pltf. in his representative character as exor. or administrator with a counterclaim against him personally,

or not.]—A counterclaim may be set up as a defence, though it sounds in damages.—FORSYTH v. LAWRENCE (1887), 19 N. S. R. (7 R. & G.) 148; 7 C. L. T. 174.—CAN.

a. Action under small debt procedure.—Counterclaim for amount exceeding small debt jurisdiction.]—COX v. CHRISTIE (1903), 5 Terr. L. R. 475.—CAN.

b. Where matter proper subject for petition of right.]—Matter proper for petition of right cannot be set up by way of counterclaim.—A. G. FOR ONTARIO v. HARGRAVE (1906), 11 O. L. R. 530.—CAN.

PART II. SECT. 2, SUB-SECT. 2.—A.

330 i. If claim arising in same right.]—Notwithstanding the rule that a deft. may not set up by way of counterclaim against the claim of a

Sect. 2.—Availability of counterclaim: Sub-sect. 2, A.

especially if it will embarrass the trial of the action. Where, however, such a counterclaim can be amended by striking out so much of it as relates to the claim against pltf. in his representative character, the ct., under R. S. C., Ord. 22, r. 9, will order it to be so amended instead of ordering it to be struck out altogether.—*MACDONALD v. CARINGTON* (1878), 4 C. P. D. 28; 48 L. J. Q. B. 179; 39 L. T. 426; 27 W. R. 153.

*Annotations:—*Consd. *Gray v. Webb* (1882), 21 Ch. D. 802. *Reid. Re Gilson, Gilson v. Gilson*, [1894] 2 Ch. 92.

331. Claim unconnected with plaintiff's claim.]—R. S. C., Ord. 19, r. 3, is sufficiently general to allow a counterclaim by way of defence, whether or not it is connected with or of the same character as pltf.'s claim, & whether it sounds in damages or not. But the ct. has a discretion to exclude a counterclaim which may unduly delay the action.—*GRAY v. WEBB* (1882), 21 Ch. D. 802; 51 L. J. Ch. 815; 46 L. T. 913; 31 W. R. 8.

332. Claim not of same character as plaintiff's claim.]—*GRAY v. WEBB*, No. 331, *ante*.

B. Co-Defendant.

333. Whether counterclaim available.]—It was never intended that one deft. should have a counterclaim against another deft. (*MELLISH, L.J.*).—*TRELEAVEN v. BRAY* (1875), as reported in 45 L. J. Ch. 113; 33 L. T. 827; 24 W. R. 198, C. A.

*Annotations:—*Consd. *Padwick v. Scott, Re Scott's Estate, Scott v. Padwick* (1876), 2 Ch. D. 736; *Turner v. Hednesford Gas Co., Hednesford Gas Co. v. Turner & Round* (1878), 47 L. J. Q. B. 296; *Central African Trading Co. v. Grove* (1879), 40 L. T. 540. *Reid. Re Collye, Ex p. Smith* (1876), 34 L. T. 603; *Swansea Shipping Co. v. Duncan, Fox* (1876), 45 L. J. Q. B. 423. *Mentd. Benecke v. Frost* (1876), 34 L. T. 728.

334. —.]—Questions between co-defts. may be raised by a pleading which states both a defence as against pltf. & a claim against co-deft., but such pleading is not a counterclaim under R. S. C., Ord. 22, r. 5, & should not be so intitled.—*FURNESS v. BOOTH* (1876), 4 Ch. D. 586; 46 L. J. Ch. 112; 25 W. R. 267.

*Annotations:—*Distd. *Turner v. Hednesford Gas Co.* (1878), 3 Ex. D. 145. *Consd. Butler v. Butler* (1880), 42 L. T. 728.

335. —.]—*McLAY v. SHARP*, [1877] W. N. 210.

336. —.]—Questions between co-defts. may be raised by a statement of defence which contains

a counterclaim as against co-deft., & delivery of such pleading to co-deft. is sufficient notice under R. S. C., Ord. 26, r. 17. Questions of this kind may be raised after judgment upon further consideration, or at any stage of the proceedings.—*BUTLER v. BUTLER* (1880), 14 Ch. D. 329; 49 L. J. Ch. 742; 42 L. T. 728; 28 W. R. 825.

*Annotation:—*Mentd. *Sawyer v. Sawyer* (1885), 28 Ch. D. 595.

C. Plaintiff and Third Person.

337. Question between defendant & plaintiff along with third person—Relating to plaintiff's cause of action—Action for account by second mortgagee—Counterclaim for specific performance by purchaser with concurrence of plaintiff.]—First mtgee. being sole deft. to an action by second mtgees. for an account of what was due to them respectively, & to have a contract for sale entered into by the first mtgee. completed, & the sale moneys applied accordingly, made the purchaser co-deft. with pltf. to a counterclaim for specific performance by the purchaser with the concurrence of pltf., alleging that their concurrence was a term of the contract, & that the purchaser refused to complete without it. The defence & counterclaim having been served on the purchaser under R. S. C., Ord. 22, rr. 5, 6, he moved under R. S. C., Ord. 22, r. 9, to have so much of the counterclaim as affected him excluded:—*Held*: there being a question between deft. & pltf. "along with" the purchaser which deft. was entitled to raise by cross-action, the purchaser was properly made deft. to the counterclaim, & the motion refused with costs accordingly.—*DEAR v. SWORDER, SWORDER v. DEAR* (1876), 4 Ch. D. 476; 46 L. J. Ch. 100; 25 W. R. 124.

338. —.]—Action by trustee on covenant for indemnity—Counterclaim against plaintiff & third party as executors.]—Dft. must not bring a third party before the ct. as deft. to a counterclaim against pltf. unless the relief to be obtained against him relates specifically to or is connected with the subject-matter of the action. Pltf., the trustee of a settlement, by his statement of claim, pleaded that deft., a *cestui que trust* of the settlement, had by deed covenanted to indemnify him against an innocent breach of trust in consequence whereof he had been compelled to bring £10,000 into the settlement, & had incurred costs: & he claimed £11,000. Dft. delivered a defence & two

pltf., suing in a personal character claims against him in a representative capacity, this does not prevent such a counterclaim when the whole transaction was not carried on by the party in his representative character.—*SCRIM LUMBER Co. v. Ross* (1914), 20 B. C. R. 89.—CAN.

331i. Claim unconnected with plaintiff's claim.]—A counterclaim should not be entirely independent of the original cause of action, but where the counterclaim involved an issue raised as a defence, it was held to be sufficiently connected with the claim.—*POWELL v. LOWENBERG, HARRIS & Co.* (1893), 3 B. C. R. 81.—CAN.

331ii. —.]—In an action for damages for illegal seizure of pltf.'s crop deft. set up that the seizure was justifiable under the terms of an agreement for sale of the land on which the crop was grown & counterclaimed against pltf. & another as claiming an interest as such purchaser from pltf., for specific performance of the agreement & alternatively for cancellation thereof & possession of the land:—*Held*: such relief was not a proper subject of counterclaim in such action, as it was not "relief relating to or

connected with the original subject of the cause or matter" within King's Bench Act, s. 24 (3).—*GAY v. REGAN*, [1920] 2 W. W. R. 315; 52 D. L. R. 700; 13 Sask. L. R. 230.—CAN.

c. Claim connected with plaintiff's claim.]—*Held*: the facts alleged in the counterclaim were connected with the subject matter of the statement of claim, & therefore under Equity Act, 1901, s. 39, the ct. could entertain the counterclaim.—*BURNHAM v. CARROLL MUSGRAVE THEATRES, LTD.* (1926), 26 S. R. N. S. W. 372; 43 N. S. W. W. N. 95.—AUS.

d. Relators.]—In an action brought in the name of the A.-G. upon the relation of certain persons to restrain defts. from collecting tolls or keeping their toll-gates closed upon their roads, defts. alleged by way of defence certain wrongful acts of the relators, & by way of counterclaim asked damages against them:—*Held*: the relators were not in any sense pltf. & the allegations against them must be struck out.—*A.-G. v. VAUGHAN ROAD CO.* (1892), 14 P. R. 516.—CAN.

e. Claim by one defendant in individual cause of action against plaintiff.]—One of two defts. sued

jointly may counterclaim upon a cause of action which he individually has against pltf.—*POWELL v. LOWENBERG, HARRIS & Co.* (1893), 3 B. C. R. 81.—CAN.

f. Foreign plaintiff.]—*BROWNS v. BROWNS* (Alta.), [1919] 3 W. W. R. 903; 48 D. L. R. 72.—CAN.

PART II. SECT. 2, SUB-SECT. 2.—B.

333i. Whether counterclaim available.]—A deft. asking relief against his co-deft. will not be ordered to give security for costs on the ground of residence out of the jurisdiction. *Semble*: such relief should not be asked by way of counterclaim.—*WALMSLEY v. GRIFFITH* (1885), 11 P. R. 139.—CAN.

333ii. —.]—*COPE v. CRICHTON* (1899), 18 P. R. 402.—CAN.

PART II. SECT. 2, SUB-SECT. 2.—C.

g. Question between defendant & plaintiff along with third person—Relating to plaintiff's cause of action—Action for goods sold—Counterclaim for damages for malicious prosecution.]—*MACDONALD & Co. v. LOGAN* (1905),

counterclaims, making pltf. & A. B. defts. to the counterclaims. By the defence he denied that any claim had been made upon or loss sustained by pltf., & he impeached the validity of the deed of covenant. By his first counterclaim, he stated that pltf. & A. B. were the exors. of the will of his father, who had joined in the covenant, & had also given to him a covenant of counter indemnity, & he claimed that pltf. must be held to have admitted assets, & to have retained the amount of his claim out of his testator's estate, or otherwise that such estate might be administered for the purpose. By the second counterclaim, he stated that his father had appointed £10,000 to A. B. on a secret trust to satisfy the liability as to the £10,000, & he claimed performance of this trust accordingly. Upon motion on behalf of pltf. under R. S. O., Ord. 22, r. 9:—*Held*: both counterclaims must be excluded as not being sufficiently connected with the original subject-matter of the action, & as calculated unduly to embarrass & delay pltf.—*PADWICK v. SCOTT, Re SCOTT'S ESTATE, SCOTT v. PADWICK* (1876), 2 Ch. D. 736; 45 L. J. Ch. 350; 24 W. R. 723; 3 Char. Pr. Cas. 107. *Annotations*:—*Consd.* Macdonald v. Carington (1878), 4 C. P. D. 28; Gray v. Webb (1882), 21 Ch. D. 802. *Refd.* Whitworth v. Darbishire (1893), 37 Sol. Jo. 214; *Re* Gilson, Gilson v. Gilson, [1894] 2 Ch. 92.

339. ——— Action for balance of purchase-money—Counterclaim for fraudulent representation by agent.]—BARTHOLOMEW v. RAWLINGS, [1876] W. N. 56; Bitt. Prac. Cas. 125; 2 Char. Cham. Cas. 32.

340. ——— Action for damages for breach of contract—Counterclaim against plaintiff surety.]—Deft. is entitled to add a third person as party to the action if deft.'s counterclaim shows a question arising between himself & pltf. along with that third person, & relating to the cause of action sued upon by pltf., even although the third person could not be a party to pltf.'s original claim.

Claim for damages for preventing pltf. from completing certain work pursuant to a contract with defts. Defence: that by a clause in the contract defts. had power to take the work out of pltf.'s hands if he failed to do it properly; that pltf. did so fail, & defts. took the work out of his hands; & by way of counterclaim, that owing to pltf.'s breach of contract defts. did expend £256 in excess of what it would have cost them if pltf. had fulfilled his agreement; & that R. had, by a general bond, bound himself in the sum of £200 for the proper execution of the work, & they sought to recover £256 from pltf., & £200 under the bond, from R. Defts. having served R. with the defence & counterclaim pursuant to R. S. C., Ord. 22, r. 6, R. moved to strike out the counterclaim:—*Held*: the claim for relief by defts. against R., by way of counterclaim, was a question arising between defts. & pltf. along with R. within R. S. C., Ord. 22, r. 5; & defts. were entitled to add R. as party to the action.—*TURNER v. HEDNESFORD GAS CO.* (1878), 3 Ex. D. 145; 47 L. J. Q. B. 296; 38 L. T. 8; 42 J. P. 790; 26 W. R. 308, C. A.

Annotation:—*Refd.* Pender v. Taddel, [1898] 1 Q. B. 798.

341. ——— Action for libel—Counterclaim for libel by agent.]—Pltfs., a registered co., & their managing director, carrying on business as dealers in motor cars, brought an action against deft., who was the managing director of another registered co. carrying on a similar business, claiming damages in respect of an alleged libel written by deft., & caused by him to be published in two trade journals concerning pltfs. & their motor cars. Deft., while admitting that he had written the statements complained of, which he said was done in the course of & concerning a long controversy in the motoring press with regard to the respective merits of pltfs.' cars & those manufactured by his co., each company puffing their own wares & decrying those of trade rivals, counterclaimed as follows: That pltfs. by their agent falsely & maliciously wrote & caused to be published in one of the trade journals a statement which, as deft. alleged, meant that he was a man who did not pay wagers when he had lost them, & was a dishonourable man with whom it was not safe to have any dealings. Deft. accordingly joined pltfs.' agent as deft. to his counterclaim, & asked for damages:—*Held*: upon the true construction of Jud. Act, 1873 (c. 66), s. 24 (3), the counterclaim did not seek "relief relating to or connected with the original subject of the cause or matter," & ought therefore to be struck out.—*EDGE (S. F.), LTD. v. WEIGEL, WEIGEL v. EDGE (S. F.), LTD. & JOHNSON* (1907), 97 L. T. 447, C. A.

Annotation:—*Refd.* Times Cold Storage Co. v. Lowther & Blankley, Lowther & Blankley v. Times Cold Storage Co. & New Zealand Shipping Co., [1911] 2 K. B. 100.

342. ——— Action for goods sold—Counterclaim against seller & railway company.]—Pltf. brought an action against deft. for the price of goods sold & delivered, the contract being one to deliver goods f.o.r. at P. station for transmission to deft. at Exeter. Deft., by his defence, pleaded, first, that pltf. failed to deliver the goods in good condition, & therefore, did not fulfil his contract; & secondly, that if he did deliver them in good condition, he committed a breach of an implied term of his contract so to pack the goods that they should be reasonably fit to stand the ordinary risks of transit by rail. He also raised the same point against pltf. by way of counterclaim, & claimed damages. To that counterclaim he joined the G. W. ry. co. as defts., & alleged against them that the goods having been delivered to them at P. station in good condition, they, in breach of their duty as carriers, so treated them that when they arrived at their destination they were in bad condition; & claimed damages against them. He further pleaded that if the goods at the date of their delivery to the railway co. were in good condition he claimed to recover damages against them, & alternatively, in the event of its being found that the goods at the date of their delivery to the railway co. were in bad condition, he claimed to recover damages against pltf. On an application by pltf. the judge at chambers refused to order that the counterclaim, in so far as it joined the railway co. as defts. to the counterclaim, should be struck out:—*Held*: the claims were not strictly alternative, so as to be mutually exclusive;

7 Terr. L. R. 423; 2 W. L. R. 23.—**CAN.**

1. ———.]—In an action by the assignee of a mtge. against the mtgor. & the purchasers from him of the equity of redemption, the latter alleged that they had been induced by the mtgee. to purchase the lands by his promise to discharge the mtge. & accept in its place an assignment of another mtge., which agreement he had

failed to carry out & had afterwards assigned the mtge. to pltf., his wife:—*Semble*: a proper case for a counterclaim against pltf. & the third party jointly to enforce the alleged agreement or for damages.—*MOORE v. DEATH* (1894), 16 P. R. 296.—**CAN.**

k. ———.]—ROBERTSON v. WHITE (1902), 5 Terr. L. R. 311.—**CAN.**

1. ———.]—ROSS v. REDMOND

(N. S.) (1906), 1 E. L. R. 158.—**CAN.**

m. ——— Action by registered owner to remove caveat—Counterclaim for specific performance.]—Action by the registered owner of land to remove a caveat filed by deft.:—*Held*: deft. had, under King's Bench Act, 1902, r. 294, the right to set up by way of counterclaim that a third party had agreed in writing to sell the land to deft., that such third party was a co-

Sect. 2.—Availability of counterclaim: Sub-sect. 2, C. & D.; sub-sects. 3 & 4.]

but the relief claimed against the railway co. was sufficiently "connected with the original subject of the cause or matter" within Jud. Act, 1873 (c. 66), s. 24 (3), to enable the claim against the railway co. to be joined with the claim against pltf.—*SMITH v. BUSKELL, BUSKELL v. SMITH & GREAT WESTERN RY. Co.*, [1919] 2 K. B. 362; 88 L. J. K. B. 985; 121 L. T. 301; 35 T. L. R. 523; 63 Sol. Jo. 589, C. A.

343. Against third party independent of plaintiff.]—No counterclaims can be set up which do not seek relief against pltf. The only purpose for which a third party is brought before the ct. under R. S. C., Ord. 16, rr. 17, 18, is to bind him by the action, & preclude him from saying that it had not been properly defended (*JESSEL, M.R.*).—*WARNER v. TWINING* (1876), 21 W. R. 536; 2 Char. Pr. Cas. 59.

344. Alternative cause of action against third party.]—Under R. S. C., Ord. 16, rr. 3, 6, a person cannot be joined as deft. to a counterclaim against whom there is only a claim for relief in one of two inconsistent alternatives.—*EVANS v. BUCK, BUCK v. EVANS* (1876), 4 Ch. D. 432; 46 L. J. Ch. 157; 25 W. R. 392.

Annotation:—Refd. Child v. Stemming (1877), 5 Ch. D. 695.

345. —.]—In an action for trespass by pltf., who was a lessee of W., deft., in his defence & counterclaim, to which he made W. a party, claimed a right of way by grant from W. prior to pltf.'s lease, & prayed a declaration of his rights, & an injunction, & damages against pltf.; & in the alternative he prayed an indemnity & damages against W. Pltf. amended his claim & made W. deft., & prayed an injunction & damages against original deft., & in the alternative damages against W. W. demurred both to the counterclaim & the amended claim:—*Held*: the counterclaim was bad in not showing a cause of action against W.—*CHILD v. STENNING* (1877), as reported in 5 Ch. D. 695; *subsequent proceedings*, 5 Ch. D. p. 699, C. A.

Annotations:—Refd. Times Cold Storage Co. v. Lowther & Blankley, Lowther & Blankley v. Times Cold Storage Co. & New Zealand Shipping Co. (1911), 80 L. J. K. B. 901; *Smith v. Buskell, Buskell v. Smith & G. W. Ry.*, [1919] 2 K. B. 362. *Mentd. Cargill v. Bower* (1878), 10 Ch. D. 502; *Tritton v. Bankart* (1887), 56 L. J. Ch. 629; *Compania Sansinena de Carnes Congeladas v. Houlder*, [1910] 2 K. B. 354.

346. —.]—In an action for money lent, deft. set up a counterclaim, in which he joined T. as deft. to the counterclaim under R. S. C., Ord. 22, r. 5, & alleged a contract between himself & T. & a breach thereof by T. that the contract had been transferred from T. to pltf.s. & that pltf.s. had broken it. He then claimed damages against pltf.s. & in the alternative, against T.:—*Held*: T. was not properly joined as co-deft. to the counterclaim under R. S. C., Ord. 22, r. 5, but

deft. should have applied to have the question determined as against T. under R. S. C., Ord. 16, r. 17.—*CENTRAL AFRICAN TRADING CO. v. GROVE, GROVE v. CENTRAL AFRICAN TRADING CO. & TAUBMAN* (1879), 48 L. J. Q. B. 510; 40 L. T. 540; 27 W. R. 933, C. A.

Annotation:—Apld. Times Cold Storage Co. v. Lowther & Blankley, Lowther & Blankley v. Times Cold Storage Co. & New Zealand Shipping Co., [1911] 2 K. B. 100.

347. — Inconsistent with & exclusive of claim against plaintiff.]—Under C. C. R., 1903, Ord. 10, r. 22, pltf. by counterclaim is not entitled to add as deft. to the counterclaim a person against whom he has an alternative claim, which is inconsistent with & exclusive of his claim against original pltf.—*TIMES COLD STORAGE CO. v. LOWTHER & BLANKLEY, LOWTHER & BLANKLEY v. TIMES COLD STORAGE CO. & NEW ZEALAND SHIPPING CO.*, [1911] 2 K. B. 100; 80 L. J. K. B. 901; 104 L. T. 637; 55 Sol. Jo. 442, D. C.

Annotation:—Distd. Smith v. Buskell, Buskell v. Smith & G. W. Ry., [1919] 2 K. B. 362.

348. Action by auctioneer for commission on goods sold—By direction of official liquidator—Application to join official liquidator.]—In an action by an auctioneer for his commission on a sale of furniture [by order of official liquidator] supplied by deft. to an hotel co., which was subsequently wound up, an application by deft. to join the official liquidator as pltf. for the purpose of bringing a counterclaim against him, in respect of an alleged property in half the furniture, was refused.—*BECK v. DEAR* (1876), 2 Char. Cham. Cas. 25; *Bitt. Prac. Cas.* 113.

349. Action by shipowner for balance of freight—Counterclaim by consignees for short delivery—Assignment by charterer to defendant of chose in action after action brought—Application to join charterer as defendant.]—T. a shipowner, brought an action for balance of freight against G. & co., consignees of D., the charterer, who had stipulated that in his contract with them they should be liable for freight. G. & co. admitted that the balance of the freight was due & counterclaimed for short delivery. They subsequently applied to have the writ in the action amended by adding D. as a co-deft. to the counterclaim. D. made an affidavit that he was willing that this should be done:—*Held*: the ct. in its discretion under R. S. C., Ord. 16, r. 13, ought not to grant such an application.—*THORESEN v. GRAHAM & Co.* (1887), 3 T. L. R. 373.

Subject-matter of counterclaim unrelated to claim—Striking out counterclaim.]—*See Sub-sect. 4, C. (b), post.*

D. Foreign Sovereigns and States.

350. Whether counterclaim available.]—A foreign sovereign or state is exempted by international law founded upon the comity of nations, from the jurisdiction of the tribunals of this

country. [th pl.] agreement, had acted on behalf of himself & pltf. & was authorised to do so, & to claim specific performance of the agreement against both; but there was nothing in the rules to permit deft. to set up a claim in the alternative against such third party alone for damages for breach of warranty of authority to make the agreement.—*FERNIE v. KENNEDY* (1909), 19 Man. L. R. 207; 12 W. L. R. 48.—*CAN.*

343 i. Against third party independent of plaintiff.]—Pltf. sued deft. on an account assigned to him by one F. Deft., by his counterclaim, alleged a set-off against F., & adding F. as a deft. claimed judgment against him

for a balance due:—*Held*: the counterclaim as against F. must be disallowed, deft. having no right in this suit to raise an issue between himself & a third party, with which pltf. was not concerned.—*ROMANN v. BRODRICHT, BRODRICHT v. FICK* (1881), 9 P. R. 2.—*CAN.*

343 ii. —.]—Claims by deft. against a third party cannot be set up by counterclaim where the matter of the counterclaim may be set up against pltf. as a defence without bringing in the third party & where pltf. is not interested in what is claimed by the third party.—*CAPITAL LOAN CO. v. FRANK*, [1917] 2 W. W. R. 1250; 37 D. L. R. 157; 28 Man. L. R. 70.—*CAN.*

344 i. Alternative cause of action against third party.]—*FERNIE v. KENNEDY* (1909), 19 Man. L. R. 207; 12 W. L. R. 48.—*CAN.*

n. Application of third party procedure rules.]—*TAYLOR v. POPE* (1888), 3 Torr. L. R. 132.—*CAN.*

o. Joint liability of plaintiff & third party made co-defendant by plaintiff.]—A deft. cannot succeed on a counterclaim to recover on a liability which is a joint liability of pltf. & another who has been made by pltf. a co-deft. in the action, without having added that other as a co-deft. to his counterclaim.—*HUGGARD v. PRUDENTIAL LIFE INSURANCE CO. (Man.)*, [1923] 1 W. W. R. 556.—*CAN.*

country, & therefore an action is not maintainable in our cts. against a foreign sovereign or estate. The only exceptions to this rule are :

(a) Where a foreign sovereign or state has waived the privilege he possesses, & has come into the municipal cts. of this country to obtain relief, in which case deft. may assert any claim he has by way of cross action or counterclaim to the original action in order that justice may be done.

(b) Where there are moneys in the hands of third parties within the jurisdiction of the English cts., to which a claim is set up by a foreign sovereign, notice of an action against the third parties in relation to those moneys may be given to the foreign sovereign that he may have an opportunity of putting forward his claim.—*STROUSBERG v. COSTA RICA REPUBLIC* (1880), 44 L. T. 199; 29 W. R. 125, C. A.

Annotations :—*Consol. South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190. *Refd. Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797; *Soviet Republics Union v. Belaiew* (1925), 134 L. T. 64. *Mentd. Watkins v. Ross* (1893), 68 L. T. 423; *Whittham v. Moss* (1895), 73 L. T. 57.

351. —.]—By virtue of treaties between Great Britain & Japan the consular cts. of the former country & the territorial cts. of the latter country have exclusive jurisdiction over claims against British & Japanese subjects respectively. Accordingly, it would be in excess of the jurisdiction granted to the British consular ct. if it were to entertain by way of counterclaim or cross-action a claim by a British deft. against a Japanese pltf. The cognisance of such claim belongs to the territorial cts.

Resp. co., being sued by the Emperor of Japan, in a British ct. for damages resulting from a maritime collision, counterclaimed in respect of the same collision as due to the negligence of pltf.'s servants:—*Held*: the counterclaim could not be entertained.—*IMPERIAL JAPANESE GOVERNMENT v. PENINSULAR & ORIENTAL STEAM NAVIGATION Co.*, [1895] A. C. 644; 64 L. J. P. C. 107; 72 L. T. 881; 11 T. L. R. 498; 8 Asp. M. L. C. 50; 11 R. 493, P. C.

Annotations :—*Refd. Casdagli v. Casdagli*, [1918] P. 89; *The Tervaete*, [1922] P. 259. *Mentd. Skeate v. Slaters* (1914), 83 L. J. K. B. 676.

352. —.]—*SOUTH AFRICAN REPUBLIC v. TRANSVAAL NORTHERN RY.*, No. 487, *post*.

353. —.]—Counterclaim connected with plaintiff's claim.—*UNION OF SOVIET REPUBLICS v. BELAIEW*, No. 488, *post*.

SUB-SECT. 3.—TO WHOM AVAILABLE.

354. Third person not party — Whether joined as defendant.—R. S. C., Ord. 16, r. 11, provides that the ct. may add as deft. in an action any party "whose presence before the ct. may be necessary in order to enable the ct. effectually & completely to adjudicate upon & settle all the questions involved in the cause or matter."

Cargo was deposited by a shipowner with a warehouseman under M. S. Act, 1894 (c. 60), s. 443. Subsequently the consignee for sale, acting for the shipper of the goods, received delivery from the warehouseman on depositing the freight with him. The shipowner brought an action against the consignee for sale, asking for a declaration of lien:—*Held*: the ct. had jurisdiction to add the shipper as a deft. in this action to enable him

to counterclaim against the shipowner for breach of the contract of affreightment.—*MONTGOMERY v. FOY, MORGAN & Co.*, [1895] 2 Q. B. 321; 65 L. J. Q. B. 18; 73 L. T. 12; 43 W. R. 691; 11 T. L. R. 512; 8 Asp. M. L. C. 36; 14 R. 575.

Annotation :—*Distd. McCheane v. Gyles* (No. 2), [1902] 1 Ch. 911.

355. — *Whether joined as plaintiff.*—Deft. in an action counterclaimed in respect of a cause of action which he claimed to have jointly with another person against pltf's. joining that other person with pltf's. as a co-deft. to the counterclaim:—*Held*: the rules did not admit of such a counterclaim, & therefore it must be struck out.—*PENDER v. TADDEI*, [1898] 1 Q. B. 798; 67 L. J. Q. B. 703; 78 L. T. 581; 46 W. R. 452, C. A.

Annotation :—*Refd. Norbury Natzio v. Griffiths*, [1918] 2 K. B. 369.

356. Husband & wife — Action against wife — Husband joined as defendant.—To an action by exors. for the purpose of charging a married woman's separate estate with a debt to their testator contracted on the faith of such separate estate, the husband, who had been made a deft., & his wife raised a counterclaim for money belonging to his wife, not part of her separate estate, & for certain chattels in the possession of testator at his death, which it was alleged were the property of the husband. On motion under R. S. C. 1875, Ord. 22, r. 9:—*Held*: the claim to the chattels & money was a proper subject of counterclaim.—*HODSON v. MOCHI* (1878), 8 Ch. D. 569; 47 L. J. Ch. 604; 38 L. T. 635; 26 W. R. 590.

Annotation :—*Refd. Musurus Bey v. Gadbán* (1894), 71 L. T. 51.

357. Alien enemy.—The rule that an alien enemy cannot sue or prosecute his action during hostilities is confined to cases in which the alien enemy is pltf., or to a case in which a deft. alien enemy is seeking to prosecute a counterclaim, & does not apply to a case where the alien enemy is deft.—*ROBINSON & Co. v. CONTINENTAL INSURANCE Co. OF MANNHEIM*, [1915] 1 K. B. 155; 112 L. T. 125; 31 T. L. R. 20; 59 Sol. Jo. 7; 12 Asp. M. L. C. 574; *sub nom. ROBINSON & Co. v. MANNHEIM INSURANCE Co.*, 84 L. J. K. B. 238; 20 Com. Cas. 125.

Annotations :—*Mentd. Ingle v. Mannheim Continental Insee*, (1914), 84 L. J. K. B. 491; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Tingley v. Müller*, [1917] 2 Ch. 144; *Rodríguez v. Speyer*, [1919] A. C. 59.

358. —.]—*Re STAHLWERK BECKER AKTIENGESELLSCHAFT'S PATENT*, No. 4, *ante*.

SUB-SECT. 4.—THIRD PARTY NOTICE.

See R. S. C., Ord. 16, r. 6.

359. Right of third party to counterclaim — Against plaintiff.—(1) Where deft. has served a third party notice, the ct. cannot allow the third party to counterclaim against pltf.

(2) *Qu.*: whether there is jurisdiction to enable a third party to counterclaim against deft. who has given him notice.

Although by Jud. Act, 1873 (c. 66), s. 100, "deft. shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings," the term "deft." does not include a third party.

Semle: Jud. Act, 1873 (c. 66), s. 100, meant

Sect. 2.—Availability of counterclaim: Sub-sects. 4 & 5.]

to include the persons & classes represented by joining other persons as parties under R. S. C., Ord. 16, part 5, *e.g.*, the residuary legatees in an administration action.

E. brought an action against defts. for specific performance of an agreement to take a lease of coal under the lands of E., & also for an account of royalties in respect of the coals got by them since their taking possession under the agreement. Defts. denied that they were working the coals under any agreement with E., but alleged that they were working under an agreement with a lease from the Ecclesiastical Comrs. They also by leave served a notice on the Ecclesiastical Comrs. of a claim to be indemnified by them, to the extent of any rent paid by defts. to the Comrs., in respect of any payments or damages which they might be ordered to make or pay to pltf. The Comrs. obtained an order giving them leave to deliver a "counterclaim," the order not stating to whom the counterclaim was to be delivered. The Comrs. then delivered to pltf. a defence in which they denied that the coals belonged to pltf., or that defts. were working the coals under any agreement with him. They at the same time delivered a counterclaim to pltf., in which they alleged that the land under which the coal lay was partly freehold & partly copyhold held of a manor of which the Comrs. were lords, & that pltf. had confused the boundaries between the freehold & copyhold, & they claimed to have the boundaries set out:—*Held*: the counterclaim must be struck out.—*EDEN v. WEARDALE IRON & COAL CO.* (1884), 28 Ch. D. 333; 54 L. J. Ch. 384; 51 L. T. 726; 33 W. R. 241, C. A.

Annotations:—As to (1) *Consol. Barclays Bank v. Tom*, [1923] 1 K. B. 221. *Reid. Montgomery v. Foy, Morgan* (1895), 65 L. J. Q. B. 18; *Alcoy, etc., Co. v. Greenhill* [1896] 1 Ch. 19.

360. — Against defendant.]—EDEN v. WEARDALE IRON & COAL CO., No. 359, ante.

361. — —.]—A person who has been served by a deft. with a third party notice is en-

titled to counterclaim against deft.—*BARCLAYS BANK v. TOM*, [1923] 1 K. B. 221; 92 L. J. K. B. 346; 128 L. T. 558, C. A.

362. To whom available.—Plaintiff who is defendant to counterclaim.]—The right given by R. S. C., Ord. 16, r. 48, to a deft., who claims to be entitled to contribution or indemnity over against any person not a party to the action, to issue a third party notice, is applicable to the case of a pltf. in an action against whom a counterclaim is raised by the defence, pltf. in such a case being in the position of deft. to the counterclaim.—*LEVI v. ANGLO-CONTINENTAL GOLD REEFS OF RHODESIA, LTD.*, [1902] 2 K. B. 481; 71 L. J. K. B. 789; 86 L. T. 857; 50 W. R. 625; 18 T. L. R. 720; 46 Sol. Jo. 632, C. A.

SUB-SECT. 5.—PARTICULAR INSTANCES.

363. Action for balance of purchase-money—Claim for return of deposit on ground of fraud.]—*BARTHOLOMEW v. RAWLINGS*, [1876] W. N. 56; Bitt. Prac. Cas. 125; 2 Char. Cham. Cas. 32.

364. Action of ejectment—Counterclaim for specific performance of agreement for lease.]—A counterclaim for specific performance of an agreement to grant a lease of premises was allowed to be put in an action of ejectment.—*HOLMES v. ANDERSON* (1876), 3 Char. Pr. Cas. 53.

365. — Counterclaim asserting right to redeem.]—*ANON.*, [1876] W. N. 23; Bitt. Prac. Cas. 101.

366. — Counterclaim for vesting order.]—An application by an underlessee for a vesting order under Conveyancing Act, 1892 (c. 13), s. 4, may be made by defence & counterclaim in the lessor's action for possession.—*SIR ROGER CHOLMELEY'S SCHOOL AT HIGHGATE (WARDEN, ETC.) v. SEWELL*, [1893] 2 Q. B. 254; 62 L. J. Q. B. 476; 69 L. T. 118; 57 J. P. 680; 37 Sol. Jo. 602; *sub nom. HIGHGATE SCHOOL (WARDEN & GOVERNORS) v. SEWELL*, 41 W. R. 637; 5 R. 501, D. C.

v. ROBERTSON (1898), 2 Terr. L. R. 332.—CAN.

360 i. — Against defendant.]—A person brought into an action as deft. to a counterclaim delivered by the original deft. cannot deliver a counterclaim against such deft.—*GENERAL ELECTRIC CO. v. VICTORIA ELECTRIC LIGHT CO. of LINDSAY* (1895), 16 P. R. 529.—CAN.

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q. Action for balance of purchase-money—Counterclaim for specific performance.]—*MILLAR v. DARROW* (1901), 31 S. C. L. 196.—CAN.

r. — Cancellation with acquiescence—Counterclaim for return of money paid on account.]—*MILLER v. SUTTON* (1910), 15 W. L. R. 206; 20 Man. L. R. 269.—CAN.

t. Action of ejectment—Counterclaim for illegal distress.]—In an action for the recovery of land & for mesne profits, a counterclaim for damages for illegal distress against the pltf. & his bailiff who executed the distress was held good.—*DOCKSTADER v. PHIPPS* (1882), 9 P. R. 204.—CAN.

a. — —.]—In an action for possession of land by a landlord against his tenant, deft. may counterclaim against pltf. for damages for illegal seizure, distress & sale of his goods under an alleged claim for rent of the same land.—*GOWENLOCK v. FERRY* (1896), 11 Man. L. R. 257.—CAN.

b. — Counterclaim for fraudulently inducing making of negotiable

*instrument.]—*PRITCHARD v. PRITCHARD* (1888), 17 O. R. 50.—CAN.*

c. — Counterclaim for moneys paid.]—*TUNNICLIFFE v. POLLARD* (1910), 14 W. L. R. 214; 3 Sask. L. R. 153.—CAN.

d. — —.]—*NICHOL v. NELSON* (1911), 19 W. L. R. 718; 1 W. W. R. 423; 4 Sask. L. R. 315.—CAN.

e. — —.]—In an action to recover possession of land for non-payment of rent, a counterclaim cannot be made.—*FITZGERALD v. DAY* (1880), 6 L. R. Tr. 326.—IR.

f. Account.]—*FISHER v. MCPHEE* (1896), 28 N. S. R. 523.—CAN.

g. Action for goods sold—Counterclaim by assignee of account—Non-delivery of other goods & inferior quality of goods delivered.]—*Held*: to an action by the assignee of an account for the price of lumber & staves delivered by the assignor to deft. under two certain contracts therefor, deft., under R. S. O. 1877, c. 116, ss. 7, 10, & Jud. Act, ss. 11, 16, & rule 127, can set up as a defence a claim for damages for the non-delivery by the assignor to deft. of certain other timber & staves specified in the contracts, & for the inferior quality of those delivered.—*EXCHANGE BANK v. STINSON* (1881), 32 C. P. 158.—CAN.

h. — Counterclaim for breach of warranty.]—*HOGG v. PARK* (1893), 3 Terr. L. R. 171.—CAN.

k. — —.]—*CANADIAN FAIRBANKS CO. v. THOMPSON* (Sask.) (1911), 18 W. L. R. 658.—CAN.

l. — Counterclaim for slander.]—To an action for goods sold & delivered, deft. pleaded, among other things, a counterclaim, claiming damages for words spoken & published by pltf. of, & concerning deft.:—*Held*: the counterclaim should be struck out.—*LINDSAY v. CROWE* (1898), 31 N. S. R. (19 R. & G.) 406.—CAN.

m. — Counterclaim for part of purchase-money paid & for freight.]—*NORTH-WEST THRESHER CO. v. ANDREWS* (Alta.) (1908), 8 W. L. R. 827.—CAN.

n. — Counterclaim for damages for delay in delivery.]—In an action for the price of goods:—*Held*: pltf. were entitled to the full amount claimed, & deft. to damages on his counterclaim for delay.—*EDMONTON IRON WORKS v. CRISTALL* (1910), 15 W. L. R. 659; 3 Alta. L. R. 338.—CAN.

o. — —.]—In an action for the price of goods sold & delivered under a contract which specified no time for delivery:—*Held*: it was competent for the defender to plead a claim of damages for failure to deliver within a reasonable time.—*BRITISH MOTOR BODY CO., LTD. v. THOMAS SHAW (DUNDEE), LTD.*, [1914] S. C. 922.—SCOT.

p. — Dangerous goods sold without warning—Counterclaim for injuries sustained.]—*TOLLINGTON & CO. v. JONES* (Alta.) (1912), 21 W. L. R. 168; 2 W. W. R. 141; 4 D. L. R. 648.—CAN.

367. Account—Account decreed in colonial court in concurrent action.]—*B.*, of London, & *M. & C.*, of Honduras, carried on business in partnership at Honduras as *G. & co. B. & N.* carried on business in partnership in London under the same name. The Honduras firm employed the London firm as their agents under an agreement by which *B.*'s share in the profits of the Honduras firm was to be brought into account as between the two firms to the credit of the English firm. The Honduras partnership was dissolved, & *B.* obtained a decree in Honduras for taking the partnership accounts. Before those accounts had been fully taken, *M. & C.* brought this action in England against the London firm for an account of the dealings between the two firms, alleging debts. To have made improper profits in their agency. Debts. denied having made improper profits, & by counterclaim claimed to have the accounts of the Honduras firm taken. The judge ordered the counterclaim to be struck out:—*Held*: though if *M. & C.* had not brought this action, *B.* would not, after obtaining a decree in Honduras, have been allowed to carry on another action here for the same purpose, still as the two actions were so closely connected that neither of them could be finally wound up independently of the other, *B.* ought not to be prevented from proceeding with his counterclaim so as to be in a position to ask at the trial of this action for such a decree as might be right, having regard to the then position of the Honduras action; & on *N.*'s undertaking to be bound by the proceedings in the Honduras action, the order of the judge must be discharged. —*MUTRIE v. BINNEY* (1887), 35 Ch. D. 614; 58 L. T. 455; 36 W. R. 131; 3 T. L. R. 534, C. A.

368. Action by assignee of marine policy—Counterclaim by underwriters for money owing by

assignor—In respect of matters not connected with policy.]—In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment; for the claim under a policy for a loss is for unliquidated damages to which no set-off could be pleaded at law under the statutes of set-off in an action by the assured, nor in equity in a suit by the assignee, & therefore the debt incurred by the assured is not a "defence" open to the insurers under Policies of Marine Insurance Act, 1808 (c. 80), s. 1, that statute being intended merely to amend procedure, & not to alter the rights of the parties to the policy; nor is the debt incurred, by the assured the subject of "set-off" or "counterclaim" within the meaning of R. S. C., Ord. 19, r. 3.—*PELLAS v. NEPTUNE MARINE INSURANCE CO.* (1879), 5 C. P. D. 34; 49 L. J. Q. B. 153; 42 L. T. 35; 28 W. R. 405; 4 Asp. M. L. C. 213, C. A.

Annotations:—*Apld.* *Baker v. Adam* (1910), 102 L. T. 248. *Refd.* *Gray v. Webb* (1882), 21 Ch. D. 802; *Pickersgill v. London & Provincial Marine & General Insce.*, [1912] 3 K. B. 614. *Mentd.* *Ellis v. Torrington* (1919), 89 L. J. K. B. 369.

369. Action to prove will—Protection order obtained by married woman—Counterclaim to discharge protection order.]—A claim to pronounce against the validity of the will of a married woman who had obtained a protection order, & a counterclaim to discharge the protection order, may be included in the same action.—*MUDGE v. ADAMS* (1881), 6 P. D. 54; 50 L. J. P. 49; 44 L. T. 185; 29 W. R. 307.

Annotation:—*Refd.* *Mahoney v. McCarthy*, [1892] P. 21.

370. Action by gas company for damages for subsidence—Counterclaim for compensation by mineowners.]—In an action by plffs. for damages

dated damages.—*McNAMARA v. SKAIN* (1892), 23 O. R. 103.—*CAN.*

n. Action against town clerk for moneys detained—Counterclaim for salary.]—*SYDNEY CORPN. v. HILL* (1893), 25 N. S. R. (13 L. & G.) 433.—*CAN.*

o. Ship under seizure—Crew taking boat & provisions—Counterclaim against Crown for loss.]—A counterclaim was made against the Crown for damages for loss of a boat & provisions taken by deserting crew whilst the ship was under seizure:—*Held*: as the master was in command, & had full control of the crew, he alone was responsible for the loss, & the counterclaim should be dismissed.—*THE AUKORA* (1896), 5 B. C. R. 178.—*CAN.*

p. Action by sheriff against solicitor for fees & charges—Counterclaim for overcharges in former bills paid to sheriff.]—*TAYLOR v. ROBERTSON* (1901), 31 S. C. R. 615.—*CAN.*

aa. Action for account of gold dust received & for wood supplied—Counterclaim for moneys paid & goods supplied.]—*MORIN v. McDONALD (Y. T.)* (1906), 4 W. L. R. 159.—*CAN.*

bb. Action against receiver for money due & for account—Counterclaim for money paid by mistake.]—*EMERSON CORPN. v. WRIGHT (Man.)* (1907), 5 W. L. R. 365.—*CAN.*

cc. Bridge built for municipal corporation—Contract for day labour—Counterclaim for breaches of warranty.]—*RICHES v. WOLSELEY CORPN. (N. W. P.)* (1907), 6 W. L. R. 372.—*CAN.*

dd. Action for work & labour—Counterclaim for non-compliance with contract.]—*REGINA HEATING & PLUMBING CO. v. GILLESPIE (Sask.)* (1908), 8 W. L. R. 93.—*CAN.*

ee. Counterclaim for improper

q. Counterclaim for damage suffered by acting on defective plans voluntarily supplied.]—*BERLIN MACHINE WORKS, LTD. v. RANDOLPH & BAKER* (1917), 45 N. B. R. 201.—*CAN.*

r. Payment in cash & goods of more than price—Counterclaim for excess.]—*WESTERN GROCERS LTD. v. GEOUJON (Sask.)*, [1925] 3 W. W. R. 406.—*CAN.*

t. Action on negotiable instrument—Counterclaim for damages for breach of trust.]—*CANADIAN SECURITIES CO. v. PRENTICE* (1882), 9 P. R. 324.—*CAN.*

a. Partnership waiving right to rescission of contract for misrepresentation—Remedy of one partner—Counterclaim for deceit.]—In an action on a promissory note, one member of a syndicate cannot ask to have a contract set aside by reason of misrepresentation, the other members not asking for a rescission; his remedy must be by cross-action or counterclaim for deceit.—*MORRISON v. EARLS* (1884), 5 O. R. 434.—*CAN.*

b. Counterclaim for failure to deliver goods according to contract.]—*MARSHALL v. MATHESON* (1898), 31 N. S. R. 238.—*CAN.*

c. Release of collateral security by manager of bank—Counterclaim by makers of note for face value of released securities.]—*HOHELAGA BANK v. LARUE* (1910), 13 W. L. R. 114; 3 Alta. L. R. 42.—*CAN.*

d. Counterclaim for misrepresentation inducing making of note.]—*RAICHLIN v. KATZ (Man.)* (1910), 16 W. L. R. 1.—*CAN.*

e. Counterclaim for rescission of contract.]—*BELL ENGINE & THRESHING CO. v. WESENBERG* (1912), 21 O. W. R. 969; 3 O. W. N. 1169; 3 D. L. R. 550.—*CAN.*

f. Collateral verbal agreement by testator—Counterclaim against executors.]—*BENSON v. HUTCHINGS* (1913), 24 W. L. R. 782; 4 W. W. R. 907; 13 D. L. R. 273.—*CAN.*

g. Counterclaim by one defendant for rescission of agreement for sale of land & cancellation of note.]—*MORRISON v. MARGOLIER & HAMILTON (Man.)* (1914), 28 W. L. R. 508.—*CAN.*

h. Counterclaim for damages for breach of contract under which note given.]—*OLDHAM v. HAMMAY* (1903), 22 N. Z. L. R. 834.—*N.Z.*

k. Action on guarantee bond—Counterclaim not rested on agreement—Set up as arising from position of parties.]—*FEDERAL BANK v. HARRISON* (1884), 10 P. R. 271.—*CAN.*

l. Contesting will—Propounding earlier wills.]—Deft. contested the validity of a will propounded by plff., & also propounded two earlier wills, under which, in the event of the last in date being invalidated, he claimed:—*Held*: this was a proper subject of counterclaim.—*APPLEMAN v. APPLEMAN* (1887), 12 P. R. 138.—*CAN.*

m. Contract conditioned for payment of liquidated sum—Sum payable on non-completion of work by certain day—Whether counterclaim available.]—Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, & that in default he would pay \$50 a week as liquidated damages. The building was not completed until more than four months after the time fixed. The architect was not asked for & did not grant any extension of time.—*Held*: the contract must govern, & defts. were entitled to recover upon their counterclaim the sum provided by the contract as liqui-

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& for an injunction, debts. alleged, by way of counterclaim, that if plffs. were entitled to support for the mains & pipes, plffs. were bound to indemnify them against the loss which would be caused thereby in working their coal & affording such support:—*Held*: plffs. were entitled to support for the pipes, & debts. were entitled to compensation, to be claimed before an arbitrator, but not by counterclaim in the action.—*NORMANTON GAS CO. v. POPE & PEARSON, LTD.* (1883), 52 L. J. Q. B. 629; 49 L. T. 798; 32 W. R. 134, C. A.

Annotations:—*Mentd.* *Truman v. L. B. & S. C. Ry.* (1883), 25 Ch. D. 423; *South Staffordshire Waterworks Co. v. Mason* (1886), 56 L. J. Q. B. 255; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *Schweder v. Worthing Gas Light & Coke Co.* (1912), 77 J. P. 41.

—*See* *CARRIERS*, Vol. VIII., p. 192, Nos. 1218, 1219.

Counterclaim for compensation under Agricultural Holdings Act, 1883 (c. 31).—In action for rent.—*See* *AGRICULTURE*, Vol. II., p. 46, Nos. 251, 252.

371. Action for rescission of release—Counterclaim as to validity.—*MARSHALL v. LANGLEY*, [1889] W. N. 222.

372. Re-opening money-lending transaction.—A transaction of loan re-opened on the ground that the interest charged was extremely excessive in the case of a borrower who was known to the money-lender to be a man of property, there being consequently no risk which justified such an extremely high rate of interest. Money-Lenders Act, 1900 (c. 51), s. 1 (1), empowers the ct. to give relief by way of defence to a money-lender's action, only in respect of the transaction the subject-matter of the action, & as the power to re-open is limited to that transaction, so the account can only be taken in that transaction, or in some transaction part & parcel of it, or which, even though it

may include new obligations, yet comprises what purports to be a close of the dealings in respect of which the money-lender is taking proceedings. If the borrower wishes to re-open an independent transaction with the money-lender, which has been closed by repayment, & is not the subject-matter of the money-lender's action, he must either counterclaim or make a proper application in the money-lender's action to re-open that transaction under Money-Lenders Act, 1890 (c. 51), s. 2 (2), or bring an independent action for that purpose.—*SAUNDERS v. NEWBOLD*, [1905] 1 Ch. 260; 74 L. J. Ch. 120; 92 L. T. 67; 53 W. R. 162; 21 T. L. R. 104; 49 Sol. Jo. 99, C. A.; *affd. sub nom. SAMUEL v. NEWBOLD*, [1906] A. C. 461, H. L.

Annotations:—*Refd.* *Bonnard v. Dott* (1905), 92 L. T. 822. *Mentd.* *Carringtons v. Smith*, [1906] 1 K. B. 79; *Sadler v. Whiteman*, [1910] 1 K. B. 868; *Abrahams v. Dimmock*, [1911] 2 K. B. 372; *Jacobs v. Jolley* (1919), 35 T. L. R. 362; *Crossingham v. Park* (1927), 96 L. J. K. B. 1036.

373. Action under insurance agreement—Counterclaim for rescission & damages for breach of contract—Application to add counterclaim for libel refused.—Plffs., a Canadian co., sued debts., claiming for losses & balance of account under an agreement of re-insurance. Debts. put in a defence, & counterclaimed for rescission & for damages for breach of contract. They afterwards applied for leave to add to their counterclaim a claim for damages for libel:—*Held*: this application must be refused.—*FACTORIES INSURANCE CO., LTD. v. ANGLO-SCOTTISH GENERAL COMMERCIAL INSURANCE CO., LTD.* (1913), 29 T. L. R. 312, C. A.

374. Action for goods sold—Damages for breach of agreement to participate in profits—Sale of business by plaintiff.—In the course of a struggle between rival wholesale dealers to obtain control of the retail tobacco trade in the United Kingdom plffs., a firm of wholesale dealers in tobacco, as a counter offer to an offer made by a rival firm, offered for the next four years to distribute to such customers as purchased direct from them their entire net profits on goods sold by them in the

work.]—Plff. recovered judgment against debt. for the amount of a money claim for work done by plff. in breaking & ploughing land for debt. Debt. counterclaimed for damages for improper ploughing by plff., & this counterclaim was allowed.—*WHITEHEAD v. McCLAVE* (1911), 19 W. L. R. 216.—*CAN.*

c. — *Performance of part only—Counterclaim for breach of contract.*—*MOIR v. O'BRIEN* (1913), 22 W. L. R. 953; 3 W. W. R. 745; 9 D. L. R. 578.—*CAN.*

d. — *Counterclaim for sale of animal.*—*FUERSTER v. AEBIG* (Sask.) (1914), 27 W. L. R. 18.—*CAN.*

e. *Action for assault—Counterclaim for trespass & slander.*—*OICKLE v. OICKLE* (N. S.) (1911), 9 E. L. R. 301.—*CAN.*

f. *Action of trover for threshing machine—Counterclaim for amount due for threshing.*—*DELBIDGE v. PICKERSGILL* (1912), 21 W. L. R. 285.—*CAN.*

g. *Action for recovery of money paid on contract—Counterclaim for failure to accept delivery.*—*KEENAN v. FOSTER* (1912), 23 O. W. R. 153; 4 O. W. N. 168; 6 D. L. R. 861.—*CAN.*

h. *Action on mortgage—Counterclaim for occupation rent.*—*SIEMENS v. DIRKS* (Man.) (1912), 20 W. L. R. 768; 2 W. W. R. 110.—*CAN.*

k. *Action for cancellation of trust agreement for fraud & misrepresentation—Counterclaim for direction to execute trust to execute conveyances.*—*BINGHAM v. SHUMATE* (1912), 20 W. L. R. 812; 2 W. W. R. 147; 17 B. C. R. 350; 3 D. L. R. 121.—*CAN.*

l. *Action to set aside tax sale—Counterclaim for improvements.*—*RICHARDS v. COLLINS* (1912), 23 O. W. R. 499; 4 O. W. N. 375; 27 O. L. R. 390; 9 D. L. R. 249.—*CAN.*

m. *Action for detention of building erected by tenant—Counterclaim for damage to freehold by detachment of building.*—*THISTLETHWAITE v. SHARP* (Sask.) (1912), 20 W. L. R. 471; 1 W. W. R. 946.—*CAN.*

n. *Action on substituted agreement not formally drawn up—Failure to complete work—Counterclaim for moneys advanced.*—*WALLACE BELL CO. v. MOOSE JAW CORPN.* (Sask.) (1912), 21 W. L. R. 36; 2 W. W. R. 221.—*CAN.*

o. *Action for cancellation of mortgage—Counterclaim for principal & interest due.*—Plff. sued for cancellation of a mtge. on land made by him in favour of debt., on the ground of failure of consideration:—*Held*: debt. was entitled to judgment on his counterclaim for principal & interest due on the mtge.—*AYLESWORTH v. LEE* (Sask.) (1912), 21 W. L. R. 48; 3 D. L. R. 286.—*CAN.*

p. *Action for rent—Counterclaim for repairs made by tenant at request of landlord.*—*BURGOYNE v. MALLETT* (B. C.) (1912), 21 W. L. R. 566; 5 D. L. R. 62.—*CAN.*

q. — *Counterclaim for damages for eviction—Covenant for quiet enjoyment—Failure to prove damage.*—*BUTTIMER v. BETTZ* (B. C.) (1914), 26 W. L. R. 705; 6 W. W. R. 22.—*CAN.*

r. — *Counterclaim for compensation for disturbance.*—*ALLEN v. ROONEY* (1910), 45 I. L. T. Jo. 72.—*IR.*

t. *Agreement for division of estate*

—*Counterclaim for assets disposed of by widow & executrix before application for probate.*—*COONEY v. JICKLING* (Man.) (1912), 22 W. L. R. 53; 6 D. L. R. 145.—*CAN.*

a. *Counterclaim for damages sustained by reason of interim injunction.*—*EVANS v. NORRIS* (1912), 22 W. L. R. 818; 3 W. W. R. 532; 8 D. L. R. 652.—*CAN.*

b. — *—Ineson v. Holt Timber Co.* (1913), 5 O. W. N. 577; 30 O. L. R. 209.—*CAN.*

aa. *Counterclaim for moneys overpaid.*—*MCARTHUR v. CARDSTON CORPN.* (Alta.) (1913), 24 W. L. R. 850; 13 D. L. R. 575.—*CAN.*

bb. *Action on lien note—Counterclaim for seizure of goods without justification.*—*CHECHIK v. FINN* (1913), 25 W. L. R. 897; 14 D. L. R. 705.—*CAN.*

cc. *Agreement as to division of commission on sale of land—Counterclaim for share of commission.*—*DIXON v. COMLEY* (Man.) (1914), 27 W. L. R. 276; 16 D. L. R. 882.—*CAN.*

dd. *Action for freight—Delivery of greater part of goods shipped—Counterclaim for damages for non-delivery of small part of shipment—Failure to show special damage.*—*CHARLESON v. ROYAL STANDARD INVESTMENT CO.* (1914), 27 W. L. R. 538; 16 D. L. R. 478; 19 B. C. R. 226.—*CAN.*

ee. *Action on lien-notes or conditional sale agreements—Counterclaim for breach of warranty.*—*INTERNATIONAL HARVESTER CO. OF CANADA v. MAXWELL* (Alta.) (1914), 27 W. L. R. 41.—*CAN.*

ff. *Action for seizure of goods sold under instalment system—Counterclaim*

United Kingdom, & also a certain fixed sum *per annum*. Deft., in consideration of participating in such distribution agreed not to sign any similar agreement with any other firm containing conditions, which would prevent him from buying, displaying, or selling plffs.' goods, & undertook to continue to buy, display, & sell them. Before the expiration of the four years plffs. sold their business.

Plffs. having brought an action against deft. to recover the price of goods sold to him, deft. counterclaimed for damages for breach of the agreement:—*Held*: it was an implied term of the contract that plffs. should continue to carry on their business for four years, & deft. was therefore entitled to recover damages on his counterclaim.—*OGDENS, LTD. v. NELSON, OGDENS, LTD. v. TELFORD*, [1904] 2 K. B. 410; 73 L. J. K. B. 865; 90 L. T. 656; 53 W. R. 71; 20 T. L. R. 466; 48 Sol. Jo. 457, C. A.; *affd.*, [1905] A. C. 109, H. L.

Annotations:—*Mentd.* *Bovine v. Dent & Wilkinson* (1904), 21 T. L. R. 82; *Nathan v. Ogdens* (1905), 21 T. L. R. 775; *Loretto v. Collins, Collins v. Same* (1906), 50 Sol. Jo. 258; *City of Dublin Steam Packet Co. v. R.* (1908), 24 T. L. R. 657; *Lazarus v. Cairn Line of Steamships* (1912), 106 L. T. 378.

375. Action by principals against agent—Counterclaim for damages or undertaking.—*OBERRHEINISCHE METALLWERKE G. M. B. H. v. COCKS*, [1906] W. N. 127.

SECT. 3.—EFFECT OF COUNTERCLAIM WHEN RAISED.

376. Two actions converted into one.—*EVANS v. GANN*, [1875] W. N. 199; 1 Char. Cham. Cas. 70; *sub nom.* *ANON.*, Bitt. Prac. Cas. 24.

377. Treated as statement of claim in cross action—Not affected by discontinuance of action.—*McGOWAN v. MIDDLETON*, No. 314, *ante*.

SECT. 4.—COUNTERCLAIM ARISING AFTER ACTION BROUGHT.

378. Whether counterclaim may be made.—*ANON.*, [1875] W. N. 229; Bitt. Prac. Cas. 38; 1 Char. Cham. Cas. 76.

379. —.]—When deft. delivers a counterclaim under R. S. C., Ord. 19, r. 3, any damages thereby claimed must be limited to the date when the writ was issued.—*ORIGINAL HARTLEPOOL COLLIERIES CO. v. GIBB* (1877), 5 Ch. D. 713; 46 L. J. Ch. 311; 36 L. T. 433; 41 J. P. 660; 3 Asp. M. L. C. 411.

Annotations:—*N.F.* *Beddall v. Maitland* (1881), 17 Ch. D. 174. *Refd.* *Toke v. Andrews* (1882), 8 Q. B. D. 428. *Mentd.* *Fritz v. Hobson* (1880), 42 L. T. 225; *Jones v. Simes* (1890), 59 L. J. Ch. 351; *Barber v. Penley*, [1893] 2 Ch. 447; *A.-G. v. Brighton & Hove Co-op. Asscn.* (1900), 81 L. T. 762; *Land Securities Co. v. Commercial Gas Co.* (1902), 18 T. L. R. 405; *Lowdens v. Keaveney* (1902), 67 J. P. 378; *Gill v. Carson & Nield*, [1917] 2 K. B. 674.

for unpaid instalments.—*MATTHEWS v. HEINTZMAN & Co.* (1914), 27 W. L. R. 675; 16 D. L. R. 522; 7 Sask. L. R. 101.—*CAN.*

k. Counterclaim by creditor of company in liquidation—To set aside deed as invalid against creditors.—*CAPITAL TRUST CORP. v. YELLOW-HEAD PASS COAL & COKE CO., LTD. & REVILLON WHOLESALE, LTD.* (Alta.) (1916), 33 W. L. R. 873; 9 W. W. R. 1275.—*CAN.*

l. Bridge breaking under weight of loaded motor-truck—Action for damages for injury to vehicle—Counterclaim for injury to bridge.—*SERCOMBE v. VAUGHAN TOWNSHIP* (1919), 45

O. J. R. 142; 15 O. W. N. 410; 46 D. L. R. 131.—*CAN.*

m. Action for restitution of conjugal rights—Counterclaim for dissolution of marriage.—In an action for restitution of conjugal rights deft. may counterclaim asking for dissolution of marriage.—*G. v. G.* (Alta.), [1922] 3 W. W. R. 1159.—*CAN.*

n. Impeachment of patent.—It is not competent to a deft. in an action for infringement of a patent for invention to attempt to impeach the patent in question by counterclaim.—*NIELO MANUFACTURING CO. INCORPORATED v. REID*, [1927] 2 D. L. R. 813; [1927] Exch. C. R. 82.—*CAN.*

380. —.]—*BEDDALL v. MAITLAND*, No. 307, *ante*.

381. —.]—*WOOD v. GOODWIN*, [1884] W. N. 17; Bitt. Rep. in Ch. 167.

382. Stage of proceedings at which counterclaim may be made—Whether after issue joined—Effect of making counterclaim to consolidate actions.—Deft., in an action for goods sold & delivered commenced before Nov. 1, 1875, was allowed to add, subsequently to issued joined, a counterclaim founded on fraudulent misrepresentation as to the nature of the goods sold & delivered.—*EVANS v. GANN*, [1875] W. N. 199; 1 Char. Cham. Cas. 70; Bitt. Prac. Cas. 8.

383. —.]—*WARE v. GWYNNE*, [1875] W. N. 240; Bitt. Prac. Cas. 59; 1 Char. Cham. Cas. 79.

384. — Motion for final judgment in action for calls—Counterclaim for rescission of contract on ground of misrepresentation—Delivered after winding-up petition but before judgment.—*Re GENERAL RAILWAY SYNDICATE, WHITELEY'S CASE*, No. 409, *post*.

385. Stay of proceedings to enable counterclaim to be made—Possible dishonouring of bill of exchange.—*FRAKES v. BRESLOW* (1875), Bitt. Prac. Cas. 55; 1 Char. Cham. Cas. 9.

386. — Pending winding up of company.—*FRAKES v. BRESLOW* (1875), Bitt. Prac. Cas. 55; 1 Char. Cham. Cas. 9.

387. — Pending administration suit.—*FRAKES v. BRESLOW* (1875), Bitt. Prac. Cas. 55; 1 Char. Cham. Cas. 9.

388. Counterclaim must be pleaded as arising after action.—A counterclaim founded on facts which have arisen since the action was brought must be pleaded as so arising, so that plff. may be able to confess the plea; & if it is not so pleaded plff. should take out a summons to strike it out, unless it be amended.—*ELLIS v. MUNSON* (1870), 35 L. T. 585, C. A.

Annotation:—*Refd.* *McGowan v. Middleton* (1883), 11 Q. B. D. 161.

SECT. 5.—COUNTERCLAIM TO COUNTERCLAIM.

389. Whether allowed—Cause of action arising after issue of writ—At same time & out of same transaction as defendant's counterclaim.—Plff. may, in his reply to a counterclaim of deft., counterclaim in respect of a cause of action accrued after the issue of the writ, but arising at the same time & out of the same transaction as the counterclaim of deft.—*TOKE v. ANDREWS* (1882), 8 Q. B. D. 428; 51 L. J. Q. B. 281; 30 W. R. 659, D. C.

Annotations:—*Expld.* *Alcoy & Gandia Ry. & Harbour Co. v. Greenhill*, [1896] 1 Ch. 19. *Apprvd.* *Renton Gibbs v. Neville*, [1900] 2 Q. B. 181.

390. — Counterclaim continuing statement of claim—Existing before issue of writ—Statement

o. Counterclaim for declaration of partnership & accounts.—*EDMONDS v. EDMONDS* (1901), 24 N. Z. L. R. 440.—*N.Z.*

PART II. SECT. 4.

378 i. Whether counterclaim may be made.—A deft. cannot counterclaim in respect of a cause of action not matured before the issue of the writ.—*SHARP v. MCBURNE* (1885), 3 Man. L. R. 161.—*CAN.*

378 ii. —.]—A claim arising since the commencement of the action may be made the subject of counterclaim.—*CHAMBERLAIN v. CHAMBERLIN* (1886), 11 P. R. 501.—*CAN.*

Sect. 5.—Counterclaim to counterclaim. Part III.
Sect. 1: Sub-sects. 1 & 2.]

of claim must be amended.]—JAMES v. PAGE (1888), 85 L. T. Jo. 157, D. C.

Annotation:—Consd. Renton Gibbs v. Neville, [1900] 2 Q. B. 181.

391. — Counterclaim as protection against defendant's counterclaim—Not relied on as independent claim.]—In an action for the price of goods supplied defts. counterclaimed for damages for breach by plffs. of a contract. Plffs. in their reply denied that the contract was binding on them, & further alleged that, if it was binding, defts. had committed breaches of it which caused them loss, & they counterclaimed to set off the loss so sustained against defts.' counterclaim. Upon an application to strike out the counterclaim in the reply:—*Held*: as plffs. did not rely upon the counterclaim in the reply as an independent claim, but merely as a protection against defts.' counterclaim, the counterclaim was properly raised in the reply & ought not to be struck out.—RENTON GIBBS & Co., LTD. v. NEVILLE & Co., [1900] 2 Q. B. 181; 69 L. J. Q. B. 514; 82 L. T.

446; *sub nom. GIBBS & Co., LTD. v. NEVILLE & Co.*, 48 W. R. 532, C. A.

392. — By third party defendant to counterclaim—Against defendant to action.]—A person, named in a defence as a party to a counterclaim thereby made, cannot counterclaim against deft.—STREET v. GOVER, GOVER v. STREET (1877), 2 Q. B. D. 498; 46 L. J. Q. B. 582; 36 L. T. 766; 25 W. R. 750, D. C.

Annotations:—Distd. Toke v. Andrews (1882), 8 Q. B. D. 428. Follid. Alcoy & Gandia Ry. & Harbour Co. v. Greenhill, [1896] 1 Ch. 19.

393. — Against original plaintiff & defendant.]—A person not a party to an action, who is brought in by original deft. as deft. to a counterclaim, cannot counterclaim against original plff. & deft.—ALCOY & GANDIA RAILWAY & HARBOUR Co., LTD. v. GREENHILL, [1896] 1 Ch. 19; 65 L. J. Ch. 99; *sub nom. ALCOY & GANDIA RAILWAY & HARBOUR Co., LTD. v. GREENHILL, GREENHILL v. ALCOY, ETC. Co., TRUSTEES, EXECUTORS & SECURITIES INSURANCE CORPN., LTD. v. ALCOY, ETC. Co.*, 73 L. T. 452; 44 W. R. 117; 40 Sol. Jo. 97, C. A.

Annotation. Refd. Birchall v. Birch, Crisp, [1913] 2 Ch. 375.

Part III.—Pleading and Practice.

SECT. 1.—PLEADING.

SUB-SECT. 1.—SET-OFF.

See R. S. C., Ord. 19, rr. 3, 7, 11, 15; Ord. 20, rr. 6, 7; Ord. 21, r. 10; C. C. R., Ord. 10, r. 10; Ord. 22A.

394. Form of plea.]—BENNETT v. WHITE, No. 208, *ante*.

395. — By way of rejoinder.]—Count for money had & received. Plea, as to £55 6s. parcel, etc., a tender of that sum. Replication: that the demand was on one entire contract for a larger sum than that tendered. Rejoinder: that deft. had a set-off, reducing the amount due to that tendered. Demurrer:—*Held*: a bad rejoinder to a good replication.—SEARLES v. SADGRAVE (1855), 5 E. & B. 639; 25 L. J. Q. B. 15; 26 L. T. O. S. 89; 2 Jur. N. S. 21; 4 W. R. 53; 119 E. R. 618.

396. Sufficiency of plea—Several claims—Set-off generally.]—Where the declaration contains several counts, it is not necessary in a plea of set-off of a smaller sum, to specify to which particular part of plff.'s claim the set-off is to be applied.—NOEL v. DAVIS (1838), 4 M. & W. 136; 1 Horn & H. 206; 7 L. J. Ex. 287; 150 E. R. 1375.

397. — Uncertainty.]—Where rooms were

taken at a weekly hiring, to commence Feb. 25, & the landlord afterwards brought an action for rent, & the tenant pleaded set-off as to so much rent as accrued due before & on July 27, the interval of time being twenty-one weeks & five days, without stating how much in money he intended his plea should cover, & without explaining the circumstances of the apparent apportionment of the five days:—*Held*: the plea was bad for uncertainty in this respect; & the ct. would not reject the words " & on," so as to bring the time up only to July 22, which would be the completion of twenty-one weeks.—DUNN v. DI NUOVO (1841), 3 Man. & G. 105; 3 Scott, N. R. 486; 10 L. J. C. P. 318; 5 Jur. 578; 133 E. R. 1075.

398. — To call in shares.]—A plea of set-off, in respect of calls on shares in a joint-stock co., must either state the facts specially or strictly pursue the form given by 8 Vict. c. 16, s. 20; therefore, a plea founded on that statute, but omitting the words, "whereby an action hath accrued," etc., is bad on special demurrer.—MOORE v. METROPOLITAN SEWAGE MANURE Co. (1849), 3 Exch. 333; 6 Dow. & L. 406; 18 L. J. Ex. 164; 12 L. T. O. S. 354; 154 E. R. 872.

PART III. SECT. 1, SUB-SECT. 1.

p. Necessity for pleading.]—FORD v. SPAFFORD (1851), 8 U. C. R. 17.—CAN.

q. —.]—SHARP v. MAXNER (1882), 15 N. S. R. (3 R. & G.) 105.—CAN.

r. —.]—Set-off is a right which must be claimed if a party to an action desires to have the benefit of it.—HARDY v. HARSANT, [1913] T. P. D. 433.—S. AF.

t. Sufficiency of plea—Failure to aver willingness to set off amount against plaintiff's claim.]—JARVIS v. DICKSON (1840), 3 Ont. Dig. 6361.—CAN.

u. —.]—A plea of set-off did not conclude with an offer to set off deft.'s claim against plff.'s claim:—*Held*: bad.—FILLMORE v. CARTWRIGHT (1896), 33 N. B. R. 621.—CAN.

b. —.]—A plea, purporting to be a plea of set-off, is bad if it omit to aver deft.'s willingness to set off the amount against plff.'s claim.—PURCELL v. DOUGLAS (1867), 15 W. R. 1019.—IR.

c. —.]—The declaration contained eleven counts, with damages alleged at £200. Deft. pleaded to the whole declaration that the intestate was indebted to deft. in £250 on a judgment obtained for £138 8s. 7d.:—*Held*: plea defective, in not showing how the £250 was due on the judgment.—BLACKSTONE (ADMINISTRATRIX) v. CHAPMAN (1843), 3 C. P. 221.—CAN.

d. —.]—BOWERMAN v. BROWN (1846), 2 U. C. R. 409.—CAN.

e. — Sale of land—No averment that land had been conveyed.]—

MOORE v. MCKINNON (1861), 21 U. C. R. 140.—CAN.

f. — Facts out of which set-off arises not shown.]—McLAUGHLIN CARRIAGE Co. v. BORDEN (N. S.) (1906), 1 E. L. R. 84.—CAN.

g. Action on bond—Plea of non est factum & set-off.]—Non est factum & a set-off may be pleaded together to debt on bond.—ATKINS v. CLARK (1839), 6 O. S. 33.—CAN.

h. — Pleading set-off as counterclaim—Effect of.]—BENNETT v. WHITE (1889), 13 P. R. 149.—CAN.

k. —.]—GATES v. SEAGRAM (1909), 14 O. W. R. 182; 19 O. L. R. 216.—CAN.

l. —.]—RYAN v. FRASER (1884), 16 L. R. Ir. 253.—IR.

SUB-SECT. 2.—COUNTERCLAIM.

See R. S. C., Ord. 19, rr. 3, 7, 11, 15; Ord. 20, rr. 6, 7; Ord. 21, r. 10; C. C. R., Ord. 10, r. 10; Ord. 22A.

399. Must be pleaded—Notice in correspondence insufficient.]—THE SAXICAVA, No. 508, *post*.

400. What must be pleaded—All facts relied on by defendant.]—The same rules apply to a counterclaim as to a statement of claim; therefore the facts on which deft. relies must be stated in the body of his counterclaim, & cannot be inferred from pltf.'s statement, & if deft. wants alternative or general relief, the counterclaim must ask it. —HOLLOWAY v. YORK (1877), 25 W. R. 627.

Annotations:—**Consd.** Birmingham Estates Co. v. Smith (1880), 13 Ch. D. 506. **Refd.** Crowe v. Barnicot (1877), 6 Ch. D. 753. **Mentd.** Pearce v. Bastable's Trustee in Bankruptcy, [1901] 2 Ch. 122.

401. ———.]—A counterclaim must contain in itself a specific statement of the facts upon which reliance is placed for the relief claimed. It is not sufficient that the facts relied upon appear in the statement of defence, even though that & the counterclaim form one continuous document. A counterclaim defective in this respect was dismissed with costs, leave to amend being, under the circumstances of the case, refused.—CROWE v. BARNICOT (1877), 6 Ch. D. 753; 46 L. J. Ch. 855; 37 L. T. 68; 25 W. R. 789.

Annotation:—**Distd.** Lees v. Patterson (1878), 7 Ch. D. 866.

402. Form of plea—Continuous document with defence.]—CROWE v. BARNICOT, No. 401, *ante*.

403. ———.]—Pltf. commenced an action & immediately obtained a writ of *ne exeat* against deft., who was arrested, but paid the amount for which the writ was marked to the sheriff, & obtained his release. By his statement of defence deft. alleged that the writ had been improperly obtained, & claimed damages for his arrest. The paragraphs in which deft. made the allegation that the writ had been improperly obtained & claimed damages, were numbered consecutively with the other paragraphs of the statement of defence, & were not headed separately as a counterclaim:—**Held**: the pleading was good as a counterclaim.—LEES v. PATTERSON (1878), 7 Ch. D. 866; 47 L. J. Ch. 616; 38 L. T. 451; 26 W. R. 399.

404. ———.]—**Facts relied on appearing in defence—Necessity for repetition in counterclaim.]**—CROWE v. BARNICOT, No. 401, *ante*.

405. ———.]—(1) A counterclaim can be made only where an action can be brought, therefore, deft. is estopped from counterclaiming for that in respect of which he has already obtained judgment.

(2) A counterclaim need not repeat *in extenso* the statements relied upon, but can refer to any statements in the antecedent pleadings, for instance, to the paragraphs simply by number.—BIRMINGHAM ESTATES CO. v. SMITH (1880), 13 Ch. D. 506; 49 L. J. Ch. 251; 42 L. T. 111; 28 W. R. 666.

406. Particulars of plea.]—Particulars ordered of defts.' counterclaim of damages for breach of

contract in an action for goods sold & delivered.—ANON., [1875] W. N. 220; 1 Char. Cham. Cas. 36, 75; Bitt. Prac. Cas. 30.

407. ———.]—To a statement of claim alleging that all moneys due upon a mtgce. had been paid, & claiming delivery of the property, the mtgce. put in a counterclaim alleging that the mtgce. was made to cover all sums due on current account; that pltf. was indebted to deft. in a sum of £547 as commission for finding a purchaser for his business; that previous to the sale of the business pltf. had been indebted to deft. in the sum of £3,135 17s. 5d., & that deft. had received certain sums on account, but that a large balance was still due; & asking for an account. Pltf. applied for particulars of the balance by the counterclaim alleged to be due to deft.:—**Held**: pltf. was entitled to particulars of the moneys received by deft., from which he arrived at the balance alleged by the counterclaim to be due.—KEMP v. GOLDBERG (1887), 36 Ch. D. 505; 56 L. T. 736; 36 W. R. 278.

408. Claim for relief—Must be specified—Alternative or general relief.]—HOLLOWAY v. YORK, No. 400, *ante*.

409. Time for pleading—Winding up of company—Counterclaim delivered before winding-up order.]—Where a co. applied under R. S. C., Ord. 14, for leave to sign final judgment in an action for calls, & leave to defend was obtained by the shareholder upon an affidavit stating his intention to counterclaim for rescission of the contract to take shares on the ground of misrepresentation, & disclosing no other ground of defence, & this occurred before the presentation of a winding-up petition, but the counterclaim was delivered after the petition & before the winding-up order made upon it:—**Held**: the shareholder was not too late to apply for relief.—*Re* GENERAL RAILWAY SYNDICATE, WHITELEY'S CASE, [1900] 1 Ch. 365; 69 L. J. Ch. 250; 82 L. T. 134; 48 W. R. 440; 16 T. L. R. 176; 44 Sol. Jo. 228; 8 Mans. 74, C. A.

Annotations:—**Refd.** The SAXICAVA, [1921] P. 131. **Mentd.** First National Reinsurance v. Greenfield, [1921] 2 K. B. 260.

410. Amendment of counterclaim—Delay.]—In an action for specific performance of an agreement to grant pltf. who was in possession a lease of a brickfield deft. delivered a defence admitting the agreement, & expressing his readiness to perform it; he also counterclaimed for sums alleged to be due for rent under the agreement, & labour & materials supplied to pltf. in connection with the property. Three months after joinder of issue, & after notice of trial, deft. applied by summons under R. S. C., 1883, Ord. 18, r. 2, for leave to amend his defence & counterclaim & to join therewith a claim for the recovery of the land. Summons dismissed with costs on the ground of new case, & delay.—CLARK v. WRAY (1885), 31 Ch. D. 68; 55 L. J. Ch. 119; 34 W. R. 69; *sub nom.* CLARK v. WRAY, WRAY v. CLARK, 53 L. T. 485.

10 O. W. R. 36, 848; 15 O. L. R. 187.—**CAN.**

—CAMPBELL v. JOYCE (Man.) (1910), 15 W. L. R. 29; *affd.*, 15 W. L. R. 291.—**CAN.**

t. ———.]—Where a counterclaim has been set up there is no decision showing that it cannot be enlarged or amended.—HENDERSON v. HENDERSON (1916), 27 O. W. R. 422; 38 O. L. R. 97.—**CAN.**

s. ———.]—WHITTON v. HANTON (1885), 16 L. R. Ir. 137.—**IR.**

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PART III. SECT. 1, SUB-SECT. 2.

m. *Necessity for pleading.]*—MCKAY v. O'NEIL (1890), 22 N. S. R. (10 R. & G.) 346.—**CAN.**

n. *What must be pleaded.]*—A plea of counterclaim should show that it was payable before & at the commencement of the action.—SHARP v. MCBURNE (1885), 3 Man. L. R. 161.—**CAN.**

406 i. Particulars of plea.]—MOYIE LUMBER & MILLING CO. v. MAY (N. W. T.) (1905), 1 W. L. R. 152.—**CAN.**

o. *Amendment of counterclaim—To bring within jurisdiction of court.]*—Counterclaim for amount over the jurisdiction of the County Ct. cannot be amended after plea objecting to it on that ground.—BATES v. CRAYTHORNE (1886), 19 N. S. R. (7 R. & G.) 250; 7 C. L. T. 347.—**CAN.**

p. ———.]—FEINDEL v. ZWICKER (1898), 31 N. S. R. 233; Q. R. 29 S. C. 516.—**CAN.**

q. ———.]—PARKER v. TAIN (1908),

Sect. 1.—Pleading: Sub-sect. 3, A. & B. Sect. 2 Sub-sect. 1.]

SUB-SECT. 3.—PLEADING IN ANSWER TO SET-OFF OR COUNTERCLAIM.

A. Set-Off.

See R. S. C., Ord. 25, rr. 2-4, Ord. 28, rr. 1 3-6.

411. Sufficiency of plea—Payment.]—Pltf. may plead in bar to the further maintenance of a set off, as by payment, etc.—*BRISCOE v. HILL* (1842), 10 M. & W. 735; 12 L. J. Ex. 126; 7 Jur. 306; 152 E. R. 668.

Annotations:—Mentd. Dawson v. Wrench (1849), 12 L. T. O. S. 405; S. E. Ry. v. Railway Comrs. (1881), 6 Q. B. D. 586.

412. ——— By unauthorised agent—Ratified after plea.]—It is a good answer to a plea of set-off, that the amount has been paid by a person professing to act as agent for & on account of pltf., though without his authority; & that the latter ratified the act at the time of the trial.

The treasurer of a corpn. paid their clerk, deft., the amount of his year's salary both parties believing at the time that the treasurer had the authority of the corpn. to make such payment; but the treasurer had no such authority, & the corpn. afterwards repudiated the payment & dismissed deft. from their service. In an action against deft. for the recovery of certain moneys paid to him on account of the corpn.:—*Held*: the corpn. was entitled, at the trial to ratify the act of their treasurer, & deft. could not set off the amount of his salary as due to him from the corpn.—*SIMPSON v. EGGINGTON* (1855), 10 Exch. 845; 24 L. J. Ex. 312; 19 J. P. 776; 156 E. R. 683.

Annotation:—Refd. *Re* Rowe, *Ex p.* Derenburg, (1904) 2 K. B. 483.

Set-off as between principal & agent.]—See Part I., Sect. 10, sub-sect. 3, *ante*.

413. ——— Character in which plaintiff sues—Trustee.]—To an action for non-payment of £45, the balance due upon a building agreement, deft. pleaded a set-off of a judgment for £40 2s. obtained by him in an action against pltf. To this plea pltf. replied that, before the recovery of the judgment, he for a good consideration assigned the debt of £45 to J.: that deft. before the recovery of the judgment had notice of the assignment; & that he, pltf., was suing as trustee for J.:—*Held*: the replication was bad, as disclosing no legal answer to the plea.—*WATKINS v. CLARK* (1862), 12 C. B. N. S. 277; 6 L. T. 819; 142 E. R. 1149.

Annotation:—Refd. *Watson v. Mid-Wales Ry.* (1867), 36 L. J. C. P. 285.

414. ———.]—In an action for freight deft. pleaded a set-off, to which pltf. replied, on equitable grounds, that while the freight was in the course of being earned he assigned it for value to A., of which deft., before the debt became due, & before the action was brought, had notice; & that pltf. was suing only as trustee for A.:—*Held*: no answer to the plea. *Qu.*: if the replication

had alleged that deft. had notice before the subject-matter of the set-off accrued.—*WILSON v. GABRIEL* (1863), 4 B. & S. 243; 2 New Rep. 321; 8 L. T. 502; 11 W. R. 803; 1 Mar. L. C. 346; 122 E. R. 450.

Annotation:—Apld. *Christie v. Taunton, Delmard, Lane, & Taunton, Delmard, Lane*, (1893) 2 Ch. 175.

415. ———.]—*MACDONALD v. BODE* (1876), 20 Sol. Jo. 241; Bitt. Prac. Cas. 102; 2 Char. Cham. Cas. 2.

Annotation:—Expld. *Naylor v. Farrer* (1878), 26 W. R. 809.

416. ———.]—In an action to recover a debt due to pltf. as a trustee, deft. is entitled to set up as a defence that the *cestui que trust* is indebted to him in a sum for unliquidated damages exceeding the amount of the claim.

Jud. Act, 1873 (c. 66), & more especially the rules, distinctly put an unliquidated claim on the same footing as a liquidated claim for the purpose of set-off (*CHANNELL, J.*).—*BANKES v. JARVIS*, [1903] 1 K. B. 549; 72 L. J. K. B. 267; 88 L. T. 20; 51 W. R. 412; 19 T. L. R. 190, D. C.

Annotations:—Distd. *McCreagh v. Judd*, [1923] W. N. 174. *Refd.* *Baker v. Adams* (1910), 102 L. T. 248.

417. ——— To set-off for damages for negligence—Plea of insurance against damage.]—In an action of wages by master against shipowner, deft., by way of set-off & counterclaim, claimed damages for the loss of the ship by the negligence of pltf. Reply, that the ship was insured against a total loss, & that the underwriters had paid or agreed to pay to the owners the whole amount payable by them on a total loss:—*Held*: the reply was bad, because pltf. had not pleaded that the money had been actually paid to deft., or that the counterclaim had been brought without the authority of the underwriters.—*THE SIR CHARLES NAPIER* (1880), 5 P. D. 73; 42 L. T. 167; 28 W. R. 718; 4 Asp. M. L. C. 231, C. A.

Statute of Limitations.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 323, 324, 544, 545.

Effect of failure to plead.]—See Sect. 2, sub-sect. 5, *post*.

B. Counterclaim.

See R. S. C., Ord. 21, r. 14, Ord. 25, rr. 2, 3, 4, Ord. 28, rr. 1, 3, 4, 5, 6.

418. Sufficiency of plea—Whether specific allegations must be dealt with—Sufficiency of general plea.]—(1) A reply joining issue generally to a counterclaim will not be ordered to be amended or struck out as embarrassing under R. S. C., Ord. 27, r. 1, or Ord. 59, because it does not deal specifically with the allegations of the counterclaim.

(2) In an action for an account of rents & profits claimed to set off a sum due to him by pltf. under an award. Pltf. having joined issue generally, deft., on the ground that the facts stated in the counterclaim must be taken to be admitted under R. S. C., Ord. 19, rr. 17-20, moved under R. S. C., Ord. 40, r. 11, & R. S. C., Ord. 33, for an

PART III. SECT. 1, SUB-SECT. 3.—A.

b. Sufficiency of plea—Set-off on note—Note given to raise money to pay partnership debt.]—To a plea of set-off on a note:—*Held*: the pltf., under a replication of *numquam indebtedatus*, might show that the note was given by him to deft. while they were in partnership, to raise money to pay off a debt of the firm.—*MILLER v. THOMPSON* (1852), 10 U. C. R. 391.—**CAN.**

c. ———.] — *DENNISON v. KNOX* (1864), 24 U. C. R. 119.—**CAN.**

d. ——— Explanation of delivery of goods.]—*BISHOP v. ROBINSON* (1867), 12 N. B. R. (1 Han.) 68.—**CAN.**

e. ——— *Estoppel.]*—*MILLER v. BOSS* (1883), 23 N. B. R. 439.—**CAN.**

f. Plaintiff declaring specially—Effect of.]—A pltf. cannot, by declaring specially, where he could recover on the money counts alone, deprive deft. of his right of set-off.—*MILLER v. MUNRO* (1839), 3 Ont. Dig. 6360.—**CAN.**

g. Right of plaintiff to plead matters arising subsequent to action brought.]—If a claim to liquidated damages by a deft. is pleaded by way of set-off, pltf. may not reply matters arising subsequent to action brought.—*MCNAMARA v. SKAIN* (1892), 23 O. R. 103.—**CAN.**

PART III. SECT. 1, SUB-SECT. 3.—B.

418 i. Sufficiency of plea—Whether specific allegations must be dealt with—Sufficiency of general plea.]—*FORSYTH v. LAWRENCE* (1887), 19 N. S. R. (7 R. & G.) 148; 7 C. L. T. 174.—**CAN.**

418 ii. ———.]—A deft. by counterclaim shall not deny generally the allegations of the counterclaim, but shall set forth the facts upon which he relies even if this may involve the assertion of a negative.—*HOWSON v. THOMPSON* (1921), 67 D. L. R. 195; 51 O. L. R. 299.—**CAN.**

418 iii. ———.]—Pltf., under Ord. 19, r. 17, must deal specifically

account of what was due to him, or, in the alternative, that the reply might be struck out or amended under R. S. C., Ord. 27, r. 1, & R. S. C., Ord. 59:—*Held*: an order for an account could not be made on the counterclaim without going into the particulars of pltf.'s claim, the balance mentioned in R. S. C., Ord. 22, r. 10, being the balance at the hearing of the action; & the reply could not be ordered to be struck out or amended.—*ROLFE v. MACLAREN* (1876), 3 Ch. D. 106; 24 W. R. 816; 3 Char. Pr. Cas. 82.

Annotations:—As to (1) *N.F. Benbow v. Low* (1880), 13 Ch. D. 553. As to (2) *Folld. Aitken v. Dunbar* (1877), 16 L. J. Ch. 489.

419. ———.—Pltfs. asserted the right to use defts.' name as a trade name, for goods manufactured & sold by themselves, & alleging that they had recently heard that defts. claimed the exclusive right to the name, claimed a declaration that pltfs. were entitled to use the name, & also an injunction to restrain deft. from representing that the goods manufactured by them, pltfs., were an imitation of the goods manufactured by defts. Defts. by their statement of defence made a number of allegations as to the origin & history of the manufacture, & stated that they had discovered that pltfs. had recently sold goods manufactured by them, pltfs., with a mark greatly resembling that of defts. Then, by counterclaim, defts. repeated & relied on the allegations as if they had been repeated verbatim, & alleging misrepresentation, claimed an injunction to restrain pltfs. from selling goods not manufactured by defts., as & for goods manufactured by defts. To the counterclaim pltfs. replied by joining issue:—*Held*: the allegations in the counterclaim must be specifically dealt with, & the reply was irregular.—*BENBOW v. LOW* (1880), 13 Ch. D. 553; 49 L. J. Ch. 259; 42 L. T. 14; 28 W. R. 384.

420. ———.—To a counterclaim . . . you must answer specifically (*HALL, V.-C.*).—*WILLIAMSON v. LONDON & NORTH WESTERN RY. CO.* (1879), 12 Ch. D. 787; 48 L. J. Ch. 559; 27 W. R. 724.

Annotation:—*Mentd. Darbyshire v. Leigh*, [1896] 1 Q. B. 554.

421. ———.—To counterclaim for damages for negligence.—*Plea of insurance against damage.*—*THE SIR CHARLES NAPIER*, No. 417, *ante*.

422. ———.—Agreement to forego claim.—Claim set up despite agreement.—All the directors of a co. in liquidation mutually agreed to forego their respective claims to directors' fees then owing. The liquidator was a party to the agreement on behalf of the co. Subsequently the co. sued one of the directors for work done, & the director counterclaimed against the co. for his fees earned

previously to the agreement:—*Held*: although there was no consideration for the agreement moving from the co., the fact of the liquidator being a party to it rendered it binding as between the director & the co.; & the agreement was, therefore, a good defence to the counterclaim.—*WEST YORKSHIRE DARRACQ AGENCY, LTD. v. COLERIDGE*, [1911] 2 K. B. 326; 80 L. J. K. B. 1122; 105 L. T. 215; 18 Mans. 307.

423. Time for delivery of reply.—*RUMLEY v. WINN*, No. 501, *post*.

424. Admission of allegations in counterclaim.—What amounts to.—(1) Deft. to an action delivered a statement of defence & counterclaim. The defence contained various admissions & allegations of fact, & then, by way of counterclaim, deft. repeated "the several matters hereinbefore stated & admitted," & claimed certain relief. Pltf., by his reply, after making certain admissions & joining issue on the rest of the statement of defence, "in reply to the statements alleged by way of counterclaim" repeated "the several matters stated in the statement of claim & the admissions hereinbefore made," & said that, "save as stated in the statement of claim or hereinbefore admitted, each of such allegations is untrue":—*Held*: this amounted to an admission of all the statements alleged by way of counterclaim. But leave to amend was given.

(2) The issues of fact on the claim & the counterclaim being identical:—*Held*: pltf. was not entitled to adduce fresh evidence in reply on the counterclaim.—*GREEN v. SEVIN* (1879), 13 Ch. D. 589; 49 L. J. Ch. 166; 41 L. T. 724; 44 J. P. 282.

Annotations:—*Generally, Mentd. Lee v. Soames* (1888), 59 L. T. 366; *Phillips v. Howell*, [1901] 2 Ch. 773; *Stickney v. Keeble*, [1915] A. C. 386.

425. Evidence in answer to counterclaim.—Right of plaintiff to adduce fresh evidence.—Issues of fact on claim & counterclaim identical.—*GREEN v. SEVIN*, No. 424, *ante*.

426. Statute of Limitations.—*LOWE v. BENTLEY*, No. 327, *ante*.

Effect of default of pleading.—*See Sect. 2, sub-sect. 4, post*.

SECT. 2.—PRACTICE.

SUB-SECT. 1.—IN GENERAL.

See R. S. C., Ord. 21, rr. 10, 11.

427. Jurisdiction.—To try counterclaim.—Inferior court.—Extent of power to grant relief.—Under Jud. Act, 1873 (c. 66), ss. 89, 90, an inferior ct. has jurisdiction to entertain a claim set up by way

with every allegation of fact in the counterclaim which he does not admit to be true. Pltf. is not entitled to reply to a counterclaim by a mere joinder of issue. He must plead to it as though it were a statement of claim.—*CHENEY v. McDOWELL*, [1924] 1 D. L. R. 262; 51 N. B. R. 262.—*CAN.*

418 iv. ———.—*DUNNE v. CLANCY* (1880), 6 L. R. Lr. 395.—*IR.*

423 i. Time for delivery of reply.—*MORGAN v. MACDONALD*, [1924] 4 D. L. R. 457; [1924] 3 W. W. R. 374; 19 Sask. L. R. 10.—*CAN.*

426 i. Statute of Limitations.—*WATEROUS ENGINE WORKS (CO. v. BALT.* (1903), 7 Terr. L. R. 32.—*CAN.*

h. Joinder of issue.—*IRWIN v. TURNER* (1891), 16 P. R. 349.—*CAN.*

k. Right of plaintiff to plead matters arising subsequent to action brought.—If a claim of liquidated damages by a deft. is pleaded by way of counterclaim, pltf. may reply matters

arising subsequent to action brought.—*McNAMARA v. SKAIN* (1892), 23 O. R. 103.—*CAN.*

l. Necessity for filing reply.—*KIRKLAND v. HOLE* (1912), 7 Terr. L. R. 64.—*CAN.*

m. Amendment.—An amendment to a statement of defence to a counterclaim to set up undue influence as a ground for making certain transfers of land, made at the trial & unsupported by material, should not be allowed; the application should be made in chambers & the record completed before trial.—*CRIPPS v. WORSNER* (1916), 31 W. L. R. 1082.—*CAN.*

n. Counterclaim disclosing no cause of action.—*ALLEN v. WAMBOLT* (1921), 62 D. L. R. 651; 54 N. S. R. 550.—*CAN.*

o. Action based on crime.—Absence of plea of laying of criminal charge.—The objection that a counterclaim prays for relief against a criminal

offence without disclosing that a criminal charge has been laid in respect thereto is met by Criminal Code, s. 13.—*MOYLE v. McLAUGHLAN (Man.)* (1922), 66 D. L. R. 767; [1922] 1 W. W. R. 782.—*CAN.*

p. Necessity for order.—Jud. Act, 1909, Ord. 23, r. 1, applies to a reply to a counterclaim.—*CHENEY v. McDOWELL*, [1924] 1 D. L. R. 262; 51 N. B. R. 262.—*CAN.*

PART III. SECT. 2, SUB-SECT. 1.

427 i. Jurisdiction.—To try counterclaim.—Inferior court.—Extent of power to grant relief.—Where, although a deft. to a District Ct. action counterclaims for a liquidated amount & unliquidated damages in amounts aggregating over \$800, he expressly abandons all of his counterclaim in excess of said sum, the District Ct. has jurisdiction to give judgment on the counterclaim for an amount not

Sect. 2.—Practice: Sub-sect. 1.]

of counterclaim although it is in respect of matters which arose beyond its local jurisdiction, but the power to grant relief in respect of such counterclaim is limited to the same amount which pltf. has claimed in the action.—*DAVIS v. FLAGSTAFF MINING Co.* (1878), 3 C. P. D. 228; 47 L. J. Q. B. 503; 38 L. T. 769; 28 W. R. 431, C. A.

Annotation:—*Apld.* Webster v. Armstrong (1885), 1 T. L. R. 213.

428. — Judge of Admiralty Division.]—The owners, master, & crew of a steam tug, all foreigners out of the jurisdiction, commenced an action *in rem* in the Admty. Div. against defts., owners of a British ship & her freight, for salvage services alleged to have been rendered to defts.' vessel in Northern Russia. Defts., besides defending the action, set up a counterclaim *in personam* for demurrage alleged to be due by the owners of the steam tug under two charterparties. On an application by pltf. to strike out the counterclaim:—*Held*: a judge of the Admty. Div., as a judge of the High Ct., has jurisdiction to try such a counterclaim, & the discretion of the judge, in refusing to strike out the counterclaim on the ground of embarrassment, had been rightly exercised.

Defts. would not be in a position to bring this counterclaim in a separate action, for the reason that pltf. are out of the jurisdiction (COLLINS, M.R.).—*THE CHEAPSIDE*, [1904] P. 339; 73 L. J. P. 117; 91 L. T. 83; 53 W. R. 120; 20 T. L. R. 655; 9 Asp. M. L. C. 595, C. A.

Annotation:—*Refd.* Bow, McLachlan v. Camosun, [1909] A. C. 597.

County courts.]—*See* COUNTY COURTS, Vol. XIII., pp. 466, 467, Nos. 152–161.

429. Set-off—Whether plaintiff obliged to prove whole demand.—In first instance.]—Where there are cross demands, & deft. pleads a set-off, pltf. is not obliged to prove the whole of his account in the first instance but may prove only the balance which he claims, & after deft. has proved his set-off, pltf. may prove other parts of his accounts to show that a larger sum was due.—*WILLIAMS v. DAVIES* (1833), 1 Cr. & M. 464; 1 Dowl. 647; 3 Tyr. 383; 2 L. J. Ex. 102; 149 E. R. 481.

Annotations:—*Refd.* Jacobs v. Tarleton (1848), 12 Jur. 517; Wright v. Wilcox (1850), 15 L. T. O. S. 228. *Mentd.* Doe d. Nicoll v. Bower (1851), 16 Q. B. 805.

430. — Particulars—Non-compliance with order for—Whether evidence of set-off excluded.]—Deft. who has not complied with a judge's order to deliver particulars of set-off with dates, will not be allowed to give any evidence of his set-off. Particulars delivered in which the only dates were "from Jan. 1823 to Jan. 1834," are not a compliance with such an order.—*SWAIN v. ROBERTS* (1835), 1 Mood. & R. 452, N.P.

431. — — — — —.]—Where deft. pleads a set-off, & an order is obtained directing him, within a limited time, to deliver the particulars thereof, or be excluded from giving same in evidence, & he neglects to comply therewith, a judge *at nisi prius* has no power to exclude evidence tendered in proof of such plea:—*Semle*: proper course to be pursued by pltf. in such a case is to apply for an attachment against deft.; or,

if there be other pleas pleaded, to apply to a judge to strike out such plea of set-off.—*PAYNE v. DAVIS* (1845), 5 L. T. O. S. 220; 9 Jur. 734.

432. — — — — —.]—If a judge's order for particulars of set-off directs them to be given with dates, but the particulars are delivered without dates, pltf. need not object or take out a summons for better particulars; & deft. cannot at the trial give evidence of his set-off. But after verdict for pltf., the ct. granted a new trial, on an affidavit of merits, & on payment of costs & bringing the money into ct.—*IBBETT v. LEAVER* (1847), 16 M. & W. 770; 4 Dow. & L. 716; 2 New Pract. Cas. 236; 16 L. J. Ex. 208; 9 L. T. O. S. 129; 11 Jur. 415; 153 E. R. 1401.

Annotation:—*Consd.* Hull v. Bollard (1856), 1 H. & N. 134.

433. — — — — —.]—Where deft. has failed to deliver particulars of set-off pursuant to a judge's order, he is precluded from giving evidence of any set-off at the trial.—*YOUNG v. GEIGER* (1848), 6 C. B. 541; 6 Dow. & L. 337; 18 L. J. C. P. 43; 12 Jur. 983, n.; 136 E. R. 1360.

434. — — — — — Waiver.]—An order was obtained for delivery of particulars of set-off within a fortnight: they were not delivered for five weeks, but after the delivery an order was made by consent for the amendment of the declaration. This is a waiver of the irregularity in the delivery of the particulars.—*WALLIS v. ANDERSON* (1829), Mood. & M. 291, N. P.

Annotations:—*Distd.* Ibbett v. Leaver (1847), 2 New Pract. Cas. 236. *Refd.* Hull v. Bollard (1856), 1 H. & N. 134.

435. — — — — — Sufficiency of compliance.]—If pltf. obtain an order for the particulars of deft.'s set-off, & upon an application to deft.'s attorney to deliver a particular under the order, he refers to another already delivered by his client, he is not obliged to deliver a fresh particular.—*HATCHET v. MARSHAL* (1793), Peake, 229; 170 E. R. 139, N. P.

436. — — — — — Explanatory of plea.]—The particulars of set-off are merely explanatory of the plea of set-off, & pltf. by putting them in evidence to prove his case, *e.g.* to rebut the defence of Stat. Limitations, does not thereby admit the correctness of their contents.—*BURKITT v. BLANSHARD* (1848), 3 Exch. 89; 18 L. J. Ex. 34; 12 L. T. O. S. 221; 154 E. R. 768.

437. — — — — —.]—To a declaration on the common counts, deft. pleaded a set-off, & delivered particulars of his set-off with the plea. He afterwards withdrew this plea, & pleaded *puis darrein continuance* that there had been a controversy between pltf. & himself about other matters in addition to those in the cause, that a balance of accounts had been struck between the parties, that pltf. admitted the set-off pleaded to be due, & that it was agreed that the balance then struck should be paid by instalments, etc., & that it was further agreed that deft. should release pltf. from all liability on a certain contract, etc.; & that this agreement was accepted by pltf. in satisfaction of his cause of action. Pltf. replied that he had been induced to enter into this agreement by fraud:—*Held*: the particulars of set-off, delivered with the original plea of set-off, & in which particulars the statement of accounts differed from the statement upon which the

exceeding \$800 in the aggregate. District Cts. Act, 1920, s. 38, applies to cases where the counterclaim, as brought before the District Ct., is one with which it would not deal as a substantive claim.—*MINKY v. RYLAND*, (1925) 4 D. L. R. 398; [1925] 3 W. W. R. 565.—*CAN.*

434.1. Set-off—Particulars—Non-compliance with order for—Waiver.]—Where a deft. delivers his particulars of set-off on a day later than that appointed by judge's order, & pltf.'s attorney, through his clerk, accepts & retains them without objections, such conduct is a waiver of all objections

on the ground of delay.—*McLELLAN (EXECUTOR) v. McMANUS* (1843), 1 U. C. R. 271.—*CAN.*

q. — — — — —.]—*COWER'S EXECUTORS v. STEPHENS* (1842), 6 I. L. R. 124.—*IR.*

r. — Notice.]—A notice of set-

agreement was founded, were admissible in evidence for the purpose of explaining the plea.—*BUCKMASTER v. MEIKLEJOHN* (1853), 8 Exch. 634; 1 C. L. R. 839; 22 L. J. Ex. 242; 21 L. T. O. S. 62; 155 E. R. 1506.

438. Counterclaim—Raised against co-defendant—To whom to be delivered.]—Counterclaims raised by deft. against co-deft. are to be delivered to pltf. & co-deft., & formal notice need not be given to co-deft.—*SHEPARD v. BEANE* (1876), 2 Ch. D. 223; 45 L. J. Ch. 429; 24 W. R. 363; 2 Char. Pr. Cas. 58.

Annotations:—N.F. Furness v. Booth (1876), 4 Ch. D. 586. *Dtd. Cook v. Dey* (1876), 3 Char. Pr. Cas. 65; *Harris v. Gamble* (1877), 6 Ch. D. 748.

439. —Leave to file—Refused on ground of delay.]—Where deft. in a foreclosure suit obtained an order for leave to file a counterclaim by way of set-off, & through the negligence of his solr. no counterclaim was delivered, & a decree of foreclosure was made in his absence, an application more than six months afterwards for leave to file the counterclaim was refused on the ground of delay.—*WILKINS v. BEDFORD* (1876), 35 L. T. 622.

440. —Against plaintiff & third party—Right of third party to interrogate plaintiff.]—M. commenced an action against K. K. delivered a defence & counterclaim, to which M. & I. were defts. I. applied for leave to exhibit interrogatories for the examination of M.:—*Held*: as I. was not a deft. in the original action, & I. & M. were co-defts. in the counterclaim, they were not opposite parties, & I. had no right to interrogate M.

Except as regards mode of trial, a counterclaim is a separate action (*COTTON, L.J.*).—*MOLLOY v. KILBY* (1880), 15 Ch. D. 162; 29 W. R. 127, C. A. *Annotations:—Distd. Eden v. Weardale Iron & Coal Co.* (1887), 34 Ch. D. 223. *Apld. Marshall v. Langley*, [1889] W. N. 822. *Refd. Birchall v. Birch, Crisp*, [1913] 2 Ch. 375.

441. —Against party out of jurisdiction—Leave for service.]—*Re LUCKIE, NIXON v. LUCKIE, BADHAM v. NIXON*, [1880] W. N. 12.

442. —Coming within jurisdiction.]—Defts. had been refused leave to serve pltf., a Dutch firm, out of the jurisdiction in an action for damages for breach of contract. Subsequently pltf. instituted the present action against defts. in respect of the same matters, & defts. counterclaimed for the damages they sought to recover in the first-named action:—*Held*: the Dutch firm having brought themselves within the jurisdiction by suing here, defts. were entitled to counterclaim.—*GRIENDTVEEN v. HAMLYN & Co.* (1892), 8 T. L. R. 231, D. C.

Annotation:—Apprvd. The Cheapside, [1904] P. 339.

off could not be given before the plea of the general issue was filed.—*RICKERSTAFF v. MERCHANT* (1838), 3 Ont. Dig. 6361.—*CAN.*

1. Counterclaim—Leave to file.]—*PRITCHARD v. PRITCHARD* (1888), 17 O. R. 50.—*CAN.*

*—*MOORE *THRASHER* (1912), 23 O. W. R. 400; 4 O. W. N. 302; 6 D. L. R. 910.—*CAN.*

445 i. Issues raised by counterclaim—When tried by jury.]—Where, in a county ct. action, the amount claimed either by the original claim or by counterclaim exceeds \$50, either party is entitled to give a jury notice & to have both claim & counterclaim tried by jury.—*DOUGLAS LAKE CATTLE CO., LTD. v. REINSETH (B. C.)* (1922), 45 D. L. R. 646; [1922] 1 W. W. R. 1258, 1259.—*CAN.*

445 ii. —Where the relief claimed in a counterclaim is such that if it had been claimed in an inde-

443. ——*THE CHEAPSIDE*, No. 428, ante.

Whether independent action.]—See Nos. 304-313, ante.

444. Death of party—Defendant—Necessity for order to continue—Effect of order to continue obtained by plaintiff.]—On the death of deft. who has delivered a counterclaim, it is necessary that his representatives if they wish to prosecute the counterclaim against pltf. in the original action should obtain an order of revivor against him. An order of revivor of the original action obtained by pltf. against them does not authorise them to prosecute the counterclaim against him.—*ANDREW v. AITKEN* (1882), 21 Ch. D. 175; 51 L. J. Ch. 781; 46 L. T. 689; 30 W. R. 701.

445. Issues raised by counterclaim—When tried by jury.]—(1) Deft. who counterclaims in respect of any of the matters specified in R. S. C., Ord. 36, r. 2, is not pltf. within the meaning of that rule, & is not entitled thereunder as of right to have the issues of fact raised by the counterclaim, tried by a jury; but if he applies to the ct. in the exercise of its discretion to order these issues to be tried by a jury, in the absence of special circumstances, the ct. will be disposed to accede to the application.

(2) Deft. in an action brought in the Ch. Div. to enforce an agreement for a compromise counterclaimed for relief in respect of various matters including libel, & applied that the action & counterclaim might be transferred to the K. B. Div. for trial by a jury:—*Held*: the inclusion in the counterclaim of a claim for libel was not a ground for directing a transfer of the whole action, & deft. not desiring that the issues relating to libel alone should be sent to a jury, the application was refused.—*KINNAIRD (LORD) v. FIELD*, [1905] 2 Ch. 361; 74 L. J. Ch. 692; 93 L. T. 190; 54 W. R. 85; 21 T. L. R. 682; 49 Sol. Jo. 671, C. A. *Annotation:—Generally, Refd. R. v. Westminster Assmt. Com., R. v. Islington Assmt. Com.*, [1917] 2 K. B. 215.

446. —Inclusion of claim for libel—Transfer of hearing from King's Bench to Chancery Division.]—*KINNAIRD (LORD) v. FIELD*, No. 445, ante.

447. Counterclaim remitted to City of London court—On discontinuance of claim—Jurisdiction.]—*R. v. CITY OF LONDON (COURT JUDGE)*, [1891] 2 Q. B. 71; 60 L. J. Q. B. 575; 64 L. T. 869.

Annotations:—Distd. Delobel Filpo v. Varty (1893), 62 L. J. Q. B. 398. *Consd. Gullford v. Lambeth*, [1894] 2 Q. B. 832; *Dierken v. Philpot*, [1901] 2 K. B. 380; *R. v. Mellor*, [1914] 2 K. B. 588.

Actions remitted to county court.]—See COUNTY COURTS, Vol. XIII., p. 484, Nos. 333, 334, 336.

448. Joinder of other claims—To counterclaim—Claim for libel.]—*FACTORIES INSURANCE CO.,*

pendent action there would have been a right to have the action tried by a jury, then there is the same right to have the counterclaim tried by a jury.—*BEGG & Co. v. NAUJOKS* (1904), 23 N. Z. L. R. 565.—*N.Z.*

b. Joinder of other claims—To counterclaim.]—A counterclaim for the recovery of land is an action for the recovery of land, within rule 341 as to joinder of causes of action.—*HUNTER v. STARK* (1895), 17 P. R. 47.—*CAN.*

c. Right of defendant to examine plaintiff—Recovery of excess over plaintiff's demand.]—*HAWKINS v. PATERSON & KENRICK* (1863), 23 U. C. R. 197.—*CAN.*

d. Adding counterclaim—After case in paper for trial.]—An order may be made adding a counterclaim after the case was in the paper for trial.—*BEER BROTHERS v. COLLISTER* (1894), 3 B. C. R. 145.—*CAN.*

e. Counterclaim to specially indorsed writ.]—The practice in Ontario is the same for writs specially indorsed as it is for writs not so indorsed, & a deft. is within his rights when he sets up a counterclaim to a specially indorsed writ, & it matters not that his counterclaim is, strictly speaking, really a set-off, so long as it is a claim which he desires to enforce over & above his defence, & he sets it out in his affidavit of defence on merits.—*HENDERSON v. HENDERSON* (1916), 27 O. W. R. 422; 38 O. L. R. 97.—*CAN.*

1. Joinder of claims by counterclaim.]—Combined claims, against a principal for rescission, & against the principal & his agent for damages for alleged fraudulent misrepresentation by the agent, may be made in one action, & such joinder of claims may be made by counterclaim.—*ROTHWELL v. ATTWOOD*, [1924] 1 D. L. R. 43; 34 Man. L. R. 130; [1923] 3 W. W. R. 1281.—*CAN.*

Sect. 2.—Practice: Sub-sects. 1, 2, 3 & 4, A., B. & C. (a).]

LTD. v. ANGLO-SCOTTISH GENERAL COMMERCIAL INSURANCE CO., LTD., No. 373, *ante*.

Admiralty practice.—See ADMIRALTY, Vol. I., pp. 183, 184, Nos. 967-969, 975-978.

SUB-SECT. 2.—BY AND AGAINST WHOM MAINTAINABLE.

Set-off.—See Part I., Sect. 3, sub-sect. 3, & sect. 10, *ante*.

Counterclaim.—See Part II., Sect. 2, sub-sects. 2 & 3, *ante*.

SUB-SECT. 3.—IN RESPECT TO THIRD PERSON NOT A PLAINTIFF.

See R. S. C., Ord. 21, rr. 12, 13, Ord. 27, r. 11.

449. Time for appearance—Not till after service.—A person, not a party to the action, named as deft. to a counterclaim, but not served with a copy, has no right to appear gratis. He cannot appear till after service pursuant to R. S. C., Ord. 22, r. 6.—FRASER v. COOPER, HALL & CO., WADDELL v. FRASER (1883), 23 Ch. D. 685; 52 L. J. Ch. 684; 48 L. T. 754; 31 W. R. 714.

450. Effect of non-appearance—Procedure as plaintiff in original action—Judgment in default of appearance.—By R. S. C., Ord. 21, r. 12, Ord. 27, r. 11, & Ord. 67, r. 4, pltf. by counterclaim can proceed against defts. by counterclaim who do not appear, in the same way as pltf. in an original action.

Deft. to an action by which rights of common were claimed, counterclaimed against pltf., & several others whom he added as defts., & asked for an injunction on the ground of trespass. The added defts. did not appear or defend. Pltf. by counterclaim moved for judgment in default of appearance, & upon admissions:—*Held*: the motion must stand till the trial, as if the question raised by the counterclaim was not connected with the original subject of the action, the added defts. were improperly brought before the ct.; & if it was connected, then no relief should be given until trial.—VERNEY v. THOMAS, THOMAS v. VERNEY (1888), 58 L. T. 20; 36 W. R. 398.

Annotations:—*Refd.* Rumley v. Winn (1889), 60 L. T. 32; Charles v. Shepherd (1892), 67 L. T. 67.

Third person out of jurisdiction—Leave for service.—See No. 441, *ante*.

SUB-SECT. 4.—EXCLUSION OR STAY OF SET-OFF OR COUNTERCLAIM.

A. In General.

See R. S. C., Ord. 19, r. 3, Ord. 21, r. 15.

451. Exclusion of part—Set-off—Express understanding between parties.—The ct. set aside a

particular of set-off which deft. was attempting to avail himself of in contravention of an express understanding between the parties as to the real question to be tried.—GOULD v. OLIVER (1838), 4 Bing. N. C. 676; 6 Scott, 648; 132 E. R. 949.

452. Application by party not a plaintiff.—DEAR v. SWORDER, SWORDER v. DEAR, No. 337, *ante*.

453. Where application to be made—Whether in court or chambers.—NAYLOR v. FARRER, No. 492, *post*.

B. Discretion of Court.

See R. S. C., Ord. 19, r. 3, Ord. 21, r. 15.

454. Stay or exclusion a matter of discretion.—CAPELEUS v. BROWN, No. 476, *post*.

455.—NAYLOR v. FARRER, No. 492, *post*.

456.—Pltf. bank specially indorsed their writ for certain sums of money claimed, by virtue of promissory notes & covenants, by way of a liquidated amount. Upon defts. appearing pltf. took out a summons to sign final judgment in compliance with the terms of R. S. C., Ord. 14. Defts. resisted this application on the ground that they had both a good defence to the action on the merits, & also a good counterclaim against pltf.:—*Held*: the right to bring a counterclaim is not a right of course, but depends on the discretion of the judge, & as regards the defence, when there is "no fairly arguable point to be argued on behalf of deft.," effect must be given to R. S. C., Ord. 14, r. 1.—ANGLO-ITALIAN BANK v. WELLS, ANGLO-ITALIAN BANK v. DAVIES (1878), 38 L. T. 197, C. A.

Annotation:—Mentd. Hartison v. Lascelles, Johnston & Gordon (1887), 3 T. L. R. 490.

457. Whether appeal lies.—The exors. of M., a holder of debentures of a co. to the amount of £2,000, commenced an action to have the trusts of a deed for securing payment of the debentures of a co. carried into execution. The co. delivered a defence & counterclaim. By the defence they alleged that an amount exceeding £2,000 was, under the circumstances mentioned in the counterclaim, due from M. to the co., & claimed a set-off. By the counterclaim they alleged that M. had been a director & promoter of the co., & while filling those characters had joined with other persons in selling an estate to the co. at a profit, concealing the fact of his interest in the estate, & that he had received more than £2,000 as his share of the profit of the transaction. The counterclaim asked that the exors. might be ordered to pay to the co. the share of profit which M. had received, & also the remainder of the profit which, in breach of his duty as a director, he had allowed to be received by the other vendors. Pltf. applied to have the counterclaim excluded on the ground that it could not be conveniently disposed of in the present action, & ought to be tried in an independent proceeding:—*Held*: although, taking R. S. C., Ord. 19, r. 3, & Ord. 22, r. 9, together, the question whether a counterclaim shall be

g. Refusal of nonsuit—Defendant's evidence completing plaintiff's case—Effect of counterclaim.—CANADA PRODUCTS, LTD. v. BOURK (Sask.), [1927] 4 D. L. R. 41; [1927] 2 W. W. R. 741.—CAN.

h. Motion to set aside counterclaim—Motion for judgment upon admissions—Whether entertained simultaneously.—A motion to set aside a counterclaim & a motion for judgment upon admissions of fact in a statement of defence cannot be entertained simultaneously.—CHURCH TEMPORALITIES COMBS. IN IRELAND v. M'IVOR (1879), 3 L. R. Ir. 433.—IR.

PART III. SECT. 2, SUB-SECT. 4.—A.

k. Counterclaim raising issue which should be tried by jury.—The paragraph of a statement of defence setting up a counterclaim will not be struck out on the ground that it raises an issue which should be tried by a jury.—GOWENLOCK v. FEIRY (1896), 11 Man. L. R. 257.—CAN.

l. Exclusion against some parties.—SOVEREIGN BANK OF CANADA v. PARSONS (1908), 18 O. L. R. 665; 11 O. W. R. 968.—CAN.

m. Not permissible on affidavit evi-

dence.—THOMPSON v. BIG CITIES REALTY & AGENCY CO. (1910), 16 O. W. R. 425; 21 O. L. R. 394; 1 O. W. N. 933.—CAN.

n. Exclusion by agreement.—OTIS v. WEIDMARK (Sask.) (1911), 19 W. L. R. 723; 1 W. W. R. 382.—CAN.

PART III. SECT. 2, SUB-SECT. 4.—B.

454 i. Stay or exclusion a matter of discretion.—SHANNON v. SMITH (1914), 14 S. K. N. S. W. 253; 31 N. S. W. W. N. 82.—AUS.

excluded is not so entirely in the discretion of the judge of first instance as to preclude an appeal, he has a discretion which will not be interfered with by the Ct. of Appeal except in a very strong case, & in the present case this discretion had been rightly exercised.—**HUGGONS v. TWEED** (1879), 10 Ch. D. 359; 40 L. T. 284; 27 W. R. 495, C. A.

458. —.]—**GRAY v. WEBB**, No. 331, *ante*.

459. —.]—**SOUTH AFRICAN REPUBLIC v. TRANSVAAL NORTHERN RY.**, No. 487, *post*.

460. —.]—**THE CHEAPSIDE**, No. 428, *ante*.

C. Grounds for.

(a) In General.

See R. S. C., Ord. 19, r. 3, Ord. 21, r. 15.

461. **No action able to be brought.**—**BIRMINGHAM ESTATES CO. v. SMITH**, No. 405, *ante*.

462. **Embarrassment.**—In an action for rent under a written agreement, the judge refused to strike out a counterclaim for damages in respect of the non-performance of conditions in the agreement, & for specific performance of an agreement to grant a lease.

I cannot hold that this counterclaim is sufficiently embarrassing to be struck out (**LINDLEY, J.**).—**ATWOOD v. MILLER** (1876), 20 Sol. Jo. 218; 1 Char. Cham. Cas. 82; Bitt. Prac. Cas. 89.

Innovation:—**Reid**, Naylor v. Farrer (1878), 26 W. R. 809.

463. —.]—**THE CHEAPSIDE**, No. 428, *ante*.

464. —.]—**STOHWASSER v. MILLAR** (1910), cited in Halsbury's Laws of England, Vol. XXII., p. 431.

465. — **Counterclaim in double capacity.**—**MACDONALD v. CARINGTON**, No. 330, *ante*.

466. — **Joinder of fresh cause of action.**—The provision of R. S. C., Ord. 17, r. 2, that no cause of action, except those specified in that rule, shall, unless by leave of the ct. be joined with an action for the recovery of land, applies to a counterclaim, as well as to an original action. Order made to exclude a counterclaim, on the ground that in it such a joinder of causes of action had been made without the leave of the ct. & that the fair trial of the action would be embarrassed.—**COMPTON v. PRESTON** (1882), 21 Ch. D. 138; 47 L. T. 122; 30 W. R. 563; *sub nom.* **COMTON v. PRESTON**, 51 L. J. Ch. 680.

467. **Delay.**—**GRAY v. WEBB**, No. 331, *ante*.

468. **Agreement to refer.**—Where there is an agreement to refer the subject-matter of a counterclaim, the counterclaim will be stayed on the application of pltf.—**SPARTALI & CO. v. VAN HOORN**, [1884] W. N. 32; Bitt. Rep. in Ch. 216.

469. **No reasonable cause of action—Claim without substance.**—A deft. ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion. There may be either a defence to the claim which is plausible, or there may be a counterclaim pure & simple. To shut out such a counterclaim if there

is any substance in it would be an autocratic & violent use of R. S. C., Ord. 14. The ct. has no power to try such a counterclaim on such an application, but if they think it so far plausible that it is not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded (**LORD ESHER, M.R.**).—**SHEPPARDS & CO. v. WILKINSON & JARVIS** (1889), 6 T. L. R. 13, C. A.

470. — **Claim frivolous & vexatious.**—**SALOMONS v. KNIGHT** (1892), 8 T. L. R. 472.

471. —.]—A counterclaim in a passing-off action which alleges threats barely, & claims an injunction to restrain such threats, but shows no malice or bad faith on the part of pltf. who is maintaining the action which he has brought, can be struck out under R. S. C., Ord. 14, r. 4, as disclosing no reasonable cause of action under 46 & 47 Vict. c. 57, s. 32, or otherwise.—**RIPLEY v. ARTHUR & CO.** (1900), 45 Sol. Jo. 165; 18 R. P. C. 82.

Plaintiff sovereigns & states.—See Part II., Sect. 2, sub-sect. 2, D., *ante*.

472. **Payment of money into court—Admission of plaintiff's claim.**—A landowner brought an action claiming damages for trespass, & also an injunction. Deft. put in a defence & counterclaim alleging a right by custom to go on the land, & under R. S. C., Ord. 22, r. 1, with his defence, though denying liability, paid a sum into ct. by way of satisfaction of his liability, if any, in respect of the matters complained of. Under r. 6 pltf. took the money out on notice to deft. that he accepted it "in satisfaction of the claim in respect of which it is paid in." On an application by pltf. to strike out the counterclaim on the ground that deft. had by his payment into ct., followed by pltf.'s acceptance, admitted pltf.'s entire cause of action:—*Held*: there had been no such admission by deft. as to preclude him from prosecuting his counterclaim setting up the custom, nor, *semble*, such acceptance in satisfaction by pltf. as to preclude him from prosecuting his claim for an injunction, the payment into ct. being by r. 1 confined to pltf.'s claim for damages only.—**COOTE v. FORD**, [1899] 2 Ch. 93; 68 L. J. Ch. 508; 80 L. T. 697; 47 W. R. 548; 15 T. L. R. 378, C. A.

473. —.]—**STOHWASSER v. MILLAR** (1910), cited in Halsbury's Laws of England, Vol. XXII., p. 431.

474. **Refusal by defendants to give security.**—Under R. S. C., Ord. 19, r. 3, the ct. may refuse permission to defts. to proceed by counterclaim if of opinion that it cannot be conveniently disposed of or "ought not to be allowed." By Admiralty Court Act, 1861 (c. 10), s. 34, "The High Ct. of Admty. may, on the application of deft. in any cause of damage, & on his instituting a cross-cause for the damage sustained by him in respect of the same collision, direct that the principal & the cross-cause be heard at the same time & upon the same evidence; & if in the principal cause the ship of deft. has been arrested

PART III. SECT. 2, SUB-SECT. 4.—C. (a).

462 i. **Embarrassment.**—**BANK OF BRITISH NORTH AMERICA v. YETMAN** (1894), 26 N. S. R. (14 R. & G.) 481.—**CAN.**

462 ii. —.]—**ROBERT v. MILLER** (No. 3) (1900), 20 C. L. T. 411.—**CAN.**

462 iii. —.]—**MCLISAAC v. ROYD, KIRK v. MCLISAAC** (1908), 42 N. S. R. 332.—**CAN.**

462 iv. —.]—A counterclaim should not contain allegations set up only by way of anticipating the defence that deft. supposes pltf. will make to it, &

such allegations will be struck out as embarrassing.—**WINNIPEG CORPN. v. TORONTO GENERAL TRUSTS CORPN.** (1910), 19 Man. L. R. 420; 13 W. L. R. 577.—**CAN.**

462 v. —.]—**BROWNS v. BROWNS** (Alta.), [1919] 3 W. W. R. 903; 48 D. L. R. 72.—**CAN.**

o. **Delay.**—**ODELL v. BENNETT** (1889), 13 P. R. 10.—**CAN.**

p. —.]—**NEWFOUNDLAND RY. CO. v. NEWFOUNDLAND GOVERNMENT** (1889), 7 Nfld. L. R. 401.—**NFLD.**

470 i. **No reasonable cause of action—Claim frivolous & vexatious.**—A counterclaim must be considered as if it were

a cross-action. There is no authority for dismissing it summarily on the ground that it is false, frivolous & vexatious, & pleaded merely for delay.—**WHITFORD v. ZINC** (1896), 28 N. S. R. 531.—**CAN.**

470 ii. —.]—A counterclaim will not be struck out unless it is either frivolous or vexatious.—**MAH PO v. MCCARTHY** (1911), 18 W. L. R. 656; 5 Sask. L. R. 17.—**CAN.**

q. **Full relief obtainable without counterclaim.**—**UNION INVESTMENT CO. v. POLUSHIE** (N. W. T.) (1906), 4 W. L. R. 552.—**CAN.**

r. **Irrelevancy.**—**VICTORIA LUMBER**

Sect. 2.—Practice: Sub-sect. 4, C. (a), (b) & (c).]

or security given by him to answer judgment, & in the cross-cause the ship of pltf. cannot be arrested, & security has not been given to answer judgment therein, the ct. may, if it think fit, suspend the proceedings in the principal cause & until security has been given to answer judgment in the cross-cause."

Pltfs.' & defts.' vessels came into collision & both received damage. Pltfs. brought an action in rem against defts., "the owners of the steamship Neptune." Defts. counterclaimed, & applied to pltfs. for security to answer the counterclaim. Security was given, but on pltf. making a similar application, defts. refused to give security on the ground that the Neptune was owned by the French Govt., & was not subject to arrest:—Held: the ct. had no power to order security to be given or, in default thereof, to stay defts.' counterclaim.—THE NEPTUNE, [1919] P. 17; 88 L. J. P. 94.

(b) Subject-Matter Unrelated to Plaintiff's Claim.

See R. S. C., Ord. 19, r. 3, Ord. 21, r. 15.

475. Whether counterclaim available.]—In an action of assault & slander a counterclaim for breach of a parol agreement to repair was struck out, although the parties were talking about the state of the house at the time that the cause of action arose.—*LEE v. COLYER* (1875), 1 Char. Cham. Cas. 86; Bitt. Prac. Cas. 80.

476. —.]—In an action for the price of timber, commenced before Nov. 1, 1875, deft. was allowed to set up a counterclaim for insufficient delivery in respect of other cargoes already paid for. The judge may strike out such a counterclaim after it has been set up, if he thinks it ought not to be allowed.—*CAPELEUS v. BROWN* (1875), 1 Char. Cham. Cas. 77; Bitt. Prac. Cas. 43.

477. —.]—In an action by the exor. for money due, the judge refused to strike out a counterclaim in respect of an overdue promissory note of deceased.—*WAVELL v. NATIONAL PROVINCIAL BANK OF ENGLAND* (1875), 1 Char. Cham. Cas. 82; Bitt. Prac. Cas. 75.

478. —.]—*PADWICK v. SCOTT, Re SCOTT'S ESTATE, SCOTT v. PADWICK*, No. 338, *ante*.

479. —.]—A counterclaim must claim relief against pltf., & he must be made a party to it. The relief claimed by a counterclaim must relate to the specific subject-matter of the action. Where a counterclaim sought indemnity:—*Held: the indemnity must be confined to the specific property which was the subject of the action.*—*HARRIS v. GAMBLE* (1877), 6 Ch. D. 748; 46 L. J. Ch. 768; *subsequent proceedings* (1878), 7 Ch. D. 877.

480. —.]—Where deft. has filed an affidavit in opposition to the application of pltf. for leave to sign judgment, pltf. cannot as of right file affidavits in reply.

Deft., in his affidavit, set up a counterclaim for damages for a libel, totally unconnected with pltf.'s claim:—*Held: deft. could not be allowed to set up such counterclaim as a defence to pltf.'s action.*—*ROTHERAM v. PRIEST* (1879), 49 L. J. Q. B. 104; 41 L. T. 558; 28 W. R. 277.

481. —.]—*STOOKE v. TAYLOR*, No. 2, *ante*.

482. —.]—*GRAY v. WEBB*, No. 331, *ante*.

483. —.]—An action asking relief as in *detinue* was brought against a sole deft. who had seized goods which B. has assigned to pltf. under a bill of sale. The sole deft. filed a statement of defence & a counterclaim impeaching the *bona fides* of pltf.'s bill of sale, & alleging a bill of sale by B. to himself, & by such counterclaim, claimed relief against pltf., & against B. the money due under the bill of sale from B. to himself, & damages for the alleged fraud. The counterclaim against pltf. was abandoned at the hearing:—*Held: the relief asked by deft. against B. was not a matter sufficiently "relating to or connected with the original cause or matter," to be the subject of a claim under Jud. Act, 1873 (c. 66), s. 24.*—*BARBER v. BLAIBERG* (1882), 19 Ch. D. 473; 51 L. J. Ch. 509; 46 L. T. 52; 30 W. R. 362.

Annotation:—Reid. Compton v. Preston (1882), 21 Ch. D. 138.

484. —.]—An action was brought by a tenant for life, & other *cestuis que trust* against the trustees of a settlement for breaches of trust. One of the trustees alleged as a defence that the breaches of trust had been sanctioned by the tenant for life; & also set up a counterclaim upon a bill of exchange for £15, claiming payment of that amount, & that the income of the tenant for life, arising from the property subject to the settlement, might be applied towards payment of the £15, & any other sums which the trustee might be ordered to pay:—*Held: the counterclaim must be struck out under R. S. C., Ord. 21, r. 15.*—*FENDALL v. O'CONNELL* (1885), 52 L. T. 538.

485. —.]—*HAWKINS HILL CONSOLIDATED GOLD MINING CO., LTD. v. MYBREA* (1886), 3 T. L. R. 91, D. C.

486. —.]—*MUTRIE v. BINNEY*, No. 367, *ante*.

487. —.]—A foreign sovereign who brings an action against his concessionaires for the mere appointment of a new trustee of funds subject to the trusts of the concession does not thereby submit to the jurisdiction *quoad* a counterclaim for moneys payable under the concession, & such a counterclaim will be struck out on his application:—*Held: as a matter of discretion in the particular case, independently of the question of jurisdiction, a counterclaim so foreign to the subject-matter of the action must be struck out under R. S. C., Ord. 19, r. 3.*—*SOUTH AFRICAN REPUBLIC v. TRANSVAAL NORTHERN RY.* (1897), 67 L. J. Ch. 92.

488. —.]—In 1916 the Russian Govt. Committee, of which deft. was a member, was set up in London by the Imperial Russian Govt., & was continued by its successor, the Russian Provisional Govt. Certain documents, the property of these Govts. & relating to financial obligations incurred by the committee, were in the possession of the committee. In 1918 the committee ceased to function, & the documents were handed over to a board of trustees appointed by the *charge d'affaires* of the Russian Provisional Govt. Deft. became president of this board. Pltfs., the present Govt. of Russia, were now the owners of these documents, which remained in deft.'s possession, & they brought an action claiming delivery. There were pending against deft. as a member

& MANUFACTURING CO., LTD. v.

CAN.

PART III. SECT. 2, SUB-SECT. 4.—
C. (b).

475 i. Whether counterclaim avail-

able.]—A deft. may plead a counterclaim though it arises not in the same right as pltf.'s claim, or be not connected therewith, provided it be one which can be conveniently disposed of in the same action.—*BANK OF MONTREAL v. CHUCKSHANK*, [1920] 1 W. W. R. 381.—CAN.

475 ii. —.]—In an action by a husband against his wife for a declaration that moneys on deposit in her name were held in trust for him, a counterclaim for a judicial separation & alimony was ordered to be struck out.—*CALLANDER v. CALLANDER* (Sask.), [1927] 3 W. W. R. 449.—CAN.

of the Russian Govt. Committee certain actions arising out of the matters to which these documents related. Deft. set up the contention, by way of defence & counterclaim, that he was entitled to a lien on the documents until he had received an indemnity in respect of the other actions pending against him:—*Held*: although when a sovereign state is pltf., a counterclaim can be maintained against it "to enable complete justice to be done between the parties," the counterclaim must be confined to matters immediately connected with the claim. Here the indemnity claimed by deft. was not in respect of any liability incurred by him acting as custodian of the documents, & the counterclaim therefore failed, while the action succeeded.—*UNION OF SOVIET REPUBLICS v. BELALEW* (1925), 134 L. T. 64; 42 T. L. R. 21.

(c) *Inconvenience of disposing of Subject-Matter in Action.*

See R. S. C., Ord. 19, r. 3, Ord. 21, r. 15.

489. *Whether exclusion granted.*—In an action for libel brought by a director of a co., a counterclaim for damages for loss sustained in respect of shares in the co. bought on false representations, made by the directors, was struck out on terms.—*NICHOLSON v. JACKSON* (1876), Bitt. Prac. Cas. 106; *sub nom.* *NICOLSON v. JACKSON*, 2 Char. Cham. Cas. 37.

490. —.]—*PADWICK v. SCOTT, Re SCOTT'S ESTATE, SCOTT v. PADWICK*, No. 338, *ante*.

491. —.]—*ATWOOD v. MILLER*, No. 462, *ante*.

492. —.]—It is in the discretion of the judge under R. S. C., Ord. 19, r. 3, to refuse permission to a deft. to avail himself of a counterclaim, which cannot be conveniently disposed of in the action. To an action for dissolution of partnership deft., after denying the partnership, set up a counterclaim stating certain transactions which raised an altogether different cause of action, & claiming remuneration from pltf. for his services. Such transactions were totally unconnected with the partnership, the subject of pltf.'s claim:—*Held*: such a claim was not convenient to be disposed of in the present action, & deft. could not be allowed to avail himself of it; but it was a proper subject for a cross-action. *Semble*: applications under R. S. C., Ord. 19, r. 3, are rightly made in ct. & not in chambers.—*NAYLOR v. FARRER* (1878), 26 W. R. 809.

493. —.]—Pltf. brought an action for redemption of shares mortgaged by him. Deft. by counterclaim sought relief incident to his position

as mtgee., & also damages for alleged fraudulent misrepresentations made by pltf. to deft. which affected the amount of the balance to secure which the mtge. was given. Pltf. applied to have the action tried with a jury which the judge refused:—*Held*: the case did not come within R. S. C., Ord. 36, r. 6, so as to give pltf. a right to have the action tried with a jury; his proper course would have been to apply to have the counterclaim for damages tried separately, as a claim which could not be conveniently tried in the pending action.—*LYNCH v. MACDONALD* (1887), 37 Ch. D. 227; 57 L. J. Ch. 651; 58 L. T. 293; 36 W. R. 419, C. A.

494. —.]—A fund arising from debentures issued by deft. co. & guaranteed by the South African Republic was by arrangement lodged with two trustees, one nominated by the Republic & the other by the co., pending the completion of a railway which the co. was making under a concession by the Republic. The nominee of the co. having died, the Republic brought an action here, the fund being in England, to have a new trustee appointed & the fund paid to the two trustees. The co. put in a defence & counterclaim. By their defence they alleged various grounds of complaint against the Republic as making it inequitable that they should have any control over the fund, & among other things a letter addressed to the co. by the Railway Comr. of the Republic, a copy of which was forwarded by him to the London Stock Exchange, making various charges against the co. which the co. alleged to be untrue. By counterclaim the co. repeated these grounds of complaint, & alleged that they had sustained heavy loss through the letter, which they alleged to be libellous, & claimed £100,000 damages for libel. The judge in chambers ordered this allegation & the claim for damages to be expunged:—*Held*: this order was right, for if pltf. had been an individual resident in this country the counterclaim for libel would have been struck out, & defts. left to bring a separate action, inasmuch as the claim for damages for libel could not be conveniently tried in an action for appointing a new trustee & protecting a trust fund, & the fact that the co. could not bring a separate action for libel against the Republic was not a sufficient ground for allowing the counterclaim for libel to go on.—*SOUTH AFRICAN REPUBLIC v. COMPAGNIE FRANCO-BELGE DU CHEMIN DE FER DU NORD*, [1897] 2 Ch. 487; 66 L. J. Ch. 747; 77 L. T. 241; 46 W. R. 67; 13 T. L. R. 567; 41 Sol. Jo. 713, C. A.

Annotation:—*Apld.* *Factories Insec. v. Anglo-Scottish General Commercial Insec.* (1913), 29 T. L. R. 312.

PART III. SECT. 2, SUB-SECT. 4.—
C. (c).

489 i. *Whether exclusion granted.*—The ct. may refuse to allow a set-off or counterclaim if, in the opinion of the ct., it cannot be conveniently disposed of in the suit or ought not to be allowed.—*SHANNON v. SMITH* (1914), 14 S. R. N. S. W. 253; 31 N. S. W. W. N. 82.—*AUS.*

489 ii. —.]—Counterclaim for libel & slander against pltf. in an action on a promissory note struck out.—*CENTRAL BANK OF CANADA v. OSBORNE* (1887), 12 P. R. 160.—*CAN.*

489 iii. —.]—Deft. C. counterclaimed for damages in respect of a trespass by pltf. upon the lands in question, whilst C. was in possession, & for an assault, etc., whereby he was compelled to quit the premises:—*Held*: the counterclaim should not be disallowed or excluded on the ground of inconvenience, it not appearing that there would be any incon-

venience.—*GORING v. CAMERON* (1884), 10 P. R. 496.—*CAN.*

489 iv. —.]—In an action for damages for negligence, a counterclaim for libel was excluded, on the ground of the inconvenience which would arise in trying the two causes of action together.—*MCLEAN v. HAMILTON STREET RY. CO.* (1885), 11 P. R. 193.—*CAN.*

489 v. —.]—*ODELL v. BENNETT* (1889), 13 P. R. 10.—*CAN.*

489 vi. —.]—The fact that a counterclaim, if successful, involves the taking of long accounts which will delay the disposition of the action, is not a sufficient cause for excluding it if otherwise unobjectionable.—*POWELL v. LOWENBERG, HARRIS & CO.* (1893), 3 B. C. R. 81.—*CAN.*

489 vii. —.]—*Held*: the claims made in the counterclaim against pltf. alone were proper subjects of a counterclaim in the action; but there was no such intimate connection between the

subject of the action & the subject of the counterclaim against the four parties, only one of whom was resident within the jurisdiction or had admitted the jurisdiction of the ct., as to oblige the ct. to require both to be disposed of in the same action.—*DUNLOP PNEUMATIC TYRE CO. v. RYCKMAN* (1902), 23 C. L. T. 106; 5 O. L. R. 219; 1 O. W. R. 699, 820.—*CAN.*

489 viii. —.]—*FRASER v. MCCOLL* (N. S.) (1909), 7 E. L. R. 159.—*CAN.*

489 ix. —.]—*DOBSON & BARLOW v. BENGAL SPINNING & WEAVING CO.* (1896), 1 L. L. R. 21 Bom. 126.—*IND.*

489 x. —.]—Counterclaim excluded upon the ground that it was of a nature which could not be conveniently tried at the same time as the original action.—*CAREW v. CHRISTOPHER* (1881), 8 L. R. Ir. 252; *affd.*, 10 L. R. Ir. 38.—*IR.*

489 xi. —.] *BOURKE v. NICHOL* (1883), 12 L. R. Ir. 415.—*IR.*

Sect. 2.—Practice: Sub-sects. 5, 6 & 7.]

SUB-SECT. 5.—EFFECT OF DEFAULT IN PLEADING.

See R. S. C., Ord. 27, r. 11.

495. Right of defendant to judgment on counterclaim.—An order will not be made upon a counterclaim until the original claim has been dealt with. Therefore where in answer to a statement of claim a defence & counterclaim had been delivered, & some months after the expiration of the period allowed to pltf. for replying, a motion was made "for a decree according to the prayer of the counterclaim," the motion was dismissed.

The proper course to adopt in such a case, where there is undue delay on the part of pltf., is to give notice of motion to dismiss the original action for want of prosecution, & for judgment on the counterclaim.—*AITKEN v. DUNBAR* (1877), 46 L. J. Ch. 489.

496. —.]—Pltf. having made default in delivery of reply to def't's statement of defence & counterclaim. The ct. ordered final judgment to be entered for def't. in respect of both the claim & counterclaim under R. S. C., Ord. 40, r. 11.—*LUMSDEN v. WINTER* (1882), 8 Q. B. D. 650; 51 L. J. Q. B. 413; 46 J. P. 487; 30 W. R. 751, D. C.

Annotation:—*Refd.* *Graves v. Terry* (1882), 9 Q. B. D. 170.

497. —.]—Pltf. having made default in delivery of a reply to def't's statement of defence & counterclaim, the ct. held that under R. S. C., Ord. 29, r. 12, & Ord. 40, r. 11, def't. was entitled to an order dismissing pltf.'s action with costs, & an order on the counterclaim for the relief thereby claimed, with costs of the counterclaim.

There being no positive admissions of fact in the pleadings, but only constructive admissions by reason of the absence of a reply, the action was ordered to be set down on motion for judgment & notice of the setting down was directed to be given.—*CAROLI v. HIRST* (1883), 48 L. T. 759; 31 W. R. 839.

498. — On motion for judgment.]—R. S. C., Ord. 23, r. 4, & Ord. 27, r. 11, 12, 1883, apply when a motion for judgment in default of pleading is made after, although the default itself was made before, they came into operation; & these rules apply to a case where a def't. to a counterclaim has made default in pleading to it, & entitle pltf. in the counterclaim to move for judgment against the defaulting def't.—*STREET v. CRUMP* (1883), 25 Ch. D. 68; 49 L. T. 397; 32 W. R. 89.

499. —.]—*McGOWAN v. MIDDLETON*, No. 314, ante.

500. —.]—Where pltf. fails to deliver, a defence to a counterclaim, & his action is dismissed under a master's order, judgment on the counterclaim can only be signed by def't. upon a motion for judgment under R. S. C., Ord. 27, r. 11.

—*HIGGINS v. SCOTT* (1888), 21 Q. B. D. 10; 58 L. J. Q. B. 97; 58 L. T. 383, D. C.

Annotation:—*Apprvd.* *Jones v. Macaulay*, [1891] 1 Q. B. 221.

501. —.]—When pltf. fails to deliver a defence to a counterclaim, def't. cannot sign judgment on the counterclaim for default of pleading, but must move for judgment under R. S. C., Ord. 27, r. 11.—*JONES v. MACAULAY*, [1891] 1 Q. B. 221; 60 L. J. Q. B. 258; 64 L. T. 621; 39 W. R. 211; 7 T. L. R. 179, C. A.

Annotation:—*Refd.* *Kinnaird v. Field*, [1905] 2 Ch. 361.

502. —.]—After def't. to an action had delivered a counterclaim, the action was dismissed for want of prosecution, pltf. not having delivered a reply within the time limited for that purpose:—*Held*: def't. was entitled, under R. S. C., Ord. 27, r. 11, to set down the action on motion for judgment according to his counterclaim.—*ROBERTS v. BOOTH*, [1893] 1 Ch. 52; 67 L. T. 646; 41 W. R. 220; 37 Sol. Jo. 66; 3 R. 151.

503. — Reply delivered before receipt of notice of motion.]—Pltf. delivered his reply after three weeks had elapsed from delivery of the statement of defence, & subsequently def't., treating the facts stated in the defence as admitted, under R. S. C., Ord. 29, r. 12, by reason of pltf.'s failure to reply in time, gave notice of motion for judgment under R. S. C., Ord. 40, r. 11:—*Held*: the reply having been actually delivered before the notice of motion was given, def't. was not entitled to judgment.—*GRAVES v. TERRY* (1882), 9 Q. B. D. 170; 51 L. J. Q. B. 464; 30 W. R. 748, D. C.

504. — Whether application to be made at chambers.]—A reply to a defence & counterclaim may be delivered within the twenty-one days allowed by R. S. C., Ord. 23, r. 1, for delivering a reply, & need not be delivered within the ten days allowed by R. S. C., Ord. 21, r. 6, for delivering a defence.

Qu.: whether an application for judgment, under R. S. C., Ord. 27, r. 11, in default of pltf. delivering reply to a defence & counterclaim, ought not to be made at chambers.—*RUMLEY v. WINN* (1889), 22 Q. B. D. 265; 58 L. J. Q. B. 128; 60 L. T. 32; 37 W. R. 285; 5 T. L. R. 203, D. C.

SUB-SECT. 6.—DISCONTINUANCE, STAY OR DISMISSAL OF ACTION.

See R. S. C., Ord. 21, r. 16.

505. Whether defendant may proceed on counterclaim—Discontinuance.—A counterclaim is part of the original action, & when the action has been discontinued, no further step can be taken in the counterclaim.—*VAVASSEUR v. KRUPP* (1880), 15 Ch. D. 474; 28 W. R. 366.

Annotations:—*Dtd.* *Beddall v. Maitland* (1881), 17 Ch. D. 174. *Overd.* *McGowan v. Middleton* (1883), 11 Q. B. D. 464. *Refd.* *Gathercole v. Smith* (1881), 7 Q. B. D. 626;

If it were an action.—*DOMINION BURLARY GUARANTEE Co. v. WOOD* (1901), 22 C. L. T. 151; 3 O. L. R. 365.—CAN.

505 ii. —.]—*CANADIAN MORTGAGE INVESTMENT Co. v. TEEL* (No. 2) (Alta.), [1923] 1 D. L. R. 576; [1923] 1 W. W. R. 110.—CAN.

505 iii. —.]—Where a def't. has filed a statement of counterclaim he may proceed to trial thereon, although pltf. has before trial discontinued his action.—*CAMPBELL v. NEW ZEALAND TIMBER Co., LTD.* (1881), 3 N. Z. L. R. 236 (S. C.).—N.Z.

505 iv. —.]—*ISAAC v. MILLS* (1899), 17 N. Z. L. 305.—N.Z.

PART III. SECT. 2, SUB-SECT. 5.

495 i. *Right of defendant to judgment on counterclaim.*—*COSGRAVE v. DUCHKK* (N. W. T.) (1906), 3 W. L. T. 194.—CAN.

495 ii. —.]—*THOMPSON v. YOCKNEY* (Man.) (1912), 22 W. L. R. 863; 8 D. L. R. 776; 3 W. W. R. 591; *affd.*, 25 W. L. R. 602.—CAN.

t. *Reply tendered at trial.*—Where no replication had been put in to a plea of set-off, & one had been tendered at the trial:—*Held*: the judge ought to have received it.—*TOBIN v. DUNN* (1858), 3 N. S. R. (2 Thom.) 402.—CAN.

a. *Effect of taking issue on defence*

without mentioning counterclaim.—A counterclaim must be a defence in the action in which it is pleaded, & it is as much a part of the defence as any of the other pleas. Where pltf. took issue on the defence, not mentioning the counterclaim:—*Held*: the pleadings were closed, & a notice of trial served thereafter was regular.—*MACARA v. SNOW* (1888), 12 P. R. 616.—CAN.

PART III. SECT. 2, SUB-SECT. 6.

505 i. *Whether defendant may proceed on counterclaim—Discontinuance.*—Where pltf. discontinues his action after def't. has delivered a counterclaim, def't. may proceed with his counterclaim as

Caroll v. Hirst (1883), 48 L. T. 759; Alcoy & Gandia Ry. & Harbour Co. v. Greenhill, Greenhill v. Alcoy, etc. Co., Trustees, Executors, & Securities Insec. Corp'n. v. Alcoy, etc. Co. (1895), 73 L. T. 452.

506. ———.] —McGOWAN v. MIDDLETON, No. 314, *ante*.

507. ———.] —Before counterclaim set up.]—A French steamship & a British steamship collided, the French steamship being sunk. The owners of the French steamship arrested the English vessel in an action *in rem*. At noon on the day after the collision, & before an appearance had been entered by defts., the solrs. acting on behalf of the French owners filed a *præcipe* praying a release of the English vessel as they had withdrawn the action. The marshal thereupon released the English vessel. Later on the same day the solrs. for the French owners received a telegram from defts.' solrs. undertaking to appear & put in bail, & asking for the writ to be sent to them by post. The solrs. for the French owners replied: "Sabylia released; not proceeding with action." These telegrams were confirmed by letters. On the following day the solrs. acting for the English vessel wrote saying their clients had a counterclaim, & asking for the writ to be sent that they might enter an appearance, & they then entered an appearance in London & sent the *præcipe* of appearance to the London agents of the solrs. acting for the French owners, who returned it saying they had no authority to act in the discontinued action. The solrs. for defts. then took out a summons before the registrar calling on pltf. in the action to file a preliminary act so that the counterclaim might be proceeded with. The registrar dismissed the summons. Defts. appealed to the judge:—*Held*: the action was wholly discontinued on the withdrawing of the arrest before the entry of appearance, & as the counterclaim had not been set up before the discontinuance of the action it could not be proceeded with.—THE SALLYBIA, [1910] P. 25; 79 L. J. P. 31; 101 L. T. 959; 26 T. L. R. 170; 11 Asp. M. L. C. 361. *Annotation*:—*Consd.* The Saxicava, [1924] P. 131.

508. ———.] —A notice of counterclaim contained in correspondence passing between pltf.'s & deft.'s solrs. is not sufficient to "set up" a counterclaim within R. S. C., Ord. 21, r. 16, so that the counterclaim may be proceeded with if pltf.'s action is stayed, discontinued or dismissed.

The counterclaim must at least be set up by some proceeding which is either directed by or recognised by the rules & in respect of which there is a record on the files of the ct.—THE SAXICAVA, [1924] P. 131; 93 L. J. P. 66; 131 L. T. 342; 40 T. L. R. 334; 68 Sol. Jo. 666; 16 Asp. M. L. C. 324, C. A.

509. ———.] —Dismissal—For want of prosecution.] —ROBERTS v. BOOTH, No. 502, *ante*.

510. ———.] —THE SAXICAVA, No. 508, *ante*.

511. ———.] —Stay.] —THE SAXICAVA, No. 508, *ante*.

512. What amounts to setting up counterclaim—For purposes of R. S. C., Ord. 21, r. 16—Necessity for pleading.] —BILDT v. FOY (1892), 9 T. L. R. 34; on appeal, 9 T. L. R. 83, C. A.

Annotations:—*Distd.* The Sallybia, [1910] P. 25. *Consd.* The Saxicava, [1924] P. 131.

513. ———.] —Notice in correspondence.] —THE SAXICAVA, No. 508, *ante*.

5101. ———.] —MIDDLETON v. BLACK (Man.) (1912), 21 W. L. R. 249; 2 D. L. R. 209; 2 W. W. R. 869.—CAN.

5111. ———.] —Stay.] —MUSGRAVE v. MAIL (1901), 40 N. S. R. 624.—CAN.
b. Dismissal of another action in

inferior court.] —SMITH v. McDONALD (N. S.) (1907), 4 E. L. R. 106.—CAN.

c. Dismissal of action & counterclaim—Without prejudice to subsequent action.] —BARTLET v. DELANEY (1913), 29 O. L. R. 426; 5 O. W. N. 200.—CAN.

514. Order for new trial—Effect of on counterclaim.] —Where the Ct. of Appeal orders that the whole judgment given by the trial judge be set aside, & a new trial had between the parties, & directs that the costs of an abandoned counterclaim abide the decision of the judge on the new trial, the counterclaim is revived & must be tried together with the claim.—SMITH v. STROUD (1920), 42 T. L. R. 372.

SUB-SECT. 7.—JUDGMENT.

515. Right of plaintiff to judgment—Set-off less than claim—Whether judgment for balance.] —In debt for goods sold, etc., deft. pleaded as to £10 3s. a set-off, but only proved £8 3s.; as to £8 3s. 6d., he pleaded a plea which he proved; & as to the residue, he paid a sum into ct., which was taken out by deft. There was no plea of *nunquam indebitatus*:—*Held*: pltf. was entitled to a verdict & judgment for the £2 unproved on the first plea, although the £8 3s. proved together with the £8 3s. 6d., & the sum paid into ct. amounted to the sum claimed by the particulars of demand.—GREEN v. MARSH (1837), Will. Woll. & Dav. 343; 1 Jur. 478.

516. ———.] —When deft., under a plea of set-off to the whole declaration, proves a sum of money owing to him from pltf., less than the amount of the claim which pltf. has established, deft. is not entitled to have a verdict entered for him on that issue for the amount which he has so proved, but the issue must be found for pltf.: unless where deft., by all his pleas taken together, covers the whole cause of action.—TUCK v. TUCK (1839), 5 M. & W. 109; 7 Dowl. 373; 2 Horn & H. 71; 8 L. J. Ex. 165; 3 Jur. 680; 151 E. R. 47.

Annotations:—*Apld.* Kilner v. Bailey (1839), 5 M. & W. 382; Ford v. Beech (1846), 11 Q. B. 842. *Consd.* Rodgers v. Maw (1846), 15 M. & W. 444. *Refd.* Falconer v. Benn (1841), 2 Q. B. 314; Wood v. Peyton (1844), 13 M. & W. 30; Woodhams v. Newman (1849), 13 L. T. O. S. 118; Spradbery v. Gillam (1851), 20 L. J. Ex. 237; Wilkinson v. Kirby (1854), 15 C. B. 430; Oulds v. Harrison (1855), 21 L. J. Ex. 66; Traherne v. Gardner (1857), 8 E. & B. 161. *Mentd.* Avelett v. Goddard (1842), 11 L. J. C. P. 123; Parr v. Jewell (1855), 16 C. B. 684; Brown v. Hellaby (1857), 26 L. J. Ex. 217.

517. ———.] —The rule of Trinity term, 1837, that deft. need not plead payment of any sums, for the payment of which credit is given in the particulars, does not apply to items of set-off, admitted in the particulars of pltf.'s demand.

Where, therefore, pltf.'s particulars exhibited an account of items due from deft. to pltf.; & on the other side, admitted certain items by way of set-off, & certain others by way of payment, falling short of the amount due to pltf., & stated that the action was for the balance; &, on the trial, pltf. proved the amount claimed by way of balance only, under a plea of set-off:—*Held*: deft. was not entitled to deduct the items admitted as set-off in the particulars for the amount proved, but he was entitled to deduct the items admitted

Ex. 57.

518. ———.] —Greater than claim when joined with plea of payment.] —Where pltf. at the trial

PART III. SECT. 2, SUB-SECT. 7.

5151. Right of plaintiff to judgment—Set-off less than claim—Whether judgment for balance.] —FISHER v. GRAND RIVER LUMBER CO. (1905), 38 N. S. R. 180.—CAN.

Sect. 2.—Practice: Sub-sect. 7.]

proved a debt of £11 18s. 1d. & debt. established a defence under one plea as to 18s., under a set-off as to £7 8s., & also a payment of £4 after the commencement of the suit, thus affording an answer to the whole of pltf.'s demand:—*Held*: the payment having been made after the commencement of the suit, pltf. was entitled to a verdict with nominal damages, on the plea of set-off.—*SPRADBERRY v. GILLAM* (1851), 6 Exch. 422; 2 L. M. & P. 366; 20 L. J. Ex. 237; 17 L. T. O. S. 99; 155 E. R. 608.

519. — Unless set-off equal aggregate demand of plaintiff.]—A plea of set-off to several counts is not divisible: & pltf. is entitled to a verdict generally, unless debt. proves a set-off equalling the whole of pltf.'s aggregate demand. Where, therefore, to a declaration for goods sold & money paid, & on an account stated, debt. pleaded *non assumpsit* & a set-off, & the cause being referred, the arbitrator ordered a verdict to be entered for pltf. on both issues, except as to the count for money paid, & so far as the issues applied to that count, for debt. on both, the ct. held the award bad in this respect.—*MOORE v. BUTLIN* (1837), 7 Ad. & El. 595; 2 Nev. & P. K. B. 436; Will. Woll. & Dav. 638; 7 L. J. Q. B. 20; 2 Jur. 153; 112 E. R. 594.

*Annotations:—**Consd. Kilner v. Bailey* (1839), 5 M. & W. 382; *Tuck v. Tuck* (1839), 5 M. & W. 109; *Rodgers v. Maw* (1846), 15 M. & W. 444. *Apld. Ford v. Beech* (1846), 11 Q. B. 812. *Refd. Eastmure v. Laws* (1839), 5 Bing. N. C. 444; *Falcon v. Benn* (1841), 11 L. J. Q. B. 73; *Spradbery v. Gillam* (1851), 6 Exch. 422.

520. — Set-off pleaded to whole amount.—Proof of less amount.—Equivalent to particular of demand.]—Debt for money had & received, money lent, & on an account stated, to the amount of £19 10s. Plea of set-off of £50. The particulars of demand claimed £6 10s. for money lent; at the trial debt. merely proved a set-off of £6 10s.:—*Held*: he was not entitled to the verdict.—*RODIE v. CHAMPAIN* (1847), 1 Exch. 10; 5 Dow. & L. 121; 16 L. J. Ex. 249; 9 L. T. O. S. 177; 154 E. R. 5.

521. — Claim exceeding counterclaim.—Judgment for balance.—Form of entry of judgment.]—Where in an action, certain questions on the facts are left to the jury, the answers to which amount to a finding for pltf. on his claim, & for debt. on his counterclaim, & the judge directs a verdict to be entered for pltf. for the balance, upon a summons to vary the entry of the verdict by stating what pltf. & debt. respectively recovered in order to enable debt. to recover the costs of his counterclaim, the ct. will not interfere.—*POFFER v. CHAMBERS* (1878), 39 L. T. 350, D. C.

522. — Plaintiff wholly unsuccessful.—Proof of counterclaim establishing defence to claim.]—*LOWE v. HOLME*, No. 564, *post*.

523. — Claim admitted by defendant.—Although counterclaim made.]—Although the mere fact that a counterclaim is pleaded does not preclude the ct. from allowing pltf. to sign judgment under R. S. C., Ord. 40, r. 11, on a statement of claim which debt. admits, yet the ct. will not as a rule make such an order when the counterclaim is not shown to be frivolous, unsubstantial, or set up for the purpose of delay.—*MERSEY S.S. Co. v.*

SHUTTLEWORTH (1883), 11 Q. B. D. 531; 52 L. J. Q. B. 522; 48 L. T. 625; 32 W. R. 245, C. A.

*Annotations:—**Apld. Westacott v. Bevan*, [1891] 1 Q. B. 774. *Expld. Bankes v. Jarvis* (1903), 72 L. J. K. B. 267.

524. — — — — —.]—In an action for goods sold & delivered by writ specially indorsed, leave being given to defend, debt. did not plead any defence, but set up a counterclaim for damages in respect of goods sold to debt. which were alleged to be not according to sample. On motion for judgment:—*Held*: under R. S. C., Ord. 40, r. 11, on the admissions in the pleadings, pltf. were entitled to judgment, but upon the terms that if debt. brought the debt. into ct., execution should be stayed until after the trial of the counterclaim.—*SHOWELL & Co. v. BOWRON* (1883), 52 L. J. Q. B. 284; 48 L. T. 613; 31 W. R. 550, D. C.

*Annotation:—**Dbtd. Morsey S.S. Co. v. Shuttleworth* (1883), 11 Q. B. D. 531.

525. — Defendant not appearing at trial.—Form of order.]—A solr. brought an action against a client for payment of his bill of costs. Debt. denied the retainer of pltf., & made a counterclaim for negligence. Debt. did not appear at the trial, & pltf. produced evidence in support of the allegations in his statement of claim:—*Held*: pltf. was entitled to judgment as follows: "Dismiss counterclaim, with costs to be paid by debt. Refer the bill of costs on which this action is brought to the taxing master for taxation, pursuant to the Act of 1843. Pltf. to give credit at the time of taxation for all sums recovered by him from or on account of debt. to pay the amount of the taxing-master's certificate on taxation, adding thereto or deducting therefrom, as the case might acquire, the costs of taxation, together with the costs of the action up to & including the hearing, & the costs of the appeal.—*LUMLEY v. BROOKS* (1889) 41 Ch. D. 323; 58 L. J. Ch. 494; 61 L. T. 172; 37 W. R. 454, C. A.

*Annotation:—**Mentd. Re Webster*, [1891] 2 Ch. 102.

526. Right of defendant to judgment.—Set-off.—Pleas of payment to whole & set-off to whole.]—Where pltf. in an action of *assumpsit* claimed by his bill of particulars the sum of £36 2s. 4d., being the balance of a certain account, to which debt. pleaded the general issue, payment & a set-off, except as to the sum of 5s., which was paid into ct.; & at the trial proved payment to the amount of £29 17s. 3d., & a set-off to the amount of £16 10s. 7d.:—*Held*: debt. was not entitled to have a verdict entered for him on those pleas, for the amount proved under them.

Here the pleas are . . . payment to the whole & set-off to the whole; but they did not cover the whole demand established in evidence (*ALDERSON, B.*).—*KILNER v. BAILEY*, (1839), 5 M. & W. 382; 7 Dowl. 803; 9 L. J. Ex. 37; 3 Jur. 894; 151 E. R. 162.

*Annotation:—**Refd. Ford v. Beech* (1845), 6 L. T. O. S. 100.

527. — — — — — More than claim.]—The amount of these bills reduces pltf.'s claim below debts' set-off. Our judgment must therefore be for the latter, even on the supposition that it would be against them on all the important general points that have been raised (*LORD DENMAN, C.J.*).—*FURZE v. SHARWOOD* (1841), 2

521 i. — Claim exceeding counterclaim.—Judgment for balance.—Form of entry of judgment.]—*EDMONTON IRON WORKS v. CRISTALL* (1910), 15 W. L. R. 659; 3 Alta. L. R. 338.—*CAN.*

d. — New trial on counterclaim.]—*GARLAND v. THOMPSON* (1885),

9 O. R. 376.—*CAN.*

e. — Judgment on one claim.—Stay of operation until after judgment on another claim & defendant's counterclaim.—Hampering trial. *SPEARS v. FLEMING* (1900), 20 122; 19 P. R. 127.—*CAN.*

527 i. Right of defendant to judgment.—Set-off.—More than claim.]—Deft. is entitled to have judgment in his favour for the excess of his set-off over pltf.'s claim, & for such purpose no special prayer or conclusion in the plea of set-off is necessary.—*SMART v.*

Q. B. 388; 2 Gal. & Dav. 116; 11 L. J. Q. B. 19; 6 Jur. 554; 114 E. R. 154.

Annotations:—*Mentd.* King v. Blokley (1842), 6 Jur. 582; Robson v. Curlewis (1842), 2 Q. B. 421; Miers v. Brown (1843), 11 M. & W. 372; East v. Smith (1847), 16 L. J. Q. B. 292; Caunt v. Thompson (1849), 7 C. B. 400; Paul v. Joel (1859), 5 Jur. N. S. 603; Yorkshire Banking Co. v. Beatson (1880), 5 C. P. D. 109; Nicholls v. Knapman (1909), 101 L. T. 746.

528. ——— Divisible—Sufficient to cover residue of claim remaining otherwise unanswered.]—A plea of set-off is divisible; so that, if enough is proved under it to cover so much of pltf.'s demand as is left unanswered by the other pleas, deft. is entitled to the verdict, though the set-off, if pleaded alone, would not have answered pltf.'s demand (*LORD DENMAN, C.J.*).—*FORD v. BEECH* (1847), 11 Q. B. 842; 16 L. J. Q. B. 100; 9 L. T. O. S. 23; 11 Jur. 299; 116 E. R. 689; *revsd.* on other grounds (1848), 11 Q. B. 852, Ex. Ch.

Annotations:—*Refd.* Roberts v. Campbell (1817), 10 L. T. O. S. 183. *Mentd.* Gibbons v. Vouillon (1849), 8 C. B. 483; Webb v. Spicer, Webb v. Salmon (1849), 13 Q. B. 894; Moss v. Hall (1850), 5 Exch. 46; Overton v. Harvey (1850), 9 C. B. 321; Belshaw v. Bush (1851), 11 C. B. 191; Orme v. Galloway (1854), 9 Exch. 544; Bottomley v. Nuttall (1858), 5 C. B. N. S. 122; Foley v. Fletcher (1858), 28 L. J. Ex. 100; Frazer v. Jordan (1858), 8 E. & B. 303; Rayner v. Fussey (1859), 28 L. J. Ex. 132; Owens v. Pizey (1862), 7 L. T. 350; Walker v. Nevill (1864), 3 H. & C. 403; Itay v. Jones (1865), 34 L. J. C. P. 306; Coddington v. Paleologo (1867), L. R. 2 Exch. 193; Newington v. Levy (1870), L. R. 6 C. P. 180; Slater v. Jones, Capes v. Ball (1873), L. R. 8 Exch. 186; Baker v. Ingall, [1912] 3 K. B. 106; Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. v. Same, [1915] 1 K. B. 471; *Re* Sutro & Heilbut, Symons, [1917] 2 K. B. 348; Saunders v. Young's Brewery (1925), 134 L. T. 319.

529. ——— Less than claim—Set-off pleaded to whole of claim.]—Where a set-off is pleaded to the whole declaration, & the amount proved under it does not cover pltf.'s demand, the sum proved will go in reduction of damages, but deft. will not be entitled to a verdict on the plea for the amount proved.—*RODGERS v. MAW* (1846), 15 M. & W. 444; 4 Dow. & L. 66; 16 L. J. Ex. 137; 7 L. T. O. S. 260; 153 E. R. 924.

Annotation:—*Mentd.* A.-G. v. De Keyser's Royal Hotel, [1920] A. C. 508.

530. ——— As set forth in particulars.]—Where there is but one plea to the whole declaration, & that plea a set-off of an amount exceeding pltf.'s claim in his particulars of demand; if deft. prove a greater amount at the trial due from pltf. to him, than is proved to be due from deft. to pltf., then deft. is entitled to judgment, & pltf. cannot have a verdict for nominal damages.—*NICHOLS v. TUCK* (1853), 1 C. L. R. 532; Bail Ct. Cas. 194; 22 L. J. Q. B. 351; 21 L. T. O. S. 170; 17 Jur. 624; 1 W. R. 449.

531. ——— When entitled to judgment on balance.]—*LOWE v. HOLME*, No. 561, *post*.

532. ———.]—*HEWITT & CO. v. BLUMER & CO.* (1886), 57 L. J. Q. B. 196, n.; 3 T. L. R. 221, C. A.

Annotations:—*Consd.* Shrapnel v. Laing (1888), 20 Q. B. D. 334. *Refd.* Atlas Metal Co. v. Miller, [1898] 2 Q. B. 500; Sharpe v. Haggith (1912), 106 L. T. 13.

533. ———.]—By an agreement in writing defts. agreed to let & pltf.s. to take the exclusive right of putting up advertisement hoardings & posting bills thereon upon specified land of defts., for seven years pltf.s. paying defts. a fixed annual sum payable quarterly, rates & taxes to be paid by "the tenants." Pltf. erected hoardings which were affixed in a very substantial manner to the land & exhibited advertisements upon them.

Pltf.s. fell into arrear in their payments under the agreement, & defts. levied a distress upon the hoardings & ultimately carried them away & sold them. Pltf.s. brought an action to recover damages for wrongful distress & defts. counter-claimed for the amount of the arrears due under the agreement.—*Held*: pltf. co. having gone into liquidation it would be equitable to set off the damages recovered by pltf.s. on the claim against the arrears recovered by defts. on the counter-claim & to give judgment for the balance, & separate judgments ought to be given on the claim & counterclaim respectively.—*PROVINCIAL BILL POSTING CO. v. LOW MOOR IRON CO.*, [1909] 2 K. B. 344; 78 L. J. K. B. 702; 100 L. T. 726; 16 Mans. 157, C. A.

534. ——— Counterclaim against plaintiffs & third parties—Non-appearance of third parties.]—*VERNEY v. THOMAS, THOMAS v. VERNEY*, No. 450, *ante*.

Failure of plaintiff to plead.]—*See* Sub-section 5, *ante*.

535. Right of plaintiff to judgment on claim & defendant on counterclaim—Counterclaim not able to be pleaded as set-off.]—In an action tried with a jury, where deft. counterclaims in respect of matters which could not be pleaded as set-off, & pltf. recovers a sum on his claim, & deft. recovers on his counterclaim a sum exceeding that which pltf. recovers on his claim, the claim & counterclaim should, for the purpose of taxation of costs, be treated as separate & independent actions, & the costs in each taxed in favour of the successful party, subject to a deduction in respect of the costs of any issues on which he has not succeeded. In such a case it is immaterial, with respect to the taxation of costs, whether the judgment is drawn up in form for pltf. for the sum recovered on his claim, & for deft. for the sum recovered or his counterclaim; or whether judgment is given for deft. for the balance under R. S. C., Ord. 21, r. 17.—*SHRAPNEL v. LAING* (1888), 20 Q. B. D. 334; 57 L. J. Q. B. 195; 58 L. T. 705; 36 W. R. 297; 4 T. L. R. 241, C. A.

Annotations:—*Apld.* Finska Angfartygs Akt. v. Brown, Toogood (1891), 7 T. L. R. 578. *Consd.* Atlas Metal Co. v. Miller, [1898] 2 Q. B. 500. *Apld.* Sharpe v. Haggith (1911), 106 L. T. 13; Fox v. Central Silksstone Collieries, [1912] 2 K. B. 597. *Refd.* Amon v. Bobbett (1889), 60 L. T. 912; Westcott v. Bevan, [1891] 1 Q. B. 774; Christie v. Platt, [1921] 2 K. B. 17; Wilson v. Walters, [1926] 1 K. B. 511. *Mentd.* Pincott v. Lettis (1897), 77 L. T. 160; Craske v. Wado (1899), 80 L. T. 380; Bates v. Gordon Hotels (1913), 82 L. J. Q. B. 441.

536. ——— Plaintiff giving credit for counterclaim.]—Pltf. claimed damages for fraudulent misrepresentations, & in the statement of claim said that £90 was due from her to deft., "for which sum pltf. is willing to give deft. credit in account against the damages herein claimed." Deft. counterclaimed that sum of £90, & pltf., in the defence to counterclaim, said that she repeated the above paragraph of the claim. At the trial the jury found a verdict for pltf. with £50 damages, & for deft. for £90 on the counterclaim.—*Held*: judgment ought to be entered for pltf. for £50 on the claim & for deft. for £90 on the counterclaim.—*SHARPE v. HAGGITH* (1912), 106 L. T. 13; 28 T. L. R. 194, C. A.

537. Amount recovered on counterclaim—Exceeding amount recovered on claim—Claim of costs in favour of plaintiff—Set-off by defendant against over balance.]—The ct. having jurisdiction to do so, will in the exercise of its discretion order a

BOWMANVILLE MACHINE & IMPLEMENT CO. (1875), 25 C. P. 503.—*CAN.*

PEOPLE'S LIFE INSURANCE CO. (1885), 30 O. R. 438.—*CAN.*

until trial of counterclaim.]—KAUFMAN v. CLIMAX MANUFACTURING CO. (1927), 37 Man. L. R. 75; [1927] 2 W. W. R. 660; 8 C. B. R. 370.—*CAN.*

527 II. ———.]—*WALLACE v.*

f. Setting aside entry of judgment

Sect. 2.—Practice: Sub-sects. 7, 8 & 9, A.]

set-off of the balance of amounts recovered by deft. on his counterclaim over damages & a sum awarded to pltf. as against a balance of costs of action & counterclaim due to pltf.—*MEYNALL v. MORRIS* (1911), 104 L. T. 667; 55 Sol. Jo. 480.
Annotation:—Refd. Puddheatt v. Leith, [1916] 2 Ch. 168.

538. No order on counterclaim until claim disposed of.—*AITKEN v. DUNBAR*, No. 195, *ante*.

Judgment on plea of set-off—Action for sum claimed by set-off—Estoppel.—*See ESTOPPEL*, Vol. XXI., p. 202, Nos. 451, 455.

SUB-SECT. 8.—SECURITY FOR COSTS.

See R. S. C., Ord. 65, r. 6.

539. Defendant resident out of jurisdiction—Discretion of court.—Where deft. resident out of the jurisdiction set up a counterclaim which arose out of the same transaction as the claim & was in substance, though not technically, in the nature of a defence to the action:—*Held*: the ct. had a discretion to refuse to order deft. to give security for the costs of the counterclaim.—*NECK v. TAYLOR*, [1893] 1 Q. B. 560; 62 L. J. Q. B. 511; 68 L. T. 399; 41 W. R. 486; 9 T. L. R. 337; 4 R. 344, C. A.

Annotations:—Refd. New Fenix Compagnie Anon. d'Assurances de Madrid v. General Accident Fire & Life Assce. Corpn., [1911] 2 K. B. 619; *Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co.*, [1923] 2 K. B. 166.

540. ———.—There is no hard & fast rule of practice which prevents the ct. from making an order for security for costs against a person resident out of the jurisdiction who, upon being sued in this country, sets up a cross-claim, either by counterclaim or by cross-action. It is for the ct. to consider, in the exercise of its discretion, whether, having regard to the circumstances of the particular case the cross-claim must be treated as made, substantially, by way of defence to the action against claimant, or whether it must be regarded as being in the nature of an independent claim made in respect of matters foreign to that action, & therefore one with regard to which security for costs ought to be ordered to be given.

An agreement was made between insurance co. A. & insurance co. B., which was a foreign co. carrying on business out of the jurisdiction, for the reinsurance by the latter co. of a certain proportion of fire risks undertaken by the former co. in various parts of the world. The agreement provided for quarterly settlements of accounts between the two co.'s. Such settlements accordingly took place every quarter during a period of four years ending in 1908. Co. A. brought an action against co. B., alleging that they had been unable to obtain settlements of accounts from co. B. in respect of business done in subsequent quarters, & claiming an account in respect of such quarters & payment of the balance, if any, found to be due to them. Co. B. thereupon brought a cross-action against co. A., asking for inspection of all original documents & vouchers connected with all transactions in which pltf's were interested

under the agreement, that all the previously settled accounts between the two cos. should be reopened on the ground of errors having occurred therein, & for an account & payment of any moneys found to be due to them after the accounts had been reopened & taken:—*Held*: an order should be made for security for the costs of the cross-action against co. B.—*NEW FENIX COMPAGNIE ANONYME D'ASSURANCES DE MADRID v. GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPN., LTD.*, [1911] 2 K. B. 619; 80 L. J. K. B. 1301; 105 L. T. 469, C. A.

Annotation:—Refd. Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co., [1923] 2 K. B. 166.

541. — Counterclaim arising out of different transaction.—The test of a cross-bill is that it is a simple bill of defence to an existing attack. Where a bill did not come within the definition, security for costs was ordered, pltf. being abroad.—*TYNTE v. HODGE* (1862), 2 John. & H. 692; 1 New Rep. 48; 7 L. T. 349; 8 Jur. N. S. 1226; 11 W. R. 52; 70 E. R. 1237.

542. ———.—Where deft. residing out of the jurisdiction sets up a counterclaim which amounts to an independent action, he may be ordered to give security to pltf's for the costs of the counterclaim.—*LAKE & LAKE (TRADING AS HASELTINE, LAKE & CO.) v. HASELTINE* (1885), 55 L. J. Q. B. 205, D. C.

Annotation:—Refd. Neck v. Taylor (1893), 41 W. R. 486.

543. ———.—Where a claim & counterclaim arise out of different matters, so that the counterclaim is really in the nature of a cross-action, deft., if he is residing out of the jurisdiction, may be required to give security for pltf.'s costs of the counterclaim, & if the only dispute remaining arises on the counterclaim, it is beyond doubt right that he should be so required.—*SYKES v. SACERDOTI* (1885), 15 Q. B. D. 423; 54 L. J. Q. B. 560; 53 L. T. 418, C. A.

Annotations:—Refd. Lake (trading as Haseltine, Lake) v. Haseltine (1885), 55 L. J. Q. B. 205; *Delobel Filipo v. Varty* (1893), 62 L. J. Q. B. 398; *Neck v. Taylor* (1893), 41 W. R. 486.

544. — Counterclaim arising out of same transaction.—In an action for breach of contract against deft., a foreigner residing abroad, he, by his defence, denied the breaches, & also made a counterclaim for breaches of the same contract by pltf., claiming damages to an amount less than pltf.'s claim:—*Held*: deft. could not be ordered to give security for pltf.'s costs occasioned by the counterclaim.

The case which at first seemed to me at variance with our present decision was *Winterfield v. Bradnum*, No. 545, *post*. . . . But I think there are broad distinctions between the two cases . . . one is that the counterclaim arose out of a different transaction from that in respect of which pltf. was suing, whereas in the present case pltf.'s & deft.'s cases rest respectively upon the same circumstances (*FIELD, J.*).—*MAPLESON v. MASINI* (1879), 5 Q. B. D. 144; 49 L. J. Q. B. 423; 42 L. T. 531; 28 W. R. 488, D. C.

Annotations:—Refd. Lake William & Henry (trading as Haseltine, Lake) v. Haseltine (1885), 55 L. J. Q. B. 205; *Sykes v. Sacerdoti* (1885), 15 Q. B. D. 423; *Neck v. Taylor* (1893), 41 W. R. 486; *New Fenix Compagnie Anon. d'Assurances de Madrid v. General Accident Fire & Life Assce. Corpn.*, [1911] 2 K. B. 619; *Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co.*, [1923] 2 K. B. 166.

security for costs.—*BALFOUR v. PICKRE* (Alta.), [1922] 2 W. W. R. 1327.—*CAN.*

544 i. — Counterclaim arising out of same transaction.—Where deft. is out of the jurisdiction & makes a counterclaim arising out of the same transaction on which pltf.'s claim is based, & in the nature of a defence

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541 i. Defendant resident out of jurisdiction—Counterclaim arising out of different transaction.—*CARTWRIGHT v. PRATT* (1912), 22 O. W. R. 92; 3 O. W. N. 1279; 3 D. L. R. 460.—*CAN.*

541 ii. ———.—*Seemle*: where a counterclaim by a deft. out of the jurisdiction arises out of a different subject-matter than that on which pltf.'s claim is based, & is therefore in the nature of a cross-action, the mere fact that he is a deft. in pltf.'s action does not prevent an order being made against him for

545. Plaintiff resident out of jurisdiction—Counterclaim arising out of different transaction.]—Def't. who admits the cause of action sued upon & sets up a counterclaim founded upon a distinct claim, is not entitled to security for costs from pl'tf. a foreigner residing without the jurisdiction.—*WINTERFIELD v. BRADNUM* (1878), 3 Q. B. D. 324; 38 L. T. 250; 26 W. R. 472, C. A.

Annotations:—Consd. Mapleson v. Masini (1879), 5 Q. B. 144; *Beddall v. Maitland* (1881), 17 Ch. D. 174. *Al---* *Sykes v. Sacerdoti* (1885), 15 Q. B. D. 423. *Reid. Stooke v. Taylor* (1880), 5 Q. B. D. 569; *Toke v. Andrews* (1882), 8 Q. B. D. 428; *McGowan v. Middleton* (1883), 11 Q. B. D. 484; *Lake & Lake* (trading as Haseltine, Lake) *v. Haseltine* (1885), 55 L. J. Q. B. 205; *Neck v. Taylor* (1893), 41 W. R. 486.

546. — Action on foreign judgment.]—A foreigner resident abroad brought an action on a foreign judgment. Def'ts. pleaded that the judgment had been obtained by fraud on the part of pl'tf. :—*Held*: pl'tf. must give security for costs, for the plea showed a good defence to the action & the rule which required a pl'tf. resident abroad to give security for costs applied as well to an action on a foreign judgment as to any other kind of action.—*CROZAT v. BROGDEN*, [1894] 2 Q. B. 30; 63 L. J. Q. B. 325; 70 L. T. 522; 42 W. R. 353; 10 T. L. R. 361; 9 R. 296, C. A.

547. Action of tort—Plaintiff without visible means of paying defendant's costs—Defendant with counterclaim.]—County Courts Act, 1888 (c. 43), s. 66, cannot be made to apply to def't. with a counterclaim, although the issue raised by the counterclaim is the only issue left for trial in the action.—*DELOBBEL-FLIPO v. VARTY*, [1893] 1 Q. B. 663; 62 L. J. Q. B. 398; 68 L. T. 797; 42 W. R. 48; 37 Sol. Jo. 426; 5 R. 347, D. C.

Annotation:—Reid. Guilford v. Lambeth, [1894] 2 Q. B. 832.

By company in liquidation.]—See COMPANIES, Vol. IX., p. 683, No. 4564.

In Admiralty actions.]—See ADMIRALTY, Vol. I., pp. 188–190, Nos. 1021–1027, 1041–1043.

SUB-SECT. 9.—COSTS.

A. Set-off.

548. Costs of withdrawn plea of set-off.]—Def't. having pleaded a set-off of a sum exceeding the damages laid in the declaration, pl'tf. obtained leave, on payment of costs, to amend his declaration by increasing the amount of damages. Def't. thereupon withdrew his plea of set-off, & pleaded payment into ct. :—*Held*: def't. was not entitled to the costs of the plea so withdrawn.—*GOULD v. OLIVER* (1838), 5 Bing. N. C. 115; 6 Scott, 884; 132 E. R. 1048.

549. Plaintiff entitled to costs till set-off pleaded.]—*Semble*: in such case if def't.'s answer to pl'tf.'s claim consists partly of a set-off, pl'tf. is entitled to his costs to the time of pleading, unless

def't. has offered to allow the set-off.—*WALTON v. BROWN* (1858), 3 H. & N. 879; 28 L. J. Ex. 38; 32 L. T. O. S. 149.

550. Defendant establishing set-off exceeding claim—Defendant entitled to costs of action.]—Pl'tf. claimed to recover commission due to him from def'ts. on an agreement. Def'ts. denied the claim, & claimed by way of counterclaim £230 0s. 9d. for goods sold. The jury found a verdict for pl'tf. on the claim for £114 17s. 6d. & a verdict for def'ts. on the counterclaim for £230 0s. 9d. The judgment entered was "that pl'tf. recover against def'ts. £ for his costs of suit"; & "that def'ts. recover against pl'tf. £115 3s. 3d. on the counterclaim & £ for their costs of the counterclaim":—*Held*: on taxing the costs according to the judgment, pl'tf. & not def'ts. was entitled to the costs of the cause.

If this had been treated as a pure set-off to the amount of pl'tf.'s claim as I think it might have been & it had so appeared on the judgment then it seems to me def'ts. would have been entitled to the costs of the action because then def'ts. would have denied by way of defence that pl'tf. had any right to bring an action at all. . . . Where there is a claim with issues taken on it & a counterclaim, not a set-off, but in the nature of a cross-action with issues on it, & where pl'tf. succeeds on the claim & def't. on the counterclaim, the proper principle of taxation, if not otherwise ordered, is to take the claim as if it & its issues were an action, & then to take the counterclaim & its issues as if it were an action, & then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case where items are common to both actions the master would divide them (*BRETT, L.J.*).—*BAINES v. BROMLEY* (1881), 6 Q. B. D. 691; 50 L. J. Q. B. 465; 44 L. T. 915; 29 W. R. 706, C. A.

Annotations:—Apld. Re Brown, Ward v. Morse (1883), 23 Ch. D. 377. *Distd. Lowe v. Holme* (1883), 10 Q. B. D. 286. *Expld. Lund v. Campbell* (1885), 14 Q. B. D. 821. *Consd. Shrapnel v. Laing* (1888), 20 Q. B. D. 334; *Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500. *Reid. Ahrbecker v. Frost* (1886), 55 L. T. 264; *Wight v. Shaw* (1887), 19 Q. B. D. 396; *Christie v. Platt*, [1921] 2 K. B. 17.

551. —.]—Pl'tf. having claimed for goods sold & delivered, & for commission, & def'ts. having counterclaimed for moneys collected by pl'tf. on def'ts.' account & for work & labour, the action was referred to an arbitrator under an order of reference whereby "the costs of the cause, & the costs of the reference & award shall abide the event." The arbitrator found the issues on the claim in favour of pl'tf., & awarded him a sum of money in respect thereof, & found the issues on the counterclaim in favour of def'ts., & awarded to them a sum of money in respect thereof. After deducting the sum found for pl'tf. from the sum found for def'ts., a balance of £97 was due to def'ts.:—*Held*: the word "event" in the order of reference must be construed distributively, &

thereto, the ct. will, in its discretion, refuse to make him find security for costs.—*BALFOUR v. PIERCE* (Alta.), [1922] 2 W. W. R. 1327.—CAN.

544 II. —.]—*JAMIESON v. TAYLOR* (Alta.) (1922), 70 D. L. R. 240; [1922] 3 W. W. R. 909.—CAN.

545 I. Plaintiff resident out of jurisdiction—Counterclaim arising out of different transaction.]—A def't. is not necessarily entitled to security for costs because pl'tf.'s residence is out of the jurisdiction. If it be made apparent by evidence that def't. has no defence, Def't. admitted that he owed the debt sued for, but he afterwards alleged a counterclaim for illegal arrest

by pl'tf. in the course of his action :—*Held*: def't. was not entitled to security for costs.—*DOER v. RAND* (1884), 10 P. R. 165.—CAN.

G. Counterclaim in respect of distinct matter—Company having no assets.]—*MACKENZIE v. PRINCE JOHN MINING CO.*, [1924] 4 D. L. R. 221; [1924] 3 W. W. R. 168; 34 B. C. R. 193.—CAN.

PART III. SECT. 2, SUB-SECT. 9.—A.

550 I. Defendant establishing set-off exceeding claim—Defendant entitled to costs of action.]—*GATES v. SEAGRAM* (1909), 19 O. L. R. 216; 14 O. W. R. 182.—CAN.

550 II. —.]—*MAGER v. BAIRD RANCHING CO.*, [1921] 1 W. W. R. 311; 57 D. L. R. 283.—CAN.

h. Effect of claims accruing after action.]—*SHERWOOD v. CAMPBELL* (1836), 5 O. S. 2.—CAN.

k. Plaintiff's claim within jurisdiction of court—Set-off not within jurisdiction.]—Where pl'tf.'s claim is within the jurisdiction of the District Ct. it is no ground for a certificate for full costs that def't.'s set-off could not be tried in the District Ct.—*GOODERHAM v. CHILVER* (1837), 5 O. S. 496.—CAN.

l. Right of set-off contested—Successful party entitled to costs of application.]—If the right of set-off

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judgment must be entered for debts., who were entitled to the costs of the action, reference, & award, but pltf. was entitled to the costs of the issues found in his favour.—*LUND v. CAMPBELL* (1885), 14 Q. B. D. 821; 54 L. J. Q. B. 281; 53 L. T. 900; 33 W. R. 510; 1 T. L. R. 341, C. A.

Annotations:—Distd. Ahrbecker v. Frost (1886), 17 Q. B. D. 606. *Reid. Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500; *Reid, Hewitt v. Joseph*, [1918] A. C. 717.

*B. Counterclaim.**(a) Claim and Counterclaim Both Succeeding.*

552. Whether plaintiff entitled to general costs of action—Defendant to costs of counterclaim.]—Pltf. brought an action to recover £90 on breach of contract for dilapidations, & debt., by counterclaim, sought to recover an account book alleged to be improperly retained by pltf., & also a sum of £15 for fixtures. The counterclaim was not in form for detinue of the book. The judge at the trial directed the book to be returned to debt., which pltf. agreed to do, & in order to insure its return, the judge assessed its value at £150. A verdict was found by the jury for pltf. for £90 damages on his claim, & for debt. for £15 on his counterclaim, with 1s. damages for the detention of the book; but there was no distinct finding by the jury as to its value. The judge directed the verdict to be entered for pltf. for £75, the difference between £90 & £15, & ordered the book to be returned to debt. or £150, its value, & 1s. paid to him for its detention.

The certificate of the associate set out the findings of the jury as above stated, & concluded as follows: "The judge directed that judgment should be entered for pltf. for £75, & for debt. for the return of the book, or £150, its value, & 1s. damages for its detention." The book was, in fact, returned to debt. within a week after the trial.

Debt. on the taxation of costs, claimed to be entitled to the general costs of the cause, on the ground of having recovered a sum of money, or its equivalent, exceeding the amount recovered by pltf.:—*Held*: debt. was not so entitled, & could not maintain his claim; but pltf. was entitled to the general costs of the cause, & debt. to the costs of the particular issues which had been found in his favour.—*HALLINAN v. PRICE* (1879), 41 L. T. 627; 27 W. R. 490.

553. ———.]—*DAINES v. DROMLEY*, NO. 550, ante.

554. ———.]—Pltfs. claimed £49 12s.

be contested the successful party may be entitled to the costs of the application.—*REAL ESTATE LOAN CO. v. MOLESWORTH* (1885), 3 Man. L. R. 176.—*CAN.*

PART III. SECT. 2, SUB-SECT. 9.—B. (a).

552 i. Whether plaintiff entitled to general costs of action—Defendant to costs of counterclaim.]—In an action where there is a claim & a counterclaim, & pltf. succeeds upon his claim & debt. on his counterclaim, judgment should be entered with costs, for each party for the amount recovered by him on his claim & counterclaim respectively.—*BANK OF VICTORIA v. SYNNOT* (1885), 11 V. L. R. 598.—*AUS.*

552 ii. ———.]—*COUGHLIN v. HOLLINGSWORTH* (1894), 5 O. R. 207.—*CAN.*

552 iii. ———.]—*BERTRAM v. MASSEY MANUFACTURING CO.* (1888), 16 O. R. 516.—*CAN.*

552 iv. ———.]—*SUMMERFELDT v. JOHNSTON* (1895), 17 P. R. 6.—*CAN.*

552 v. ———.]—Where pltf. succeeds upon his claim, & debt. upon his counterclaim, the former should receive the costs of the action, & the latter those of the counterclaim.—*ONTARIO FORGE & BOLT CO. v. COMET CYCLE CO.* (1896), 17 P. R. 156.—*CAN.*

552 vi. ———.]—*BAULD v. FRASER* (1901), 34 N. S. R. 178.—*CAN.*

552 vii. ———.]—*SJOSTROM v. GALE* (N. W. T.) (1905), 2 W. L. R. 332.—*CAN.*

552 viii. ———.]—*SWANSON v. GRAHAME* (B. C.) (1908), 8 W. L. R. 982.—*CAN.*

552 ix. ———.]—*KELLY v. CITY OF WINNIPEG* (1909), 12 W. L. R. 49.—*CAN.*

552 x. ———.]—*CAMPBELL v. JOYCE* (Man.) (1910), 15 W. L. R. 29; *affd.*, 15 W. L. R. 291.—*CAN.*

552 xi. ———.]—*AUTOMOBILE*

Defts. admitted the claim & counterclaimed for £75. The judgment was for pltfs. on the claim & for debts. on the counterclaim for £40; pltfs. to have the costs of their claim & debts. to have the costs of their counterclaim:—*Held*: pltfs. were entitled to the costs of the cause up to the time of delivery of the statement of defence, & debts. were entitled to such costs after the delivery of the statement of defence.—*BOWKER v. KESTIVEN & CO.* (1882), 47 L. T. 545.

555. ———.]—When pltf.'s claim & debt.'s counterclaim have both been successful, pltf., in the absence of any special directions to the contrary, is entitled to the general costs of the action, notwithstanding that the result of the litigation is in favour of debt. There will be no apportionment of such costs as would have been duplicated had the counterclaim been the subject of an independent action, but pltf. is not to recover as costs of the action any costs fairly attributable to the counterclaim.—*Re BROWN, WARD v. MORSE* (1883), 23 Ch. D. 377; 52 L. J. Ch. 524; 49 L. T. 68; 31 W. R. 936, C. A.

Appl.—*Holme* (1883), 10 Q. B. D. 286; *Pearson v. Ripley* (1884), 50 L. T. 629; *Shrapnel v. Laing* (1888), 58 L. T. 705.

556. ———.]—Where debt. has succeeded on a counterclaim not being of the nature of a set-off, he will be entitled to the costs of such counterclaim as if they were for an independent action. The party who is substantially successful is entitled to the general costs of the cause, & the other party to the costs of the issues, if any, on which he may have succeeded.—*PEARSON v. RIPLEY* (1884), 50 L. T. 629; 32 W. R. 463, D. C.

557. ———.]—*HEWITT & CO. v. BLUMER & CO.* (1886), 57 L. J. Q. B. 196, n.; 3 T. L. R. 221, C. A.

Annotations:—Folld. Shrapnel v. Laing (1888), 20 Q. B. D. 334. *Reid. Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500; *Sharpe v. Haggrith* (1912), 106 L. T. 13.

558. ———.]—Pltf. claimed £78 15s. in respect of a quarter's rent of premises let furnished to debt. Debt. by his pleadings admitted the claim, but counterclaimed a larger amount as damages in respect of the insanitary condition of the demised premises. The action was tried by a jury who found for debt. on the counterclaim with £17 16s. damages. The judge at the trial ordered that judgment should be entered for pltf. for the amount of the claim, with costs down to the date of the counterclaim; & that judgment should be entered for debt. for £17 16s. on the counterclaim, with the costs of the counterclaim & subsequent

SALES, LTD. v. MOORE (1913), 24 O. W. R. 26; 4 O. W. N. 700; 10 D. L. R. 184.—*CAN.*

552 xii. ———.]—*PRINNEVEAU v. MORDEN & JONES* (1913), 24 W. L. R. 288; 4 W. W. R. 637; 11 D. L. R. 272.—*CAN.*

552 xiii. ———.]—*CANADIAN LAKE TRANSPORTATION CO. v. BROWNE* (1913), 24 O. W. R. 149; 4 O. W. N. 880; 14 D. L. R. 744.—*CAN.*

552 xiv. ———.]—*DORMAN v. CRAPPER* (Sask.) (1914), 27 W. L. R. 598.—*CAN.*

552 xv. ———.]—*VICTORIA SAA-NICH MOTOR, ETC., CO. v. WOOD MOTOR CO., LTD.* (1915), 31 W. L. R. 853.—*CAN.*

552 xvi. ———.]—*NIVEN & CO., LTD. v. POVERTY BAY FARMER'S MEAT CO., LTD.*, [1917] N. Z. L. R. 879.—*N.Z.*

m. —Reservation of costs of counterclaim—Reference to ascertain amount.—*FURLONG v. THOMAS* (N. W. T.) (1905), 2 W. L. R. 188.—*CAN.*

thereto including the costs of the trial:—*Held*: the effect of the judge's order as regards costs was to prevent them from following the "event" & in the absence of "good cause" he had no jurisdiction to make such order.—*WIGHT v. SHAW* (1887), 19 Q. B. D. 396; 36 W. R. 408, C. A.
Annotation.—*Appl. Wilts, Dorset & Somerset Dairy Produce Supply Assn. v. Hammond* (1889), 5 T. L. R. 196.

559. ———.]—*SHRAPNEL v. LAING*, No. 535 *ante*.

560. ———.]—*WILTS, DORSET & SOMERSET DAIRY PRODUCE SUPPLY ASSN. v. HAMMOND* (1889), 5 T. L. R. 196, C. A.

561. ———.]—*FINSKA ANGFARTYGS AKT. v. BROWN, TOOGOOD & Co.* (1891), 7 T. L. R. 578, C. A.

Annotation.—*Consol. Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500.

562. — *Apportionment*.]—Pltfs. brought an action against defts. for wrongfully repudiating a contract to purchase oil from them over a period of a year & to provide storage for the oil during that time. They alleged in their statement of claim that the date named for the first delivery, Feb. 15, 1924, had been postponed till Mar. 15 by mutual agreement, but that on Feb. 18 defts. had refused to carry out the contract. Defts. pleaded as a defence that there had been no agreement to postpone delivery & that pltfs. had committed a fundamental breach of the contract in not making the first delivery by Feb. 15, & in failing to give notice, as they had agreed to do, of the arrival of the oil; & they counterclaimed damages for these breaches. Pltfs. in their reply & defence to the counterclaim denied that they had committed any breach of contract to deliver by Feb. 15; (a) because of the alleged agreement to postpone delivery, (b) because defts. were not ready & willing to provide storage for the oil, (c) because defts. had broken a condition precedent to pltfs.' obligation to deliver in that they had omitted to procure a banker's guarantee for the price of the oil to be delivered, & (d) because defts. had omitted to do this in order to prevent pltfs. from obtaining oil from their suppliers & so performing their contract with defts. At the trial the evidence & the arguments of counsel were mainly directed to these four matters. Both the claim & the counterclaim were dismissed with costs. In taxing the costs the taxing master allowed defts. only the costs of litigating the first matter, the question whether there had been any agreement to postpone delivery, being of opinion that the three other matters arose on the counterclaim only:—*Held*: all four matters arose upon the claim & upon the counterclaim & the costs of all must be apportioned.

The same principles applicable to cases in which the ct. has dismissed the action & counterclaim with costs apply conversely to cases in which both parties have succeeded (*LAWRENCE, L.J.*).—*CONTINENTAL CONTRACTORS v. MEDWAY OIL & STORAGE Co.*, [1928] 1 K. B. 238; 96 L. J. K. B. 967; 138 L. T. 125; 43 T. L. R. 830, C. A.

563. Plaintiff entitled to costs of claim & counterclaim.]—A direction in the will of a married woman that her debts shall be paid makes all the property she has power to dispose of, including arrears of an annuity which was subject to a restraint on anticipation, assets for payment

of all liabilities of her separate estate, including damages for breach of covenant by her legal personal representatives.

By a separation deed the husband covenanted to pay £1,000 to a trustee upon trust to pay the income thereof to the wife for her separate use without power of anticipation, & to pay him a further annual sum upon the same trusts. Afterwards the husband sued for a divorce. The proceedings were compromised by a deed whereby the wife & the trustee purported to release the husband from his covenant to pay the further annual sum, & she & a surety covenanted with the husband that neither she nor any person on her behalf should take proceedings to compel the husband to allow her any support, maintenance, alimony, or additional income other than the income of the £1,000. The wife lived ten years after this deed, & on every quarter-day she received from the trustee a cheque for £10 representing the income of the £1,000 & made no claim for more. The £1,000 was not in fact invested, & the £10 a quarter was found by the husband.

The wife made a will whereby she directed all her debts to be paid, & gave her property to an adopted daughter for life. Her legal personal representative brought this action against the husband for arrears of the annuity. The husband counterclaimed for damages for breach of the wife's covenant:—*Held*: the release of the husband's covenant being admittedly void, the conduct of the wife, in accepting the trustee's cheques for less sums than were due, did not amount either to accord & satisfaction, or to such acquiescence as would prevent the wife claiming the arrears. Her representative was therefore entitled to succeed in the action; the wife's covenant not to sue was not personal to herself or confined to her lifetime; it bound all her free separate estate; & the direction in her will for payment of debts made the arrears of the annuity assets for payment of damages for breach of her covenant. The husband was therefore entitled to recover back on the counterclaim all the money & costs which he might be ordered to pay in the action. No order was made except that pltf. should pay the costs of the action & of the counterclaim.—*SPRANGE v. LEE*, [1908] 1 Ch. 424; 77 L. J. Ch. 274; 98 L. T. 400, C. A.

564. Defendant allowed general costs of action.—Substantial success of defendant.]—Pltf.'s claim being for the balance of the contract price of work done, after giving credit for money paid on account, defts. by way of set-off & counterclaim claimed in respect of the inferiority & defective character of the work. The action being referred for trial to an official referee, he found by his report that a balance of £32 18s. 6d. remained due to pltf. on his claim in respect of the contract price of the work, & £34 10s. 6d. was due to defts. on their counterclaim:—*Held*: the proper judgment on these findings was that defts. do recover the balance of £1 12s., & the costs of the action, on the ground, either that the inferiority of the work, though pleaded by way of counterclaim in form, in reality amounted to a defence, or that, even if pltf. were technically entitled by the findings to the costs of the action, the ct. ought to interfere under R. S. C., Ord. 55, r. 1, & give the costs to defts., who had substantially succeeded in the action.—*LOWE v.*

563 i. Plaintiff entitled to costs of claim & counterclaim.]—*LAURIE v. CROUCHER* (1891), 23 N. S. R. 293.—CAN.

563 ii. ———.]—*WEAVER v. SAWYER* (1910), 16 A. R. 422.—CAN.

563 iii. ———.]—Where a debt succeeds as to part only of a counterclaim which might have been pleaded as a set-off, pltf. may be allowed the costs of the counterclaim.—*WRIGHT v. BAKER* (1899), 18 N. Z. L. R. 448.—N.Z.

564 i. Defendant allowed general costs of action.—Substantial success of defendant.]—*ST. JOHN RIVER SS. Co. v. CRYSTAL STREAM SS. Co.* (N. B.) (1912), 12 E. L. R. 397.—CAN.

n. Apportionment of costs.]—*LEGRISS* F F 2

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HOLME (1883), 10 Q. B. D. 286; 52 L. J. Q. B. 270; 31 W. R. 400.

Annotations.—*Consd.* Lund v. Campbell (1885), 14 Q. B. D. 821. *Refd.* Atlas Metal Co. v. Miller, [1898] 2 Q. B. 500.

565. ———.]—Where pltf. recovered all his claim & a deft. all his counterclaim, but the latter overtopped the former by £25, deft. was allowed the general costs of the cause as having substantially succeeded.—*M'LEAN & Co. v. GOODMAN & Co.* (1890), 6 T. L. R. 185.

566. *Plaintiff recovering contemptuous damages—Deprived of costs of action—Defendant entitled to costs of counterclaim.*—Pltf. claimed damages from deft. in respect of an alleged libel & slander. Deft. counterclaimed in respect of statements made about him by pltf. At the trial of the action the jury found for pltf. on the claim with one farthing damages & for deft. on the counterclaim with 48s. damages.—*Held*: pltf. should be deprived of his costs, & deft. was entitled to the costs of his counterclaim.—*NICOLAS v. ATKINSON* (1909), 25 T. L. R. 568.

Annotation.—*Refd.* Martin v. Benson, [1927] 1 K. B. 771.

567. *Apportionment of costs—Brief fee on claim & counterclaim.*—In an action in a county court defts., contested the claim & counterclaimed. Judgment was given for pltf. on the claim for £25 & costs & for defts., on the counterclaim for £26 & costs. On taxation of the costs of the claim the registrar allowed a brief fee of three guineas, being the maximum fee according to the scale applicable to the amount recovered. No objection was taken by defts., to this allowance. On taxation of costs of the counterclaim the registrar also allowed a brief fee of three guineas. An objection by pltf. that the scale only authorised the allowance of one brief fee & that the maximum fee having been allowed on the claim no brief fee could in the circumstances be allowed on the counterclaim was overruled by the county ct. judge.—*Held*: the fact that the maximum brief fee had been allowed in respect of the claim did not prevent the allowance of a brief fee for the counterclaim, but the fee must be apportioned between the defence & the counterclaim & only that part which was referable to the counterclaim could be allowed.—*FOX v. CENTRAL SILKSTONE COLLIERIES, LTD.*, [1912] 2 K. B. 597; 81

L. J. K. B. 989; 107 L. T. 85; 56 Sol. Jo. 634, D. C.

Annotation.—*Mentd.* Bates v. Gordon Hotels (1913), 82 L. J. K. B. 441.

568. ——— *Expenses of witnesses.*—To a claim by a landlady against her tenant for rent the tenant pleaded that the demised premises were uninhabitable. By way of counterclaim the tenant repeated the paragraphs of the defence & claimed damages. Judgment was entered for the landlady on the claim for £200 & costs, & for the tenant on the counterclaim for £225 & costs. On each side the claim & counterclaim were dealt with in one brief. In taxing pltf.'s bill of costs the taxing master allowed the costs of counsel's brief at the trial, fees to counsel, & costs & expenses of witnesses. In taxing deft.'s bill of costs he allowed nothing in respect of these items.—*Held*: the taxation had proceeded upon a wrong principle; & costs incurred in supporting the claim & opposing the counterclaim ought to be apportioned by the taxing master to the best of his ability & the apportioned parts ought to be attributed to the costs of the claim & of the counterclaim respectively, & similarly *mutatis mutandis* as to costs incurred in supporting the counterclaim & opposing the claim.—*CHRISTIE v. PLATT*, [1921] 2 K. B. 17; 90 L. J. K. B. 555; 124 L. T. 649, C. A.

Annotations.—*Consd.* Wilson v. Walters, [1926] 1 K. B. 511. *Apld.* Continental Contractors v. Medway Oil & Storage Co. (1927), 96 L. J. K. B. 967.

General costs.—See No. 562, *ante*.

Reference to arbitration—Costs to abide event.—See *ARBITRATION*, Vol. II., pp. 591, 592, 601, 602, Nos. 2242–2245, 2328–2336.

(b) *Claim and Counterclaim Both Failing.*

See R. S. C., Ord. 65.

569. *Whether defendant entitled to general costs of action—Plaintiff to amount of increase caused by counterclaim.*—Where pltf.'s claim & deft.'s counterclaim are both dismissed with costs, pltf. is to pay to deft. the general costs of the action, & deft. is to pay to pltf. only the amount by which the costs have been increased by reason of the counterclaim.—*SANER v. BILTON* (1879), 11 Ch. D. 416; 48 L. J. Ch. 545; 40 L. T. 314; 27 W. R. 472.

Annotations.—*Apprvd.* Mason v. Brentini (1880), 15 Ch. D. 287. *Apld.* *Re* Brown, Ward v. Morse (1883), 23 Ch. D. 377. *Consd.* Atlas Metal Co. v. Miller, [1898] 2 Q. B.

& BRASSARD v. McNAB YOUNG CO., LTD. (Sask.), [1922] 3 W. W. R. 124.—CAN.

c. *Depriving both parties of costs—Discretion of court.*—*CANTLE v. DOUGLAS*, [1921] St. R. Qd. 253.—AUS.

p. *Verdict subject to reference.*—*KENDREW v. ALLEN* (1841), 1 Ont. Dig. 206.—CAN.

q. *Defendant entitled to all costs subsequent to payment into court.*—*MILLARD v. DARROW* (1901), 31 S. C. R. 196.—CAN.

r. *Plaintiff entitled to general costs of action & costs of issues in counterclaim decided in his favour—Defendant to costs of issues in which successful.*—*HEKLA v. CUNARD (S.) & Co.* (1903), 40 N. S. R. 611.—CAN.

t. *Defendant deprived of costs—Costs of counterclaim put on record to obtain benefit of payments not claimed by plaintiff.*—*COX v. MCLEAN* (1906), 41 N. S. R. 238; 2 E. L. R. 291.—CAN.

a. ———. *Plaintiff notifying willingness to allow damages.*—*CORBIN v. THOMPSON* (1907), 41 N. S. R. 386; *affd.*, 39 S. C. R. 575.—CAN.

b. *Costs of & incidental to obtaining order for security for costs.*—*GRIFFIN*

v. RULLER (1906), 7 Tert. L. R. 119; 4 W. L. R. 12.—CAN.

c. *Claims within inferior court jurisdiction—Scale of costs.*—*FOSTER v. VIEGEL* (1889), 13 P. R. 133.—CAN.

d. ———. *Starratt v. BENJAMIN (N. S.)* (1906), 2 E. L. R. 35.—CAN.

e. ———. *Norton v. SMITH (Alta.)*, [1920] 3 W. R. 553.—CAN.

f. ———. *Caldwell v. HUGHES* (1913), 24 O. W. R. 498; 4 O. W. N. 1192; 10 D. L. R. 788.—CAN.

g. ———. *Baxter v. ELIOTT* (1914), 30 W. L. R. 73; 7 W. W. R. 244, 698; 20 D. L. R. 64.—CAN.

h. *Set-off of costs—Set-off & counterclaim.*—*LINK v. BUSH* (1890), 13 P. R. 425.—CAN.

PART III. SECT. 2, SUB-SECT. 9.—B. (b).

569 i. *Whether defendant entitled to general costs of action—Plaintiff to amount of increase caused by counterclaim.*—Although a counterclaim claims a larger sum than that claimed by the statement of claim, but substantially no issues are raised by it

which are not raised by the defence & little, if any, additional evidence is called for, & the action & counterclaim are both dismissed, deft. ought to be left in the same position in respect to costs as if he had merely defended successfully pltf.'s action, i.e. pltf. should be ordered to pay deft.'s costs of a defended action & there should be no extra allowance of costs because of the counterclaim.—*LEONARD v. WHITTLESEA*, [1918] 3 W. W. R. 215; 13 Alta. L. R. 550; 43 D. L. R. 62.—CAN.

569 ii. ———. *Pltf.'s claim was dismissed & deft.'s counterclaim was also dismissed. Deft. was awarded the general costs of the action, deducting any costs incurred by reason of & solely attributable to the counterclaim; pltf. were awarded only such costs as were incurred by reason of & solely attributable to the counterclaim, & none of the costs incurred in the action that would have been incurred if there had been no counterclaim.*—*CREAN (JAMES) & SON, LTD. v. M'MILLAN*, [1922] 2 I. R. 105.—IR.

569 iii. ———. *In an action where judgment is given against pltf. on his claim, & against deft. on his counterclaim, pltf. must pay the general costs of the action, & deft.*

500. *Folld. Wilson v. Walters*, [1926] 1 K. B. 511. *N.F.* Continental Contractors *v.* Medway Oil & Storage Co. (1927), 96 L. J. K. B. 967. *Reid. Myers v. Defries* (1880), 49 L. J. Q. B. 266; *Gort v. Rowney* (1886), 17 Q. B. D. 625; *Russell v. Russell*, cited, [1898] 2 Q. B. at p. 503; *Jones v. Stott*, [1910] 1 K. B. 893; *Christie v. Platt*, [1921] 2 K. B. 17.

570. ———.]—Where *pltf.'s* claim & *defts.'* counterclaim are both dismissed with costs, *pltf.* is to pay to *deflt.* the general costs of the action, & *deflt.* is to pay to *pltf.* only the amount by which the costs have been increased by reason of the counterclaim.—*MASON v. BRENTINI* (1880), 15 Ch. D. 287; 43 L. T. 557; 29 W. R. 126, C. A.

Annotations:—*Apld. Re Brown, Ward v. Morse* (1883), 23 Ch. D. 377. *Reid. Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500; *Wilson v. Walters*, [1926] 1 K. B. 511.

571. ———.]—*Pltf.* in a county ct. action for damages for negligence failed, & *deflt.'s* counterclaim for damages for negligence also failed. Both claim & counterclaim arose out of the same event. The judge held that in taxing the costs of the counterclaim items common to claim & counterclaim, which had already been dealt with in taxing the costs of the claim, should be apportioned:—*Held*: only such extra costs on the counterclaim should be allowed to *pltf.* as were occasioned thereby.—*WILSON v. WALTERS*, [1926] 1 K. B. 511; 95 L. J. K. B. 624; 134 L. T. 597, D. C.

Annotation:—*N.F.* Continental Contractors *v.* Medway Oil & Storage Co. (1927), 96 L. J. K. B. 967.

572. ———.]—*Apportionment*.—*CONTINENTAL CONTRACTORS v. MEDWAY OIL & STORAGE CO.*, No. 562, *ante*.

573. *Apportionment of costs* — *Defendant ordered to pay half total costs*.—The judge, at the trial of an action in which there was a claim & counterclaim, thinking both parties in the wrong, dismissed the action without costs, & also dismissed the counterclaim with costs, but ordered that if the costs of the counterclaim should not amount to half the whole costs of the action, *deflt.* should pay the difference to *pltf.*:—*Held*: the order as to costs was irregular, inasmuch as, after dismissing the action without costs, it imposed part of the costs of the action upon *deflt.* by way of penalty; but in substance the order was within the discretion of the judge, as it amounted to dismissing the claim & counterclaim & directing *deflt.* to pay half the whole costs of the action.—*WILLMOTT v. BARBER* (1881), 17 Ch. D. 772; 45 L. T. 229, C. A.

Annotations:—*Consd. Middleweek v. Dearsley* (1881), 50 L. J. Ch. 777. *Apld. Bradford Corp. v. Pickles*, [1894] 3 Ch. 53. *Reid. Roberts v. Jones, Willey v. G. N. Ry.*, [1891] 2 Q. B. 194. *Mentd. Russell v. Watts* (1883), 25 Ch. D. 559; *Preston Corp. v. Fullwood L. B.* (1885), 53 L. T. 718; *Re Gorton, Dowse v. Gorton* (1889), 60 L. T. 305; *Civil Service Musical Instrument Assn. v. Whiteman* (1899), 68 L. J. Ch. 484; *Marriott v. Reid* (1900), 82 L. T. 369; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *King v. Bird* (1909), 100 L. T. 478; *Hoare v. Kingsbury U. C.*, [1912] 2 Ch. 452; *Morrell v. Studd & Millington*, [1913] 2 Ch. 648; *Re Chaplin, Milne, Grenfell* (1915), 31 T. L. R. 279; *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117.

the costs of the proceedings so far as they have been increased by reason of the counterclaim.—*CROWN BREWERY CO., LTD. v. BUCKLEY & MARSHALL* (1885), 3 N. Z. L. R. 385 (S. C.).—*N.Z.*

k. ———.]—*MCARTHUR v. THE JOHN-SON* (1913), 23 W. L. R. 619; 14 Exch. C. R. 321; 18 B. C. R. 94; 9 D. L. R. 568.—*CAN.*

1. *Apportionment of costs*.—A claim & counterclaim, involving the same questions of fact & of law, were both dismissed with costs:—*Held*: while the taxing officer must, in one sense, tax the costs of the claim on the footing that there is no counterclaim, & the costs of the counterclaim on

the footing that there is no claim, he must, however, to the best of his ability, ascertain & apportion to or against the parties respectively (a) costs incurred by *pltf.* solely in support of his claim; (b) costs incurred by *pltf.* solely in answering the counterclaim; (c) costs incurred by *deflt.* solely in opposing the claim; & (d) costs incurred by *deflt.* solely in advancing his counterclaim; any costs saved to either of the parties by reason of there being a claim & counterclaim instead of two separate & distinct proceedings commenced by two separate writs & conducted as two separate actions, are not allowed to the party, because they are not costs incurred by him but saved by him;

574. ———.]—*Costs incurred in respect of both claim & counterclaim*.—(1) In an action where there is a claim & counterclaim, the party ordered to pay or receive the costs of the action pays or receives the whole of such costs as if there were no counterclaim.

(2) The party ordered to pay or receive the costs of the counterclaim pays or receives the costs occasioned by the counterclaim, & in determining what they are, costs which have been saved by a counterclaim being brought instead of a cross-action are not to be taken into account.

(3) Costs which have been incurred partly in support of or in opposition to a defence, & partly in support of or in opposition to a counterclaim, must be apportioned by the taxing master, but no costs incurred in the action which have not been increased by reason of the counterclaim are to be apportioned.—*ATLAS METAL CO. v. MILLER*, [1898] 2 Q. B. 500; 67 L. J. Q. B. 815; 79 L. T. 5; 46 W. R. 657; 42 Sol. Jo. 653, C. A.

Annotations:—*As to (2) Consd. Fox v. Central Silkstone Collieries*, [1912] 2 K. B. 597. *Apld. Wilson v. Walters*, [1926] 1 K. B. 511. *Consd. Continental Contractors v. Medway Oil & Storage Co.* (1927), 96 L. J. K. B. 967. *Generally, Christie v. Platt*, [1921] 2 K. B. 17.

— *General costs*.—*See* No. 562, *ante*.

575. *Set-off of costs* — *Of claim & counterclaim*.—Where *pltf.'s* claim & *deflt.'s* counterclaim are both dismissed with costs the proper form of judgment is to refer it to the taxing master to tax *deflt.'s* costs of the action & *pltf.'s* costs of the counterclaim & to set off the costs of *pltf.* & *deflt.* & to order payment of the balance by the party from whom the same shall be found to be due to the other party.—*JAMES v. JACKSON*, [1910] 2 Ch. 92; 79 L. J. Ch. 418; 102 L. T. 804.

576. ———.]—Where in actions for infringement, *deflt.* counterclaimed for revocation of the patents, & at the trial *pltf.s* submitted to judgments for *deflt.s* with costs, & thereupon *deflt.s* did not open their counterclaims, it was held that the actions had not proceeded to trial, & the actions & counterclaims were dismissed with costs, with a set-off.

In two actions for infringement of the same patents *deflt.s* petitioned by way of counterclaim for revocation of the patents. The actions were consolidated, & on their coming on for trial *pltf.s* at once submitted to judgment for *deflt.s* with the costs of the actions. *Deflt.s* stated that, in the absence of evidence in the actions, they were unable to proceed with the counterclaims. They contended that the counterclaims were in effect part of the defences, & that, on the actions being dismissed with costs, no order ought to be made with regard to the costs of the counterclaims:—*Held*: the case fell within R. S. C. Ord. 53A, r. 22, namely, that the actions had not proceeded to trial, & that the actions & counterclaims must

costs of either party which are common to both the claim & the counterclaim should be divided.—*MCINTOSH v. GREEN* (Sask.), [1924] 3 D. L. R. 57; [1924] 2 W. W. R. 625.—*CAN.*

m. ———.]—Where a separate & substantial question is raised by a counterclaim, substantial costs are taxable in relation to the counterclaim, & in such a case there must be apportionment; but where the subject-matter of a counterclaim is substantially the same as the defence or part of the defence, the costs should not be apportioned, & only such extra costs should be allowed as were incurred by reason of the counterclaim.—*CREAN v. M'MILLAN*, [1922] 2 I. R. 105.—*IR.*

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be dismissed with costs, with a set-off.—**BABCOCK & WILCOX, LTD. v. WATER TUBE BOILER & ENGINEERING CO., BABCOCK & WILCOX v. EDWIN DANKS & CO. (OLDBURY), LTD.** (1910), 27 R. P. C. 626.

Annotation:—Apld. British Foreign & Colonial Automatic Light Controlling Co. v. Metropolitan Gas Meters, [1912] 2 Ch. 82.

C. Liability of Third Party.

See R. S. C., Ord. 16, r. 54.

577. Liability for costs occasioned by counterclaim.]—When a third party is brought into an action by deft. who claims indemnity against him, the ct. cannot determine questions between such third party & deft. without an order directing them to be determined. It is in the discretion of the ct. to order such third party to pay to successful pltf. the costs occasioned by his defence or counterclaim.—**PILLER v. ROBERTS** (1882), 21 Ch. D. 198; 46 L. T. 527; 30 W. R. 595.

578. Liability for costs of counterclaim by defendant.]—In an action by landlord against tenant for rent, deft. brought a counterclaim against pltf. & third parties for illegal distress. The judge, before whom the case was tried without a jury, gave judgment for pltf. on the claim & the counterclaim, but for deft. against the third parties for £2 5s. "with such costs as deft. would be entitled to by law":—*Held*: as the case had been tried without a jury, the costs were, by R. S. C., Ord. 65, r. 1, in the discretion of the judge, & there having been no exercise of such discretion in favour of deft. as against the third parties, deft. was not "entitled by law" to costs.

Semle, when the counterclaim is against a person not a party to the action, Jud. Act, 1873 (c. 66), s. 24 (3) & R. S. C., Ord. 21, rr. 11–14, do not render County Courts Act, 1867 (c. 142), s. 5 applicable to such a counterclaim.—**LEWIN v. TRIMMING, TRIMMING v. LEWIN & CHADWICK & SONS** (1888), 21 Q. B. D. 230; 59 L. T. 511; 37 W. R. 10, D. C.

Annotations:—Consd. Amon v. Bobbett (1889), 58 L. J. Q. B. 219. *Mentd. Ritter c. Godfrey, [1920] 2 K. B. 47.*

D. Claims within County Court Jurisdiction.

579. Set-off—Claim in High Court—Reduced by set-off within limits of county court jurisdiction—Right of plaintiff to costs on High Court scale.]—Where pltf.'s debt is reduced below £20 by set-off, the judge at the trial will grant a certificate to empower pltf. to receive costs.—**OSMOND v. BONE** (1851), 16 L. T. O. S. 538.

580. ————.]—Where pltf. in an action in one of the superior cts. proves a debt exceeding £20, & deft. proves a set-off, which reduces the verdict to a sum not exceeding £20, pltf. "recovers" the balance only within County Court Act, 1850 (c. 61), s. 11, & therefore is not entitled to costs.—**BEARD v. PERRY** (1862), 2 B. & S. 493; 31 L. J. Q. B. 180; 6 L. T. 352; 8 Jur. N. S. 914; 10 W. R. 619; 121 E. R. 1156. *Annotation:—Consd. Stooke v. Taylor* (1880), 5 Q. B. D. 569.

581. ————.]—Pltfs. claimed on a balance of accounts a sum of money exceeding £50. Defts. denied their indebtedness, & pleaded by way of set-off & counterclaim that pltfs. were indebted to them for money advanced & money due for work done, & goods sold & delivered, & they claimed a balance on the accounts in their favour exceeding £50. The cause was referred

to an arbitrator, costs to abide the event. The arbitrator found that defts. were indebted to pltfs. in a sum exceeding £50, & that pltfs. were indebted in like manner to defts. in a sum exceeding £50, but that a balance was due to pltfs. on the whole account of £11 10s. 3d.:—*Held*: pltfs. & defts. were each entitled to the costs of the issues on which they had succeeded, on the ground that the relief sought could not be given in a county ct.—**NEALE v. CLARKE** (1879), 4 Ex. D. 286; 41 L. T. 438.

Annotations:—Held. Baines v. Bromley (1880), 6 Q. B. D. 197; *Stooke v. Taylor* (1880), 5 Q. B. D. 569.

582. ————.]—Where an action of contract is commenced in the High Ct. of Justice for a sum exceeding £50, & pltf. establishes his claim to the amount, but in consequence of a counterclaim being decided in favour of deft. pltf. recovers a judgment for a sum not exceeding £20 he is not deprived of his costs by virtue of County Courts Act, 1867 (c. 142), s. 5, extended to actions in the High Ct. by Jud. Act, 1873 (c. 66), s. 67, for the relief sought by him could not, within the meaning of the latter sect., have been given by a county ct.—**POTTER v. CHAMBERS** (1879), 4 C. P. D. 457; 48 L. J. Q. B. 274, D. C. *Annotations:—Consd. Cole Marchant v. Firth* (1879), 40 L. T. 851. *Apld. Neale v. Clarke* (1879), 4 Ex. D. 286. *Held. Stooke v. Taylor* (1880), 5 Q. B. D. 569; *Re Brown, Ward v. Morse* (1883), 49 L. T. 68.

—See, also, COUNTY COURTS, Vol. XIII., pp. 466, 467, Nos. 152–161.

583. Counterclaim—Judgment recovered for balance.]—Pltf. whose claim is reduced by a counterclaim being proved by deft., recovers judgment under Jud. Acts for the balance only, & the question of costs under the County Court Act, 1867 (c. 142), s. 5, must be decided with reference to that balance.—**STAPLES v. YOUNG** (1877), 2 Ex. D. 324; 25 W. R. 304.

Annotations:—Consd. Blake v. Appleyard (1878), 3 Ex. D. 195; *Potter v. Chambers* (1878), 4 C. P. D. 69; *Hallinan v. Price* (1879), 41 L. T. 627. *Distd. Potter v. Chambers* (1879), 4 C. P. D. 457. *Distd. Stooke v. Taylor* (1880), 5 Q. B. D. 569. *Held. Chatfield v. Sedgwick* (1879), 4 C. P. D. 383; *Cole, Marchant v. Firth* (1879), 40 L. T. 851; *Neale v. Clarke* (1879), 4 Ex. D. 286.

584. Right of defendant to costs of counterclaim.]—The County Courts Act, 1867 (c. 142), s. 5, does not apply to counterclaims, so that where pltf. proved a claim for £40, & deft. a counterclaim for £10, deft. in the absence of any order as to costs was held entitled to the costs of proving his counterclaim & of the issues so far as they related thereto.—**BLAKE v. APPLE-YARD** (1878), 3 Ex. D. 195; 47 L. J. Q. B. 407; 26 W. R. 592.

Annotations:—Consd. Potter v. Chambers (1878), 4 C. P. D. 69. *Apld. Davidson v. Gray* (1879), 40 L. T. 192. *Consd. Amon v. Bobbett* (1889), 58 L. J. Q. B. 219. *Held. Chatfield v. Sedgwick* (1879), 4 C. P. D. 383; *Cole Marchant v. Firth* (1879), 40 L. T. 851; *Hallinan v. Price* (1879), 41 L. T. 627; *Neale v. Clarke* (1879), 4 Ex. D. 286; *Myers v. Deftnes* (1880), 5 Ex. D. 180; *Lewin v. Trimming* (1888), 21 Q. B. D. 230.

585. ————.]—Pltf. claimed a balance of £114 8s., & deft. established a counterclaim to the extent of £109 16s.; whereupon the judge directed the jury, as the result of their answers to certain questions submitted to them, to find a verdict for pltf. for the balance, £4 12s., & no order was made as to costs. The direction of the judge was not questioned. The ct. refused to alter the findings of the jury, the judge being unable to do so, for the purpose of giving deft. costs upon his counterclaim.—**POTTER v. CHAMBERS** (1878), 4 C. P. D. 69; 27 W. R. 414; *subsequent proceedings* (1879), 4 C. P. D. 457, D. C.

Annotations:—Consd. Cole Marchant v. Firth (1879), 40 L. T. 851. *Distd. Davidson v. Gray* (1879), 40 L. T. 192.

586. ———.]—Pltf. claimed on a balance of accounts a sum of money exceeding £50. Deft. pleaded a set-off, & also made a counterclaim for goods supplied to the amount of about £24. The action was referred to a master, the costs of the action to abide the event. The master certified that there was due from deft. to pltf. on the claim £16, & from pltf. to deft. on the counterclaim £23, & that the balance due from pltf. to deft. was £7 :—*Held* : deft. was entitled to his costs.—*CHATFIELD v. SEDGWICK* (1879), 4 C. P. D. 459 ; 27 W. R. 790, C. A.

Annotations :—*Distd.* *Stooke v. Taylor* (1880), 5 Q. B. D. 569 ; *Pearson v. Ripley* (1884), 32 W. R. 463. *Consd.* *Lund v. Campbell* (1885), 14 Q. B. D. 821. *Refd.* *Myers v. Defries* (1880), 42 L. T. 137 ; *Lewin v. Trimming*, *Trimming v. Lewin & Chadwick* (1888), 21 Q. B. D. 230 ; *Solomon v. Mulliner*, [1901] 1 K. B. 76.

587. ———.]—In an action for freight pltf. claimed about £50 & defts. counterclaimed about £10 for damage to the cargo, paying the remaining £40 into ct. The action was remitted to a county ct. under 19 & 20 Vict. c. 108, s. 26, & the registrar certified a verdict for the pltf. for 16s. :—*Held* : the ct. would alter the certificate by distributing the findings on the issues, so as to enable deft. to be allowed the costs of his counterclaim.—*DAVIDSON v. GRAY, BARROW & Co.* (1879), 5 Ex. D. 189, n. ; 42 L. T. 834, C. A.

Annotations :—*Consd.* *Cole Marchent v. Flrth* (1879), 40 L. T. 851. *Apld.* *Myers v. Defries* (1880), 5 Ex. D. 180 ; *Pearson v. Ripley* (1884), 50 L. T. 629.

588. ———.]—*STOOKE v. TAYLOR*, No. 2, ante.

589. ———.]—*WOOD'S PATENT BRICK CO. v. CLOKE* (1896), 40 Sol. Jo. 390, D. C.

590. ———]—Plaintiff succeeding on claim within county court jurisdiction—& on counterclaim in excess of county court jurisdiction—Right to costs

on High Court scale.]—*AMON v. BOBBETT*, No. 310, ante.

Reference to arbitration.—See *ARBITRATION*, Vol. II., pp. 591, 592, Nos. 2242–2245.

591. Counterclaim in county court for more than twenty pounds—Claim under twenty pounds—Leave.—An appeal will lie from the decision of a county ct. judge on a counterclaim for an amount exceeding £20 even although the claim does not exceed that amount.—*SMITH v. GILL*, [1896] 2 Q. B. 166 ; 65 L. J. Q. B. 556 ; 44 W. R. 574 ; 40 Sol. Jo. 584, D. C.

SUB-SECT. 10.—APPEALS.

592. Action & counterclaim founded on distinct causes of action—Cross-appeal.—A cross-notice under R. S. C., Ord. 58, r. 6, by resp. to an appeal can only be given in relation to the subject-matter of the action, & cannot be extended to some other matter not the subject of the action. For example, where an action & counterclaim founded on separate & distinct causes of action have each been dismissed with costs & pltf. on the counterclaim appeals, it is irregular for pltf. in the action, that is, resp. to the appeal, if he desires to appeal also, to give a cross-notice under R. S. C., Ord. 58, r. 6. In such a case, the causes of action being separate & distinct his proper course is to bring a cross-appeal & not to give a cross-notice.—*NATIONAL SOCIETY FOR DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS v. GIBBS*, [1900] 2 Ch. 280 ; 69 L. J. Ch. 457 ; 82 L. T. 443 ; 48 W. R. 499 ; 16 T. L. R. 348 ; 44 Sol. Jo. 427, C. A.

PART III. SECT. 2, SUB-SECT. 10.

n. Appeal from judgment dismissing counterclaim.—A counterclaim being an independent action, & not a mere defence to pltf.'s claim, if deft. is dissatisfied with the judgment dismissing his counterclaim, it is incumbent upon him to appeal, & in the absence of such appeal, he cannot ask the ct. to deal with the counterclaim under the notice of appeal given by pltf., which is confined to issues arising under the defence to the state-

ment of claim.—*CORBIN v. PURCELL* (1906), 2 E. L. R. 217 ; 41 N. S. R. 454.—CAN.

o. Defendant accepting judgment in his favour on one branch of counterclaim—Relief on other branch refused on appeal—Claims inconsistent.—*GARVEY v. MASSRY* (B. C.) (1913), 23 W. L. R. 7 ; 3 W. W. R. 767 ; 9 D. L. R. 366.—CAN.

p. Defendant demanding at hearing of appeal leave to amend notice of appeal.

—*MOONEY v. LIPKA* (Sask.), [1926] 3 D. L. R. 647 ; [1926] 3 W. W. R. 391.—CAN.

q. Counterclaim in magistrate's court exceeding fifty pounds.—The fact that the amount of the claim in the original action exceeded £50 does not give a right to appeal on matter of fact from a decision of a magistrate upon a counterclaim for an amount not exceeding £50.—*CROSBY v. HARDEN* (1905), 24 N. Z. L. R. 827.—N.Z.

SETTLED ESTATES.

See INFANTS AND CHILDREN ; LAND IMPROVEMENT ; SETTLEMENTS.

SETTLED LAND.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION ; INFANTS AND CHILDREN ; LAND IMPROVEMENT ; SETTLEMENTS.

SETTLEMENT.

See CONFLICT OF LAWS ; POOR LAW.

SETTLEMENTS. .

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Part I.—Definition and Nature.

SECT. 1.—DEFINITION.

See, now, Settled Land Act, 1925 (c. 18), s. 1 (1).

Under Settled Land Acts.]—See Part XIII., Sect. 1, *post*.

SECT. 2.—DURATION.

Rule against perpetuities.]—See PERPETUITIES, Vol. XXXVII., pp. 55 *et seq*.

Rule prohibiting limitations to issue of unborn persons.]—See PERPETUITIES, Vol. XXXVII., pp. 122–130.

Part II.—Creation and Construction of Settlements.

SECT. 1.—SETTLEMENTS CREATED BY ACT OF PARLIAMENT.

1. What property passes—Under general words—Remote reversion in fee.]—A remote reversion in fee held to pass under general words in an Act of Parliament, by way of settlement in execution of arts., though the reversion was not particularly in contemplation at that time; the general words being sufficient to carry it; & the intention of the parties being to include all the estate of the settlor.—FREEMAN *v.* CHANDOS (DUKE) (1775), 1 Cowp. 360; 98 E. R. 1129.

Annotations:—*Apld.* Atkyns *v.* Atkyns (1778), 2 Cowp. 808; Doe d. Biddulph *v.* Meakin (1801), 1 East, 456. *Consd.* Goodright d. Buckinghamshire *v.* Downshire (1801), 2 Bos. & P. 600.

2. Settlement obtained by fraud—Whether relief granted.]—M'KENZIE *v.* STUART (1754), 5 Cru. Dig. 31, H. L.

3. ———.]—BIDDULPH *v.* BIDDULPH (1790), 5 Cru. Dig. 34.

SECT. 2.—SETTLEMENTS CREATED UNDER DIRECTION IN WILL.

SUB-SECT. 1.—IN GENERAL.

4. Whether settlement ordered—Sufficiency of limitations in will.]—Devise to trustees, of money to be laid out in land, & to be settled as counsel

should advise, in trust for A. & the heirs male of his body, to take in succession & priority; & the interest of the money, till laid out, to be paid to A. his sons & issue, A. shall have but an estate for life, with remainder to first & other sons in tail, etc.

LORD CAMDEN took a distinction between the case where testator has given complete directions for settling his estate with perfect limitations & where his directions are incomplete & are rather minutes or instructions & cannot be performed in the words of the will. In the former case the legal expression shall have legal effect though perhaps contrary to his intention. In the latter case the ct. will consider the intention & direct the conveyance according to it.—WHITE *v.* CARTER (1768), Amb. 670; 27 E. R. 435; *previous proceedings* (1768), 2 Eden, 366.

Annotations:—*Refd.* Dodson *v.* Hay (1791), 3 Bro. C. C. 405; Parker *v.* Bolton (1835), 5 L. J. Ch. 98.

5. ———.]—Testator directed £8,000 to be settled on the marriage of his daughter, & then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; & if no child should live to attain a vested interest, then to fall into his residue; & he gave his residue to A. for life, remainder to B.:—*Held*: testator had made a positive settlement, & the ct. could not add to it in any way.—FULLERTON *v.* MARTIN (1860),

1 Drew. & Sm. 31; 29 L. J. Ch. 469; 1 L. T. 531; 6 Jur. N. S. 265; 8 W. R. 289; 62 E. R. 290.

*Annotations:—***Reid.** Allhusen v. Whittell (1867), 36 L. J. Ch. 929; *Re* Hawkins, White v. White, [1916] 2 Ch. 570.

6. ———.] — *Re* PARROTT, WALTER v. PARROTT, No. 14, *post*.

7. ——— **Share to be secured for benefit of children & their mother.**—Testator directed that a share of his property, upon the death of the husband of his daughter E., which happened, should be secured for the benefit of the children of E. & for that of their mother:—*Held*: the share must be settled upon E. for her life with remainder to her children.—**COMBE v. HUGHES** (1872), L. R. 14 Eq. 415; 41 L. J. Ch. 693; 27 L. T. 366; 20 W. R. 793.

——— **Share of daughter or other female.**—*See* Sub-sect. 2, *post*.

SUB-SECT. 2.—SHARE GIVEN TO DAUGHTER OR FEMALE RELATIVE.

8. **Whether ordered to be settled—Share to be for daughter's sole use.**—Testator directed his property to be divided between his children at twenty-five share & share alike, & all moneys inherited by his daughters to be placed in the hands of trustees, to be settled on them for the sole use of themselves & their lawful issue:—*Held*: "strict settlement" was not intended by these words, but the money inherited was to be settled upon the daughters, & their lawful issue, which would have the effect of giving to the daughters an absolute interest.—**SAMUEL v. SAMUEL** (1845), 2 Coop. temp. Cott. 119; 14 L. J. Ch. 222; 5 L. T. O. S. 34; 9 Jur. 222; 47 E. R. 1082.

*Annotation:—***Reid.** Holloway v. Collier (1853), 1 W. R. 266.

9. ——— **To the exclusion of husband.**—Testator, by his will, gave real & personal property to his daughter A. absolutely; but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, & be secured for the benefit of her children, equally, after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share"; &, in default of such children or other issue, over:—*Held*: (1) the property must be settled in trust for A. for life, to her separate use, without power of anticipation; &, after her decease, upon trust for such of her children as should survive her, & for the issue living at her death of such of her children as should not survive her, equally, as tenants in common, the issue to take *per stirpes*, but *inter se* equally as tenants in common; (2) there should be limitations in the nature of cross-remainders in favour of such of the children & issue as should survive A. in respect of the share of any child dying in her lifetime without leaving issue, & in respect of the share of any issue of any child similarly dying; (3) the realty should be settled as realty; &, as testator, by simply directing a settlement, must have intended, with powers of leasing & sale & exchange, & with a receipt clause; (4) the settlement should contain provisions for maintenance, education & advancement, & a power to appoint new trustees.—**TURNER v. SARGENT** (1853), 17

Beav. 515; 22 L. T. O. S. 129; 2 W. R. 50; 51 E. R. 1134.

*Annotation:—**As to* (3) **Fold.** Wise v. Piper (1880), 13 Ch. D. 848.

10. ——— **Share not to be liable to debts or control of husband.**—A father directed a fund, given to his daughter, to be settled "upon her & her issue," so that "the same might not be liable or subject to the debts, control or engagements of any husband" whom she might happen to marry during her lifetime:—*Held*: the settlement ought to give the daughter a power of appointment by will, in default of issue.

Form of settlement in such a case.—**STANLEY v. JACKMAN** (1857), 23 Beav. 450; 28 L. T. O. S. 334; 5 W. R. 302; 53 E. R. 177.

*Annotation:—***Distd.** Findon v. Findon (1857), 1 De G. & J. 380.

11. ——— **To be settled on child for life remainder to issue—Gift over on default of issue.**—Testator bequeathed to his daughter an annuity of £100 while she remained single but on her marriage & on some adequate provision made & which he directed to be made by settlement for her life & to the use of her issue he bequeathed to & for her use £2,500 & in default of such issue he bequeathed that sum for the benefit of his grandchildren who should be then living. The daughter married but no settlement was made & the annuity continued to be paid to her. She had an only child who died in her lifetime under age:—*Held*: the gift over did not take effect & her personal representative was entitled to the £2,500.—**FINDON v. FINDON** (1857), 1 De G. & J. 380; 26 L. J. Ch. 561; 30 L. T. O. S. 19; 5 W. R. 794; 44 E. R. 770, L. C.

12. ——— **Directed to be strictly settled.**—Where testator directed that his daughters' shares under his will should be "settled upon themselves strictly":—*Held*: the income of each daughter's share should, during the joint lives of herself & her husband, be paid to her for life for her separate use, without power of anticipation; & if she died first, then her share should go as she should by will appoint, & in default of appointment to her next of kin, exclusively of her husband; & if she survived, then to her absolutely.—**LOCH v. BAGLEY** (1867), L. R. 4 Eq. 122; 15 W. R. 1103.

*Annotations:—***Distd.** *Re* Spicer, Spicer v. Spicer (1901), 84 L. T. 195. **Consd.** *Re* Bannister, Hoys-Jones v. Bannister (1921), 90 L. J. Ch. 415. **Reid.** *Re* Traill's Trust (1868), 18 L. T. 176.

13. ———.] — Testator gave his residuary estate to trustees upon trust for his sons & daughters who should attain twenty-one in equal shares, & declared that no daughter should be entitled in any case to receive her share, but should receive the income thereof only with power to dispose of the principal by will, if unmarried; but, in the event of any daughter marrying, then testator especially empowered his trustees to see that her share was duly & properly settled upon her by deed, so that same should be preserved for her separate use independently of her husband:—*Held*: the share of a daughter marrying should be settled so as to give her a life estate for her separate use without power of anticipation, with trusts in favour of the children of the marriage, & the ultimate trusts usual in a settlement of the wife's property.—*Re* SPICER, SPICER v. SPICER (1901), 84 L. T. 195.

14. ——— **Directed to be settled on daughter for life.**—Testator bequeathed as follows: "To my daughter A., wife of M., I bequeath £10,000.

PART II. SECT. 2, SUB-SECT. 2.

a. **Whether ordered to be settled—Direction to settle legacies on daughters independent of coverture—& added to money settled on marriage.**—**EUSTACE v. ROBINSON** (1880), 7 L. R. Ir. 83.—*IR.*

**Sect. 2.—Settlements created under direction in will :
Sub-sects. 2 & 3, A. & B.]**

This amount to be settled upon her for life & to be invested for her in good securities in the names of two or more trustees. At her death £8,000 of the above sum to be divided equally amongst her children, & the remaining £2,000 to be given to her husband if living : if deceased, then the whole amount is to be equally divided amongst her children." The daughter & her husband & child applied for the sanction of the ct. to a settlement of the legacy :—*Held* : (1) a settlement ought to be directed, treating the directions in the will as instructions for a settlement; (2) on the construction of the will, the settlement must be so framed to make the contingent gift of £2,000 to "her husband if living" apply only to M. & not to any future husband, & so as to confine the trusts in favour of the daughter's children to her children by him; (3) the settlement ought to be framed so as to restrain the daughter from anticipating the income, & so as to make the fund divisible only among children who being sons should attain twenty-one, or being daughters attain that age or marry, & it ought to contain the usual powers of maintenance & advancement, & a power of appointment by the daughter in default of children, with the usual limitations to herself or her next of kin in default of appointment, but not any power of appointment among the children, as such a power would be inconsistent with the direction for equal division; (4) the costs ought to be paid out of the legacy & not out of the residuary estate.—*Re PARROTT, WALTER v. PARROTT* (1886), 33 Ch. D. 274; 55 L. T. 132; 34 W. R. 553, C. A.

Annotation :—As to (2) *Reid*. *Re Hancock, Malcolm v. Burford-Hancock* (1896), 65 L. J. Ch. 276.

15. — **To be settled at marriage.**—Testator left to his daughter, J., the sum of £2,000 to be settled on her when she married, or to be paid to her on her attaining twenty-one : should she die not leaving issue, the £2,000 to fall into the residue of his estate. J. married in her father's lifetime. The ct. directed the legacy to be settled in trust for her separate use for life; remainder for her children living at her death, according to her appointment; in default of appointment, for her sons at twenty-one & her daughters at that age or on marriage; remainder for her next of kin; & if she had no child living at her death, the legacy to become part of testator's residue.—*YOUNG v. MACINTOSH* (1843), 13 Sim. 445; 1 L. T. O. S. 106; 7 Jur. 383; 60 E. R. 172.

Annotation :—*Consd.* *Cogan v. Duffield* (1876), 2 Ch. D. 44.

16. — **Attainment of majority.**—Testator, by his will, directed his property to be divided into nine shares, & gave one & a half share to each of his two daughters, "to be settled on themselves at their marriage." At his death, the two daughters were infants. The two daughters having attained twenty-one, & being unmarried :—*Held* : they were entitled to their shares absolutely, & there was no trust for a settlement which the ct. could execute.—*MAGRATH v. MOREHEAD* (1871), L. R. 12 Eq. 491; 41 L. J. Ch. 120; 24 L. T. 868.

Annotation :—*Fold*. *Re Bannister, Heys-Jones v. Bannister* (1921), 90 L. J. Ch. 415.

17. — **Testator directed by his will that his residuary real & personal estate should, after the death of his widow, be "equally divided amongst & settled for their own & sole use upon my dear children & should they marry, the husband to have no control over their property."** Testator left him surviving three

daughters only [over twenty-one years old] :—*Held* : the expression in the will of testator was not sufficiently precise to raise an executory trust; an intention to restrict the gifts to life interests could not be extracted from the language used by testator; & the daughters took their shares absolutely.—*Re BANNISTER, HEYS-JONES v. BANNISTER* (1921), 90 L. J. Ch. 415; 125 L. T. 54.

18. — **Share of married daughter—Power of executors to settle.**—Testator, possessed of real & personal property, desired his exors., out of such moneys of his as might come to their hands, to purchase two annuities for W. & her children; with regard to the rest of his property, of what kind soever, he desired his exors. after payment of his debts, to pay & make over the whole to his daughter M., the wife of B., & to the children of his daughter after her decease :—*Held* : the exors. took a power to settle the freehold property upon the daughter for life, with remainder after her decease to her children & their heirs.—*KNOCKER v. BUNBURY* (1840), 6 Bing. N. C. 306; 8 Scott, 414; 9 L. J. C. P. 212; 133 E. R. 121.

19. — **Share of niece—Settled for separate use with trust for issue.**—Testator gave one-third of his residue to his niece which he desired might be settled by his exors., on her, for her separate use for her life, but to devolve to her issue at her death, & failing issue, then to revert to his nephew. The ct. directed the third to be settled in trust for the niece for her separate use for life, & after her death, in trust for her issue then living, & if there should be no such issue, then in trust for the nephew.—*STONOR v. CURWEN* (1832), 5 Sim. 264; 58 E. R. 336.

Annotation :—*Apld.* *Lyddon v. Ellison* (1854), 19 Beav. 565.

20. **Form of settlement.**—Devise to the heir-at-law & his issue male in strict settlement; remainder in trust to be sold, & the money to be distributed among certain persons or the survivors or survivor of them; & that the share of one should previous to her marriage be settled upon her for life; & after her death upon her issue; in default of issue upon her right heirs; the produce of the sale is to be considered as personal; & vests in the survivors at the death of the tenant for life without issue male. A settlement in trust for the husband for life, then for the wife for life, then for the children, as they should appoint, in default of appointment equally; if no children, according to their joint appointment; in default thereof to the husband, his exors., etc., is a sufficient execution of the direction in the will.—*BROGRAVE v. WINDER* (1795), 2 Ves. 634; 30 E. R. 815.

Annotations :—*Apld.* *Maberly v. Strode* (1797), 3 Ves. 450. *Consd.* *Burrell v. Crutchley* (1809), 15 Ves. 544. *Dtd.* *Webb v. Kelly* (1825), 3 L. J. O. S. Ch. 172. *Reid*. *Perry v. Woods* (1798), 3 Ves. 204; *Newton v. Ayscough* (1815), 19 Ves. 534; *Hoghton v. Whitgreave* (1819), 1 Jac. & W. 146; *Doe d. Long v. Prigg* (1828), 2 Man. & Ry. K. B. 338; *Home v. Pillans* (1834), 4 L. J. Ch. 2; *Wordsworth v. Wood* (1839), 4 My. & Cr. 641; *Buckle v. Fawcett* (1845), 4 Hare, 536.

21. — *STONOR v. CURWEN*, No. 19, *ante*.

22. — *YOUNG v. MACINTOSH*, No. 15, *ante*.

23. — *TURNER v. SARGENT*, No. 9, *ante*.

24. — *STANLEY v. JACKMAN*, No. 10, *ante*.

25. — *LOCH v. BAGLEY*, No. 12, *ante*.

26. — *Re PARROTT, WALTER v. PARROTT*, No. 14, *ante*.

27. — *Testator bequeathed his personal estate upon trusts for his children equally, & directed that in case his daughter, M., or any future born daughter, should marry during minority with, or after majority without, such*

consent as therein mentioned, the share of such daughter or daughters so marrying should be assigned to trustees in settlement "upon such respective marriages" for the benefit of such daughter or daughters so marrying for life, "& after her or their deceases for the uses of her or their intended husband or husbands for his or their life or lives, & after their decease respectively," for the children of "such marriage or respective marriages," with a gift over in the event of a daughter dying "without leaving any issue her surviving." *M.*, the only daughter of the testator, was twice married. On her first marriage, she being then an infant, a settlement of her share was made on herself, husband & children, containing no provisions in favour of the husband or children of a future marriage. On her second marriage a settlement of her share was made whereby a life interest was limited to her second husband in the event of his surviving her, which happened. She subsequently died without leaving issue her surviving:—*Held*: the executory trust contained in the will authorised a settlement of a daughter's share on her for life with remainder to any husband she might leave for his life; & the second husband of *M.* was accordingly entitled to a life interest in her share.—*NASH v. ALLEN* (1889), 42 Ch. D. 54; 61 L. T. 193; 37 W. R. 646; *sub nom. Re NASH, NASH v. ALLEN*, 58 L. J. Ch. 754.

28. —.]—Testator gave legacies upon certain trusts for each of his daughters for life, & after her death, for her husband & children, & subject thereto he directed that each legacy should "sink into, & form part of, my residuary estate & be applied & disposed of as hereinafter mentioned." He gave his residue to his children equally, "the shares of daughters to be paid to the same trustees respectively & to be settled upon the same trusts" as their respective legacies. One of the daughters having died unmarried:—*Held*: the direction for settlement of daughters' shares of residue being executory, the ct., in framing a settlement of such a share, would modify the ultimate gift over by inserting a limitation in favour of the other residuary legatees excluding the particular daughter, & the share of deceased daughter of testator was divisible accordingly among the other residuary legatees.—*Re BALLANCE, BALLANCE v. LANPHER* (1889), 42 Ch. D. 62; 58 L. J. Ch. 534; 61 L. T. 158*; 37 W. R. 600.

Annotations:—*Reid. Holgate v. Jennings* (1893), 37 Sol. Jo. 303. *Mentd. Re Palmer, Palmer v. Answorth*, [1893] 3 Ch. 369.

29. —.]—*Re SPICER, SPICER v. SPICER*, No. 13, *ante*.

SUB-SECT. 3.—LIMITATIONS AND PROVISIONS INSERTED.

A. In General.

30. General principles governing preparation of settlement—General intent of testator.]—*WHITE v. CARTER*, No. 4, *ante*.

31. —.]—Not strict meaning of words in will.]—(1) The general intent of testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement.

PART II. SECT. 2, SUB-SECT. 3.—B.

b. Direction to settle as jointure on wives of sons marrying.]—A direction, after a devise to testator's three sons during their lives, that "in case all or any of my said three sons should

think of marrying I empower & direct my said trustees or the survivor of them to settle & secure the share or shares of such son or sons so marrying as a jointure on the wife of such marriage during her life & to their issue share & share alike," enures for the

(2) The manner of executing an executory trust must be guided by the object of the author of the trust, provided such object is one which can be legally effectuated.

(3) There is no difference between the construction to be put on an executory trust created by marriage arts. & on an executory trust created by a will, except so far as the former, by its nature, furnishes more emphatically the means of ascertaining the intention of those who created the trust.—*SACKVILLE-WEST v. HOLMESDALE (VISCOUNT)* (1870), L. R. 4 H. L. 543; 39 L. J. Ch. 505, H. L.; *subsequent proceedings, sub nom. HOLMESDALE (VISCOUNT) v. WEST* (1871), L. R. 12 Eq. 280.

Annotations:—*As to* (1) *Consd. Re Johnston, Cockerell v. Essex* (1884), 26 Ch. D. 538. *Generally, Reid. Dawkins v. Penrhyn* (1877), 6 Ch. D. 318.

32. —.]—Object of testator—If object legal.]—*SACKVILLE-WEST v. HOLMESDALE (VISCOUNT)*, No. 31, *ante*.

33. —.]—Limitations void for remoteness.]—Testatrix directed her trustees to settle her property, but in such a way, that some of the limitations would be void for remoteness:—*Held*: in carrying the direction into effect, the ct. would modify the limitations, so as to make them consistent with the rules of law & equity.—*LYDDON v. ELLISON* (1854), 19 Beav. 565; 24 L. T. O. S. 123; 18 Jur. 1066; 2 W. R. 690; 52 E. R. 470.

Annotation:—*Reid. Re White, White v. Edmond*, [1901] 1 Ch. 570.

34. —.]—For benefit of family.]—*TURNER v. SARGENT*, No. 9, *ante*.

35. —.]—Favour strict settlement.]—*PAPILLON v. VOICE* (1731), 2 P. Wms. 471; 1 Eq. Cas. Abr. 185; Kel. W. 27; Fitz-G. 38; 24 E. R. 819, L. C.

Annotations:—*Consd. Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Sayer v. Masterman* (1757), Wilk. 386; *Austen v. Taylor* (1759), Amb. 376; *Jervoise v. Northumberland* (1820), 1 Jac. & W. 559. *Reid. A.-G. v. Young* (1733), 1 Com. 423; *Glenorchy v. Bosville* (1733), Cas. temp. Talb. 3; *Williams v. Brown* (1734), 2 Barn. K. B. 416; *Roberts v. Dixwell* (1738), 1 Atk. 607; *Hopkins v. Hopkins* (1739), West temp. Hard. 606; *Newcoman v. Bethlehem Hospital* (1741), Amb. 8; *Roe d. Fulham v. Wickett* (1741), Willes, 303; *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Doe d. Long v. Lamung* (1760), 2 Burr. 1100; *Green v. Stephens* (1810), 17 Ves. 64; *Doe d. Bagnall v. Harvey* (1825), 7 Dow. & Ry. K. B. 78; *Jordan v. Adams* (1861), 9 C. B. N. S. 483; *Davenport v. Davenport* (1863), 1 Hem. & M. 775.

36. —.]—Whether differing from those for construction of articles.]—*BLACKBURN v. STABLES*, No. 296, *post*.

37. —.]—*SACKVILLE-WEST v. HOLMESDALE (VISCOUNT)*, No. 31, *ante*.

Limitations inserted in particular instances.]—*See Sub-sect. 3, B., post*.

B. Limitations in Particular Instances.

38. Direction to render barring of entail impossible—Estate for life.]—A. devises lands to trustees to pay debts & legacies, & then to settle the remainder on her son B. & the heirs of his body, with remainders over; & directs, that special care should be taken in the settlement, that it should never be in the power of her son to dock the entail. Decreed the son should be only tenant for life, without impeachment of waste, & should not have an estate tail conveyed

benefit of any wife, whether in the case of a first or any subsequent marriage, & whether there is or not any issue of such marriage, at any rate if there be a gift over in case of the son dying "without children."—*MASON v. MASON* (1871), 19 W. R. 741.—*IR.*

Sect. 2.—Settlements created under direction in will:
Sub-sect. 3, B., C. & D.]

to him.—**LEONARD v. SUSSEX** (1705), 2 Vern. 526; 23 E. R. 940.

Annotations:—*Apld.* **Capillion v. Voice** (1728), Kel. W. 27. *Consd.* **Davenport v. Davenport** (1863), 1 Hem. & M. 775. *Refd.* **Glenorchy v. Bosville** (1733), Cas. temp. Talb. 3; **Bagshaw v. Spencer** (1748), 1 Ves. Sen. 142; **Garth v. Baldwin** (1755), 2 Ves. Sen. 646; **Austen v. Taylor** (1759), Amb. 376; **Jones v. Morgan** (1783), 1 Bro. C. C. 206; **Doe d. Bagnall v. Harvey** (1825), 7 Dow. & Ry. K. B. 78; **Stanley v. Coulthurst** (1870), L. R. 10 Eq. 259.

39. Direction to settle on persons for their several lives—Estates tail.]—Devise to A. in fee, with directions to settle on descendants of his mother for their several lives, etc. A. may limit an inheritance to effectuate the general intent.—**GODOLPHIN v. GODOLPHIN** (1747), 1 Ves. Sen. 21; 27 E. R. 865, L. C.

40. “Die without issue male.”—**TOLLETT v. TOLLETT** (1753), Amb. 194; 27 E. R. 131, L. C.

41. Direction to settle life estate—Estate tail.]—Devise of land to trustees in trust to pay an annuity, & subject thereto in trust to A. for life; remainder to trustees to preserve, etc.; remainder to the heirs of the body of A.; remainder to testator's right heirs, & the residue of testator's personal estate to be laid out in land, & settled to the same uses:—*Held*: A. was entitled to an estate tail in the lands to be purchased.—**AUSTEN v. TAYLOR** (1759), 1 Eden, 361; Amb. 376; 28 E. R. 725.

Annotations:—*Consd.* **Jervoise v. Northumberland** (1820), 1 Jac. & W. 559. *Refd.* **Hodgson v. Ambrose** (1780), 1 Doug. K. B. 337; **Dodson v. Hay** (1791), 3 Bro. C. C. 404; **Green v. Stephens** (1810), 17 Ves. 64; **Parker v. Bolton** (1835), 5 L. J. Ch. 98.

42. Direction for estate tail.]—Testator devised his estates to trustees, “upon trust as counsel should advise, to convey, settle, & assure, the said premises to or for the use of or in trust for his daughter J. for her life, & after her death then on the heirs of his body, etc.” The ct. directed the estates to be settled upon J. for her life, with remainder to her first & other sons in tail general with remainder to her daughters in tail general, etc. The limitations being to both sons & daughters in tail general, there is no necessity for a subsequent limitation to J. & the heirs of her body.—**BASTARD v. PROBY** (1788), 2 Cox, Eq. Cas. 6; 30 E. R. 3.

43. —With benefits for other children.]—**JERVOISE v. NORTHUMBERLAND (DUKE)**, No. 279, post.

44. Direction for remainder to issue “in tail male”—Daughters entitled.]—Testator devised freehold estates to trustees in trust to settle & convey them to the use of G. R. for life, with remainder to his issue in tail male, in strict settlement, & in default of such issue the estates to go over. G. R. had no son but had several daughters, all born after testator's death:—*Held*: the words “in tail male” were descriptive, not of the issue, but of the interest they were to take, & the daughters were entitled to take, under the limitation in remainder, as tenants in common.—**TREVOR v. TREVOR** (1847), 1 H. L. Cas. 239; 9 E. R. 747, H. L.

Annotations:—*Consd.* **Walmesley v. Gerard** (1861), 29 Beav. 321. *Refd.* **Williams v. Teale** (1847), 6 Hare, 239; **Fowler v. Cohn** (1856), 21 Beav. 360; **Thellusson v. Rendlesham** (1859), 7 H. L. Cas. 429; **Surtees v. Surtees** (1871), 25 L. T. 288; **Fryse v. Fryse** (1872), 42 L. J. Ch. 253. *Mentd.* **Forster v. Davies** (1863), 32 Beav. 624.

45. Direction to secure for benefit of family.]—Testator directed that upon the death of his wife, to whom he gave a life interest in all his property, both real & personal, his nephew, whom he named, should be heir to all his property not otherwise

disposed of; but added, that, as he had had little intercourse with his nephew, & was apprehensive that his habits might require some control, whatever portion of the property might be possessed by him was to be secured by the exors. for the benefit of his family:—*Held*: the real estate was to be settled on the nephew for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee; & the personal estate upon the nephew for life, with remainder to all his children as joint tenants, with a proviso that in the event of all the children dying under twenty-one, & daughters, unmarried, or, if sons, without issue, the personality should be held in trust for the nephew absolutely.—**WHITE v. BRIGGS** (1848), 2 Ph. 583; 15 Sim. 300; 17 L. J. Ch. 196; 41 E. R. 1068, L. C.

Annotations:—*Consd.* **Davenport v. Davenport** (1863), 1 Hem. & M. 775; **Keay v. Boulton** (1883), 25 Ch. D. 212. *Refd.* **Wingfield v. Wingfield** (1878), 9 Ch. D. 658.

46. Direction as to ultimate remainder.]—Devise subject to life interest of testator's widow, upon trust to convey, assign, & assure freehold property “unto & to the use of my son T. F., & the heirs of his body lawfully issuing, but in such manner & form, nevertheless, & subject to such limitations & restrictions, as that if T. F. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto & belong to my daughter R. F., her heirs, exors., administrators, & assigns”:—*Held*: the devise was an executory trust to be executed by a conveyance to the use of T. F. during his life, with remainder to his first & other sons & daughters as purchasers in tail, with remainder to R. F. in fee.—**THOMPSON v. FISHER** (1870), L. R. 10 Eq. 207; 18 W. R. 860.

47. Direction to settle as executor should think fit.]—**CLARK v. FELLOWS** (1717), 2 Eq. Cas. Abr. 743; 22 E. R. 630, L. C.

Settlement of share of daughter or other female.]—See Sub-sect. 2, ante.

General principle directing limitations.]—See Sub-sect. 3, A., ante.

C. Powers Inserted.

48. Power of sale—Direction to insert general & special power.]—Testator having, by will, devised all his estates to trustees, in trust to convey to his son & his issue, in strict settlement, with a remainder to his nephew & his issue; by a codicil directed that a power should be inserted, enabling the trustees, with consent of the son, to sell one of the estates to the nephew, on his agreeing to assume testator's name, & by a second codicil directed that the settlement should contain usual powers to the trustees, with the consent of the tenants for life, & guardians of infant tenants in tail in possession, to sell “all or any part” of the estates:—*Held*: the special power was not revoked by the general one, but that the settlement must contain both.—**GREENE v. WIGLESWORTH** (1818), 1 Swan. 234; 1 Wils. Ch. 313; 37 E. R. 134.

49. Power of sale & exchange—Direction to insert all proper & usual powers.]—A will directing a settlement of estates, & that there should be inserted all proper powers for making leases, & otherwise, according to circumstances, for the tenants for life, to be exercised by them when qualified, & when not by the trustees, does not authorise the insertion of a power of sale & exchange to the trustees, to be exercised with the consent of the tenant for life.

Qu.: whether the will authorises the introduction of a power of sale & exchange of any

description.—**BREWSTER v. ANGELL** (1820), 1 Jac. & W. 625; 37 E. R. 506, L. C.

Annotation.—**Reid**. **Head v. Godlee, Reynolds v. Godlee** (1859), John. 536.

50. ——— For making leases & otherwise.]

—A will, directing a settlement of estates, & that there should be inserted all proper powers for making leases, & otherwise, according to circumstances to & for the tenants for life, to be exercised by them when qualified & when not, by the trustees, does not authorise the insertion of a power of sale & exchange.—**HORNE v. BARTON** (1822), Jac. 437; 37 E. R. 915.

Annotations.—**Reid**. **Head v. Godlee, Reynolds v. Godlee** (1859), John. 536; **Wise v. Piper** (1880), 13 Ch. D. 848.

51. ——— Settlement of realty & personalty.]

Testator, who made his will in 1810, & died in 1820, directed by his will that his daughters' shares in his property, which consisted of realty & personalty, should be so settled that, if they married, one-half of their fortune should be settled on them & their children, exclusive of their husbands:—**Held**: this direction authorised the insertion in the settlement of a power of sale & exchange of that moiety of a daughter's share in testator's real estate which was to be settled on her & her children.—**WISE v. PIPER** (1880), 13 Ch. D. 848; 49 L. J. Ch. 611; 41 L. T. 794; 28 W. R. 442.

52. Power to charge portions—Direction to insert all other usual clauses, powers & provisos

—**Settlement of realty on sons.]**—A will directed a settlement to be made of real estate on A. & his first & other sons in tail, with powers of jointuring, leasing, sale & exchange, & all other clauses, powers & provisos usually inserted in settlements of the same kind:—**Held**: these last words did not authorise the insertion of a power to charge with portions.—**HIGGINSON v. BARNEY** (1826), 2 Sim. & St. 516; 57 E. R. 443.

Annotation.—**Reid**. **Sackville-West v. Holmesdale** (1870), L. R. 4 H. L. 543.

53. Power to appoint new trustees—Direction to insert all other usual clauses, powers & provisos

—**Strict settlement.]**—Testator directed his real estates to be settled on certain persons in strict settlement, & that there should be inserted, in the settlement so to be made, powers of leasing, sale, partition & exchange, " & my will is that, in such intended settlement, shall be inserted all such other proper & reasonable powers as are usually inserted in settlements of the like nature ":—**Held**: a power to appoint new trustees, was a proper & reasonable power to be inserted in the settlement.—**LINDOW v. FLEETWOOD** (1835), Sim. 152; 58 E. R. 551.

54. Power of appointment—Settlement settled by court—Life estate to husband.]

Where testator had directed that, in the event of the marriage of his daughter, a certain portion of his property should be secured to her & the issue of her marriage, by a settlement or some other good assurance, in such manner as his trustees or trustee for the time being might think fit, the ct., on an application to which the surviving trustee was a party, approved of a power in the settlement made on the marriage of the daughter, enabling her to appoint by will a life estate in the property to her husband.—**CHARLTON v. RENDALL** (1853), 11 Hare, 296; 68 E. R. 1287.

55. ———.]—In making a settlement of property directed to be settled on the wife & children of testatrix's son, the ct. has jurisdiction to give to the husband a life interest & also power to appoint the fund amongst the issue of the marriage jointly with the wife during the coverture,

& alone if he survive her.—**Re GOWAN, GOWAN v. GOWAN** (1880), 17 Ch. D. 778; 50 L. J. Ch. 248.

Annotations.—**Reid**. **Re Parrott, Walter v. Parrott** (1886), 55 L. T. 132; **Re Galsworthy, Galsworthy v. Galsworthy**, [1922] 2 Ch. 558.

56. ———.]—**SMITHERS v. GREEN** (1877), cited 2 Seton's Judgments & Orders, 7th ed. 907.

Annotation.—**Consd.** **Re Gowan, Gowan v. Gowan** (1880), 17 Ch. D. 778.

57. What powers inserted—Where no direction.]—**TURNER v. SARGENT**, No. 9, ante.

D. Waste.

58. Whether tenant for life made liable for waste.]—A. devises lands to his sister B. & C. & their heirs & assigns, upon trust, that until his granddaughter D. should marry or die, to receive the profits, & thereout to pay her £100 a year for her maintenance: the residue to pay debts & legacies. After payment thereof, in trust for the said D. & upon further trust, that if she lived to marry a protestant of the church of England, & at the time of such marriage be of the age of twenty-one or upwards, or if under that age, such marriage be with the consent of the said B. then to convey, with all convenient speed, after such marriage, to the use of the said D. for life, sans waste voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over; & upon further trust, that if the said D. die unmarried, then to the use of B. for life; remainder to the son of his other granddaughter E. in tail; remainder to deft. C. remainder to his first & other sons; remainder to A.'s right heirs; & upon further trust, that if D. marry not according to the will, then upon such marriage to convey to trustees, as to one moiety to the use of D. for life, then to trustees to preserve contingent remainders: remainder to her first & every other son, being a protestant, with remainders over; & as to the other moiety, to the son of his daughter E. in like manner. A. dies, D. attains her full age; & upon a treaty of marriage with F. applies to B. & C. for a conveyance to herself for life; remainder to her intended husband for life; remainder to the issue of her body; B. executes such conveyance, but C. refuses; D. suffers a recovery of the whole to the use of herself in fee, & then marries F. who made a considerable settlement upon her; she covenants to settle her estate upon husband & wife; remainder to first, etc., sons in tail, remainder to survivor of husband & wife in fee. They bring a bill to compel C. to convey, etc., decreed, not an estate tail to D., but an estate for life sans waste, *ut supra*, as being the intent of A. upon the will with remainders over in strict settlement.—**GLENORCHY (LORD) v. BOSVILLE** (1733), as reported in *Cas. temp. Talb.* 3; 25 E. R. 628, L. C.

Annotations.—**Consd.** **Meure v. Meure** (1737), 2 Atk. 265. **Reid**. **Roberts v. Dixwell** (1738), 1 Atk. 607; **Reed v. Snell** (1743), 2 Atk. 642; **Bagshaw v. Spencer** (1748), 1 Ves. Sen. 142; **Exel v. Wallace** (1751), 2 Ves. Sen. 318; **Austen v. Taylor** (1759), Amb. 376; **White v. Carter** (1766), 2 Eden, 366; **Kelley v. Fowler** (1768), Wilm. 298; **Jones v. Morgan** (1783), 1 Bro. C. C. 206; **Bold v. Hutchinson** (1855), 5 De G. M. & G. 558.

59. ——— Timber estate.]—Testator devised F., a well timbered estate to deft. in fee, & directed him to settle it on himself for life, with divers remainders over, & directed that such settlement should contain such powers of jointuring, etc., as deft. should direct, & all other usual & proper provisions for giving effect to his intentions therein expressed, & all such other powers & provisions as counsel should advise:—**Held**: the successive tenants for life ought not to be made

Sect. 2.—Settlements created under direction in will: Sub-sect. 3, D.; sub-sect. 4. Sect. 3: Sub-sects. 1, 2 & 3, A.]

dispunishable for waste, but power should be inserted in the settlement for trustees to cut timber in a due course of management for the benefit of all parties interested.—*DAVENPORT v. DAVENPORT* (1863), 1 Hem. & M. 775; 3 New Rep. 26; 33 L. J. Ch. 33; 9 L. T. 370; 10 Jur. N. S. 35; 12 W. R. 6; 71 E. R. 339.

Annotation:—Folld. Stanley v. Coulthurst (1870), L. R. 10 Eq. 259.

60. —.]—Although, where the object of a direction that property shall be strictly settled appears to be simply to prevent the first taker from alienating the property, he will be made tenant for life without impeachment of waste; yet, where there are other circumstances to show that he was intended to take simply an estate for life, he will not be made dispunishable for waste.

Personalty was settled by will on a woman for life, for her separate use, without power of anticipation, & after her death in moieties on her two sons for life & their first or other sons who should attain twenty-one. There was a power to invest in real estate, to be settled in strict settlement, subject to the same uses, trusts & powers as the trust funds were then subject to, or as near thereto as the nature & quality of the estates would permit:—*Held*: the tenants for life of realty purchased under the power ought to be impeachable for waste.—*STANLEY v. COULTHURST* (1870), L. R. 10 Eq. 259; 39 L. J. Ch. 650; 23 L. T. 761; 18 W. R. 969.

See, further, Part X., Sect. 3, post.

SUB-SECT. 4.—COSTS.

61. *Fall on particular legacy.*—Under a direction by will to accumulate & lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested.—*GWYTHYR v. ALLEN* (1842), 1 Hare, 505; 66 E. R. 1131.

Annotation:—Mentd. Parker v. Watkins (1859), John. 133.

62. —.]—*Re PARROTT, WALTER v. PARROTT*, No. 14, *ante*.

SECT. 3.—SETTLEMENTS CREATED BY DEED.

SUB-SECT. 1.—IN GENERAL.

See Settled Land Act, 1925 (c. 18), ss. 4, 5.

63. *Existence of deed of settlement presumed.*—The existence & execution of a settlement by indentures of lease & release presumed from circumstances: principally the existence of the drafts; the statement in an abstract of the title; & the existence of the lease for a year of other estates, appearing to have been included in the same plan of settlement.—*WARD v. GARNONS* (1810), 17 Ves. 134; 34 E. R. 52, L. C.

Annotation:—Mentd. Pickering v. Ely (Bp.) (1843), 2 Y. & C. Ch. Cas. 249.

64. *Estoppel.—Father allowing son to settle interest not possessed.*—Father, supposing his son tenant in fee, stands by & lets his son make a settlement, which he had not power of doing according to his real title; yet shall make good the

settlement.—*TEASDALE v. TEASDALE* (1726), Cas. temp. King, 59; 25 E. R. 222, L. C.

Annotation:—Consd. Olliver v. King (1856), 8 De G. M. & G. 110.

65. — *Settlement of reversion expectant—Fund subsequently obtained under appointment.*—A marriage settlement made in 1864 gave the husband & wife or the survivor, power to appoint the settled funds among the children of the marriage. In 1904 one of the daughters, on her marriage, executed a settlement which contained a recital that, under the settlement of 1864 & a deed poll executed by her parents, she was entitled in reversion expectant upon the death of the survivor of her parents, both then living, to one-third part of £6,500 of the trust funds of the settlement of 1864, & witnessed that the daughter assigned to trustees "all that the third part or share" to which she was entitled in reversion expectant as aforesaid. The mother survived the father & died in 1917, having by her will, made in 1916, appointed £2,000, part of the funds settled in 1864, to the daughter. There was no evidence of any other appointment by deed poll or otherwise:—*Held*: the appointed sum of £2,000 was caught by & subject to the settlement of 1904.—*Re HARPER'S SETTLEMENT, WILLIAMS v. HARPER*, [1919] 1 Ch. 270; 88 L. J. Ch. 245; 120 L. T. 439.

—.]—*See, further, ESTOPPEL*, Vol. XXI., pp. 283–286.

—.]—*See WILLS.*

Covenant by covenantor with himself & others.—*See CONTRACT*, Vol. XII., p. 23, No. 17.

Whether bills of sale.—*See BILLS OF SALE*, Vol. VII., p. 26, Nos. 124–130.

SUB-SECT. 2.—EXECUTION.

See, generally, DEEDS, Vol. XVII., pp. 199–226.

66. *Execution necessary.*—*HORE v. DIX* (1660), 1 Sid. 25; 82 E. R. 948.

Annotations:—Refd. Samon v. Jones (1690), 2 Vent. 318. *Mentd. Thomason v. Mackworth* (1666), O. Bridg. 502; *Doe d. Milburn v. Salkeld* (1755), Willes, 673; *Roe d. Wilkinson v. Tranmarr* (1758), Willes, 682; *Doe d. Lewis v. Davies* (1837), 2 M. & W. 503.

67. *Execution by some parties only—Binding upon executing parties.*—Where a deed of marriage settlement is drawn up, as between the intended husband & wife, & their respective fathers; & the father of the wife secures to the father of the husband, a sum of money, as the portion of the wife, according to a provision of the deed; but neither he nor his daughter execute the deed, & it is executed only by the intended husband & his father; it is binding upon & as between the parties who execute, & creates efficient rights for the objects of the settlement.

On points, in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute; & the lands & property comprised in the deed first registered, are also bound, after satisfying the trusts of the first by the contracts & trusts of the deed last registered.—*M'NEILL v. CAHILL* (1820), 2 Bli. 228; 4 E. R. 311, H. L.

Annotations:—Mentd. Daniel v. Falmouth, Turner v. Falmouth (1834), 5 L. J. Ch. 69; *Hoaking v. Terry* (1862), 15 Moo. P. C. C. 493.

68. — *Relief of other parties.*—Where, after a marriage, proposals were made by the

PART II. SECT. 3, SUB-SECT. 1.
c. *Necessity for registration.*—A settlement upon trust for the settlor's wife for life & after death upon trust

for the settlor for life, & after the death of the survivor upon trust for the children of the marriage must, even where the settlor predeceases his

wife, be registered under Administration & Probate Act, 1880, s. 113.—*WHITING v. MCGINNIS*, [1909] V. L. R. 250.—AUS.

lady's father for a settlement to be made by him upon the husband & wife & the issue of the marriage, upon the husband's making a similar settlement, & the father accordingly executed the settlement, but the wife having died in the meantime, leaving an infant daughter, the husband refused to execute the settlement; it was held that the father was entitled to be relieved from the covenants contained in the settlement, & to have the instrument delivered up to be cancelled.—*WOODCOCK v. MONCKTON* (1844), 1 Coll. 273; 3 L. T. O. S. 261; 63 E. R. 416.

69. —[In contemplation of marriage, an intended wife & her father executed the engrossment of a settlement of (*inter alia*), funds to be provided by the father, & the present & after-acquired property of the intended wife. The engrossment was given into the custody of the solrs. of the intended husband; it was not executed by him or the trustees. The engagement was broken off by agreement. After the lapse of three & a half years the ct. declared the engrossment void as a settlement & directed it to be given up.

Even if a marriage did take place between the parties, it would take place under such different circumstances that it would be, strictly speaking, not the same marriage (*PEARSON, J.*).—*BOND v. WALFORD* (1886), 32 Ch. D. 238; 55 L. J. Ch. 687; 54 L. T. 672; 2 T. L. R. 469.

—Disclaimer by trustee.]—See *DEEDS*, Vol. XVII., p. 214, Nos. 265, 266.

SUB-SECT. 3.—CONSTRUCTION.

A. In General.

Construction of deeds generally, see *DEEDS*, Vol. XVII., pp. 242 *et seq.*

70. Difference in construction of will & settlement.]—Though there may not be any different rule of construction applicable to wills & settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: shares under a settlement being held not to be vested might create a resulting trust for the settlor whilst in a will the residuary legatee might take.—*FARRER v. BARKER* (1852), 9 Hare, 737; 68 E. R. 712.

Annotations:—*Consd.* *Dalton v. Hill* (1862), 6 L. T. 446; *Jackson v. Dover* (1864), 2 Hem. & M. 209. *Refd.* *Swallow v. Binns* (1855), 1 K. & J. 417; *Re Thorne's Trust* (1862), 10 W. R. 338; *Re Crosse's Will* (1863), 32 L. J. Ch. 344; *Williams v. Haythorne, Williams v. Williams* (1871), 6 Ch. App. 782; *Re Hamlet, Stephen v. Cunningham* (1888), 38 Ch. D. 183; *Leader v. Duffey* (1888), 13 App. Cas. 294. *Mentd.* *Malden v. Maine* (1855), 2 Jur. N. S. 206.

71. —[*Semble*: the distinction between a settlement & a will is, that in the former case, a settlor must be assumed *a priori* to have a general intention to benefit husband, wife, & children impartially; whereas, in the latter, testator may have good reasons for making a distinction & an intention of equally benefiting all cannot be assumed.—*Re CROSSE'S WILL* (1863), as reported in 32 L. J. Ch. 344; 8 L. T. 299; 9 Jur. N. S. 429; 11 W. R. 396.

72. —Marriage settlement.]—Marriage settlements, by their very existence, prove an intention to provide for children, & it is not to be supposed that the intention was limited to children who

should survive their parents; but a will is arbitrary in its nature, & such may be the intention. True it is, that in the case either of a settlement or of a will, the question is one of intention, & a will may be so framed as to evince an intention to provide for children, & in the case of a will so framed, the principle may be reasonably applied (*TURNER, L.J.*).—*BYTHESEA v. BYTHESEA* (1854), 23 L. J. Ch. 1004; 24 L. T. O. S. 17; 2 W. R. 677, L. C. & L. J.

Annotations:—*Refd.* *Jeyes v. Savage* (1875), 23 W. R. 764; *Re Orlebar's Settlements* (1875), L. R. 20 Eq. 711. *Mentd.* *Young v. Turner* (1861), 1 H. & S. 550; *Richards v. Davies* (1862), 13 C. B. N. S. 69; *White v. Hill* (1867), L. R. 4 Eq. 265; *Bryden v. Willett* (1869), L. R. 7 Eq. 472; *Re Watson's Trusts* (1870), L. R. 10 Eq. 36; *Re Mercer's Trusts, Davies v. Mercer* (1876), 4 Ch. D. 182.

73. Construction that makes interests of children independent of their surviving the parents.]—In putting a construction on a marriage settlement, the ct. always endeavours not to make the interest of the children depend on their surviving their parents.—*STRUTT v. BRAITHWAITE* (1852), 5 De G. & Sm. 369; 21 L. J. Ch. 609; 19 L. T. O. S. 28; 16 Jur. 882; 64 E. R. 1157.

Annotation:—*Mentd.* *Hope v. Potter* (1857), 3 K. & J. 206.

74. Construction irrespective of expediency of provisions.]—*SMYTH v. FOLEY*, No. 1471, *post*.

75. Expressed intention to provide for one event that has happened—Not controlled by provision for other events not happening.]—Where parties to a deed of settlement contemplate several states of circumstances, & there is found, on the face of the instrument, a clear & distinct expression of intention to provide for one event, which has precisely happened, the terms of gift so expressed are not to be superseded, nor their effect destroyed, by any ambiguity of terms used solely in reference to other events or states of circumstances which have not happened.

A husband by post-nuptial contract, after granting an annuity to his wife, bound himself, his heirs & exors. to pay her, or any person appointed by her in writing, during her life, with or without the husband's consent, & whether she should survive or predecease him, & have issue or not, the sum of £3,000 or other lesser sum, as she should direct, at the first term of Whitsunday or Martinmas next after the husband's death, in case he should survive or predecease her without leaving issue of the marriage; or at the first of those terms after failure of the issue, in case she should survive leaving issue of the marriage; or at any of the said terms after any of these events; so that no part of the said sum should be raised during the life of the husband, or the joint existence of the wife, & the issue of the marriage; with proviso, that in case the wife should survive the husband & the issue of the marriage, & recover payment of the said sum or any part of it, her annuity should suffer restriction equal to the interest of the sum recovered. The wife survived the husband, & died without having had issue, & without recovering or disposing of any part of the £3,000:—*Held*: in the event which happened, the £3,000 belonged to the wife's estate, & her personal representative was entitled to it against the husband's estate.—*DILL v. HADDINGTON (EARL)* (1841), 8 Cl. & Fin. 168; 8 E. R. 67, H. L.

76. Failure as to part—Remainder valid.]—*CARRICK v. ERRINGTON* (1726), 2 P. Wms. 361; Mos. 9; 24 E. R. 766, L. C.; *affd. sub nom.*

Sect. 3.—Settlements created by deed: Sub-sect. 3, A. & B.]

ERRINGTON v. CARRICK (1728), 5 Bro. Parl. Cas. 390, H. L.

Annotations:—*Consd.* *Re* Willis, *Crossman v. Kirkaldy*, [1917] 1 Ch. 385. *Re*ld. *Hopkins v. Hopkins* (1738), 1 Atk. 581; *Re* Scott, *Scott v. Scott*, [1911] 2 Ch. 374; *Re* Conyngham, *Conyngham v. Conyngham*, [1921] 1 Ch. 491. *Mentd.* *Marwood v. Darrill* (1735), Cunn. 149; *Addington v. Cann* (1744), 3 Atk. 141; *Tregonwell v. Sydenham* (1815), 3 Dow, 194; *Lomas v. Wright* (1833), 2 My. & K. 769; *Lainson v. Lainson* (1854), 24 L. J. Ch. 46; *D'Eyncourt v. Gregory* (1864), 34 Beav. 36.

77. Marriage settlement—Whether benefits extend to children of subsequent marriage.]—*BOND v. TAYLOR*, No. 1109, *post*.

78. Division of specific fund—Accretion to fund.]—The doctrine of *Page v. Leapingwell* (1812), 18 Ves. 463, that, where various parts of a specific fund are disposed of in such a way as to exhaust the fund, they are to be treated as aliquot parts of the fund, & must all abate if there is a deficiency, applies also to cases where the securities on which the fund is invested, have increased in value, & there is a surplus.

A settlement of £10,000, by which £5,000 is given to A. & the residue to B.:—*Held*: on the true construction of the settlement, to be a division of the fund into moieties, so that the surplus funds arising from an increase in the value of investments must be shared equally between A. & B.—*Re* PHILLIPS, *EDDOWES v. PHILLIPS* (1897), 66 L. J. Ch. 714, C. A.

79. Covenant to convey free from incumbrances—Estate subsequently incumbered by settlor.]—*TROUGHTON v. TROUGHTON* (1748), 1 Ves. Sen. 86; 3 Atk. 656; 27 E. R. 908, L. C.

Annotations:—*Mentd.* *Adams v. Claxton* (1801), 6 Ves. 226; *O'Grady v. Wilmot*, [1916] 2 A. C. 231.

80. —Rentcharge issuing out of hereditaments partly settled.]—By a voluntary settlement of 1868 husband & wife & each of them did "grant, release, dispose of & confirm" a moiety of the wife's hereditaments " & all the estate right title interest property claim & demand " of either of them, to, & out of the same to trustees & their heirs on certain trusts. The husband was entitled to a rentcharge issuing out of the hereditaments, but it was not mentioned in the settlement. The settlement contained no covenants for title:—*Held*: the settlement operated by way of release & not by way of grant of the rentcharge, & as the husband & wife, the owners of the unsettled moiety of the hereditaments had concurred, that moiety, by virtue of Law of Property Amendment Act, 1859 (c. 35), s. 10, remained subject to the entire charge.—*PRICE v. JOHN*, [1905] 1 Ch. 744; 74 L. J. Ch. 469; 92 L. T. 768; 53 W. R. 456.

81. Covenant for further assurance—"Upon the request" of certain parties—Requests by others.]—A declaration on a covenant for further assurance set it out as a covenant to execute further assurances on request & at the expense of deft., his heirs or assigns, & alleged a request by plffs. The covenant itself was a covenant to assure upon the request, & at the expense of deft.:—*Held*: a fatal variance.—*WHYTE v. BURNBY* (1846), 16 L. J. Q. B. 156; 8 L. T. O. S. 411.

82. Proviso for husband & wife to reside in property.]—Previously to his marriage a husband executed two deeds in England, by the first of which he transferred certain mtges. of freehold

hereditaments in Sierra Leone, & granted certain freehold hereditaments in Australia to trustees, upon trust for himself until the marriage, & afterwards upon trust to sell same with the joint consent of himself & his wife, & to hold the proceeds of sale, & also the rents & profits until sale, upon the trusts declared concerning same by the second deed, which was of even date with the first. The first deed contained a proviso that until the premises were sold the settlor & his wife, during their joint lives, & the survivor, after the death of either, should be permitted to reside in & enjoy all or any of the premises rent free. The second deed recited the first, & declared that the trustees should invest the proceeds of the sale of the settled premises, & should, during the joint lives of the husband & wife, pay the interest, dividends, & annual produce thereof to the wife for her separate use, & after her death to the settlor for life, & then in trust for the issue of the marriage, but it contained no express trust of the rents & profits of the settled premises until sale. A separation took place soon after the marriage, & the wife filed a bill to have the trusts of the deed executed:—*Held*: as the husband & wife did not both elect to reside on the settled premises, the proviso did not enable the husband to do so.—*RAINY v. ELLIS* (1872), 27 L. T. 463, L. JJ.

83. Proviso against marriage without consent—First marriage with consent—Second marriage without consent.]—Lands settled on a daughter provided she marry by consent, & she marries by consent, after she marries a second husband without consent, this second marriage is no breach of the proviso.—*FENWICK v. WOODROFFE* (1685), 2 Rep. Ch. 363; 21 E. R. 688.

84. Correction of mistake by construction—Words supplied.]—Trust money in marriage arts. in power of the ct., & construed against the words for sake of the intent, by supplying the word, if wife should die without issue.—*TARGUS v. PUGER* (1750), 2 Ves. Sen. 194; 28 E. R. 126.

Annotation:—*Re*ld. *Abbott v. Middleton*, *Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68.

85. —.]—By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, certain sums of stock were vested in trustees in trust for the wife for life, & after her decease upon trust for all & every the child & children of the marriage who being a son or sons should attain the age of twenty-one years, equally to be divided between or among them & their respective exors. & administrators; & if there should be but one such child, the whole to be in trust for such one or only child, his or her exors., & administrators. There followed a clause directing that the trustees should, during the minority of each of the said children, pay to the father, to be by him applied or not as he should think fit, & after his decease should apply, the income of the presumptive share of each such child for or towards his or her maintenance & education until his or her share should become vested, or he or she should previously die:—*Held*: daughters who attained twenty-one were entitled to share in the fund.—*Re DANIEL'S SETTLEMENT TRUSTS* (1875), 1 Ch. D. 375; 45 L. J. Ch. 105; 34 L. T. 308; 24 W. R. 227, C. A.

Annotations:—*Re*ld. *Re Redfern*, *Redfern v. Bryning* (1877), 6 Ch. D. 133. *Expld.* *Re Litchfield*, *Horton v. Jones* (1911), 104 L. T. 631.

79 i. Covenant to convey free from incumbrances—Estate subsequently incumbered by settlor.]—*Re BARKER'S ESTATE* (1879), 3 L. R. Ir. 395.—*IR.*

d. Proviso against marriage without

consent.]—*Re BENNETT'S ESTATE*, [1898] 1 I. R. 185.—*IR.*

e. Mutual settlement by husband & wife for benefit of survivor—Husband predeceasing wife leaving personal pro-

perty only—Right of heirs of wife.]—*BAILLIE'S EXECUTORS v. BAILLIE* (1899), 1 F. (Ct. of Sess.) 974; 38 Sc. L. R. 739; 7 S. L. T. 54.—*SCOT.*

1. According to intention of parties.]

86. — Tail male construed as tail general.]—By a marriage settlement made in 1886 it was provided that if the eldest son of the settlor should become entitled to N.'s real estate under his will for an estate in tail male he should be excluded from all share in the trust funds subject to the settlement. A. was the settlor's eldest son, & under the limitations of the will of M. who died in 1868, he became entitled to testator's real estate for an estate in tail general. The trustees of the settlement took out a summons to determine whether he had lost his right to a share in the settlement funds:—*Held*: inasmuch as the intention of the settlor was clear & at the date of the settlement she must have known that if A. came into testator's real estate it must be for an estate in tail general, not an estate in tail male, the insertion of the word "male" in the settlement must be treated as a misdescription, & the settlement construed as if the word were omitted; & A. was excluded from sharing in the settlement moneys, without prejudice to his claims if the younger son died.—*Re ALEXANDER'S SETTLEMENT, JENNINGS v. ALEXANDER*, [1910] 2 Ch. 225; 79 L. J. Ch. 656; 102 L. T. 909; 45 Sol. Jo. 602.

—*See, further, ESTOPPEL*, Vol. XXI., pp. 372, 373.

Construction by reference to articles.]—*See DEEDS*, Vol. XVII., p. 342, No. 1528.

According to what law presumed.]—*See CONFLICT OF LAWS*, Vol. XI., pp. 434–440, Nos. 965–1008.

B. What Passes under Settlement.

87. Inclusion of every interest settlor can part with.]—*MARSHALL v. FRANK* (1717), Prec. Ch. 480; Gilb. Ch. 143; 24 E. R. 215, L. C.
Annotation:—*Reid*, Francis v. Minton (1867), L. R. 2 C. P. 543.

88. —.]—Primâ facie when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with, & which he does not except.—*JOHNSON v. WEBSTER* (1854), 4 De G. M. & G. 474; 3 Eq. Rep. 99; 24 L. J. Ch. 300; 24 L. T. O. S. 178; 1 Jur. N. S. 145; 3 W. R. 84; 43 E. R. 592, L. C.

Annotations:—*Consd.* *Re Somerset, Thynne v. St. Maur* (1886), 55 L. T. 753. *Appl. Price v. John*, [1905] 1 Ch. 744. *Reid*, *Pears v. Weightman* (1856), 2 Jur. N. S. 586; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34; *Derry v. Sanders* (1910), 83 L. J. K. B. 410. *Mend.* *Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587.

89. — Except where against intention—Nature & purpose of deed.]—*MOOR (LESSEE OF) v. MOOR* (1774), Loft, 398; 98 E. R. 714.

90. —.]—K. being solely seised, as trustee under a will, of real property thereby devised to him in trust for the benefit of testator's wife & children, of which latter he was one, & as such was beneficially interested in or entitled to two-sixteenth parts of such trust property, executed an indenture of settlement whereby, "in consideration of natural love & affection" he conveyed unto S. & his heirs "all & singular the

real estate whatsoever & wheresoever now vested in K., to hold unto S., his heirs & assigns, for ever," upon trusts therein declared for the sale, & disposal of the proceeds thereof, by S. among all K.'s children equally; & upon K.'s death:—*Held*: the legal estate in the property devised to K. in trust by the will did not pass to S. under the conveyance. Although the words of the conveyance are *primâ facie* sufficient to pass the legal estate in the whole property vested in K. as trustee under the will, yet, when the surrounding circumstances, the nature & purpose of the conveyance, & the intention of the grantor, as gathered therefrom, are considered, a doctrine equally applicable to the construction of deeds as of wills, it is manifest that he could not have intended to convey any property but that in which he was beneficially interested, & the deed operated only upon such parts of the trust property as belonged to him in his own right.—*SIDEBOTHAM v. KNOTT* (1872), 26 L. T. 700; 20 W. R. 415.

91. — Omission of schedule.]—*VINT v. VINT* (1888), 4 T. L. R. 630, C. A.

92. Effect of absence of words of limitation.]—By a settlement, dated Nov. 4, 1891, H. assigned to A. & B. "all that the share & interest to which H. is entitled under or by virtue of the will & codicils of E. in his residuary estate & the investments representing the same, to hold the share & premises hereinbefore expressed to be hereby assigned unto A. & B., their exors., administrators, & assigns, upon the trusts hereinafter declared concerning same" H. was then absolutely entitled under the will to have conveyed to him in fee simple a share in certain real estate vested in trustees devised by the will upon trusts which, as the ct. held, did not amount to a conversion thereof; & also to a like share of testator's personal estate. H. afterwards died, having by will given all his real & personal estate to his wife upon trust for the person or persons who would have been entitled thereto under Statutes of Distribution of the effects of intestates if H. had died seised or possessed thereof intestate. On a summons taken out by the wife against the trustees of the settlement & her children:—*Held*: the reference in the settlement to the will of E. was not sufficient to supply the want of words of limitation, & the trustees took, in the share of real estate under the will to which H. was entitled at the date of the settlement, only an estate for their joint lives & the life of the survivor.—*Re HUDSON, KÜHNE v. HUDSON* (1895), 72 L. T. 892; 39 Sol. Jo. 468; 13 R. 546.

Annotations:—*Follid.* *Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752. *Consd.* *Re Hughes, Loddiges v. Jones*, [1916] 1 Ch. 493. *Reid.* *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469.

93. —.]—By a post-nuptial settlement made in 1884 between I. of the one part, & trustees "whom & their exors. or administrators are intended to be hereafter included in the designation of the trustees" of the other part, it was

—*Re BLAKE'S ESTATE* (1871), 19 W. R. 765.—*IR.*

f. —.]—*Re DAVIS'S ESTATE*, [1912] 1 I. R. 516.—*IR.*

PART II. SECT. 3, SUB-SECT. 3.—B.

92 i. Effect of absence of words of limitation.]—*SEXTON v. HORTON* (1927), 38 C. L. R. 240; 27 S. R. N. S. W. 340; 44 N. S. W. W. N. 24.—*AUS.*

92 ii. —.]—*BRENAN v. BOYNE* (1864), 16 I. Ch. 87.—*IR.*

92 iii. —.]—*CURRIE v. DOYLE* (1878), 3 L. R. Ir. 265.—*IR.*

92 iv. —.]—*CHISM v. LIPSETT*, [1905] 1 I. R. 60.—*IR.*

92 v. —.]—By an indenture of settlement dated July 3, 1897, certain lands were conveyed to trustees, to hold in trust for persons named as tenants in common. There were no words of limitation of the respective estates of the persons named:—*Held*: the ct. was at liberty to look at the intention of the settlor, as evidenced by the whole deed, & there being a sufficient indication of intention, the persons named were entitled to equitable estates in fee simple.—*RODGERS v. HOUSTON*, [1909] 1 I. R. 319.—*IR.*

92 vi. —.]—*Re COLLES'S ESTATE*, [1918] 1 I. R. 1.—*IR.*

92 vii. —.]—*Sim v. DUNCAN* (1900), 2 F. (Ct. of Sess.) 434; 37 Sc. L. R. 332; 7 S. L. T. 380.—*SCOT.*

h. Settlement by tenant in tail—Pur autre vie—Quasi-entail barred.]—*BONYNGE v. FINUCANE* (1857), 10 Ir. Jur. 141.—*IR.*

k. —.]—*Re CRUISE & CRUISE (OWNERS), BURKE, BURKE & BURKE, PETITIONERS* (1871), 19 W. R. 769.—*IR.*

1. Settlement of conditional purchase—Installments partly paid up to death

Sect. 3.—Settlements created by deed: Sub-sect. 3, B. & C.]

recited that I. was absolutely entitled to freehold hereditaments, "which said freehold property" he was desirous to settle in favour of his wife & children. It was then witnessed that in pursuance of such desire he assigned the "said freehold hereditaments" to the trustees, without the words "heirs," upon trust for sale & investment & to pay the income to Mrs. I. for life & then to the settlor for life & then for their children. The settlement contained a proviso that if any present or future trustee died or wished to retire it should be lawful for the surviving or continuing trustee or, if there should be no continuing trustee, for the retiring trustee to appoint another trustee in his place, & that the trust funds & premises should thereupon be vested in the new trustees. Amongst the settlor's freeholds were some in which he only had an equitable estate:—*Held*: by reason of the absence of words of limitation there passed to the trustees merely an estate in the settlor's equitable freeholds for the lives of the trustees named in the deed & the survivor of them.—*Re IRWIN, IRWIN v. PARKES*, [1904] 2 Ch. 752; 73 L. J. Ch. 832; 53 W. R. 200; 48 Sol. Jo. 640.

Annotations:—*Foll.* *Re Monckton's Settlmt.*, *Monckton v. Monckton*, [1913] 2 Ch. 636. *Cons.* *Re Nutt's Settlmt.*, *McLaughlin v. McLaughlin*, [1915] 2 Ch. 431. *Re Bostock's Settlmt.*, *Norrish v. Bostock*, [1921] 2 Ch. 469.

94. —.]—*BRIDGE v. FICKLIN* (1906), 50 Sol. Jo. 343.

95. —.]—By a settlement made in 1908 the settlor, being then entitled for a contingent reversionary equitable estate in fee simple to freehold hereditaments & for a corresponding estate to copyhold hereditaments & investments in personalty directed to be held upon the same trusts as capital money arising under the Settled Land Act, 1882 (c. 38), from the freehold hereditaments granted unto a trustee, first, the freehold & copyhold hereditaments, & secondly the investments, to hold the same as to the freehold hereditaments & the investments "to the use of the trustee according to the customs of the several manors of which they are respectively held"; & it was thereby agreed that the trustee, his exors. or administrators, or other the trustee or trustees for the time being, should stand possessed of the freehold hereditaments, upon trust for the settlor during his life, & after his death upon such trusts in favour of his widow, children, or remoter issue, or the respective husbands or wives of such children, as he should appoint, & subject thereto, in trust for his sons & daughters in tail as therein mentioned, with an ultimate trust for the settlor, his heirs & assigns. The copyhold hereditaments were to be held on corresponding trusts, & the investments were to be applied, first, in discharging an incumbrance created by the settlor, & as to the residue, if any, in the purchase of freehold hereditaments to be assured to the trustee or trustees in fee simple upon the same trusts as were thereby declared of the freehold hereditaments thereby assured. On the death of the trustee in 1913:—*Held*: (1) as to the freehold & copyhold hereditaments the trustee took a life interest only, & the trusts of the settlement came to an end on the death of the trustee; (2) as to the investments

no words of limitation appropriate to real estate were necessary to pass an absolute interest to the trustee, Settled Land Act, 1882 (c. 38), s. 22 (5), having made no alteration in the law in this respect, & the trusts of the settlement did not come to an end on the death of the trustee.

Words of limitation are unnecessary in disposing of the equitable interest either in personal property subject to a trust for conversion into land or in the prospective proceeds of sale of land which is under a trust for conversion into money. The conveyancer can have regard to either the interest in the existing property or the interest in the property which is ultimately to represent the existing property after conversion; & if either the existing property or the ultimate property is of the nature of personalty, he can properly deal with the equitable interests in that property without using the word "heirs" or its equivalent "in fee simple."—*Re MONCKTON'S SETTLEMENT, MONCKTON v. MONCKTON*, [1913] 2 Ch. 636; 83 L. J. Ch. 34; 109 L. T. 624; 57 Sol. Jo. 836.

Annotations:—*As to* (1) *Re Bostock's Settlmt.*, *Norrish v. Bostock*, [1921] 2 Ch. 469. *As to* (2) *Appl. Re Nutt's Settlmt.*, *McLaughlin v. McLaughlin*, [1915] 2 Ch. 431. *Cons.* *Re Dickson's S. E.*, [1921] 2 Ch. 108.

96. —.]—By a settlement land was assured to the use of trustees & their heirs upon certain trusts during the life of A. & after her death to the use of her children as she should by deed appoint. By a deed poll A. appointed that the trustees should after her death hold "the trust funds & property" in trust for her four sons in equal shares without words of limitation. At the date of the appointment some of the land had been sold & the property consisted partly of land & partly of money subject to a trust for investment in land:—*Held*: (1) the appointees took equitable & not legal estates; (2) though the gift by deed of an equitable estate in land without words of limitation passed only a life estate, the fee might pass if there was to be found in the construction of the deed as a whole an intention that it should pass, & such an intention was shown by the fact that a gift of land was coupled with a gift of money subject to a trust for investment in land which would pass absolutely without words of limitation.—*Re NUTT'S SETTLEMENT, McLAUGHLIN v. McLAUGHLIN*, [1915] 2 Ch. 431; 84 L. J. Ch. 877; 113 L. T. 914; 59 Sol. Jo. 717.

97. —.]—*Re BOSTOCK'S SETTLEMENT, NORRISH v. BOSTOCK*, No. 1746, *post*.

98. *Settlement by tenant in tail—Entail not barred.*—Settlement by lease & release, the settlor being tenant in tail, & covenanting to suffer a recovery which was never suffered:—*Held*: ineffectual to carry out intentions in favour of younger children as against the remainderman in tail.—*STANHOUSE v. GASKELL* (1852), 20 L. T. O. S. 139; 17 Jur. 157; 1 W. R. 77.

See, now, Law of Property Act, 1925 (c. 20), s. 60 (4).

99. *Settlement of leaseholds—Limitation giving absolute interest.*—A. on his marriage assigns a term for one thousand years, in trust for himself for life, remainder to his wife for life, remainder to the heirs of the bodies of the husband & wife, remainder to the husband's right heirs; the wife dies leaving issue; the whole term vests in the husband & he may assign it.—*WEBB v. WEBB*

of settlor—Installments paid treated as advancements.—*Re ANDERSON* (1901), 1 S. R. N. S. W. 223.—*AUS.*

m. Settlement of renewable freeholds—Limitations purporting to give absolute interest.—A marriage settle-

ment conveyed renewable freeholds to trustees & their heirs, upon trust to permit & suffer the lands to be enjoyed for ever by the issue male of the marriage. The settlement contained expressions affording some

evidence of an intention to grant a perpetual interest:—*Held*: the sons of the marriage took only estates for life.—*BARRON v. B.* (1858), 8 L. Ch. 11, 366; *Drury temp. Nap.* 364.—*IR.*

n. Covenant to settle residue under

(1710), 1 P. Wms. 132; 2 Vern. 668; 2 Eq. Cas. Abr. 363, pl. 12; 23 E. R. 1036.

Annotations.—*Distd.* *Hodgeson v. Bussey* (1740), 2 Atk. 89. *Consd.* *Villiers v. Villiers* (1740), 2 Atk. 71. *Apld.* *Garth v. Baldwin* (1755), 2 Ves. Sen. 646. *Consd.* *Lyon v. Mitchell* (1816), 1 Madd. 467. *Foll.* *Bartlett v. Green* (1842), 13 Sim. 218. *Held.* *Papillon v. Voise* (1728), Kel. W. 27; *Theobridge v. Kilburne* (1751), 2 Ves. Sen. 233; *Tothill v. Pitt* (1770), 2 Dick. 432. *Mentd.* *Taylor v. Clarke* (1763), 2 Eden, 202; *Adams v. Adams* (1892), 61 L. J. Ch. 237.

100. ———.]—Lease for three lives to A her exors., etc. A. assigns all right to the use of B. for life, & afterward of his issue; & for want of such issue to the use of A. her exors., etc. The whole vests in the issue of B.; & issue means children; & A.'s exor., who was a special occupant, cannot claim against it.

Words construed according to nature of the estate.—*WILLIAMS v. JEKYL, ELIOT v. JEKYL* (1755), 2 Ves. Sen. 681; 23 E. R. 434, L. C.

Annotations.—*Held.* *Ex p. Sterne* (1801), 6 Ves. 156; *Ripley v. Waterworth* (1802), 7 Ves. 425. *Mentd.* *Doe v. Robinson* (1828), 2 Man. & Ry. K. B. 249.

101. ———.]—By indenture of settlement made upon the marriage of A. & B., A. assigned a term of two thousand years in certain premises to a trustee to be held upon the trusts of the settlement. The settlement recited that it was agreed that the premises should be settled "upon A. for life, then to B. for her life; & after their several deceases, on the issue of the marriage, & in default of such issue, then to the brother of A. & his heirs, exors., & administrators." The trusts declared in the deed were "to permit & suffer A. to receive the rents, issues, & profits, etc., for so many years of the term as should expire in his lifetime"; then to B. for life " & from & after the several deceases of A. & B., to permit & suffer the heirs of the body of A. begotten of B., to receive the rents, issues, & profits of the premises for so many years of the term as should expire in the life or lives of him, her, or them, etc." & in default of such issue, then to the brother of A. for the residue of the term.—*Held*: the words "heirs of the body, etc.," were words of limitation & not of purchase; & the effect of the settlement was to give the absolute interest in the term to A., & which if undisposed of by his will, would go to his next of kin & not to his heir-at-law.—*BARTLETT v. GREEN* (1842), 13 Sim. 218; 12 L. J. Ch. 148; 6 Jur. 1099; 60 E. R. 85.

102. *Mixing funds with settled funds.*—By a post-nuptial settlement a wife settled savings of her separate estate upon trusts for herself & her husband successively for life, with remainder to their two sons, with a proviso that in the event of the death of either under twenty-five without issue, his share should go to the survivor. There was also a proviso that the husband or wife should be at liberty to add any part of the dividends to the sum invested, & that the sum to be so added should be subject to the like trusts as the original fund. The wife invested in the names of the trustees, but without communicating the fact to them, various sums, arising partly from accumulations of the dividends & partly from funds derived from other sources; & after the death of the husband, & of both of the sons, without issue, the exor. of the survivor of the sons, instituted a suit to have the trusts of the settlement executed.—*Held*: it was not a sufficient defence on the part of the settlor as to the additions to the fund that she had invested them under a misapprehension as to the

effect of the settlement, & all the additions were subject to the trusts of it.—*MUGGERIDGE v. STANTON* (1859), 1 De G. F. & J. 107; 1 L. T. 144; 8 W. R. 69; 45 E. R. 300, L. C. & L. JJ.

Effect of recitals.—See Sub-sect. 3, D., *post*.
Proviso as to future separation—In marriage settlement.—See *HUSBAND & WIFE*, Vol. XXVII., p. 223, Nos. 1938–1940.

C. Conflicting Deeds or Clauses.

See, generally, *DEEDS*, Vol. XVII., pp. 349–353.

103. *Conflict between settlement & subsequent document—Settlement controls.*—The Master of the Rolls of opinion, that a note under the hand of the husband ought to be looked upon as part of the marriage agreement, & consequently as part of the settlement; & as the wife would have been relieved if she had brought a bill against the husband, equally so, as brought against the assignees, who stand in his place.

A settlement will control a writing executed after, but the parties refusing to execute the settlement without it, they must be construed as one entire agreement & both consistent.—*TYRRELL v. HOPE* (1743), 2 Atk. 558; 26 E. R. 735.

Annotations.—*Held.* *Shaw v. Jakeman* (1803), 4 East, 201; *Dye v. Dye & Beloe* (1883), 47 J. P. 520. *Mentd.* *Blacklow v. Laws* (1842), 2 Harc. 40.

104. ———.]—*Refusal to execute settlement without subsequent document—Construed as one instrument.*—*TYRRELL v. HOPE*, No. 103, *ante*.

105. *Conflict between voluntary settlement & subsequent marriage settlement—Marriage settlement prevails so far as it revokes voluntary settlement.*—A father by a voluntary deed conveyed certain estates to trustees upon trust to allow him the rents & profits for life; then to the use of his son, his exors., administrators & assigns. Subsequently he makes another settlement of the same premises on the marriage of the son, by which he gives up the immediate rents & profits to the son, & after some further limitations reserves the ultimate reversion to himself.—*Held*: the voluntary deed remained in force, in as far as it was not revoked by the subsequent marriage settlement; & the reversion belonged to those claiming under the son, & not to those claiming under the father.—*CROKER v. MARTIN* (1827), 1 Dow. & Cl. 15; 1 Bli. N. S. 573; 6 E. R. 430, H. L.
Annotation.—*Held.* *Anstey v. Newman* (1870), 39 L. J. Ch. 769.

106. *Conflict between settlement & subsequent appointment—Necessity for clear intention to alter limitations.*—By a deed of settlement, lands were conveyed, subject to certain uses, to such use as W. R. & his wife should appoint; & in default of such appointment, to W. R. the younger. W. R. & his wife appointed several times, by way of mtge., with provisos for reconveyance to the former uses; & at length appointed, with a power of sale & a proviso for reconveyance to W. R. & his wife in fee. W. R. survived his wife, & sold his supposed equity of redemption.

On a bill filed by parties claiming under the trusts of the original settlement against the representatives & other persons claiming under W. R., the husband, for redemption.—*Held*: under the last mtge. deed W. R. & his wife did not take an absolute fee in the equity of redemption; & therefore, plffs. were entitled to redeem against the representatives of the purchaser, the intention

will accruing to settlor during marriage.—*ARMIT v. BREDDIN* (1866), 17 L. Ch. R. 165.—*IR.*

o. Mutual settlement of life interest

with power to alter during respective lives—Property reinvested on terms conveying absolute title on survivor—Whether predeceasing settlor's property

still bound by mutual settlement.—*RENTON'S TRUSTEES v. ALISON* (1876), 3 R. (Ct. of Sess.) 1142; 13 Sc. L. R. 696.—*SCOT.*

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to alter the original devolution of the estate not being sufficiently apparent.

Declaration, or clear intention equivalent to it, necessary to change the use.—*WHITBREAD v. SMITH* (1854), 3 De G. M. & G. 727; 2 Eq. Rep. 377; 23 L. J. Ch. 611; 23 L. T. O. S. 2; 18 Jur. 475; 2 W. R. 177; 43 E. R. 286, L. C. & L. JJ.

*Annotations:—*Consd. *Heather v. O'Neil* (1858), 2 De G. & J. 399. *Reid. Sharshaw v. Gibbs* (1854), Kay, 333.

107. Conflicting clauses in settlement—Rejection of one clause only if absolutely necessary.]—Where a deed contains inconsistent clauses, the ct. very reluctantly rejects one altogether, never, unless it is absolutely impossible to reconcile the inconsistencies.—*BUSH v. WATKINS* (1851), 14 Beav. 425; 51 E. R. 350.

108. — Presumption that child takes vested interest at twenty-one.]—When clauses in a settlement are conflicting, the rational presumption is that a child attaining twenty-one takes a vested interest.

In a settlement, the limitation was to the children "who should be living at the time of the decease of the father"; this was controlled by the gift over:—*Held*: a child who died in the life of her father, having attained twenty-one, was held entitled to a share.—*DIXON v. BARKSHIRE* (1865), 34 Beav. 537; 55 E. R. 742.

109. — Omission of words—"Only" or "no more."]—*POTT v. LEE* (1714), 1 Eq. Cas. Abr. 157; 21 E. R. 956.

110. — Estates in tail male & female for successive life tenant—Priority of estate.]—The settlor conveyed real estate to trustees in fee, to the use of A., B., C. & four others successively, for life, & afterwards upon trust to convey to all & every the sons & daughters of the eight tenants for life, "who should be then living, & to the heirs male & female of his, her & their body & bodies respectively, in a course of entail," the sons & daughters of A., & their heirs, to take before all the other persons named, & the sons & daughters of B. & their heirs to take next after the sons & daughters of A. & their heirs, & similar as to the five others in succession, & the sons of all & every the persons last above named & the heirs, etc., to take before the daughters & their heirs:—*Held*: the daughters of A. took in priority of the sons of B.—*RANDALL v. DANIEL* (1857), 24 Beav. 193; 53 E. R. 331.

D. Recitals.

111. Binding effect governed by intention—Recital by father—Whether binding on daughter's property.]—*SEAMER v. BINGHAM, STRODE v. STRODE*, No. 752, post.

112. — Interest to vest only on son surviving both parents.]—By the recitals contained in a settlement, the intention of the settlor was plain that a son, then *in esse*, should only take absolutely in the event of his surviving both his parents, & also attaining twenty-one; by the subsequent limitations, an absolute interest vested in such son on his attaining twenty-one, though dying in the lifetime of one of such parents:—*Held*: the intention must prevail, & no vested interest passed under such limitations.—*LAW v. DAVEY* (1833), 2 L. J. Ch. 82.

113. Operation as covenant to pay.]—*GRAVES v. WHITE* (1680), 2 Eq. Cas. Abr. 652; Freem. Ch. 57; 22 E. R. 548, L. C.

Recitals controlling operative part.]—*See DEEDS*, Vol. XVII., pp. 362–370.

— Mistake of parties.]—*See MISTAKE*, Vol. XXV., p. 116, No. 207.

Recital operating as estoppel.]—*See ESTOPPEL*, Vol. XXI., pp. 252–262.

Covenants to settle after acquired property.]—*See Part III., Sect. 4, sub-sect. 5, post.*

E. Particular Words and Phrases.

114. "Attempt to impeach the settlement"—Action to determine rights thereunder.]—*STERLING (EARL) v. LEVINGSTON* (1872), 2 Rep. Ch. 75; 15 Sim. 619, n.; 21 E. R. 620.

*Annotation:—**Reid. Cooke v. Turner* (1849), 14 L. T. O. S. 413.

115. "Begotten" or "to be begotten."]—The words begotten & to be begotten are the same as well on construction of wills as settlements, & take in all the issue after begotten, & although upon the death of testator there was then only a daughter born, yet upon the birth of another child, the estate shall open & take in the afterborn son (*WRIGHT, LORD KEEPER*).—*COOK v. COOK* (1706), 2 Vern. 545; 23 E. R. 952.

*Annotations:—*Consd. *Doe d. James v. Hallett* (1813), 1 M. & S. 124. *Reid. Gore v. Gore* (1733), Kel. W. 254; *Early v. Benbow* (1846), 2 Coll. 342; *Locke v. Dunlop* (1888), 39 Ch. D. 387. *Mentd. Cray v. Willis* (1729), 2 P. Wms. 529; *Buffar v. Bradford* (1741), 2 Atk. 220; *Elliot v. Jekyl* (1755), 2 Ves. Sen. 681; *Pickering v. Towers* (1758), 1 Eden, 142; *Keene d. Pinnock v. Dickson* (1783), 3 Doug. K. B. 312; *Forrest v. Whiteway* (1849), 3 Exch. 367; *Edwards v. Champion* (1853), 3 De G. M. & G. 202; *Allgood v. Blake* (1872), L. R. 7 Exch. 339.

116. —.]—A settlement of money to be paid to such children "as shall be begotten, etc." but "that if the husband shall die without any children, then the said money shall be paid to A." extends to a child *in esse* at the time the settlement was made.—*SLINGSBY v. —* (1718), 10 Mod. Rep. 397; 2 Eq. Cas. Abr. 658; 88 E. R. 780, L. C.

117. —.]—Provision for daughters to be born shall extend to daughters then begotten.—*HEWET v. IRELAND* (1718), 1 P. Wms. 426; 2 Coll. 344, n.; *Gilb. Ch. 145*; *Prec. Ch. 489*; 24 E. R. 456, L. C.

*Annotations:—*Consd. *Doe d. James v. Hallett* (1813), 1 M. & S. 124; *Early v. Benbow* (1846), 2 Coll. 342; *Barnes v. Jennings* (1866), L. R. 2 Eq. 448; *Locke v. Dunlop* (1888), 39 Ch. D. 387. *Reid. Abbott v. Middleton, Ilkett v. Carpenter* (1858), 7 H. L. Cas. 69.

118. "Cattle & stock."]—Cattle & stock upon a plantation or penn in Jamaica are, by the law of the island, personal estate, & not affixed to the freehold.

A., by bond, in consideration & contemplation of marriage, bound himself in a certain sum, for the purposes of his intended marriage settlement, to mortgage certain estates " & properties & the lands thereto belonging, & their respective appurtenances " in the island of Jamaica, of which he was seised in fee, & to raise a certain sum by way of settlement. By a mtge. by way of settlement, in pursuance of such bond, A. mortgaged (*inter alia*) the said estates & pennis, & appurtenances, & "all & every the cattle, stock, & plantation implements":—*Held*: cattle & stock upon the estate & pennis were not included in the bond, & though the mtge. deed, made in pursuance of such bond, was by way of marriage settlement, yet it could not enlarge the provisions of the bond.—*TURNER v. BARCLAY* (1854), 9 Moo. P. C. C. 264; 14 E. R. 297, P. C.

119. "From & after the decease of A."—"Or other sooner determination of the term" supplied.]—*GOODTITLE d. WESTON v. BURTENSHAW* (1772), 1 Fearn on Contingent Remainders, 10th ed., App. I., 570.

*Annotations:—**Reid. Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Doe d. Angell v. Angell* (1846), 9 Q. B. 328; *Lightfoot v. Maybery*, [1914] A. C. 782.

120. Issue.]—Grandchildren & great-grandchildren included by the term "issue" & the word "children" following it, explained as meaning "issue" likewise.—*WYTH v. BLACKMAN* (1749), 1 Ves. Sen. 196; 27 E. R. 979; *sub nom. WHYTTE v. THURLSTON*, Amb. 555, L. C.

*Annotations:—**Expld. Davenport v. Hanbury* (1796), 3 Ves. 257. *Consd. Harley v. Mitford* (1855), 21 Beav. 280; *Re Hopkins' Trusts* (1878), 9 Ch. D. 131. *Appl. Re Warren's Trusts* (1884), 26 Ch. D. 208. *Reid. Doe d. Devonshire v. Cavendish* (1782), 4 Term Rep. 741, n.; *Radcliffe v. Buckley* (1804), 10 Ves. 195; *Orford v. Churchhill* (1814), 3 Ves. & B. 59; *Doe d. Smith v. Webber* (1818), 1 B. & Ald. 713; *Pride v. Fooks* (1858), 3 De G. & J. 352; *Berry v. Berry* (1861), 3 Giff. 134. *Mentd. R. v. Darlington* (1792), Nolan, 124.

121. —.]—*WILLIAMS v. JEKYL, ELLIOT v. JEKYL*, No. 100, *ante*.

122. —.]—A bond given by a father on the marriage of his daughter was conditioned for payment of interest of a certain sum to the husband or his exors. during the obligor's life, & also for payment of the principal to the husband or his exors. within a limited time after the obligor's death, if any of the issue of the marriage should be living at that time; there were children of the marriage who all died before the obligor, leaving grandchildren; the grandchildren were deemed to be issue of the marriage within the meaning of the condition; & consequently the husband's exors. are entitled to recover on the bond.—*HAYDON v. WILSHIRE* (1789), 3 Term Rep. 372; 100 E. R. 627.

123. —.]—The word "issue" unconfined by any indication of intention, includes all descendants. Intention necessary to restrain it to children.—*LEIGH v. NORBURY* (1807), 13 Ves. 340; 33 E. R. 321.

*Annotations:—**Consd. Pruett v. Osborne* (1840), 11 Sim. 132. *Reid. Hampson v. Brandwood* (1815), 1 Madd. 381.

124. —.]—Issue, construed to mean issue living at the death, under the circumstances.—*TUCKER v. HARRIS* (1832), 5 Sim. 538; 2 L. J. Ch. 18; 58 E. R. 440.

*Annotations:—**Reid. Bythessea v. Bythessea* (1854), 23 L. J. Ch. 1004; *White v. Hill* (1867), L. R. 4 Eq. 265.

125. —.]—By a marriage settlement a sum of money was settled upon trusts for the husband for life, then for the wife for life, & after the death of the survivor, upon trust to pay the principal among all the children & issue of the intended husband, to be by him begotten on the body of the intended wife; & if there should be no child or issue of the marriage, or, being such, they should all die in the lifetime of the survivor of the husband & wife, upon other trusts:—*Held*: the children of the marriage, including those dying in the lifetime of the survivor of the husband & wife, took the fund, & no other issue were entitled.—*GORDON v. HOPE* (1849), 3 De G. & Sm. 351; 18 L. J. Ch. 228; 12 L. T. O. S. 551; 13 Jur. 382; 64 E. R. 512.

*Annotation:—**Reid. Strutt v. Braithwaite* (1852), 5 De G. & Sm. 369.

126. —.]—"Issue" in a deed held to include grandchildren.

J., by deed, assigned certain leasehold premises to trustees for the residue of a term of years, upon

trust to pay the rents & profits to his daughter M. for life for her separate use, & upon the decease of her the said M. leaving issue of her body by her husband, upon trust to stand possessed of the assigned premises for such issue respectively, to be a vested interest & assigned to them at twenty-one, for an absolute estate & interest to them, their exors., administrators & assigns, as tenants in common. M. survived J. & died leaving several children & two grandchildren, children of a deceased daughter living at her death:—*Held*: the grandchildren were entitled to share in the gift to the "issue" of M.—*SOUTH v. SEARLE* (1856), 27 L. T. O. S. 118; 2 Jur. N. S. 390; 4 W. R. 470.

127. —.]—Certain estates were vested in trustees in trust for sale, & after the death of B. to pay the proceeds amongst the twelve children of B. as described in the settlement, or such of them as should be living at the time of the decease of D. & J., & the issue of such as might be then dead, to be equally divided between them, the issue to take the parent's share; but if any of such twelve children should die in the lifetime of D. & J., or the survivor of them, without leaving issue living at the decease of such survivor, then in trust to pay the share of the child who should die without such issue unto the survivors & survivor of them, & the issue of such as should be dead. Ten of the children survived D., but died in the lifetime of J. G., one of the ten children, left six children, one of whom, by this bill, prayed that the trusts might be carried into execution. W., another of the ten children, left two children, one of whom died four months previously to J., leaving four children, & the question was, whether these four children were entitled to the share of their deceased parent:—*Held*: the word "issue" being used in conjunction with that of "parent," more remote descendants than children were not included in the word "issue" & therefore the grandchildren were not entitled to their parent's share.—*ANDERSON v. ST. VINCENT (VISCOUNT)* (1856), 2 Jur. N. S. 607; 4 W. R. 304.

128. —.]—By a settlement, a trust fund was settled after the death of husband & wife upon the children equally who should survive them. But if any child should die in the life of the husband & wife, & leaving "issue" then living, his share should go equally between the issue of such child, when & at such time as the respective shares of such child would have become due & payable:—*Held*: the "issue" of "children" took *per stirpes*, & that the successive generations of "issue" took their respective shares by substitution, & not concurrently, so that grandchildren & great-grandchildren could not take together as a class.—*ROBINSON v. SYKES* (1856), 23 Beav. 40; 20 L. J. Ch. 782; 28 L. T. O. S. 114; 2 Jur. N. S. 895; 53 E. R. 16.

*Annotations:—**Reid. Davis v. Bennet* (1862), 5 L. T. 815; *Re Orton's Trust* (1866), L. R. 3 Eq. 375; *Ralph v. Carrick* (1877), 5 Ch. D. 984; *Re Flower, Matheson v. Goodwyn* (1890), 62 L. T. 216. *Mentd. Re Veale's Trusts* (1876), 25 W. R. 122.

129. —.]—By a marriage settlement, a fund was settled, after the death of the survivor of the

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120 i. Issue.]—By a marriage settlement land was vested in trustees upon trust for X. for life, & from & after the decease of the said X. upon trust to the use of the issue of X.'s body, her surviving, their heirs & assigns for ever as joint tenants:—*Held*: issue meant descendants not children.—*BYRNE v. BYRNE* (1904), 4 S. R. N. S. W. 373; 21 N. S. W. W. N. 124.—*AUS.*

120 ii. —.]—*Re HOWARD'S TRUSTS* (1858), 7 I. Ch. R. 344.—*IR.*

120 iii. —.]—*Re BROMHEAD'S TRUSTS, PUBLIC TRUSTEE v. BROMHEAD*, [1922] 1 I. R. 75.—*IR.*

120 iv. —.]—Where "issue" are declared in a settlement to take the deceased parents' share the primary rule is that the word "issue" should be given its ordinary meaning

of "descendants," unless the context shows that it is used in a restricted sense to mean children of the parent only; & there is no rule of construction that in such a case the word is *prima facie* restricted to children, particularly so when the gift to "issue" is independent & original & not substitutionary.—*GUARDIAN TRUST & EXECUTORS CO. OF NEW ZEALAND, LTD. v. RAMAGE*, [1927] N. Z. L. R. 288.—*N.Z.*

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husband & wife, in trust for the "children then living," to be paid at twenty-one, & in case the parents should die "without leaving any lawful issue," then as the husband should appoint, & in default, "in case there should be no child or children as aforesaid," over. Children attained twenty-one, but they all died in the life of their parents, leaving issue, who survived the parents:—*Held*: the gift over took effect.—*Re HEATH'S SETTLEMENT* (1856), 23 Beav. 193; 53 E. R. 75.

130. —.]—Under a marriage settlement after-acquired property of the wife was to be held in trust for the wife for life, & at her decease upon trust for all the "issue" of the marriage upon the same or the like trusts as were thereinbefore declared concerning certain specified settled property. Under the last-mentioned trusts the property was given after the deaths of the tenants for life "to the children" of the marriage, with a provision for the substitution of the "issue" of such children for their parents, in the event of the latter dying under twenty-one. There was also a maintenance clause confined to "children," & the gift over in both parts of the settlement was to take effect in default of "children" attaining twenty-one without leaving lawful "issue" living at their death:—*Held*: on the construction of the settlement it was obvious that the issue of children were only to take in substitution for, & not concurrently with their parents & that the word "issue" in the clause relating to the after-acquired property must be read "children."—*MARSHALL v. BAKER* (1862), 31 Beav. 608; 7 L. T. 303; 9 Jur. N. S. 396; 11 W. R. 78; 54 E. R. 1275.

131. —.]—By a marriage settlement property was vested in trustees upon trust, after the death of the wife, to pay the rents & profits to the husband for life, or until he married again, & in case he married again & there was issue of the intended marriage, then to pay him one-half of the rents & profits, & out of the other half to levy & raise for the maintenance & education of one child one-fourth, of two or three children one-third, & of four or more children the whole income of such other half, & subject thereto to pay the whole income thereof to the husband for his life, & if there should be no issue, then to pay the whole of the rents & profits to the husband. The husband married again, & at the date of the decree there were four children of the first marriage, two daughters & one son, who had attained twenty-one, one son under age, & a child of a deceased daughter:—*Held*: the word "issue" was restricted to the first generation, & therefore, the child of a deceased daughter took no interest.—*FREWEN v. HAMILTON* (1877), 47 L. J. Ch. 391.

132. —.]—There is no absolute rule that, because the word "issue" is used in one or more clauses of a settlement as meaning "children" only, it must receive the same construction in every other clause.

By a marriage settlement certain funds were assigned to trustees upon trust, after the death of the husband & wife, for the issue of the marriage as the wife should by deed or will appoint, & for want of such appointment, upon trust for the issue of the marriage, if more than one, in equal shares, the sons at twenty-one, & the daughters at twenty-one or marriage, & in case there should be but one child issue of the marriage, or, if more than one, & all but one should die without having become entitled, then in trust for such only or surviving child at the time thereinbefore limited

or appointed; & in case there should not be any issue of the intended marriage, upon certain trusts therein mentioned. The wife by will appointed part of the trust fund to the five children of her late son A.:—*Held*: the word "issue" in the power of appointment must be construed in its strictly technical meaning, & therefore the appointment was valid.—*Re WARREN'S TRUSTS* (1884), 26 Ch. D. 208; 53 L. J. Ch. 787; 50 L. T. 454; 32 W. R. 641.

Annotations:—*Consd. Re Birks, Kenyon v. Birks*, [1899] 1 Ch. 703. *Mentd. Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Brooksbank, Beauclerk v. James* (1886), 34 Ch. D. 160; *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; *Re Beales' Settltm.*, *Barrett v. Beales*, [1905] 1 Ch. 256; *Re Oliver's Settltm.*, *Rivers v. Leigh*, [1905] 1 Ch. 191; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1.

133. —.]—The doctrine that issue when collocated with parent is used in the restricted sense of meaning children applies to a deed as well as a will.—*BARRACLOUGH v. SHILLITO* (1884), 53 L. J. Ch. 841; 32 W. R. 875.

In marriage articles.]—*See* Nos. 315, 316, *post*.

134. Issue then in being.]—By a settlement made on his marriage, the settlor granted freehold lands to trustees upon trust for himself for life & after his death to convey the lands & pay the rents & profits "unto or for the benefit of all & every or any one or more child or children, or any grandchild or grandchildren or other issue then in being of the said intended marriage," for such estate or interest & in such shares & subject to such conditions as the settlor should by deed or will appoint. There was issue of the marriage several children, who all attained twenty-one. The settlor appointed a portion of the lands to his eldest son, then of age, his heirs & assigns, & joined with him in mortgaging this portion. The son having died in his father's lifetime:—*Held*: upon the true construction of the settlement the words "then in being" governed only the words "grandchild or grandchildren or other issue," & not the words "child or children."—*LEADER v. DUFFEY* (1888), 13 App. Cas. 294; 58 L. J. P. C. 13; 59 L. T. 9, H. L.

Annotations:—*Refd. Re Hamlet, Stephen v. Cunningham* (1888), 39 Ch. D. 426; *Re Wise's Settltm.*, *Smith v. Waller*, [1913] 1 Ch. 41. *Mentd. Weardale Iron & Coal Co. v. Hodson* (1894), 70 L. T. 632.

135. "Children or child or remote issue."]—In a settlement where property is given in default of appointment to "the children or any the child or remoter issue" of A. on the happening of certain contingencies, a child living at the happening of such contingencies will take to the exclusion of his issue.—*Re LUND'S SETTLEMENT, STANFIELD v. KEENE* (1903), 89 L. T. 606.

136. "Children & grandchildren."]—Construction of a will & settlement, as not comprehending great-grandchildren under the description of children & grandchildren.—*ORFORD (EARL) v. CHURCHILL* (1814), 3 Ves. & B. 59; 35 E. R. 401. *Annotation*:—*Refd. Sanderson v. Bayley* (1838), 4 My. & Cr. 56.

137. "All & every or any child or children"—*Construed as one to exclusion of others.*]—A power of appointment in a marriage settlement was to be exercised in favour of "all & every or any child or children":—*Held*: those words conferred a right of appointing the whole fund to one or more, in exclusion of the others of such children.—*BLAND v. PLUMMER* (1864), 9 L. T. 825.

138. All property devised under a will—*Construed as much as remained at date of settlement.*]—A settlement of "all & singular the two-third parts of all & every the whole of my property,

goods, etc., belonging to me in the empire of Great Britain & the East Indies, lately willed & devised unto me by M.," held to pass only two-thirds of such property as then remained, & did not extend to such parts of the property as had been spent previous to the settlement.—*COTTEEN v. MISSING* (1815), 1 Madd. 176; 56 E. R. 66.

Annotations.—*Mentd.* Hooper v. Goodwin (1818), 1 Swan 485; *M'Fadden v. Jenkyns* (1842), 1 Hare, 458.

139. "Next of kin or personal representatives."—In a marriage settlement moneys belonging to the wife were settled in default of appointment by her, in trust for her "next of kin or personal representatives," subject as to part to a trust for the husband for life.—*Held*: on the wife's death without exercising her power the husband was not entitled under the ultimate trust.—*BAILEY v. WRIGHT* (1818), 1 Wils. Ch. 15; 1 Swan. 39; 37 E. R. 7, L. C.

Annotations.—*Apld.* Bulmer v. Jay (1834), 3 My. & K. 197. *Refd.* *Re Best's Settlement. Trusts* (1871), L. R. 18 Eq 686.

140. "Nearest of kin of the name of B."—By deed an estate was settled, after several preceding estates tail, to the use of all & every the nearest of kin, in equal degree, to D., at the time of her decease without issue of the name of B. :—*Held*: a person, who at the time of D.'s death was her nearest of kin, born with the name of B., but who was not her nearest of kin, & who had previous to D.'s death, married & assumed her husband's name, was not entitled to take under this clause in the deed.—*DOE d. WRIGHT v. PLUMPTRE* (1820), 3 B. & Ald. 474; 106 E. R. 736.

Annotations.—*Refd.* *Boys v. Bradley* (1853), 4 De G. M. & G. 58. *Mentd.* Doe d. Blight v. Pett (1810), 11 Ad. & El. 842.

141. Household goods, furniture, etc.]—A *feme sole* trader who kept a horse & chaise to visit her customers, before marriage, by deed conveyed to trustees "all her household furniture, goods, & chattels," specified in a schedule in which the horse & chaise were not included, & "all her stock-in-trade, materials & other articles belonging to her, in & about her said business." After marriage, she used the horse & chaise as before.—*Held*: the horse & chaise passed to the trustees by the deed, & were not liable to be taken in execution for the debts of her husband.—*DEAN v. BROWN* (1826), 5 B. & C. 336; 8 Dow. & Ry. K. B. 95; 108 E. R. 125.

142. —.]—A marriage settlement, reciting that it had been agreed that the intended husband should settle & assign all the household goods, furniture, plate, etc., belonging to him, & to which he would become entitled on the solemnisation of the said marriage, & set forth in an inventory; witnessed, that in pursuance, etc., & in consideration, etc., the husband did assign all the household goods, furniture, etc., belonging to him, set forth in the inventory, to a trustee upon trust, after the marriage, to assign the same to such person as the wife should by deed or will appoint, & in default of appointment, to permit her to retain possession & enjoy the said household goods, etc., therein-before described, & to sell the same for her sole use & benefit, exclusive of the husband, & not subject to his debts, etc., & after the death of the wife upon trust for the husband, & after the death of the husband, in case the wife should survive him, in trust for the wife, but in case she should

die, during his life, then upon trust for him. The goods mentioned in the inventory were in a house in the possession of the husband; a part of them belonged to the father of the wife, which he had agreed to give her, a part to the wife, & the remainder to the husband. The marriage was solemnised, the parties enjoyed the use of the furniture for five years, when they removed, & the husband, at the desire of the wife exchanged some articles, & sold some, & with the proceeds bought others. The trustee was informed of this, & approved, & ever since the husband & his wife continued to use & enjoy the furniture.—*Held*: looking at the whole scope of the deed, the husband joined in conveying the whole of the goods to the trustee for the sole & separate use of his wife, the exchanging part of the goods, & the selling other parts & buying fresh goods, were acts done by the husband as the agent of the trustee, & therefore the substituted goods must be considered as belonging to the trustee, & subject to the trusts of the deed.—*LANE v. GRYLLS* (1862), 6 L. T. 533.

143. *Fixtures & fittings up.*]—Suit instituted by husband against his wife, from whom he is separated, & the trustees of their marriage settlement, to enforce his claim in the marital right to certain furniture & tenant's fixtures, alleged not to have been comprised in the settlement; the furniture being in a house which is let ready furnished, *pltf.* claims two-thirds of the rent, in respect of the furniture, & also two-thirds of the rent received already by his wife.—*Held*: the furniture in question was not comprised in the marriage settlement.

The fixtures mentioned in the settlement are exclusively landlord's fixtures, & I also think it clear that the furniture in question was not included in the settlement. . . . Tenant's fixtures were not comprised in the expression "fixtures" & "fittings-up" did not include furniture (*WIGRAM, V.-C.*).—*SIMMONS v. SIMMONS* (1847), 6 Hare, 352; 10 L. T. O. S. 106; 12 Jur. 8; 67 E. R. 1202.

Annotation.—*Refd.* *Re Whitehead, Ex p. Whitehead* (1885), 14 Q. B. D. 419.

144. "Survivor" or "survivors."—Lands, held in fee simple, were, by settlement made in 1752, conveyed to trustees, to the use of the settlor for life; remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her first & other sons successively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common in case of two survivors, with remainder, in like manner as to the original share, to the use of the first & other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters as tenants in common in tail; & in case one or two of the settlor's daughters should die without issue, the share or shares of such daughter or daughters, to go to the use of the daughters of the survivors or survivor, as tenants in common in tail general; & in case all three should die without issue, then remainder over, with

1441. "Survivor" or "survivors."—*SMITH'S TRUSTEES v. SMITH'S TRUSTEES* (1905), 7 F. (Ct. of Sess.) 815; 42 Sc. L. R. 657; 13 S. L. T. 190.—*SCOT.*

p. "To the same uses."—*KINGS-J.*—VOL. XL.

BURY v. MARTIN (1901), 1 S. R. N. S. W. 272; 18 N. S. W. W. N. 158.—*AUS.*

q. "After his death"—*Not limited to upon his death.*—*Re MOORE'S SETTLEMENT* (1888), 9 N. S. W. L. R.

(Law) 54; 4 N. S. W. W. N. 165.—*AUS.*

r. "Plantation."—*JACKMAN v. WALSH* (1882), 6 Nfld. L. R. 367.—*NFLD.*

t. "After the decease of E."—

Sect. 3.—Settlements created by deed: Sub-sect. 3, E.]

ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion:—*Held*: the words "survivors or survivor" were to be read "others or other," & consequently, the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in the lifetime of another, who subsequently died without issue, but that limitation took effect as a good cross-remainder.—*COLE v. SEWELL* (1848), 2 H. L. Cas. 186; 12 Jur. 927; 9 E. R. 1062, H. L.

Annotations:—*Follid. Re Palmer's Settlement, Trusts* (1875), L. R. 19 Eq. 320; *Re Friend's Settlement, Cole v. Allcot*, [1906] 1 Ch. 47. *Reid. Smith v. Osborne* (1857), 30 L. T. C. 57. *Menda. Doe d. Davies v. Davies* (1851), 16 Q. B. 951; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Wolley v. Jenkins* (1856), 23 Beav. 53; *Re Finch, Abbs v. Burney* (1881), 17 Ch. D. 211; *Re Frost, Frost v. Frost* (1889), 43 Ch. D. 246; *Whitby v. Mitchell* (1890), 44 Ch. D. 85; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1.

145. —.]—The word "survivor" in one of the clauses of a settlement may be read "other" in order to effectuate the clear intention of the parties, notwithstanding that the same word may require to be read in its natural sense in other clauses of the same settlement referring to the same fund.—*Re PALMER'S SETTLEMENT TRUSTS* (1875), L. R. 19 Eq. 320; 44 L. J. Ch. 247; 32 L. T. 9; 23 W. R. 478.

Annotations:—*Consd. Cross v. Maltby* (1875), L. R. 20 Eq. 378. *Reid. Beckwith v. Beckwith* (1876), 25 W. R. 6.

146. —.]—In 1836 real estate was by deed settled upon trust for the six daughters & one son of A. for their respective lives as tenants in common, with remainder as to the share of each tenant for life to his or her child or children who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry, & if more than one as tenants in common in fee; provided that if any one or more of the seven tenants for life should die, without issue, or leaving issue & such issue being a son should die under the age of twenty-one, or being a daughter should die under that age without having been married, then the original as well as the accrued share of any such tenant for life should go & be equally divided between "the survivors & survivor" of them the seven tenants for life & their, her & his issue respectively for such estates & interests & in such shares & proportions in all respects as the original shares of the seven tenants for life were directed to be divided; & there was an ultimate limitation to the settlor in fee if all the seven tenants for life died without leaving issue who should live to attain twenty-one or marry as aforesaid. Four of the tenants for life died without issue. Another married & died leaving one child, who attained twenty-one & afterwards died. Another married & died leaving several children, all of whom attained twenty-one, & some of whom were still living. One tenant for life was still living:—*Held*: the words, "survivors & survivor" must be construed "others & other," & all the children of tenants for life who respectively attained twenty-one acquired absolute vested interests, irrespective of whether they did or did not survive deceased tenants for life or the tenant for life who was still living.—*Re FRIEND'S SETTLEMENT, COLE v. ALLCOT*, [1906]

1 Ch. 47; 75 L. J. Ch. 14; 93 L. T. 739; 54 W. R. 295.

Annotation:—*Reid. Powell v. Hellicar*, [1919] 1 Ch. 138.

147. "Die intestate & unmarried."] — *Re NORMAN'S TRUST, No. 1191, post.*

148. —.] — *Re SAUNDERS' TRUST, No. 1193, post.*

149. —.] — *STODDART v. SAVILLE, No. 1177, post.*

150. —.] — *Re MARE, MARE v. HOWEY, No. 1178, post.*

151. —.] — A wife, who had obtained a divorce from her first husband, by whom she had one son, by a settlement made in contemplation of a second marriage, settled a fund, upon the death of the survivor of herself & the intended husband, upon the usual trusts for the issue of the intended marriage, & if there should be no child who should become entitled thereunder a general power of appointment over the fund was reserved to her; & in default of appointment the fund was to be held, in the event of her predeceasing her husband, in trust for such person or persons as under the Statutes of Distribution would have become entitled thereto at her death, had she died possessed thereof intestate & "without having been married." There was no issue of the second marriage & the wife predeceased her husband without having exercised her power of appointment. On the death of the husband the question arose whether the son of the former marriage was entitled to the fund as next of kin:—*Held*: the son was excluded by the terms of the ultimate trust, there being nothing in the context or in the circumstances of the case to modify the natural meaning of the words "without having been married."—*BOYCE v. WASBROUGH*, [1922] 1 A. C. 425; 91 L. J. Ch. 369; 38 T. L. R. 483; *sub nom. Re ELLIS'S SETTLEMENT, WASBROUGH v. BOYCE*, 127 L. T. 161, H. L.

152. "Stock-in-trade."] — A., a widow, who carried on business as a licensed victualler, previously to her second marriage, executed a settlement, whereby she assigned "her household goods, furniture, plate, linen, china, books, stock-in-trade, brewing utensils, & all other her effects," & all her interest therein to trustees, upon trust for her separate use for life, & after her decease to sell the same, & divide the clear proceeds amongst her three children. The husband of the second marriage carried on the business, & substituted, from time to time, stock-in-trade, in the place of that previously consumed in carrying on the business:—*Held*: the substituted stock-in-trade, as well as the original stock-in-trade, was contemplated by the settlement, & the same & the good-will of the business passed under the above words.—*ENGLAND v. DOWNS* (1842), 6 Beav. 269; 12 L. J. Ch. 85; 6 Jur. 1075; 49 E. R. 829; *previous proceedings* (1840), 2 Beav. 522.

Annotation:—*Reid. Groves v. Wright* (1856), 2 K. & J. 347.

153. "Sole."] — The word "sole" in a will, has not a fixed technical meaning, throwing on the person who contests that meaning the necessity of showing, by implication, that it is not used in the particular instrument in its strict technical sense. In a marriage settlement it may, from the circumstances of the case, have a particular &

Whether constituting a contingency.—*JONES v. SMYTHE* (1899), 32 N. S. R. 95.—*CAN.*

a. "Whole free proceeds" of lands — *Thinnings of woods included.*—*BREADALBANE'S (MARQUIS) TRUSTEES v. BUCKINGHAM (DUCHESS)* (1854),

16 Dunl. (Ct. of Sess.) 359; 26 So. Jur. 170.—*SCOT.*

b. "Conquest or acquire."] — The word "conquest" when used as a verb active, & not as a noun substantive, has a wide & flexible signification.

Where a lady had, by ante-nuptial settlement, assigned & conveyed to trustees whatever she might "conquest or acquire" during the marriage:—*Held*: the words "conquest" & "acquire," so used, were sufficient to pass to the trustees property of

exclusive meaning attached to it.—*MASSY v. ROWEN* (1869), L. R. 4 H. L. 288; 23 L. T. 141, H. L.

Annotations:—*Refd. Re Graham's Trusts* (1872), 20 W. R. 289; *Re Peacock's Trusts* (1879), 10 Ch. D. 490.

154. "Part share & interest."—*Re HENRIQUE'S TRUSTS*, [1875] W. N. 187.

155. "Eldest son"—*Younger son becoming in fact eldest.*—A sum of money was settled upon trust for the husband & wife, & the survivor of them, for life, & after the death of the survivor, upon trust to transfer the same to all the children of the marriage equally, except an eldest or only son; the shares to vest at the age of twenty-one, & the share of any son who died before the period of vesting to accrue for the benefit of the others, except an eldest or only son. There were six sons, of whom the first & last born died in infancy; the second attained twenty-one, & succeeded his father in the title, but died without issue; the third & fourth born attained twenty-one & died without issue; the fifth born attained twenty-one & succeeded his brother in the title:—*Held*: the second son was the "eldest son" within the meaning of the settlement, & as such to be excluded from participation in the settled fund.—*Re RIVERS'S SETTLEMENT TRUST* (1870), 40 L. J. Ch. 87; 24 L. T. 253; 19 W. R. 318.

156. ———.—By a marriage settlement made in 1861 real estate was limited to uses under which A. became tenant for life with remainder to his first & other sons in strict settlement. On the same day was executed a settlement of personality by which it was declared that after the death of A. & his intended wife the trustees should stand possessed of the trust funds in trust for the children of the marriage "other than an eldest or only son or other son who before attaining the age of twenty-one years shall be or become the heir male or heir male apparent of" A. as A. & his wife should appoint. Each of the settlements was made in consideration of the marriage, but neither of them contained any express reference to the other. A. had five children, a son W., who attained twenty-one, disentailed & resettled the estate, & died a bachelor in 1899; a son V., who attained twenty-one, became eldest son on the death of W., & took a life interest under the resettlement; B., who died an infant; & two others who were still living. A. died in 1910, & V. thereupon became entitled to the settled real estate for his life:—*Held*: the two settlements must be read together, but V. was not excluded from a share in the settled personality.

I think it is equally clear that, in considering whether children who are in fact younger children

have become eldest sons, the ct. will not hold that a child who does not take the bulk of the estate has become an eldest son within the meaning of the clause though at the time of the distribution he is in fact the eldest child (*PARKER, J.*).—*Re WROTTESELEY'S SETTLEMENT*, *WROTTESELEY v. FOWLER*, [1911] 1 Ch. 708; 80 L. J. Ch. 457; 104 L. T. 281.

Annotation:—*Refd. Re Cavendish's Settltmt.*, *Grosvenor v. Butler* (1912), 106 L. T. 510.

157. ———.—The estate of an eldest son who attained the age of twenty-one years, but died a bachelor & intestate, in the lifetime of his father, & without having executed any disentailing assurance of the family property, was held entitled to share in the funds of the personality settlement which were held by the trustees, in default of appointment, "upon the trusts following, that is to say, if there shall be but one child of the said intended marriage, other than such eldest or only son as aforesaid, in trust for that one child to be an interest vested in such child being a son at the age of twenty-one years or being a daughter at the age of twenty-one years or day of marriage which shall first happen, & if there shall be two or more children of the intended marriage other than such eldest or only son as aforesaid then in trust for such two or more children in equal shares."—*Re CAVENDISH'S SETTLEMENT*, *GROSVENOR v. BUTLER* (1912), 106 L. T. 510; 56 Sol. Jo. 344.

—*See, further*, Part IX., Sect. 5, sub-sect. 3, B., *post*.

158. "Or."—*Re COLEY, GIBSON v. GIBSON*, No. 1112, *post*.

159. "Uterine" brothers & sisters.]—A gift to "uterine" brothers & sisters is a gift to brothers & sisters by the same mother but by a different father.—*Re VINCENT, PUBLIC TRUSTEE v. VINCENT* (1926), 70 Sol. Jo. 1220.

160. "Live & dead stock."—A settlor who had resettled his estate, made by a subsequent deed a declaration of trust that the trustees should be entitled to "the whole of the live & dead stock" to be found at his death on certain farms, & he afterwards removed to these farms a stud of thoroughbred racehorses. At the time of his death certain thoroughbred stock was on the farms:—*Held*: the racehorses did not pass under the deed, as it must be construed as relating only to stock found in the ordinary way on the farms carried on as agricultural holdings.—*Re CADOGAN SETTLED ESTATES, RICHMOND & GORDON (DUKE) v. CADOGAN* (1915), 31 T. L. R. 536.

"Sterling lawful money of Ireland."—*See MONEY & MONEY LENDING*, Vol. XXXV., p. 171, No. 20.

every kind which during the marriage had come to her by succession.—*DROGHS V. GORDON* (1867), L. R. 1 Sc. & Div. 136.—*SCOT*.

c. *Household furniture, etc.*, includ-

ing *heirship movables*—*Greenhouses not included.*—*TOD'S TRUSTEES v. FINLAY* (1872), 10 Macph. (Ct. of Sess.) 422.—*SCOT*.

d. *Nearest of kin.*]—*GREGORY'S*

TRUSTEES v. ALISON (1889), 16 R. (Ct. of Sess.) (H. L.) 10; 26 Sc. L. R. 787.—*SCOT*.

e. ———.—*HOOD v. MURRAY* (1888), 14 App. Cas. 124.—*SCOT*.

Part III.—Contracts for Settlements.

SECT. 1.—PAROL AGREEMENTS AND THE STATUTE OF FRAUDS.

SUB-SECT. 1.—IN GENERAL.

Statute of Frauds generally.]—See CONTRACT, Vol. XII., pp. 118–172.

161. Contracts within Statute of Frauds—Agreements in consideration of marriage.]—HALES v. VAN BERCHEM (1708), 2 Vern. 617; 23 E. R. 1000, L. C.

162. ———.]—An agreement made by the husband before the marriage, without writing, within Stat. Frauds.—MONTACUTE (VISCOUNTESS) v. MAXWELL (1720), 1 P. Wms. 618; 24 E. R. 541; sub nom. MOUNTACUE (DOWAGER COUNTESS) v. MAXWELL, 1 Stra. 236; sub nom. MAXWELL v. MOUNTACUTE (LADY), Prec. Ch. 526; 1 Eq. Cas. Abr. 19, L. C.

Annotations:—Consd. Pitcairn v. Ogbourne (1751), 2 Ves. Sen. 375. Reifd. Wood v. Midgley (1854), 5 De G. M. & G. 41; Barkworth v. Young (1856), 4 Drew. 1; Warden v. Jones (1857), 23 Beav. 487; Re Holland, Gregg v. Holland, [1902] 2 Ch. 360.

163. ——— Collateral security for performance of agreement.]—HALES v. VAN BERCHEM (1708), 2 Vern. 617; 23 E. R. 1000, L. C.

164. ——— Promise to give portion to daughter—Not communicated to intended husband.]—AYLIFFE v. TRACY, No. 210, post.

165. Necessity for existing complete agreement.]—A father having agreed to settle a certain sum for the benefit of his daughter & the children of her intended marriage with Lord G., a memorandum of the terms of the settlement was by his direction written by his solr., & approved of by him & Lord G., & he gave the solr. instructions to prepare such settlement, but died before the same was ready for execution, having by his will given the daughter real estates & a moiety of the residue of his personal estate. Lord G. married the daughter, & performed his part of the settlement, in conformity to the written memorandum:—*Held*: the memorandum was not a complete agreement, binding within Stat. Frauds; & of an incomplete agreement there cannot be part performance.—THYNE (LADY) v. GLENGALL (EARL) (1848), 2 H. L. Cas. 131; 12 Jur. 805; 9 E. R. 1042, H. L.; *affg.* S. C. sub nom. GLENGAL (EARL) v. BARNARD (1838), 1 Keen, 769.

Annotations:—Consd. Warden v. Jones (1857), 23 Beav. 487. Mentd. Beckton v. Barton (1859), 27 Beav. 99; Montefiore v. Guedalla (1859), 1 De G. F. & J. 93; Campbell v. Campbell (1866), L. R. 1 Eq. 383; Chichester v. Coventry (1867), L. R. 2 H. L. 71; Dawson v. Dawson (1867), L. R. 4 Eq. 504; Nevill v. Drysdale (1867), L. R. 4 Eq. 517; Murphy v. Boese (1875), L. R. 10 Exch. 126; Russell v. St. Aubyn (1876), 2 Ch. D. 398; Re Tussaud's Estate, Tussaud v. Tussaud (1878), 9 Ch. D. 363; Crichton v. Crichton, [1895] 2 Ch. 853; Bell v. Balls, [1897] 1 Ch. 663; Re Blundell, Blundell v. Blundell, [1906] 2 Ch. 222; Re Heather, Pumfrey v. Fryer, [1906] 2 Ch. 230.

166. ———.]—C. proposing to marry H., wrote out a paper beginning thus: "In the event of a marriage between the undermentioned parties, the following conditions as a basis for a marriage settlement are mutually agreed upon." Then followed several sentences each in this form: "C. to do so & so, H. to have so & so." No name of either party was signed to the paper, which was delivered by C. to H.'s solr. for the purpose of

drawing the settlement. No settlement was ever executed; it was dispensed with by H. at C.'s request, upon C.'s verbal promise to give H. certain advantages by his will. C. died, & the will was not found to fulfil the promise:—*Held*: H. was not entitled, independently of the question whether as a matter of fact there had been any waiver, to specific performance of the arrangements mentioned in the written paper as it did not constitute a contract within the meaning of Stat. Frauds.—CATON v. CATON (1867), L. R. 2 H. L. 127; 36 L. J. Ch. 886; 16 W. R. 1, H. L.

Annotations:—Consd. Strahan v. Graham (1867), 16 L. T. 87; Coles v. Pilkington (1874), L. R. 19 Eq. 174; Alderson v. Maddison (1880), 5 Ex. D. 293; Viret v. Viret (1880), 50 L. J. Ch. 69. Reifd. Williams v. Williams (1868), 37 L. J. Ch. 854; Re Garratt's Trust (1870), 18 W. R. 684; McManus v. Cooke (1887), 35 Ch. D. 681; Johnstone v. Mappin (1891), 60 L. J. Ch. 241; Dickinson v. Barrow, [1904] 2 Ch. 339; Rawlinson v. Ames, [1925] 1 Ch. 96. Mentd. Kronheim v. Johnson (1877), 7 Ch. D. 60.

SUB-SECT. 2.—THE MEMORANDUM.

A. In General.

See, generally, CONTRACT, Vol. XII., pp. 129 et seq.

167. What memorandum must contain—Parties.]—It is necessary that pltf. should prove a memorandum of the agreement, & it must be, I take it, a memorandum showing on the face of it, or by construction, all the essential elements of a contract—that is, the parties, the subject-matter, the agreement, & the consideration (STIRLING, J.).—VINCENT v. VINCENT (1886), 55 L. T. 181; 35 W. R. 7; sub nom. Re VINCENT, VINCENT v. VINCENT, 2 T. L. R. 814; *affd.* (1887), 56 L. T. 243, C. A.

168. ——— Subject-matter.]—VINCENT v. VINCENT, No. 167, ante.

169. ——— Agreement.]—VINCENT v. VINCENT, No. 167, ante.

170. ——— Consideration.]—VINCENT v. VINCENT, No. 167, ante.

171. Memorandum drawn up by agent—Solicitor.]—THYNE (LADY) v. GLENGALL (EARL), No. 165, ante.

Whether memorandum constitutes bill of sale.]—See BILLS OF SALE, Vol. VII., p. 26, No. 130.

B. What is Sufficient Memorandum.

See, generally, CONTRACT, Vol. XII., pp. 131 et seq.

172. Correspondence.]—MOOR v. HART (1683), 2 Rep. Ch. 284; 1 Vern. 201; 21 E. R. 680.

Annotations:—Apld. Wanchford v. Fotherley (1694), 2 Freem. Ch. 201. Reifd. Jenkins v. Reynolds (1821), 6 Moore, C. P. 86; Re Holland, Gregg v. Holland, [1902] 2 Ch. 360.

173. ———.]—One by letter under his hand promised £1,000, with his niece, but in the same letter dissuaded her from marrying pltf., but afterwards was present at, & gave her in marriage. The ct. would not decree the payment of the £1,000, but left pltf. to his action at law.—DOUGLAS v. VINCENT (1690), 2 Vern. 202; 23 E. R. 731.

PART III. SECT. 1, SUB-SECT. 2.—A.

167.1. What memorandum must contain—Parties.]—ABBOTT v. GERAUGHTY (1854), 4 I. Ch. R. 15.—IR.

PART III. SECT. 1, SUB-SECT. 2.—B.

1. Letter to intended wife containing promise of settlement signed by third party—Delivery to intended wife by

intended husband with knowledge of contents.]—Qu.: whether a letter written by a third person, & signed by him, addressed to the intended wife, & delivered to her by the intended

174. —.]—One by letter says he will give £3,000 portion with his daughter. The daughter marries, & the father is privy to it, & seems to approve of it; daughter dies, & husband administers. Father decreed to pay the £3,000 portion.—*WANKFORD v. FOTHERLEY* (1694), 2 Vern. 322; 23 E. R. 807; *sub nom.* *WANCHFORD v. FOTHERLEY*, Freem. Ch. 201; *affd. sub nom.* *FOTHERLEY v. WANKFORD* (1695), 15 Lords Journals, 531, H. L.

175. —.]—Promising by letter to give so much as a portion, sufficient to bring the agreement out of Stat. Frauds.—*SEAGOOD v. MEALE & LEONARD* (1721), Prec. Ch. 560; 22 E. R. 43.

Annotations :—*Refd.* *Barkworth v. Young* (1856), 4 Drew. 1. *Mentd.* *Maddison v. Alderson* (1883), 8 App. Cas. 467.

176. —.]—*LUDEBS v. ANSTEY*, No. 242, *post*.

177. —.]—A father, after having expressed an intention of making a larger provision for his younger children than he had before done, dies without having executed the intention. The son & heir-at-law, apprised of his father's intentions, enters into a correspondence, in which he states a resolution on his part to make a further provision for the younger members of the family. His sister's allowance being £4,000, she marries on the faith of this correspondence :—*Held* : a good marriage settlement, & the son was bound to pay the £4,000.—*MONTGOMERY v. REILLY* (1827), 1 Dow. & Cl. 62; 1 Bli. N. S. 364; 6 E. R. 448, H. L.

178. —.]—A gentleman, the day before his marriage, wrote to the lady's solr. as follows : " In the event of my marriage with Miss W. taking place before the settlements are ready, I agree to her fortune being settled on herself, subject, of course, to certain conditions, chiefly relating to myself & the children of our marriage, if any." The marriage took place without a settlement. The husband's evidence verified a writing containing the conditions referred to :—*Held* : the marriage must be presumed to have taken place on the faith of the agreement contained in the letter; & there must, therefore, be the usual reference to chambers to approve of a proper settlement.—*VIRET v. VIRET* (1880), 17 Ch. D. 365, n.; 50 L. J. Ch. 69; 43 L. T. 493.

Annotations :—*Consd.* *Re Badcock, Kingdon v. Tagert* (1880), 17 Ch. D. 361; *Re Spicer, Spicer v. Spicer* (1901), 84 L. T. 195.

179. **Bond reciting agreement.**—*HOLTHAM v. RYLAND* (1692), Nels. 205; 21 E. R. 826.

180. **Note promising to settle property—Proceeds of sale of wife's estate—Evidence of agreement antecedent to sale.**—Husband receiving proceeds of a sale of wife's estate, & promising by a note or receipt to lay it out, pursuant to trusts relative to other property : this note held evidence of the agreement antecedent to the sale, & estates purchased afterwards by the husband, were held to be bound.—*A.-G. v. WHORWOOD* (1750), 1 Ves. Sen. 534; 27 E. R. 1188, L. C.

Annotations :—*Mentd.* *Cary v. Abbot* (1802), 7 Ves. 490; *Morice v. Durham (Bp.)* (1805), 10 Ves. 522; *A.-G. v. Haberdashers' Co.* (1834), 1 My. & K. 420.

181. **Ante-nuptial parol agreement—Writing made after marriage.**—Settlement after marriage, held to be voluntary, proof of its having been made in pursuance of a parol promise before marriage, failing, & ct. of opinion, that even if such promise had been proved to have existed, it would not have supported a settlement made after

marriage.—*SPURGEON v. COLLIER* (1758), 1 Eden, 55; 28 E. R. 605.

Annotations :—*Consd.* *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Refd.* *Warden v. Jones* (1857), 2 De G. & J. 78.

182. —.]—A trader, before marriage, agrees by parol to settle all his stock on his intended wife; which stock, it appeared afterwards, amounted then to £450 3 per cents., but in the marriage arts. it was stated to be £340 stock; & the deed executed after marriage settled the same sum; this mistake, proved & accounted for by the witness who prepared the deed, & by the bkpt. to have originated from the latter giving the sum of £340 as the value of the stock in money at that time, & the other setting it down as the amount of the stock itself, was admitted & agreed by the bkpt., after his bkpcy. & absconding, to be rectified by the alteration of the sum as it stood in the arts. & the deed from £340 stock to £450 stock; which was accordingly done, & the instrument re-executed, with the consent of the bkpt. & his wife, & the trustees : & the whole stock having been sold out by the bkpt. before his bkpcy., & the amount paid into the hands of the trustees before such alteration, who after the bkpcy. purchased other stock with the money :—*Held* : however such an alteration might avoid the instruments if done with the consent of the parties interested; yet, inasmuch as one of the parties, the *feme covert*, to whom no fraud was imputed, was incapable, by such consent, of exonerating the trustees from the performance of the trust; but equity would probably set up again the destroyed instruments in her favour; the trustees, who had received such money under the instruments when they existed in a valid form, held the same subject to the purpose of the trust, & not for the benefit of the bkpt.'s estate; & the assignees could not recover in *assumpsit* from the trustees the value of the stock originally included in the marriage arts. & deed, but only the surplus, & such surplus they were entitled to recover at law, the agreement for the settlement of the whole stock not being evidenced by writing before marriage within Stat. Frauds; but being the subject of equitable jurisdiction only, under the circumstances.—*SHAW v. JAKEMAN* (1803), 4 East, 201; 1 Smith, K. B. 14; 102 E. R. 807.

Annotation :—*Refd.* *Re Holland, Gregg v. Holland*, [1901] 2 Ch. 145.

183. —.]—*SURCOME v. PINNIGER*, No. 205, *post*.

—.]—*See, also*, *CONTRACT*, Vol. XII., p. 129, Nos. 860–862.

184. —.]—Invalidity of a parol agreement of the husband prior to marriage to settle his wife's property.—*SPICER v. SPICER, SPICER v. DAWSON, LAWFORD v. SPICER* (1857), 24 Beav. 365; 26 L. J. Ch. 704; 29 L. T. O. S. 136; 3 Jur. N. S. 1161; 5 W. R. 431; 53 E. R. 398.

Annotation :—*Refd.* *Giacometti v. Prodggers* (1873), 8 Ch. App. 338.

Statement in affidavit by promisor.—*See CONTRACT*, Vol. XII., p. 129, No. 863.

185. —.]—**Recited in post-nuptial settlement—No acknowledgment by feme coverte—Whether court will supply want of acknowledgment.**—*LASSENCIE v. TIERNEY*, No. 203, *post*.

186. —.]—**Whether existence of ante-nuptial agreement may be disproved.**—A post-nuptial settlement was made by A. & his wife of a share of real & personal estate of the wife, in the

husband, with a knowledge on his part of its contents, evidencing an agreement for a settlement by him, would be a sufficient writing under

Stat. Frauds signed by the agent of the party to be charged.—*GILLESPIE v. GROVER* (1852), 3 Gr. 558; 21 O. R. 337.—*CAN.*

g. Letter promising to leave property by will in preference to settlement.—*ARTHUR v. DILLON* (1850), 2 Ir. Jur. 162.—*IR.*

Sect. 1.—Parol agreements and the Statute of Frauds :—
Sub-sect. 2, B. & C.; sub-sects. 3 & 4.]

hands of trustees. No notice was given to the trustees, & no fine was levied. The deed recited the ante-nuptial agreement, but it was proved that there never was any. The effect of the settlement was to give the husband a life estate, with remainder absolutely to the survivor, & there was no provision for children:—*Held*: both husband & wife desiring it, this deed was a nullity; & as against the husband it was voluntary; & it was not such a settlement as the ct. would enforce against the wife. The property was therefore treated as if it had never been settled.—*HOGARTH v. PHILLIPS* (1858), 4 Drew. 360; 28 L. J. Ch. 195; 32 L. T. O. S. 155; 4 Jur. N. S. 1093; 7 W. R. 69; 62 E. R. 139.

187. ——*J.—Scmble*: the mere fact of a post-nuptial settlement reciting a parol ante-nuptial agreement is not sufficient to satisfy Stat. Frauds.—*COOPER v. WORMALD* (1859), 27 Beav. 266; 7 W. R. 402; 54 E. R. 104.

Annotation:—*Reid, Re Whitehead, Ex p. Whitehead* (1885), 14 Q. B. D. 419.

188. ——*J.—A* post-nuptial settlement to which the testamentary guardians of the wife, then an infant, were parties recited that previously to the marriage the husband agreed to make such a settlement of the wife's fortune as was therein-after contained:—*Held*: the deed constituted such a deed or memorandum of the recited parol ante-nuptial contract in consideration of marriage as satisfied Stat. Frauds, s. 4.—*Re HOLLAND, GREGG v. HOLLAND*, [1902] 2 Ch. 360; 71 L. J. Ch. 518; 86 L. T. 542; 50 W. R. 575; 18 T. L. R. 503; 46 Sol. Jo. 483; 9 Mans. 259, C. A.

Annotations:—*Consd. Re Gillespie, Ex p. Knapman, The Trustee v. Gillespie* (1913), 20 Mans. 311. *Reid, Re Davies, Ex p. Miles*, [1921] 3 K. B. 628. *Mentd. Carruthers v. Peake* (1911), 55 Sol. Jo. 291.

189. ——*Not recited in post-nuptial settlement.*—In 1857 an infant engaged to be married wrote to his intended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859, after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the above & two other houses to trustees, upon trust for his wife for life, for her separate use, & after her death upon trust for himself for life, & after the death of the survivor, upon such trusts as the wife should by deed or will appoint, & in default of appointment, in trust for her in fee. He subsequently agreed to sell three of the houses, & the purchaser sued for specific performance:—*Held*: the purchaser was entitled to specific performance, for as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1857, & settled the property in a different way, there was no ratification in writing of the promise contained in that letter, & the settlement therefore was voluntary, & void as against a purchaser for value.—*TROWELL v. SHENTON* (1878), 8 Ch. D. 318; 47 L. J. Ch. 738; 38 L. T. 369; 26 W. R. 837, C. A.

Annotations:—*Distd. Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Mentd. Re Croasdeil & Cammell, Laird* (1906), 75 L. J. K. B. 769.

C. Signature.

190. Necessity for signature—No signature by either party.—Marriage agreement reduced into writing, though not signed by either party, yet decreed to be performed.—*COOKES v. MASCAL*

(1690), 2 Vern. 200; 1 Eq. Cas. Abr. 22; 23 E. R. 730.

Annotations:—*Reid, Wanchford v. Fotherley* (1694), 2 Freem. Ch. 201; *Luders v. Anstey* (1799), 4 Ves. 501; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

191. ——*Signature by plaintiff only.*—A marriage treated betwixt plff. & deft.'s daughter, & the arts. signed by plff., but not by deft.; but deft. permitting plff. to court his daughter; & not declaring his dislike to the marriage, & permitting the young couple to live with him. Ct. decreed deft. to pay the portion according to the arts.—*HALFPENNY v. BALLET* (1699), 2 Vern. 373; 23 E. R. 836; *sub nom. MALLET v. HALFPENNY*, 1 Eq. Cas. Abr. 20, L. C.

Annotations:—*Reid, Bawdes v. Amhurst* (1715), Prec. Ch. 402; *Welford v. Beazely* (1747), 1 Ves. Sen. 6.

192. ——*J.—I* know no case where an agreement, though it is all written with the party's own hand, has been held sufficient, unless it has been likewise signed by the party, & the party's not signing it is an evidence that he did not think it complete; he has left it to an after consideration, & might afterwards make alterations or additions in it; & therefore, unless it is either signed by him, or something equivalent done, to show that he looked upon it as completed & perfected, I think such writing by the party himself is not sufficient to bind him within that statute [Stat. Frauds] (LORD COWPER, C.).—*BAWDES v. AMHURST* (1715), Prec. Ch. 402; 1 Eq. Cas. Abr. 21; 24 E. R. 180, L. C.

Annotations:—*Distd. Welford v. Beazely* (1747), 3 Atk. 503. *Reid, Tyrrell v. Hope* (1743), 2 Atk. 558; *Colles v. Trecothick* (1804), 9 Ves. 234.

193. ——*Signature as witness—By donor of property to be settled—Effect of knowledge of contents.*—A mother agreeing to give her daughter £1,000, which by the daughter's marriage arts. was to be settled for her separate use, decreed to perform it. Her signature to those arts. as a witness, she knowing the contents, is sufficient evidence of the agreement therein recited within Stat. Frauds, although she was not in terms a party to them.—*WELFORD v. BEAZELY* (1747), 3 Atk. 503; 1 Ves. Sen. 6; 27 E. R. 855, L. C.

Annotations:—*Apld. Barkworth v. Young* (1856), 4 Drew. 1. *Reid, Coles v. Trecothick* (1804), 1 Smith, K. B. 233; *Gibson v. Holland* (1865), L. R. 1 C. P. 1; *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84.

194. ——*Statement in affidavit of promisor.*—Plff. stated in his bill a verbal promise given by testator before plff.'s marriage with his daughter that he would leave a share of his property to her by his will & a subsequent affidavit by testator referring to the words used by him when he gave the promise. On demurrer:—*Held*: the promise was in compliance with Stat. Frauds, s. 4.—*BARKWORTH v. YOUNG* (1856), 4 Drew. 1; 26 L. J. Ch. 153; 28 L. T. O. S. 199; 3 Jur. N. S. 34; 5 W. R. 150; 62 E. R. 1.

Annotations:—*Apld. Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Reid, Goldicutt v. Townsend* (1860), 28 Beav. 445; *Patch v. Shore* (1862), 11 W. R. 142; *Trowell v. Shenton* (1878), 8 Ch. D. 318; *Fletcher v. Fletcher* (1881), 50 L. J. Ch. 735; *Lucas v. Dixon* (1889), 22 Q. B. D. 357. *Mentd. Re Brookman's Trust* (1869), 5 Ch. App. 182.

Signature to memorandum generally.—See *CONTRACT*, Vol. XII., pp. 152–160, Nos. 1053–1143.

SUB-SECT. 3.—ADMISSIBILITY OF EVIDENCE OTHER THAN MEMORANDUM.

Sec, generally, *CONTRACT*, Vol. XII., pp. 160, 161, Nos. 1144–1171; *DEEDS*, Vol. XVII., pp. 302–348.

PART III. SECT. 1, SUB-SECT. 2.—C.

h. Necessity for signature—Signature by parties.—An ante-nuptial con-

tract not signed by the parties but by notaries in their own names, they having full authority to do so,

was held sufficiently signed within Stat. Frauds.—*TAILLIER v. TAILLIER* (1891), 21 O. R. 337.—*CAN.*

195. **Fraud of defendant.**—*HALFPENNY v. BALLET*, No. 191, *ante*.

196. **Loss of correspondence.**—*JAMESON v. STEIN*, No. 246, *post*.

197. — **Loss occurring through unforeseen & inevitable accident.**—A pre-nuptial agreement to settle property on the wife will be enforced even though the letters which constituted such agreement have been lost, if the loss can be proved to have occurred through an unforeseen & inevitable accident & if the existence & substance of the letters can be clearly established by the evidence.—*GILCHRIST v. HERBERT* (1872), 26 L. T. 381; 20 W. R. 348.

198. **To explain express terms of contract—"Her share."**—*LAVER v. FIELDER*, No. 227, *post*.

SUB-SECT. 4.—PART PERFORMANCE.

199. **General rule.**—Plea of Stat. Frauds to discovery of a parol agreement not allowed where part performance.—*TAYLOR v. BEECH* (1749), 1 Ves. Sen. 297; 27 E. R. 1042.

Annotations:—*Fold*, *Surcome v. Pinniger* (1853), 3 De G. M. & G. 571. *Consd.* *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 380. *Refd.* *Barkworth v. Young* (1856), 4 Drew. 1; *Re Cameron & Wells* (1887), 37 Ch. D. 32; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Sharman v. Sharman* (1892), 67 L. T. 834.

200. —.]—*SURCOME v. PINNIGER*, No. 205, *post*.

201. **No part performance of incomplete agreement.**—*THYNNE (LADY) v. GLENGALL (EARL)*, No. 165, *ante*.

202. **What are acts of part performance—Surrender in accordance with agreement.**—A. being tenant for life under a settlement, with remainder to his wife for her jointure; remainder to the issue male of the marriage; remainder over, with a power to revoke all the uses, except those to his wife & her issue; agrees, that in consideration of her surrendering her jointure estate, so as to enable him to suffer a recovery, & raise £6,000 to pay his debts, he would resettle his whole estate to particular uses. The surrender was made, & the money raised, but no resettlement made according to the agreement:—*Held*: this agreement having been in part performed, the parties were entitled to a specific execution, & decreed accordingly.—*HERBERT v. WINCHELSEA (EARL)* (1714), 1 Bro. Parl. Cas. 145; 1 E. R. 475, H. L.

203. — **Marriage.**—By a parol ante-nuptial agreement, it was agreed that the husband should take a certain portion of the wife's property, & that the residue should be settled for her separate use. This agreement was carried out so far as related to the husband; but no settlement was made on the wife. The wife subsequently to her marriage filed her bill by her next friend, stating these facts, & praying that her interests in certain property, consisting of real estate coming to her, might be declared accordingly. The husband, by his answer, admitted the statements in the bill. A deed was then prepared, purporting to be a settlement on the wife, in pursuance of the agreement, & giving her a power to dispose of her property by will. This deed, though signed by the wife, was not acknowledged by her. She made a will, disposing of her property in favour of her husband & other parties, & died. The husband then filed a supplemental bill, praying, as against the heir of the wife, that the parol agreement might be carried into effect, that the want of an acknowledgment might, if necessary, be supplied, & that the will of the wife might be established as

a valid execution of the power given to her by the deed:—*Held*: (1) in a suit thus framed there was no case established in point of proof as against the heir; (2) the contract so entered into before marriage, there being nothing but marriage following, could not be carried into effect under Stat. Frauds; (3) the ct. would not supply the want of the acknowledgment, as tending to destroy the protection which the law throws around married women.—*LASSENCÉ v. TIERNEY* (1849), 1 Mac. & G. 551; 2 II. & Tw. 115; 15 L. T. O. S. 557; 41 E. R. 1379; *sub nom.* *LASSENCÉ v. TIERNEY*, *LASSENCÉ v. LESCHER*, 14 Jur. 182.

Annotations:—*As to* (1) *Refd.* *Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615. *As to* (2) *Apld.* *Surcome v. Pinniger* (1853), 3 De G. M. & G. 571. *Refd.* *Warden v. Jones* (1857), 6 W. R. 180; *Goldcutt v. Townsend* (1860), 28 Beav. 445; *Caton v. Caton* (1866), 1 Ch. App. 137; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Johnstone v. Mappin* (1891), 60 L. J. Ch. 241; *Sharman v. Sharman* (1892), 67 L. T. 831. *As to* (3) *Refd.* *Fild v. Moore, Fild v. Brown* (1855), 7 De G. M. & G. 691. *Generally, Consd.* *Barrow v. Barrow* (1858), 4 K. & J. 409. *Refd.* *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 380. *Mentd.* *Salmon v. Salmon* (1860), 29 Beav. 27; *Re Skinner's Trusts* (1860), 1 John. & H. 102; *Whiteway v. Fisher* (1861), 9 W. R. 433; *Churchill v. Churchill* (1867), L. R. 5 Ed. 44; *Kellett v. Kellett* (1868), L. R. 3 H. L. 160; *Savage v. Tyers* (1872), 7 Ch. App. 356; *McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482; *Re Richards, Williams v. Gorvin* (1883), 50 L. T. 22; *Re Houghton, Houghton v. Brown* (1884), 53 L. J. Ch. 1018; *Cooke v. Cooke* (1887), 38 Ch. D. 202; *Re Boyd, Nield v. Boyd* (1890), 63 L. T. 92; *Re Pinhorn, Moreton v. Hughes* (1894), 42 W. R. 438; *Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678; *Re Wilcock, Kay v. Dewhurst*, [1898] 1 Ch. 95; *Hancock v. Watson*, [1902] A. C. 14; *Spencer v. Registrar of Titles*, [1906] A. C. 503; *Re Currie's Settltmt.*, *Re Roooper, Roooper v. Williams*, [1910] 1 Ch. 329; *Re Walter, Turner v. Walter*, No. 2 (1912), 56 Sol. Jo. 632; *Re Witly, Wright v. Robinson*, [1913] 2 Ch. 666; *Re Connell's Settltmt.*, *Re Bennett's Trusts, Fair v. Connell*, [1915] 1 Ch. 867; *Re Jones, Last v. Dobson*, [1915] 1 Ch. 246; *Re Harrison, Hunter v. Bush*, [1918] 2 Ch. 59; *Moryoseph v. Moryoseph*, [1920] 2 Ch. 33; *Re A Bankruptcy Notice*, [1924] 2 Ch. 76; *Re Monk, Giffen v. Wedd*, [1927] 2 Ch. 197; *Re Payne, Taylor v. Payne*, [1927] 2 Ch. 1.

204. —.]—A husband executed a post-nuptial settlement of railway stock, the property of the wife, in pursuance of a parol ante-nuptial agreement. The wife had been induced by the husband to marry him before the execution of the settlement, on the representation that the settlement would be as good after as before marriage. The husband was insolvent at the time of the marriage, although he had assured the wife & her family that he was solvent. On bill filed by creditor to set aside the settlement:—*Held*: the subsequent execution of the settlement was not such a part performance of the parol agreement as would avoid Stat. Frauds.

If marriage were to be held such a part performance as would take the contract out of Stat. Frauds, the effect in all such cases would be to make the statute absolutely ridiculous. It is another case where one of the parties agrees to do something more than marry, as, for instance, to settle an estate (*LORD CHELMSFORD, C.*).—*WARDEN v. JONES* (1857), 2 De G. & J. 76; 27 L. J. Ch. 190; 30 L. T. O. S. 206; 4 Jur. N. S. 269; 6 W. R. 180; 44 E. R. 916, L. C.

Annotations:—*Apld.* *Trowell v. Shenton* (1878), 8 Ch. D. 318. *Consd.* *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 380. *Refd.* *Goldcutt v. Townsend* (1860), 28 Beav. 445; *McAskie v. McCay* (1868), 16 W. R. 1187; *Codrington v. Codrington* (1875), 45 L. J. Ch. 660; *Re Whitehead, Ex p. Whitehead* (1885), 14 Q. B. D. 419.

205. — **Delivery of possession.**—A father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to the couple on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, & handed

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to the husband the title deeds. The husband expended money upon the property:—*Held*: sufficient part performance to take the case out of Stat. Frauds.

It has been held, in many cases, that if there be a written agreement after marriage, in pursuance of a parol agreement before marriage, this takes the case out of the statute, so also does part performance (TURNER, L.J.).—*SURCOMBE v. PINNIGER* (1853), 3 De G. M. & G. 571; 22 L. J. Ch. 419; 20 L. T. O. S. 255; 17 Jur. 196; 43 E. R. 224, L. J.J.

Annotations:—*Consd.* *Re Gulliver, Stroughill v. Gulliver* (1856), 2 Jur. N. S. 700. *Appld.* *Ungley v. Ungley* (1876), 4 Ch. D. 73. *Consd.* *Sharman v. Sharman* (1892), 67 L. T. 834. *Refd.* *Warden v. Jones* (1857), 23 Beav. 487; *Goldcutt v. Townsend* (1860), 28 Beav. 445; *Millard v. Harvey* (1864), 11 L. T. 360; *Re Cameron & Wells* (1887), 37 Ch. D. 32; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

206. ———.]—A father verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding present, & immediately after the marriage he put the daughter & her husband into possession. The father was then the owner of the house, which was leasehold & was subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which fell due during his lifetime, & at his death there remained a balance of £110, which fell due shortly afterwards:—*Held*: the verbal promise to give the house having been established, the possession took the case out of Stat. Frauds; the contract was to give the house free from incumbrances; & the £110 was payable out of the father's estate.—*UNGLEY v. UNGLEY* (1877), 5 Ch. D. 887; 46 L. J. Ch. 854; 37 L. T. 52; 41 J. P. 628; 25 W. R. 733, C. A.

Annotations:—*Folld.* *Sharman v. Sharman* (1892), 67 L. T. 834. *Refd.* *Alderson v. Maddison* (1881), 7 Q. B. D. 174. *Mentd.* *Hunt v. Wimbledon L. B.* (1878), 4 C. P. D. 48; *Goddard v. O'Brien* (1882), *De Colyar's County Court Cases*, 110.

207. ———.]—In 1889 deft. was married to pltf.'s son, & pltf. gave to his son as a marriage present, but only by word of mouth, a certain business carried on at a certain house, & also as deft. contended but pltf. denied, the lease of that house. Directly after the marriage, possession of the house was given up by pltf. & was held by the son, & he carried on the business there for his own benefit till his death, which occurred in Apr. 1891. Soon after that event a family disagreement arose, & pltf. brought an action of ejectment to recover possession of the house:—*Held*: the possession of the house given up to the son, equivalent to part performance, dispensed with the necessity of a writing, & as nothing was said to the contrary, the gift was free from incumbrances.—*SHARMAN v. SHARMAN* (1892), 67 L. T. 833; 9 T. L. R. 101; 37 Sol. Jo. 79; 4 R. 124, C. A.

208. ———.]—*Payments of interest on sum of money.*—T., in anticipation of the marriage of his daughter C., had conversations with her, in which he promised her that he would after her marriage pay her the interest on a certain sum of money during her life, & he further said that her husband would have the principal after his death. T., as alleged, made several payments on account of the interest due on the principal sum, but the payments were not regular, & no settlement was ever

come to during his life. In administering the estate of T., C. & her husband claimed to be entitled to a certain sum as the balance of the interest due, but in consequence of dispositions in their favour made by testator in his will, the principal sum was not claimed. The chief clerk allowed the claim. On motion to vary the certificate:—*Held*: even admitting the payments by T. during his life to have been made in pursuance of a virtual agreement, they did not constitute such a part performance as to take the case out of Stat. Frauds.—*Re GULLIVER, STROUGHILL v. GULLIVER* (1857), 27 L. T. O. S. 258; 2 Jur. N. S. 700; 4 W. R. 684.

Annotation:—*Expld.* *Williams v. Williams* (1868), 37 L. J. Ch. 854.

209. ———.]—*Agreement to settle.*—*WARDEN v. JONES*, No. 204, *ante*.

210. ———.]—*Execution of settlement.*—*WARDEN v. JONES*, No. 201, *ante*.

211. ———.]—*Funds left in wife's name—With husband's consent.*—On a marriage it was verbally agreed between the husband & the wife that a sum of money standing to the credit of the wife on deposit at a bank in her maiden name should be her separate property. Nothing further was done; but after the marriage the money, with the husband's consent, remained at the bank in the wife's maiden name; & she received the interest on it for two years after the marriage, when she drew the money out of the bank. The trustee in the subsequent liquidation of the husband having claimed payment of the money from the wife as part of her husband's property:—*Held*: there had been no such part performance by the husband of the parol contract to settle as to take the case out of Stat. Frauds, & the trustee was entitled to the money subject to the wife's equity to a settlement, if any.—*Re WHITEHEAD, Ex p. WHITEHEAD* (1885), 14 Q. B. D. 419; 54 L. J. Q. B. 240; 52 L. T. 597; 49 J. P. 405; 33 W. R. 471, C. A.

Part performance, generally, *see* CONTRACT, Vol. XII., pp. 168–171, Nos. 1233–1255; SPECIFIC PERFORMANCE.

SUB-SECT. 5.—ESTOPPEL.

A. By Representation.

See, generally, ESTOPPEL, Vol. XXI., pp. 290–328, Nos. 1032–1220.

212. *Liability to make representation good—Representation by third party—Necessity for proving definite representation—& that representation has been acted upon.*—*JAMESON v. STEIN*, No. 216, *post*.

213. ———.]—*Representation intended to influence another's conduct.*—*DE MANNEVILLE v. CROMPTON*, No. 213, *post*.

214. ———.]—*Of intention to act.*—Upon a treaty of marriage, the father of the intended wife said to pltf., the intended husband, "I pledge you my word, that after the death of my wife & myself, my daughter will have £10,000 at the very least." Heads of arts., which were subsequently drawn up under the sanction of & approved by the father, & intended as instructions for a settlement, contained the following passage:—"A covenant is to be drawn up by which Sir W. II., the father, guarantees that his daughter shall at the decease of both parents have a property of not less than

PART III. SECT. 1, SUB-SECT. 5.—A.

212 i. *Liability to make representation good—Representation by third party—Necessity for proving definite representa-*

tion—& that representation has been acted upon.—*KIRWAN v. BURCHELL* (1859), 10 I. Ch. R. 63.—*IR.*

214 i. ———.]—*Representation intended*

to influence another's conduct—Of intention to act.—Where a representation was made by a father on the occasion of his son's marriage of the

£10,000." In the settlement which was afterwards executed before the marriage there was a recital to that effect, but there was no express covenant by the father to make good that sum. On a bill filed by the husband who had survived his wife, against the exor. of the father:—*Held*: (1) although the settlement, if it stood alone, could not have been rectified, yet that having regard to the arts. & representation made by the father, there was sufficient evidence of mistake to authorise the ct. to make the settlement conformable to the arts., & the estate of the father was bound to make up the portion of his daughter to the stipulated sum.

When a settlement purports to be in pursuance of arts. entered into before marriage & there is any variance then no evidence is necessary in order to have the settlement corrected; & although the settlement contains no reference to the arts. yet if it can be shown that the settlement was intended to be in conformity with the arts. yet if there is clear & satisfactory evidence showing that the discrepancy has arisen from a mistake, the ct. will reform the settlement & make it conformable to the real intention of the parties (LORD CRANWORTH, C.).

(2) The representation of the father, though not afterwards fulfilled, yet being of intention merely & not of fact, did not amount to such a misrepresentation as would entitle the husband to relief in equity on the ground of fraud.

The misrepresentation, to come within the doctrine, must be a misrepresentation at the time it was made. If it is made with the view of inducing a person to act, & such person has acted upon the faith of the representation, then the person making the representation would in equity be bound to fulfil it (LORD CRANWORTH, C.).—*BOLD v. HUTCHINSON* (1855), 5 De G. M. & G. 558; 25 L. J. Ch. 598; 26 L. T. O. S. 229; 2 Jur. N. S. 97; 4 W. R. 3; 43 E. R. 986, L. C.
Annotation:—As to (1) *Reid*. Shadwell v. Shadwell (1860), 9 C. B. N. S. 159.

215. Effect of innocent mistake.—On a treaty of marriage the husband applied to the brother of the wife to know the amount of her fortune & the manner in which it was secured. The brother represented it fairly, as he then conceived it, & as being charged on a real estate under the father's will; & added that the husband need not examine the will or the family deeds, the fact being certainly as he represented. A recital to the same effect was made also in the settlement to which the brother was a party. It afterwards turned out that the father had no power to charge the estate by his will; but this fact was unknown to all the family at the time of the marriage. The representation of the brother under these circumstances will not bind him to make it good.—*MERKWEATHER v. SHAW* (1789), 2 Cox, Eq. Cas. 124; 30 E. R. 58, L. C.

216. — Common to all parties.—Bill by a husband to have his wife's portion, part of which was invested in stock, made up money, on the ground, either of express contract, or representation, upon which the marriage took place, dismissed: the description by the arts., though generally "the sum of £4,000," referring to that sum as in settlement; & the representation under circumstances not amounting to a warranty; & proceeding upon a common mistake.—*AINSLIE v. MEDLYCOTT* (1803), 9 Ves. 13; 32 E. R. 504.

Annotations:—*Foll.* Evans v. Wyatt (1862), 31 Beav. 217. *Reid*. Helps v. Clayton (1864), 17 C. B. N. S. 553.

217. — — — — ——By a marriage settlement, it was recited that the husband was absolutely entitled to a sum of £7,000 part of the personal estate of a deceased person then being administered by this ct. The husband settled £5,000 part of the £7,000, but the assets proved insufficient to pay even the £5,000:—*Held*: this was not a representation which the husband was bound to make good, & the deficiency did not constitute a debt payable out of his assets.

The facts are fairly stated, the mistake was common, & every one had a like opportunity to discover the mistake. It appears to me that this is exactly the case of *Ainslie v. Medlycott*, No. 216, *ante* (ROMILLY, M.R.).—*EVANS v. WYATT* (1862), 31 Beav. 217; 7 L. T. 86; 8 Jur. N. S. 499; 10 W. R. 813; 54 E. R. 1121.

B. By Conduct.

See, generally, ESTOPPEL, Vol. XXI., pp. 328–398, Nos. 1221–1594.

218. Standing by while own property settled.—The mother who as tenant in tail was the absolute owner of a term, is present at a treaty for her son's marriage, & hears her son declare, that the term was to come to him at his mother's death, & is a witness to the deed, whereby the reversion of the term is settled on the issue of this marriage after the mother's death. The mother is compellable in equity to make good this settlement, & to settle the reversion of the term accordingly after her death.—*HUNSDEN v. CHEYNEY* (1690), 2 Vern. 150; 1 Eq. Cas. Abr. 355; 23 E. R. 703.

Annotation:—*Reid*. Low v. Bouverie, [1891] 3 Ch. 82.

219. Bond by husband on marriage — Wife not a party—Subsequent acts of wife confirming bond.—Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, etc.; the wife not an executing party. After the marriage a real estate of the wife came into possession. The husband dies. The wife marries B. & dies; bill by a younger child against B. & the heir of his mother. It seems that Stat. Frauds could not have been taken advantage of, on account of the wife not having been an executing party, since the marriage took place in consequence of the instrument executed by the husband. Here, however, the wife had proved & acted under her first husband's will, which recited the bond; from whence it was held she had bound herself at all events.—*ARCHER v. POPE* (1754), 2 Ves. Sen. 523; 28 E. R. 334, L. C.

Annotation:—*Mentd.* Worthington v. Wiginton (1855), 20 Beav. 67.

220. — — — — ——*ESTCOURT v. ESTCOURT* (1760), 1 Cox, Eq. Cas. 20; 29 E. R. 1043.

221. — — — — ——Husband before marriage gives bond to enable his intended wife to dispose by deed or will of her freehold estate. She devises during coverture. Her heir-at-law is bound, & shall convey to the devisee.—*RIPPON v. DAWDING* (1769), Amb. 565; 27 E. R. 363, L. C.

Annotations:—*Dstd.* Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691. *Consd.* Dye v. Dye (1881), 13 Q. B. D. 117.

SECT. 2.—INFORMAL CONTRACTS.

SUB-SECT. 1.—THE MEMORANDUM.

See Sect. 1, sub-sect. 2, *ante*.

amount of property he intended to leave his son, & on the faith of his representation his son contracted the marriage:—*Held*: the father had by this representation entered into a contract with his son which he was bound to perform specifically.—*KEAY v. GILMORE* (1874), 22 W. R. 465.—*IR.*

*Sect. 2.—Informal contracts: Sub-sect. 2.]***SUB-SECT. 2.—OFFER**

Offer generally, *see* CONTRACT, Vol. XII., pp. 53 *et seq.*

222. What amounts to offer—General words spoken to incite suitors.]—WEEKS *v.* TYBALD (1604), Noy, 11; 74 E. R. 982.

*Annotation:—*Reid, Carill *v.* Carbolic Smoke Ball Co. (1892), 41 W. R. 210.

223. — Proposals for settlement—Sent to friends of lady.]—Proposals in writing being sent to the friends of the woman, relating to an intended marriage, though no answer was returned; yet the man being admitted to be a suitor, & the marriage ensuing, this in equity was decreed to be an agreement executed on all sides.—PARKER *v.* SERJEANT (1674), Cas. temp. Finch, 146; 23 E. R. 80.

224. — Representation of intention to do something in future—No present intention of assuming obligation.]—Construction of a letter; as not amounting to an absolute agreement to give a marriage portion.

It would be surprising afterwards to find that in this very letter, he had become bound to make a settlement; or to give a promise which would be as binding upon him. . . . It is clear he means to reserve it entirely within his own power, to bind himself, or not, as he might think fit, after the marriage should have taken place. . . . This letter therefore is no agreement (GRANT, M.R.).—RANDALL *v.* MORGAN (1805), 12 Ves. 67; 33 E. R. 26.

*Annotations:—*Consd. Warden *v.* Jones (1857), 23 Beav. 487; Goldieutt *v.* Townsend (1860), 28 Beav. 445. *Reid.* Montgomery *v.* Reilly (1827), 1 Bl. N. S. 361; De Bell *v.* Thomson (1841), 3 Beav. 469; Watson *v.* Parker (1843), 6 Beav. 283; Barkworth *v.* Young (1856), 4 Drew. 1; *Re* Holland, Grogg *v.* Holland, [1902] 2 Ch. 360.

225. — — — — —.]—P. while in India, made his will, leaving his daughter, who was born there, a lakh of rupees. Upon the completion of her education, P. who had returned to England, sent her back to India, & on that occasion he wrote to a particular friend, to whose guardianship & charge he confided her, "In regard to her settlement in life I shall be naturally anxious." "You may assure the young gentleman she may choose that, on his marriage with her, he shall have £2,000 sterling, nor will that be all; she is & shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced, & reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of." H. having made proposals of marriage, was informed of the letter written by P., & also of the will he had made, & after some negotiations the marriage was solemnised in 1826, & in 1829 H. & his wife returned to England. In the same year P., who was a domiciled Scotchman, executed, in Edinburgh, another will, by which he gave all his real & personal property for the benefit of his wife & his two sons by her, & in case of their dying without issue, he gave the whole to the issue of his daughter. P. died in 1831 without having made any provision for his daughter, leaving the will made by him in India in the state it was when he executed it; & upon a bill filed by his daughter, insisting that testator had contracted to settle a lakh of rupees upon her, & that the contract was contained in the letter written by him:—*Held*: in construing contracts, the ct. must ascertain the real meaning of the words used; when no definite

or specific sum was mentioned or referred to, the ct. cannot enforce any contract, testator had not afforded means of reference to any other document; except from the answer of H. there was no evidence that he married on the faith & belief that a lakh of rupees would be settled; & it was not evidence to be acted upon in favour of pltf. against the estate of testator, as previous to marriage it had been pointed out to H. that the letter did not state any precise sum; & testator had left himself unfettered by any contract.—MOORHOUSE *v.* COLVIN (1851), 15 Beav. 341; 21 L. J. Ch. 177; 18 L. T. O. S. 296; 51 E. R. 570; *affd.* (1852), 21 L. J. Ch. 782, L. JJ.

226. — — — — — Letters promising to leave property by will.]—On a treaty respecting the marriage of H., who was believed to have considerable expectations from his uncle, E., the guardians of the lady desired a settlement; & H. addressed a letter to E., who answered, "I have made my will, & left you my property in the county of T., which is very considerable." The guardians still refused their consent, "until a suitable settlement shall be made by E. of real estate upon the marriage, in the usual course of settlement, & until the sum of £10,000 shall be secured to the trustees of the estate" of the father of the lady, from whom H. had some time before borrowed that money, in order to become a partner in a bank. The resolution of the trustees was communicated to E., who, in Sept. 1815, wrote, "My sentiments respecting you continue unaltered; however I shall never settle part of my property out of my power while I exist; my will has been made for some time, & I am confident that I shall never alter it to your disadvantage. I have mentioned before, & I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, & I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made." This answer was, at the desire of E., communicated to the guardians, who, in Mar. 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited, that "H. has reason to expect that he will, upon the decease of E., become entitled, by virtue of the will of E., to a certain portion of his estate & property, pursuant to the declaration of E., contained in his letter to H. of Sept. 1815." E. was made one of the trustees of the settlement, & about twelve months afterwards, he executed the deed; but there was no evidence that he knew anything of its contents beyond the fact that he was named as one of the trustees. E. afterwards devised his property to other persons:—*Held*: H. could not maintain a suit to compel the trustees under the will of E. to convey the Tipperary estate to him, for that E.'s letters did not amount to a contract to settle it on him.—MAUNSELL *v.* WHITE (1854), 4 H. L. Cas. 1039; 22 L. T. O. S. 293; 10 E. R. 769, H. L.

*Annotations:—*Distd. Bold *v.* Hutchinson (1855), 3 Eq. Rep. 743. *Consd.* *Re* Allen, Hinks *v.* Allen (1880), 49 L. J. Ch. 553. *Reid.* Maddison *v.* Alderson (1883), 52 L. J. Q. B. 737.

227. — — — — — Amounting to positive undertaking.]—Upon the treaty for a marriage, the father of the lady wrote to the husband, "I still adhere to my last proposition, viz., to allow Elizabeth £100 a year, . . . & at my decease she shall

PART III. SECT. 2, SUB-SECT. 2.

227 i. What amounts to offer—Representation of intention to do something in future—Amounting to positive undertaking.]—KEAYS *v.* GILMORE (1873), 8 I. R. Eq. 290.—*IR.*

be entitled to her share of whatever property I may die possessed of":—*Held*: (1) this was a contract binding on the father; (2) it was not so vague as to prevent its being enforced; (3) parol evidence was inadmissible to show what was intended by the words "her share."—*LAVER v. FIELDER* (1862), 32 Beav. 1; 1 New Rep. 188; 32 L. J. Ch. 365; 7 L. T. 602; 9 Jur. N. S. 190; 11 W. R. 245; 55 E. R. 1.

Annotations.—*Consd. Re Allen, Hincks v. Allen* (1880), 49 L. J. Ch. 553. *Distd. Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331. *Refd. Keays v. Gilmore* (1874), 22 W. R. 465.

228. ————*J*.—After proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows:—"V. being my only child, of course she will come into the possession of what belongs to me at my decease." In a subsequent letter, addressed to the mother of the intended husband, the father, after declining then to extract £4,000 from his business, & stating that some years since he had made a will leaving "all my property" in trust for his daughter for life for her separate use, & the principal to be divided as she by her will might ultimately dispose of, he said, "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts of the case, & of course I should settle my property, subject to my sister's annuity, on my daughter absolutely & independent of her husband; or, in other words, in strict settlement." He further "agreed" to allow his daughter & her husband £100 a year during his life; & added, "I will take care that my property, which, I suspect, will exceed £4,000, shall be properly secured upon her & her children after my death." The marriage having taken place, the father, who was then a widower, afterwards married again, & made a will whereby he devised & bequeathed parts of his property to his wife, & gave several life annuities:—Upon bill by the daughter, claiming to have all the property of which testator died seised or possessed settled upon her in strict settlement:—*Held*: the above expressions of intention on the part of testator amounted to a contract to settle the whole of the property of which he should die seised or possessed upon *pltf.* in strict settlement.—*COVERDALE v. EASTWOOD* (1872), L. R. 15 Eq. 121; 42 L. J. Ch. 118; 27 L. T. 646; 37 J. P. 212; 21 W. R. 216.

Annotations.—*Consd. Alderson v. Maddison* (1880), 5 Ex. D. 293; *Re Allen, Hincks v. Allen* (1880), 49 L. J. Ch. 553.

229. ————*J*.—P., shortly before his marriage with *pltf.*, wrote her a letter, in which occurred the following passage: "& now, my dearest Lizzie, as life is very uncertain at my time of life, & as you are of all the world the person I love best, I hereby will & bequeath to you, after my death, the eight cottages in Peckham's-walk, occupied by C. & E. & others. You will keep this letter as a proof of my intention, in case of any sudden change occurring to me rendering me incapable of, or not in a state of mind fit for, the performance of so important a document, & making null & void any former will, & bequest I may have made previously. I am doing this, my dearest, as a temporary provision for you in case of any emergency. . . . I am your future husband in its most holy sense.—P." Another part of the will contained a reference to the wedding ring, of which *pltf.* then apparently had the custody. After the marriage P. died, leaving a will, whereof defts.

were exors. & trustees. By this will the eight cottages were not left to *pltf.* *Pltf.* claimed a declaration that P. duly contracted with her to leave to or settle upon her the eight cottages, & that by virtue of the letter *pltf.* was entitled to them in equity:—*Held*: no contract had been intended; the writer had mistakenly thought that he was making a gift.—*VINCENT v. VINCENT* (1887), 56 L. T. 243; 3 T. L. R. 398, C. A.

230. ————*J*.—In 1873, a father, prior to the marriage of his daughter, in a letter to her intended husband stated: "You are of course aware that with my large family E. will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." The intended husband accepted the letter as giving him some rights, & the marriage took place. The father afterwards acquired a large fortune, & died in 1898. His wife predeceased him. By his will he left a legacy of £2,000 to the daughter, & gave the residue of his estate equally between six of his other seven children. The daughter & her husband claimed by virtue of the letter to be entitled to an equal eighth share of the father's estate:—*Held*: the letter did not constitute a contract by the father, but was merely an expression of his intentions.—*Re FICKUS, FARINA v. FICKUS*, [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749; 48 W. R. 250; 44 Sol. Jo. 157.

231. ————*Representations intended to influence the conduct of another.*—A representation made by one party for the purpose of influencing the conduct of another, & acted on by him, will in general be sufficient to entitle him to the assistance of a ct. of equity, for the purpose of realising such representation; & so in proposals of marriage: if the parent, or his agent deliberately holds out inducements to the suitor to celebrate the marriage, & he consents & celebrates it, believing it was intended that he should have the benefits so held out to him, a ct. of equity will give effect to the proposals.

Proposals of marriage written by the lady's brothers, acting by her father's authority, stated that "Mr. J. P. T., the father, also intends to leave a further sum of £10,000 in his will to Miss T. to be settled on her & her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject, of course, to revision; but they will be sufficient for B. to act upon." B., upon receiving the proposals, provided a jointure as required by them for his intended wife, & then married her. In the settlement, afterwards executed, there was no mention of this sum of £10,000; & it was not left by J. P. T. in his will:—*Held*: his estate was liable to the payment of the £10,000 with interest from the end of one year after his death.—*HAMMERSLEY v. DE BIEL* (1845), 12 Cl. & Fin. 45; 8 E. R. 1312, H. L.; *affg. S. C. sub nom. DE BIEL v. THOMSON* (1841), 3 Beav. 469.

Annotations.—*Expld. Lassence v. Tierney* (1849), 1 Mac. & G. 551. *Apld. Surmont v. Plniger* (1853), 17 Jur. 196. *Distd. Maunsell v. White* (1854), 4 H. L. Cas. 1039. *Consd. Bold v. Hutchinson* (1855), 20 Beav. 250. *Distd. Kay v. Crook* (1857), 3 Sm. & G. 407; *Cooper v. Wormald* (1859), 27 Beav. 266. *Apld. Prole v. Soady* (1859), 2 Giff. 1. *Distd. Forshaw v. Welsby* (1860), 30 Beav. 243; *Goldcutt v. Townsend* (1860), 28 Beav. 445. *Apld. Loxley v. Heath* (1860), 27 Beav. 523. *Distd. Sands v. Soden* (1862), 31 L. J. Ch. 870. *Apld. Walford v. Gray* (1865), 5 New

230 I. ————*J*.—*MADOX v. NOWLAN* (1824), Beat. 632.—*IR.*

230 II. ————*J*.—*QUINLAN v.*

QUINLAN (1834), *Hayes & Jo.* 785.—*IR.*

230 III. ————*J*.—*M'ASKIE v. M'CAY* (1868), 2 I. R. Eq. 447.—*IR.*

231 I. ————*Representations intended to influence the conduct of another.*—*SAUNDERS v. CRAMER* (1842), 3 Dr. & War. 87.—*IR.*

Sect. 2.—Informal contracts: Sub-sects. 2, 3 & 4.]

Rep. 235; *Williams v. Williams* (1868), 37 L. J. Ch. 854; *Coverdale v. Eastwood* (1872), 21 W. R. 216. **Consd.** *Dashwood v. Jernyn* (1879), 12 Ch. D. 778; *Re Allen, Hincks v. Allen* (1880), 49 L. J. Ch. 553; *Re Badcock, Kingdon v. Tagert* (1880), 17 Ch. D. 361. **Apld.** *Viret v. Viret* (1880), 50 L. J. Ch. 69. **Consd.** *Maddison v. Alderson* (1883), 8 App. Cas. 467. **Apld.** *Synge v. Synge*, [1894] 1 Q. B. 466. **Distd.** *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331. **Consd.** *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. **Refd.** *Moorhouse v. Colvin* (1851), 15 Beav. 341; *Barkworth v. Young* (1856), 1 Drew. 1; *Re Gulliver, Stroughill v. Gulliver* (1856), 2 Jur. N. S. 700; *Warden v. Jones* (1857), 23 Beav. 487; *Loffus v. Maw* (1862), 3 Giff. 592; *Hargreaves v. Pennington* (1864), 34 L. J. Ch. 180; *Lautour v. A.-G.* (1864), 5 New Rep. 102; *Thomson v. Simpson* (1870), L. R. 9 Eq. 497; *Coles v. Pilkington* (1874), L. R. 19 Eq. 174; *Johnstone v. Mappin* (1891), 60 L. J. Ch. 241; *Sharman v. Sharman* (1892), 67 L. T. 834; *Re Broadwood, Edwards v. Broadwood*, No. 2 (1912), 56 Sol. Jo. 703. **Mentd.** *Wood v. Midgley* (1854), 5 De G. M. & G. 41; *Traill v. Baring* (1864), 3 New Rep. 362; *Re British & American Steam Navigation Co., Ward's Case* (1870), L. R. 10 Eq. 659; *Erskine v. Adeane, Bennett's Claim* (No. 2) (1878), 42 L. J. Ch. 849; *MacManus v. Cooke* (1887), 35 Ch. D. 681; *Re A Bankruptcy Notice*, [1924] 2 Ch. 76.

232. ——— Necessity for clear proof.]—

Where the evidence with sufficient certainty proved that declarations & representations were actually made by a father to the intended husband, deft. W., & to other persons, previously to, & in contemplation of, & subsequent to the marriage of his natural daughter to deft. W., & that the marriage was contracted in a confidence in such representations, that he had irrevocably settled or intended to settle the E. estate, & a sum of sicca rupees, as a provision for, & which would upon his death become the property of, his reputed daughter & her children: & where there was evidence, parol & documentary, that certain documents, purporting to settle the estate & sicca rupees, were executed by the settlor, but there was a total want of evidence as to the contents or effect of such documents, the ct. gave effect to the representations by declaring that plfts., the children of the marriage, were entitled to the estate & the sicca rupees as tenants in common absolutely.

It is essential in such a case that there should also be perfect or reasonable certainty as to the amount & nature of the property to which the representations apply.—*PROLE v. SOADY* (1859), 2 Giff. 1; 29 L. J. Ch. 721; 1 L. T. 309; 5 Jur. N. S. 1382; 8 W. R. 131; 66 E. R. 1.

Annotations:—Consd. *Re Badcock, Kingdon v. Tagert* (1880), 17 Ch. D. 361. **Refd.** *McAskle v. McCay* (1868), 16 W. R. 1187; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Johnstone v. Mappin* (1891), 60 L. J. Ch. 241.

233. ———.]—JAMESON v. STEIN, No. 246, post.

234. ———.]—In a letter to pltf.'s mother, deft., after stating that he had formed an attachment to pltf., stated that he had enough to maintain a wife upon, & that if her daughter had or might have money, his wish & intention would be that it should be settled for her sole & entire use. Pltf.'s mother accepted deft.'s proposals, & a marriage took place without the knowledge of pltf.'s mother, & without a settlement having been made of pltf.'s property. Deft. refused to make a settlement, alleging that the letter did not contain a binding agreement:—**Held:** all pltf.'s present & future property must be settled in the usual manner.—*ALT v. ALT* (1802), 4 Giff. 84; 32 L. J. Ch. 52; 7 L. T. 266; 8 Jur. N. S. 1075; 66 E. R. 630.

Annotations:—Apld. *Viret v. Viret* (1880), 50 L. J. Ch. 69. **Consd.** *Re Spicer, Spicer v. Spicer* (1901), 84 L. T. 195.

235. ———.]—Property was settled on the marriage of A. & B. on their children as A. & B. or the survivor of them should appoint & in

default of appointment on the children equally if they survived A. & B. & the issue of any who died earlier to take their parents' share. A. on the marriage of his daughter promised in writing that neither he nor his wife would exercise the power & on the faith of which promise the daughter's share in the fund in default of appointment was settled; but subsequently A. & B. did execute the power:—**Held:** a child of the daughter's marriage who was prejudiced by the appointment was entitled after her mother's death to have the appointment set aside although her claim was paramount to her mother's settlement.—*WALFORD v. GRAY* (1865), 5 New Rep. 235; 11 L. T. 620; 11 Jur. N. S. 106; 13 W. R. 335; *affd.* 12 L. T. 437; 11 Jur. N. S. 473, L. C.

236. ———.]—Deft. before, & as an inducement to, his marriage with pltf. promised in writing, as part of the terms of the marriage, to leave a house & land to her for her life. Pltf. consented to the terms proposed, & the marriage took place; but deft. subsequently conveyed the property by deed to a third person. In an action to recover damages for breach of contract:—**Held:** (1) as deft. had put it out of his power to perform the contract there had been a breach, in respect of which pltf. had an immediate right of action to recover damages, & the measure of such damages was the value of the possible life estate to which pltf. would be entitled if she survived deft.; (2) where a proposal in writing to leave property by will, made to induce a marriage, is accepted, & the marriage takes place on the faith of it, if the proposal relates to a defined piece of real property the ct. has power to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.—*SYNGE v. SYNGE*, [1894] 1 Q. B. 466; 63 L. J. Q. B. 202; 70 L. T. 221; 58 J. P. 396; 42 W. R. 309; 10 T. L. R. 194; 9 R. 265, C. A.

Annotations:—As to (1) Refd. *Central Trust & Safe Deposit Co. v. Snider*, [1916] 1 A. C. 266; *Re Cavendish Browne's Settlement Trusts, Horner v. Rawie* (1916), 61 Sol. Jo. 27.

237. ——— Expression of desire.]—On Tuesday, an intended husband, who was an infant, wrote to the trustee of the intended wife, "that he especially wished his wife's property entirely settled on herself," & that the wedding was to take place on Saturday. They married, unknown to the trustee, on Wednesday, without any settlement:—**Held:** this letter contained no settlement or agreement for a settlement binding on the husband or wife.—*BEAUMONT v. CARTER, CARTER v. BEAUMONT* (1863), 32 Beav. 586; 8 L. T. 685; 55 E. R. 230.

238. ——— Vague representations.]—A., upon the engagement of his daughter to T., wrote a letter to T. saying that the settlement proposed by him was satisfactory, & that he, A., had made his will dividing his property equally among his daughters. The marriage took place, T. believing, as he alleged, that the will operated as a settlement of one-third of A.'s property on his wife. T. made no settlement, & his wife died in A.'s life, leaving children. A. died, having made another will, whereby he left all his property to H., another daughter. Upon a claim by T. & his children to a third share of A.'s estate:—**Held:** the letter constituted only a conditional contract, & T. not having performed his part of the contract it was not binding, & in any event the letter was too vague to be enforced as a contract, & the claim was disallowed.—*Re ALLEN, HINCKS v. ALLEN* (1880), 49 L. J. Ch. 553; 28 W. R. 533.

239. — Conditional offer.] — *Re ALLEN, HINCKES v. ALLEN*, No. 238, *ante*.

240. Necessity for communication of offer.]—A letter from a father to his daughter by which he agrees to give her £3,000 portion, & this not shown to the man who afterwards married the daughter, does not take the promise out of Stat. Frauds.—*AYLIFFE v. TRACY* (1722), 2 P. Wms. 65; 9 Mod. Rep. 3; 2 Eq. Cas. Abr. 19; 24 E. R. 642, L. C.

Liability to make good representations.]—*See* Sect. 1, sub-sect. 5, A., *ante*.

SUB-SECT. 3.—ACCEPTANCE.

Acceptance generally.]—*See* CONTRACT, Vol. XII., pp. 63–75.

241. What constitutes acceptance—Acts done on faith of offer—Marriage.]—*PARKER v. SERJEANT*, No. 223, *ante*.

242. — — —.]—Settlement decreed according to a letter previous to the marriage, though no express assent; the marriage having taken place immediately, a distinct, positive, dissent would be necessary to prevent the effect of the letter & that could be evidenced only by an actual settlement before marriage.—*LUDERS v. ANSTREY* (1799), 4 Ves. 501; 31 E. R. 257, L. C.; *subsequent proceedings* (1800), 5 Ves. 213, L. C.

*Annotations:—**Distd. Moorhouse v. Colvin* (1851), 21 L. J. Ch. 782. *Refd. Prole v. Soady* (1859), 2 Giff. 1; *Alderson v. Maddison* (1880), 5 Ex. D. 293; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331.

243. — — —.]—I should be very unwilling to relax a principle, which has long prevailed both at law & in equity; that, if a representation is made upon the circumstances of a person about to form a connection in marriage, & that representation is of such a nature, that, if not made good, or if varied, it will materially affect the circumstances in life of that party, & cts. both of law & equity will hold the party bound to make good that representation, even at the suit of individuals, concerned in fraudulently defeating such a representation, upon which that connection was proceeding. It is, however, of equal importance, that this should not be carried to the extent, that, whenever anything occurs in general treaty, not entering into particulars, or showing that the marriage actually took place upon such representation, that principle is to be applied to a case, to which it has no application, & was never intended to be applied (*LORD ELDON, C.*).—*DE MANNEVILLE v. CROMPTON* (1813), 1 Ves. & B. 354; 35 E. R. 138, L. C.

*Annotations:—**Consd. St. George v. Wake* (1833), Coop. temp. Brough, 129; *Taylor v. Pugh* (1842), 1 Hare, 608. *Refd. Re Brittlebank, Coates v. Brittlebank* (1881), 30 W. R. 99.

244. — — —.]—*HAMMERSLEY v. DE BIEL*, No. 231, *ante*.

245. — — —.]—*MOORHOUSE v. COLVIN*, No. 225, *ante*.

246. — — —.]—(1) Where a person seeks to make a third party make good representations made by him on his marriage, he must establish, & that clearly, first, that sufficient representations were made; & secondly, that the marriage took place on the faith of them.

A husband & wife alleged that, on their marriage, the wife's father stated in a letter, which, however, they stated had been destroyed, "that he could do no more for her than he had done, & that he had settled his W. estate upon her." He had, in fact, previously settled that estate on her, but subject to a prior charge of £5,000. They sought to have the representation made good by payment

of the £5,000 out of the father's estate. The court doubted whether the principle applied to such a representation, & also whether the marriage took place on the faith of it, & refused relief.

Qu.: whether the notice of the existence of the settlement in this case was not notice of its contents.

(2) The owner of an estate voluntarily charged it with his own simple contract debt, & by the same deed, settled the estate, subject thereto, on himself for life, with remainder to his daughter. He afterwards paid off the debt, but declared that the charge should continue for the benefit of his personal estate. After his death:—*Held:* the charge still subsisted & must be raised & paid.

The representation made by testator was in a letter written to his daughter, & the burden of proof lies on Mrs. M. to show the contents of this letter (*ROMILLY, M.R.*).—*JAMESON v. STEIN* (1855), 21 Beav. 5; 25 L. J. Ch. 41; 25 L. T. O. S. 300; 52 M. R. 759.

247. — — —.]—*PROLE v. SOADY*, No. 232, *ante*.

248. — — —.]—A parol promise by a father, prior to the marriage of his son, to make a future provision for him, his wife & children, cannot be enforced if the marriage did not take place by reason of any reliance on such promise, or if it was not acted on as a reason & consideration for the marriage.—*GOLDICUTT v. TOWNSEND* (1860), 28 Beav. 445; 54 E. R. 437.

249. — — —.]—*VIRET v. VIRET*, No. 178, *ante*.

250. — — —.]—*SYNGE v. SYNGE*, No. 236, *ante*.

251. — — — Consent to marriage.]—*ALT v. ALT*, No. 234, *ante*.

252. — — —.]—An unattested paper signed by A., & by him handed to B. stated that as a mark of his esteem & great friendship he agreed to allow B. £500 a year, & that after his, A.'s, death he had in lieu thereof bequeathed to him £10,000. B. took this document to C., who thereupon consented to the marriage of her daughter with B., such consent having hitherto been withheld on the ground of B.'s want of means. The marriage took place, but no settlement was made by B. on his wife. A. died about six months after signing the paper, having paid B. the first quarter of the allowance of £500 a year. His will contained no provision whatever in favour of B.:—*Held:* assuming the consent of C. to her daughter's marriage with B. to have been given on the faith of the engagement contained in the paper, there was no such connection between A.'s promise or representation & the consent given by C. as to sustain a claim against A.'s estate.—*DASHWOOD v. JERMYN* (1879), 12 Ch. D. 776; 27 W. R. 868.

*Annotations:—**Refd. Alderson v. Maddison* (1880), 5 Ex. D. 293; *Ashwell & Nesbit v. Stanton* (1900), 16 T. L. J. 399.

253. How acceptance disproved—Positive dissent—Actual settlement before marriage.]—*LUDERS v. ANSTREY*, No. 242, *ante*.

SUB-SECT. 4.—SUBJECT-MATTER OF CONTRACT.

254. Necessity for reasonable certainty.]—*MOORHOUSE v. COLVIN*, No. 225, *ante*.

255. — — —.]—A father, on a treaty for his eldest son's marriage, promised by letter to settle a sum of money forthwith, & to recognise his son in common with the rest of his family in the future provisions of his will. The sum of money was settled, & the marriage took place on the

Sect. 2.—Informal contracts: Sub-sects. 4, 5 & 6.
Sect. 3: Sub-sect. 1, A.]

faith of the representation in the letter. By his will testator made a substantial provision for his son, but much less than equal to those made for his other children:—*Held*: the promise was so vague as to the amount, that consistently with it testator might have given all his property to a stranger, & the promise was satisfied by the provision in the will & codicil.—*KAY v. CROOK* (1857), 3 Sm. & G. 407; 29 L. T. O. S. 10; 5 W. R. 220; 65 E. R. 715; *sub nom.* *KAY v. CROOK*, *KAY v. KAY*, 3 Jur. N. S. 104.

Annotations.—Consd. Re Allen, Hincks v. Allen (1880), 49 L. J. Ch. 553. *Reid. Laver v. Fielder* (1862), 32 Beav. 1; *M'Askie v. M'Cay* (1868), 16 W. R. 1187.

256. —.].—*PROLE v. SOADY*, No. 232, *ante*.

257. —.].—*SYNGE v. SYNGE*, No. 236, *ante*.

SUB-SECT. 5.—ENFORCEMENT OF CONTRACT.

258. Estate for life to wife—Condition that she should settle her own lands—On husband & children—Protection of wife's life interest.]—Trust created, by which the wife was to have an estate for life, on condition she settle her own lands on her husband & her children by such a time, which she was willing to do, but not unless her estate for life was confirmed.—*WALLOP v. SHAFTSBURY (EARL)* (1873), *Cas. temp. Finch*, 67; 23 E. R. 36.

259. Against whom enforceable—Devisee.]—*RAMSDEN v. OLDFIELD & APPELYARD* (1720), 2 Eq. Cas. Abr. 390; 4 Vin. Abr. 453, pl. 5; 22 E. R. 333.

260. — Husband.]—*TYRRELL v. HOPE*, No. 103, *ante*.

261. — Assignees of husband.]—*TYRRELL v. HOPE*, No. 103, *ante*.

262. — Persons claiming as volunteers.]—*SYNGE v. SYNGE*, No. 236, *ante*.

263. By whom enforceable—Wife—For benefit of children.]—A promise to a woman about to marry of a sum of money "to be settled for her benefit previous to the marriage," if communicated to her intended husband, entitles her to call for a settlement for the benefit of her children; but if she dies without exercising that right, her husband, as her administrator, is entitled absolutely, to the exclusion of the issue of the marriage.—*LOVETT v. LOVETT* (1859), *John*, 118; 33 L. T. O. S. 255; 7 W. R. 333; 70 E. R. 362.

264. — Husband—Wife dying without exercising her right—Husband acting as administrator.]—*LOVETT v. LOVETT*, No. 263, *ante*.

265. Power of court to decree conveyance after death.]—*SYNGE v. SYNGE*, No. 236, *ante*.

266. Damages for non-performance.]—*SYNGE v. SYNGE*, No. 236, *ante*.

Liability of executor for promise by testator in consideration of marriage.]—*See EXECUTORS*, Vol. XXIV., pp. 616, 617, Nos. 6464–6473.

SUB-SECT. 6.—SETTLEMENT SUPERSEDING INFORMAL CONTRACT.

267. Verbal promise to settle—Insanity of promisor—Settlement in pursuance of promise—Subsequent ratification in lucid interval.]—Testator having left his son £10,000 by his will, expressed

an intention, verbally, of settling £10,000 stock on the son's marriage, & then became insane. The marriage took place, & the £10,000 stock was purchased out of testator's moneys, & settled accordingly. Testator then had a lucid interval, & on being told of the transaction did not disapprove thereof. He afterwards became irrecoverably lunatic:—*Held*: testator confirmed the settlement upon his son by not expressing any disapprobation during this lucid interval.—*BROWNE v. BROWNE* (1841), 11 L. J. Ch. 57; 5 Jur. 1053.

268. Effect of subsequent settlement—Previous promise by letter.]—(1) A father, prior to the marriage of his daughter, in a correspondence with her intended husband, stated that all his property would be equally divided amongst his children at his decease; but in a settlement executed prior to the marriage there was no expression of any such intention:—*Held*: all that was intended to be binding on the father was embodied in the settlement.

(2) "The deed of settlement raises a presumption that it constituted or expressed the whole of the marriage contract so far as property was concerned; a presumption capable certainly of being rebutted or displaced by evidence sufficient for the purpose" (*KNIGHT BRUCE, L.J.*).—*LOXLEY v. HEATH* (1860), 1 De G. F. & J. 489; 29 L. J. Ch. 313; 2 L. T. 44; 6 Jur. N. S. 436; 8 W. R. 314; 45 E. R. 451, L. C. & L. J.J.

Annotations.—As to (1) *Folld. Sands v. Soden* (1862), 31 L. J. Ch. 870; *Re Badcock, Kingdon v. Tagert* (1880), 17 Ch. D. 361.

269. —. —.].—Upon negotiations taking place previous to a marriage, the father of the lady wrote to the gentleman's father in these words: "When my eldest daughter married, I gave her £1,000 settled on herself, with a promise of sharing with my other daughters what I may be able hereafter to leave them; & this I can do for A.," the intended bride. A settlement was then prepared in the Scotch form, & executed, whereby the father assigned £1,000 to trustees for his daughter, & also all other means & estate whatsoever which she would be entitled to succeed to on his death. The father afterwards transferred a sum of £3,333 to the trustees of his daughter A.'s settlement, & he made his will, whereby he gave more property to his other daughters than to A. Upon a bill filed by the daughter & her husband claiming to be entitled to an equal share with the other children of testator:—*Held*: the settlement was a final instrument, & the estate of the father could not be bound by his letter, & the daughter had no right to come upon his assets for an equal share with his other children.—*SANDS v. SODEN* (1862), 31 L. J. Ch. 870; 10 W. R. 765.

270. —. —.].—The father of a lady wrote to her intended husband that he & his wife had determined to settle on their daughter £2,000, & that in addition she would have £2,000 on her mother's death, & at least as much on her father's death. Eleven months afterwards the marriage took place; & on that occasion a formal agreement for a settlement of £2,000 was executed, the letter not being in any way referred to. The mother died sixteen years & the father died twenty-five years after the marriage. The husband then claimed from the father's estate £4,000 under the promises contained in the letter:—*Held*: the letter had, under the circumstances, been superseded by the agreement for a settlement.—*Re BADCOCK, KINGDON v. TAGERT* (1880), 17 Ch. D. 361; 43 L. T. 688; 29 W. R. 278.

271. — Ante-nuptial agreement.]—A post-nuptial settlement of money recited an ante-nuptial contract. By the settlement, those children who survived their parents alone took, but by the contract, as recited, all the children took vested interests at their birth. The recital being the only proof of the contract:—*Held*: the ct. must act on the settlement.—*MIGNAM v. PARRY* (1862), 31 Beav. 211; 31 L. J. Ch. 819; 7 L. T. 88; 8 Jur. N. S. 634; 10 W. R. 812; 54 E. R. 1119.

SECT. 3.—ARTICLES.

SUB-SECT. 1.—LIMITATIONS INSERTED IN SETTLEMENTS.

A. In General.

272. Power of court to construe—Without directing settlement.]—To save expense, the ct. declared the construction of executory marriage arts. instead of directing a settlement to be executed in conformity therewith.—*BYAM v. BYAM* (1854), 19 Beav. 58; 24 L. J. Ch. 209; 1 Jur. N. S. 79; 3 W. R. 95; 52 E. R. 270.

Annotation:—Mentd. Re Smith, Eastick v. Smith, [1904] 1 Ch. 139.

273. Construction according to intention—Against actual words.]—*WARD v. BRADLEY* (1687), 2 Vern. 23; 23 E. R. 626.

274. — — —.]—*KENTISH v. NEWMAN*, No. 1104, *post*.

275. — — —.]—There is no other difference between marriage settlements or marriage provisions made upon a valuable consideration & voluntary assignments of terms, than that in the first case the ct. will sometimes make a stronger & more favourable construction to answer that intention, than they will in the other (*LORD HARDWICKE, C.*).—*HODGSON v. BUSSY* (1740), Barn. Ch. 195; 2 Atk. 89; 27 E. R. 610; *sub nom. HODSELL v. BUSSELL*, 9 Mod. Rep. 236, L. C.

Annotations:—Reid. Bagshaw v. Spencer (1743), 2 Atk. 570; *Read v. Snell* (1743), 2 Atk. 642; *Theebridge v. Kilburne* (1751), 2 Ves. Sen. 233; *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Ex p. Sterne* (1801), 6 Ves. 156; *Kinch v. Ward* (1825), 2 Sim. & St. 409; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276.

276. — — —.]—*TARGUS v. PUGET*, No. 84, *ante*.

277. — — —.]—The cases establish that in carrying marriage arts. into effect the ct. does not confine its view to the strict words of the arts. but seeks to effectuate the intention of the parties. Is this, then, such a settlement as the husband agreed to make? His contract was to settle the property on the wife & her children, & though it is to be settled in such way & manner as the trustees may think proper yet their discretion is not as to who shall be the objects of the settlement but as to the manner & way in which the persons who are marked out as the objects of it shall take. Now, by the settlement a great part of the property is in immediate advancement to the husband, & another considerable part of it he takes absolutely upon an event which has happened. It appears to me that such a settlement cannot be deemed

conformable to the arts. (*GIFFORD, M.R.*).—*WEBB v. KELLY* (1825), 3 L. J. O. S. Ch. 172.

278. — — —.]—*BRUDENELL v. ELWES* (1802), 7 Ves. 382; 32 E. R. 155, L. C.

Annotations:—Consd. Re Mortimer, Gray v. Gray, [1905] 2 Ch. 502. *Reid. Holmesdale v. West* (1866), L. R. 3 Eq. 474; *Eastwood v. Avison* (1869), L. R. 4 Exch. 141.

279. — — —.]—Devise of copyhold estates, the legal estate being outstanding, "To my son R. W. G., to be entailed upon his male heirs, & failing such to pass to his next brother, & so on from brother to brother, allowing £2,500 to be raised upon the estates for female children each." *Qu.*: whether a trust executed or executory; & if the latter, whether an estate tail in R. W. G. The point too doubtful to compel a purchaser to take the title. No difference between marriage articles & executory trusts in wills, except that the former afford *prima facie* evidence of intent, which does not belong to the latter.—*JERVOISE v. NORTHUMBERLAND (DUKE)* (1820), 1 Jac. & W. 559; 37 E. R. 481, L. C.

Annotations:—Reid. Stonor v. Curwen (1832), 5 Sim. 264; *Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Jones v. Price* (1841), 11 Sim. 557; *Pyrke v. Waddingham* (1852), 10 Hare, 1; *Collard v. Sampson* (1853), 4 De G. M. & G. 224; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540. *Mentd. Archer v. Slater* (1841), 11 Sim. 507; *Lincoln v. Arcedeckne* (1844), 1 Coll. 98.

280. — — —.]—*SACKVILLE-WEST v. HOLMESDALE (VISCOUNT)*, No. 31, *ante*.

281. Whether articles executory or final—Considered as minutes only.]—*BLANDFORD (MAR-CHIONESS) v. MARLBOROUGH (DOWAGER DUCHESS)*, No. 1288, *post*.

282. — — —.]—*RANDALL v. WILLIS*, No. 322, *post*.

283. — — —.]—*PHILLIPS v. JAMES*, No. 312, *post*.

284. — — — Unless rights of parties finally declared—Covenant to stand seised.]—In arts. under seal, after a recital of an intended marriage between B. & C., A., the father of B., "for the support & settlement in the world of the young couple, freely & clearly giveth & settlcth upon B. his lands from Michaelmas next" for life, remainder to the first son of the marriage, " & so on successively for every other son" with remainders over. This is a covenant to stand seised, & not an executory contract.—*DOE d. JONES v. WILLIAMS* (1833), 5 B. & Ad. 783; 2 Nev. & M. K. B. 602; 110 E. R. 980.

285. — — — Though future act remains to be done.]—Where an instrument, executed previously to a marriage under the name of "arts. of agreement," appears on the face of it finally to declare the intention of the parties, & does not point to a future instrument as necessary to complete the contract, it will not be treated as executory, though, in order to give full effect to its provisions, a future act may remain to be done after its execution.—*DE HAVILLAND v. DE SAUMAREZ, DE HAVILLAND v. BINGHAM* (1865), 14 W. R. 118, L. J.

Annotation:—Consd. Mayn v. Mayn (1867), L. R. 5 Eq. 150.

286. — — —.]—M., by voluntary arts. under seal, covenanted with his two daughters that he would at such time in his lifetime as he

PART III. SECT. 2, SUB-SECT. 6.

271 i. Effect of subsequent settlement—Ante-nuptial agreement.]—*WHITE v. ANDERSON* (1850), 1 I. Ch. R. 419.—*IR.*

271 ii. — — —.]—*BLAKE v. BLAKE*, [1913] 1 I. R. 343.—*IR.*

PART III. SECT. 3, SUB-SECT. 1.—A.

279 i. Construction according to in-

*tenion.]—*Articles are not to be construed in the same manner as formal dispositions, but the ct. has to consider what the contract is, which the parties intended to enter into; & where the words are short & defective, to presume what was the probable intent.—*TAGGART v. TAGGART* (1803), 1 Sch. & Lef. 84.—*IR.*

k. — Where words of limitation

omitted.]—Re PUBLIC WORKS COMRS., Ex p. RICE (1896), 30 I. L. T. 57.—*IR.*

281 i. Whether articles executory or final—Considered as minutes only.]—*BUSHELL v. BUSHELL* (1803), 1 Sch. & Lef. 94, 95.—*IR.*

281 ii. — — —.]—*FEGAN v. MEEGAN*, [1900] 2 I. R. 441.—*IR.*

Sect. 3.—Articles: Sub-sect. 1, A. & B. (a).]

thought fit, or, failing his so doing, his exors. should, within six months after his decease, settle certain securities specified in the schedule & standing in M.'s name, or other securities of equivalent value, upon certain trusts, as to one moiety in favour of his daughter I. & her issue, which trusts were stated at length, & as to the other moiety in favour of his daughter E. & her issue, which trusts were stated by reference to those of the other moiety. The arts. reserved a life interest to M., & provided that M., whilst sole trustee & the trustees or trustee for the time being, might sell any of the securities "for the time being constituting the settled fund," or such part as "might from time to time be subject to the intended trusts aforesaid," & invest the proceeds of sale as therein mentioned; also, that M. during his life, & after his death his daughter I., in the event of her marriage, might revoke the intended trusts of her moiety & resettle the same by way of marriage settlement giving a life interest to her husband; with a similar power in the case of E.'s moiety declared by reference to the other moiety; also, that after M.'s death the statutory power of appointing new trustees of either moiety should vest in I. & E. respectively; & defined the "settled fund" as meaning the securities specified in the schedule or the investments representing the same. The schedule specified the securities, & provided that any allotments of new shares or stocks in virtue thereof were not included in the settlement, but were to belong to M.:—*Held*: the arts. constituting a complete settlement which the ct. would enforce at the instance of the daughters.—*JOHNSTONE v. MAPPIN* (1891), 60 L. J. Ch. 241; 64 L. T. 48.

*B. Settlements of Realty.**(a) Estate for Life with Remainder to Heirs.*

See, now, Law of Property Act, 1925 (c. 20), s. 131.

287. General rule—Limitation construed as strict settlement—Exclusion of rule in Shelley's Case.—Upon a marriage, arts. were entered into, whereby it was agreed, that the wife's portion should be laid out in the purchasing of lands, which should be settled on the husband & wife for their lives, & the life of the longer liver of them, & after to the heirs of the body of the wife, by the husband to be begotten; yet the Master of the Rolls decreed the settlement to be to the first & other sons, etc., so as the husband & wife might not have power to bar the issue.—*JONES v. LANGHTON* (1698), 1 Eq. Cas. Abr. 392; 21 E. R. 1126.

Annotation:—*Refd.* *Jones v. Morgan* (1783), 1 Bro. C. C. 206.

288. — — — — —.]—Arts. to settle lands to one for life, remainder to the heirs of his body; in execution of the arts., equity shall go according to the intent, & not direct an estate tail according to the words.—*COLLINS v. PLUMMER* (1708), as reported in 1 P. Wms. 104; 24 E. R. 313, L. C.

Annotations:—*Refd.* *Cordwell v. Mackrill* (1766), Amb. 515; *Legard v. Hodges* (1792), 1 Ves. 477; *Hamilton v. Grant* (1815), 3 Dow. 33; *Worthing Corp'n. v. Heather*, [1906] 2 Ch. 532.

289. — — — — —.]—One devises his lands for payment of his debts, & then to A. for life, with power to make leases, etc., remainder to the heirs male of the body of A., though this be but

the devise of a trust, & executory, & expressed to be to A. for life, yet it is an estate tail in A., barrable by a fine & recovery. *Secus*, in case of marriage arts. to settle an estate on A. for life, remainder to the heirs male of his body; this being an agreement to do a future act, & in which the issue are particularly considered & looked upon as purchasers.—*BALE v. COLEMAN* (1711), 1 P. Wms. 142; 2 Eq. Cas. Abr. 309; 24 E. R. 330; *sub nom.* *BAILE v. COLEMAN*, 2 Vern. 670.

Annotations:—*Consd.* *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142. *Refd.* *Trevor v. Trevor* (1720), 1 P. Wms. 622; *Papillon v. Voice* (1728), Kel. W. 27; *Glenorchy v. Bosville* (1733), Cas. temp. Talb. 3; *Meure v. Meure* (1737), 2 Atk. 265; *Baskerville v. Baskerville* (1741), 2 Atk. 279; *Tollett v. Tollett* (1753), Amb. 177; *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Austen v. Taylor* (1759), 1 Eden, 361; *Jones v. Morgan* (1783), 1 Bro. C. C. 206; *Brydges v. Brydges*, *Phillips v. Brydges* (1796), 3 Ves. 120; *Blake v. Luxton* (1815), Coop. G. 179.

290. — — — — —.]—*NANDIKE v. WILKES* (1716), Gilb. Ch. 114; 25 E. R. 80.

291. — — — — —.]—In marriage arts. the children are considered as purchasers (*LORD HARDWICKE, C.*)—*SEALE v. SEALE* (1715), 1 P. Wms. 290; Gilb. Ch. 105; Prec. Ch. 421; 24 E. R. 393, L. C.

Annotations:—*Refd.* *Lyon v. Mitchell* (1816), 1 Madd. 467; *Paiker v. Bolton* (1835), 5 L. J. Ch. 98; *Haggard v. Neatby* (1854), Kay, 379.

292. — — — — —.]—(1) S. on his marriage covenants to settle lands to the use of himself for life, remainder to the heirs of his body by his intended wife; & to make a settlement accordingly within two years, or in default thereof, to stand seised to the same uses; though this is an estate-tail in S. at law, yet a ct. of equity will turn it into a strict settlement.

(2) If a defective settlement in any particular has been made, a second must be made till the uses in the arts. are well & effectually raised, for till then the covenant subsists.—*TREVOR v. TREVOR* (1719), 5 Bro. Parl. Cas. 122; 9 Mod. Rep. 161; 2 E. R. 574, H. L.

Annotations:—*As to* (1) *Consd.* *West v. Erisey* (1726), 1 Com. 412. *Refd.* *A.-G. v. Young* (1733), 2 Com. 423. *Generally, Refd.* *Bagshaw v. Spencer* (1743), 2 Atk. 570; *Senhouse v. Earle* (1755), Amb. 285; *Jones v. Morgan* (1783), 1 Bro. C. C. 206; *Turner v. Sargent* (1853), 17 Beav. 515; *Tatham v. Vernon* (1861), 9 W. R. 322; *D'Eyncourt v. Gregory* (1864), 3 New Rep. 628. *Mentd.* *Blackborough v. Davis* (1701), 1 P. Wms. 41.

293. — — — — —.]—The principle is clear, that in general, where in marriage arts. a settlement is agreed to be upon the parties & the heirs of their bodies, the settlement shall be made in strict settlement (*LORD HARDWICKE, C.*)—*GLANVILLE v. PAINE* (1740), Barn. Ch. 18; 2 Atk. 39; 27 E. R. 537, L. C.

294. — — — — —.]—Marriage arts. not decreed in strict settlement where by a difference in the penning the parties intended to leave part in the father's power.

Where by arts. part of an estate is limited to father for life, to wife for life, to first & every other son & daughters in tail; another part to father for life, & heirs male of his body by that wife; *LORD MACCLESFIELD* said, if that had been the sole limitation, he should without scruple decree in strict settlement according to the common rule; but where the parties had shown they knew the distinction when to put it out of the power of the father & when to leave it in his power, he would not vary the last limitation, decreeing to the father in tail as to the last, though not as to the first

PART III. SECT. 3, SUB-SECT. 1.—B. (a).

287 i. General rule—Limitation construed as strict settlement—Exclusion of rule in Shelley's Case.—*BRENNAN v.*

FITZMAURICE (1839), 2 I. Eq. R. 113.—*IR.*

287 ii. — — — — —.]—*ROCHFORD v. FITZMAURICE* (1842), 4 I. Eq. R. 375; 1 Con. & Law. 158; 2 Dr. &

War. 1.—*IR.*

1. Exceptions to rule—Estate tail to eldest son in possession with remainder in fee.—*DILLON v. BLAKE* (1864), 16 I. Ch. R. 24.—*IR.*

(LORD HARDWICKE, C.).—*HOWEL v. HOWEL* (1751), 2 Ves. Sen. 358; 28 E. R. 220, L. C.

Annotation.—*Refd. Holmesdale v. West* (1866), L. R. 3 Eq. 474.

295. ————.]—On marriage, the husband executes a deed poll whereby he purports to settle all his real & personal estate on the wife & the heirs of her body by him begotten, obliging her to give each of her children by him begotten £1,000 apiece at twenty-one & to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children as tenants in common. These marriage arts. so far tied up the property of the settlor, that a real estate purchased by him in his lifetime with part of his personal estate, shall be considered as personal estate & be disposed of accordingly.—*LOWTHER v. WESTMORELAND (EARL)* (1784), 1 Cox, Eq. Cas. 64; 29 E. R. 1064.

296. ————.]—No distinction between executory trusts by marriage arts. & will, except the inference from the object of the former, to provide for the issue, that the father should not have the power to defeat it. Therefore estate for life with remainder to the heirs of the body a strict settlement in the one case; an estate tail in the other, unless clearly not meant in their technical sense.—*BLACKBURN v. STABLES* (1814), 2 Ves. & B. 367; 35 E. R. 385.

Annotations.—*Consd. Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543. *Refd. Marshall v. Bousfield* (1817), 2 Madd. 166; *Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Shelton v. Watson* (1849), 18 L. J. Ch. 223; *Holloway v. Collier* (1853), 1 W. R. 266; *Re Wilmer's Trusts*, *Moore v. Wingfield*, [1903] 1 Ch. 874; *Silcocks v. Silcocks*, [1916] 2 Ch. 161.

297. ————.]—By marriage arts., a husband covenanted, in consideration of his wife's portion, to settle an estate to his own use, & after his decease to the use of his heirs on the body of his intended wife, & for want of such issue to his own right heirs for ever. The articles did not express any further intention of providing for the children of the marriage, & made a provision for the intended wife in lieu of dower. No settlement was executed; & the husband mortgaged the estate, & at the same time delivered the arts. to the mtgee.:—*Held*: on his death, under the arts., he was entitled to a life estate only, & the mtgee. took with notice, & could not therefore hold as against the issue of the marriage.—*DAVIES v. DAVIES* (1841), 4 Beav. 54; 49 E. R. 258.

298. ————.]—*LAMBERT v. PEYTON*, No. 316, *post*.

299. Application of rule—Whether applied in favour of daughter.]—Arts. on marriage to settle lands on husband & wife for their lives, remainder to the heirs male of the body of the husband by the wife, remainder to the heirs male of the body of the husband by any other wife, remainder to the heirs "female" of the body of the husband by this wife. A settlement is made before the marriage, & said to be pursuant to the arts., whereby the lands are limited to the husband for life sans waste, & with power to make leases, remainder to the first, etc., son of the marriage in tail male, remainder to the first, etc., son of any other marriage in tail male, remainder to the "heirs of the body" of the husband. There are issue two daughters, & the husband suffers a recovery, & devises the premises to his sister; the daughters may in equity compel the devisee to convey the premises to them.—*WEST v. ERRISSEY* (1727), 2 P. Wms. 349; 1 Bro. Parl. Cas. 225; 1 Com. 412; 24 E. R. 760, H. L.

Annotations.—*Appld. Glanville v. Paine* (1740), Barn. Ch. 13. *Consd. Roberts v. Kingsly* (1749), 1 Ves. Sen. 238; *Highway v. Banner* (1785), 1 Bro. C. C. 584; *Randall v. J.*—VOL. XL.

Willis (1800), 5 Ves. 262. *Refd. Price v. Powell* (1729), 1 Barn. K. B. 201; *Legg v. Goldwire* (1736), Cas. temp. Talb. 20; *Streetfield v. Streetfield* (1736), Cas. temp. Talb. 176; *Hart v. Middlehurst* (1743), 3 Atk. 371; *Warrick v. Warrick* (1745), 3 Atk. 291; *Partyn v. Roberts* (1756), Amb. 315; *Cordwell v. Mackrill* (1766), Amb. 515; *Twisden v. Lock* (1768), Amb. 663; *Jones v. Morgan* (1783), 1 Bro. C. C. 206; *Bold v. Hutchinson* (1855), 5 De G. M. & G. 558; *Eastwood v. Lockwood* (1867), L. R. 3 Eq. 487; *Cogan v. Duffield* (1876), 34 L. T. 593; *Re Martin, Smith v. Martin* (1885), 54 L. J. Ch. 1071.

300. ————.]—Arts. on marriage to settle lands on husband & wife for their lives, remainder to the first, etc., son of the marriage, remainder to the heirs male of the body of the husband by any wife, remainder to the heirs of the body of the husband by the first wife, remainder to the husband in fee, with provisions for the daughters of the first marriage, if no son; husband has one daughter by the first wife, suffers a recovery, & marries a second wife, & takes notice of the first marriage arts. in his second marriage settlement; the daughter by the first marriage barred by this recovery. Diversity betwixt a limitation by marriage arts. to the heirs of the body of the man & the heirs female of the body of the man; & sons more favoured than daughters.—*POWELL v. PRICE* (1729), 2 P. Wms. 535; 24 E. R. 850; *sub nom. PRICE v. POWELL*, 1 Barn. K. B. 201.

301. ————.]—(1) By settlement on the marriage of H. A. with J. C. in case there was no issue male, & there should be daughters living at the death of the father, who should attain twenty-one or be married, then such daughters should have £2,000 apiece; there were no sons, but only three daughters; deft., who was one, married A. D. & previous to his marriage, covenanted to assign with his wife's consent £500 to trustees, in trust after the death of A. D. & deft., to pay it amongst the children of the bodies of deft. & A. D. & that he should after the marriage assign to the trustees all the money & securities for it then due & belonging to deft. H. A. died in 1744. A. D. in 1745, intestate, to whom deft. administered & received the £2,000. The children, who are a son & daughter, have a right to the portion, & decreed to be secured for their benefit.

The precedent part of the arts. include a small part of the real estate, the new plffs. being heirs of the body; that estate certainly is in the power of the mother in point of law, & vests in the mother in tail; but in this ct. being under arts. is to be carried into strict settlement to the wife for life, to the first & other son in tail, & in default of issue male to daughters (*LORD HARDWICKE, C.*).

(2) Covenant by husband to assign a contingent portion of the wife to uses of the marriage. The right of calling for it vests in husband, who dies without doing so: the wife bound by this covenant.—*BASH v. DALWAY* (1747), 3 Atk. 530; 26 E. R. 1106; *sub nom. BUSH v. DALWAY*, 1 Ves. Sen. 19, L. C.

Annotations.—*As to* (2) *Consd. Honner v. Morton* (1828), 3 Russ. 65. *Refd. Ainslie v. Medlicott* (1803), 9 Ves. 13.

302. ————Against purchaser for value with notice—Articles not produced.]—Where arts. were entered into previous to marriage, for settling by the wife's father lands to the use of the husband & wife for their lives, & the life of the survivor, & after the death of the survivor, to the use of the heirs of the body of the husband on the wife, remainder over; & a settlement was made after the marriage reciting the arts., & said to be made in pursuance of the marriage; upon a bill brought by a son of the marriage, the ct. refused to decree the arts. to be carried into execution by a strict settlement against a purchaser for a valuable consideration, who had notice of them; on the

Sect. 3.—Articles: Sub-sect. 1, B. (a), (b) & (c).]

ground of the arts. not being produced by which alone the ct. could alter the settlement.—**CORDEWELL v. MACKRILL** (1766), 2 Eden, 344; Amb. 515; 28 E. R. 930, L. C.

Annotation :—**Refd.** *Parker v. Brooke* (1804), 9 Ves. 583.

303. — Against mortgagee with notice.]—DAVIES v. DAVIES, No. 297, *ante*.

304. — Estate tail to husband—Provision restraining waste.]—GRIFFITH v. BUCKLE (1686), 2 Vern. 13; 23 E. R. 620.

305. Exceptions to rule—Power to bar not in first taker alone.]—WHATELEY v. KEMP (1734), cited in 2 Ves. Sen. at p. 358; 28 E. R. 230.

Annotation :—**Refd.** *Holmesdale v. West* (1866), L. R. 3 Eq. 474.

306. — —.]—HOWEL v. HOWEL, No. 294, *ante*.

307. — —.]—Settlement on marriage, to the husband for life, remainders to wife for life, remainder to the heirs of their bodies, a strict settlement, but not so where the power of barring the entail is given to both.]—HIGHWAY v. BANNER (1785), 1 Bro. C. C. 584; 28 E. R. 1312.

Annotations :—**Consd.** *Brudenell v. Elwes* (1802), 7 Ves. 382; **Refd.** *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543.

308. — —.]—BRUDENELL v. ELWES (1802), 7 Ves. 382; 32 E. R. 155, L. C.

Annotations :—**Refd.** *Holmesdale v. West* (1866), L. R. 3 Eq. 474; *Eastwood v. Avison* (1869), L. R. 4 Exch. 141; *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502.

309. — Articles executed by legal settlement.]—By marriage settlement, purporting to be made in pursuance of arts. recited in it, an estate was conveyed to the husband & wife, & the heirs of their bodies:—Held: they thereby became tenants in tail special, & a ct. of law could not construe the deed as making them tenants for life with remainder to their issue in tail, even supposing that such be the construction to be put upon the articles by a ct. of equity.—DOE d. DANIELL v. WOODROFFE** (1842), 10 M. & W. 608; 12 L. J. Ex. 147; 152 E. R. 614; *on appeal*, *sub nom.* **WOODROFFE v. DOE d. DANIELL** (1846), 15 M. & W. 769, Ex. Ch.; *sub nom.* **DOE d. DANIEL v. WOODROFFE** (1849), 2 H. L. Cas. 811, H. L.**

Annotations :—**Mentd.** *Tarte v. Darby* (1846), 15 L. J. Ex. 328; *Spotswood v. Barrow* (1850), 5 Exch. 110; *Cowan v. Milbourn* (1867), L. R. 2 Exch. 230.

Beneficial interests in realty.]—See Part IX., post.

(b) *Limitation in favour of Issue.*

See, now, Law of Property Act, 1925 (c. 20), s. 131.

310. When construed as strict settlement—Estate for life with remainder to issue.]—This ct. will carry into strict settlement, an estate limited to a husband for life, to the wife for life, remainder to the issue of their two bodies.—VILLIERS v. VILLIERS** (1740), 2 Atk. 71; Barn. Ch. 307; 2 Eq. Cas. Abr. 305; 26 E. R. 444, L. C.**

Annotations :—**Refd.** *Tothill v. Pitt* (1770), 2 Dick. 431. **Mentd.** *Munn v. Godbold* (1825), 3 Bing. 292.

311. — —.]—By marriage arts., it was agreed, that £3,000 should be laid out in land, & settled on the husband & wife for their lives,

remainder to such issue, etc., as they should appoint; & in default of appointment, to the issue of their bodies. On the death of the husband without appointment:—**Held**: the land should be settled in strict settlement, viz. on wife for life, remainder to the first & other sons in tail.—**DOD v. DOD** (1755), Amb. 274; 27 E. R. 184.

Annotations :—**Apld.** *Phillips v. James* (1865), 3 De G. J. & Sm. 72. **Consd.** *Grier v. Grier* (1872), L. R. 5 H. L. 688.

312. — —.]—By arts. executed in contemplation of a marriage, the father of the intended husband, in consideration of a sum of money to be paid by his son, covenanted to execute a conveyance of certain real estates to trustees for the use of his son for life, with remainder to the intended wife for life or during widowhood, with remainder “to the use & benefit of the issue of the intended marriage, their heirs & assigns for ever.” No conveyance was ever executed; the husband succeeded to the estate, & upon the death of himself & his wife there survived a son & two daughters, all of whom had children:—Held**: the arts., being executory, were not to be construed in the same manner as formal dispositions, but must be treated as short notes or instructions upon which a settlement would be prepared; the ct. would, therefore, consider what was the contract which the parties intended to enter into when the words were insufficient or defective; & upon the words in this case the sons of the marriage took successive estates tail, & the daughters of the marriage estates in common in tail with cross-remainders between them in tail.—**PHILLIPS v. JAMES** (1865), 3 De G. J. & Sm. 72; 12 L. T. 685; 11 Jur. N. S. 600; 13 W. R. 934; 46 E. R. 565, L. J.**

313. — Covenant to settle on issue.]—A covenant in marriage arts. to settle an estate, after the payment of an annuity to the intended wife, “upon his issue” by the intended wife, must be construed as a covenant for strict settlement, & excludes the husband from creating charges in favour of younger children.

By arts. of marriage it was recited that the intended husband had received a sum of £600 from J., his intended wife, & he covenanted to settle upon her an annuity of £60 for her life, to commence from his death, charged upon his lands, with the ordinary powers of distress & entry, & to settle the residue & remainder of his lands “upon his issue by” J., his intended wife. There were several children of the marriage. Some years after the marriage he executed a deed by which he charged on his lands various sums of money in favour of younger children, devising the lands themselves to his eldest son, & his other sons successively in tail male:—**Held**: this deed creating these charges was void, for the covenant in the arts. gave him no power to charge the lands for the benefit of the younger children, & must be interpreted to mean that he would settle the lands in the ordinary form of strict settlement.—**GRIER v. GRIER** (1872), L. R. 5 H. L. 688, H. L.

314. Right of children to take as tenants in common.]—By a deed it was, amongst other things, agreed & declared that A., his exors., administrators, & assigns, should raise out of

PART III. SECT. 3, SUB-SECT. 1.—B. (b).

310 i. When construed as strict settlement—Estate for life with remainder to issue.]—A., having seven daughters & no sons, by articles entered into on the marriage of his daughter B., covenanted

to secure to her & her children by C., her intended husband, a share of his real estate equal to that of any other of his daughters. A. died without having made any settlement:—**Held**: B. was entitled to an estate for life, remainder to her first & other sons in tail, remainder to her daughters in tail.

—**HAMILTON v. CATHCART** (1777), Wallis by Lyne, 282.—**IR.**

314 i. Right of children to take as tenants in common.]—On articles previous to the marriage of W. with H. the father of W. “bound the whole of the farm of, etc. as a dowry or marriage portion to his son W. along

certain hereditaments £800, & should invest same in the names of trustees at interest upon govt. or real securities "upon trusts to be declared for the benefit of J., for her life, with remainder to her children, & as to J. to & for her separate use, & with all the powers for changing the security, & for maintenance, & other powers & trusts which are usually inserted in a money settlement of the like nature." No subsequent declaration of trust of the £800 was ever made:—*Held*: the deed was executory only, & the settlement so directed ought to have limited the £800, after the death of J., amongst her children as tenants in common, & not as joint tenants.—*MAYN v. MAYN* (1867), L. R. 5 Eq. 150; 17 L. T. 439.

315. Meaning of "issue"—Includes female.]—The bill was brought by the daughter & only child of the first marriage of J. for a specific performance of arts. previous thereto, insisting she ought to be tenant in tail of the lands therein mentioned. Issue in the arts. means female as well as male, & consequently plff. is entitled to have a settlement of these lands in tail, & when deft., the son of the second marriage, comes of age, he must convey to her.—*HART v. MIDDLEHURST* (1746), 3 Atk. 371; 26 E. R. 1014, L. C.

Annotations:—*Consd.* Phillips v. James (1865), 2 Drew. & Sm. 404; Grier v. Grier (1872), L. R. 5 H. L. 688. *Mentd.* Payne v. Mortimer (1859), 4 De G. & J. 447.

316. —"Issue male"—Not son of daughter.]—In marriage arts. in 1802, which were to be, but never were, followed by a formal settlement, two separate estates, one belonging to the intended husband, the other to the intended wife, were included. Both were vested in trustees, in trust to permit the husband & wife to receive the profits during life, & as to her portion, should she survive her husband, "to such of her issue male by her said husband as she may, by her last will & testament, notwithstanding her coverture, direct, limit, or appoint"; & in case of no appointment, to the "issue male" of the husband & wife; & in case of no issue male, then to go amongst her daughters: " & in case of failure of issue male or female then to go to such person or persons" as she should appoint. There were two children of the marriage, a son & a daughter. The wife survived the husband many years, & made a will, which, reciting the power reserved to her by the arts., appointed her property to her grandson, the son of her daughter, describing him as "issue male" of her marriage:—*Held*: the arts. were executory; & if in accordance with them a settlement had been executed, the estate would have been put in strict settlement; & the power reserved by them was not well exercised; the grandson, the son of a daughter, not coming within the description of "issue male" therein contained.—*LAMBERT v. PEYTON* (1860), 8 H. L. Cas. 1; 11 E. R. 325, H. L.

Beneficial interests in realty.]—See Part VIII., post.

(c) Other Cases.

317. Provision for covenant to enjoy free from incumbrances—Contingent incumbrance.]—VANE v. BARNARD (LORD) (1708), Gilb. Ch. 6; 25 E. R. 5, L. C.

with R. the one-half of said farm to be the right title & interest of the issue whether son or daughter, if begotten on the body of R. by W." The issue take as tenants in common.—*TAGGART v. TAGGART* (1803), 1 Sch. & Lef. 84.—*IR.*

315 i. Meaning of "issue"—Includes females.]—It is only where the contract has expressed an intention to

provide for issue generally, that females are included in the provision.—*MACGUIRE v. SCULLY* (1829), Beat. 370.—*IR.*

m. — Children.]—CAMPBELL v. SANDYS (1803), 1 Sch. & Lef. 281.—*IR.*

n. —]—THOMPSON v. SIMPSON (1841), 1 Dr. & War. 459.—*IR.*

318. Reservation by settlor of power to charge—Parties without notice of existing incumbrances—Priorities.]—A. by arts. previous to the marriage of his daughter agrees to settle several real estates to certain uses, but reserves to himself a power of charging them with £30,000 to pay his debts. He had previously mortgaged those estates for £27,000, but it did not appear that that fact was disclosed to all the parties at the time of executing the arts. On a question, whether the £30,000 should be raised over & above the prior incumbrances:—*Held*: those prior incumbrances should be paid out of the £30,000; & A. should have the residue, after paying the costs of the suit.—*INCHQUIN (EARL) v. FITZMAURICE* (1785), 5 Bro. Parl. Cas. 166; 2 E. R. 603, H. L.; *varying S. C. sub nom. SHELburne (COUNTESS) v. INCHQUIN (EARL)* (1784), 1 Bro. C. C. 338, L. C.

Annotations:—*Mentd.* Townshend v. Staughton (1801), 6 Ves. 328; Fowler v. Fowler (1859), 4 De G. & J. 250; Wharram v. Wharram (1864), 3 Sw. & Tr. 301; Richardson v. Smith (1870), 39 L. J. Ch. 877; Fowler v. Sugden (1916), 115 L. T. 51; Craddock v. Hunt (1923), 92 L. J. Ch. 378.

319. Construction according to intention—Provision for remainder to sons in tail—Intention to settle in tail male.]—(1) Arts. executed before a marriage, having stipulated that estates should be limited to the first & other sons of the marriage in tail, but it being proved that the intention was to limit the estates to the first & other sons in tail male, the ct., after the marriage had taken place, directed that, in the settlement to be executed in pursuance of the arts., limitations to the first & other sons in tail male should be inserted.

(2) A power was reserved, in arts. before marriage, to husband & wife to alter & vary the provisions & terms of the arts. in such manner as to them should seem fit, previous to the execution of the settlement:—*Held*: not to authorise the insertion in the settlement of a power enabling the husband to jointure a future wife, or to charge portions for younger children of a future marriage.

(3) A stipulation was made in arts. before marriage that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, & conditions usually contained in marriage settlements made in England:—*Held*: to authorise the insertion of a power of sale & exchange under which lands in England might be taken in exchange for lands in Ireland.

(4) A reference was made to the master to inquire whether certain proposed powers of leasing were usual in that part of Ireland in which the estates were situated, & whether any circumstances connected with the property rendered such powers expedient, & to the interest of all parties, with liberty to state special circumstances.—*BEDFORD (DUKE) v. ABERCORN (MARQUESS)* (1836), 1 My. & Cr. 312; 5 L. J. Ch. 230; 40 E. R. 394, L. C.

Annotations:—*As to (1) Refd.* Simpson v. Simpson (1837), 1 Jur. 688; Thompson v. Whitmore (1860), 1 John. & H. 268; Cogan v. Duffield (1876), 34 L. T. 593. *As to (2) Distd.* Mason v. Mason (1870), 19 W. L. 741. *Generally, Mentd.* Russell v. Jackson (1851), 9 Hare, 387.

Beneficial interests in realty.]—See Part IX., post.

o. —]—ROCHE v. ROCHE (1845), 2 Jo. & Lat. 561.—*IR.*

p. —]—Re DENIS' TRUSTS (1875), 10 I. R. Eq. 81.—*IR.*

q. — Not extended to children of predeceasing child.]—CATTANACH'S TRUSTEES v. CATTANACH (1901), 4 F. (Ct. of Sess.) 205; 39 Sc. L. R. 151; 9 S. L. T. 281.—*SCOT.*

Sect. 3.—Articles: Sub-sect. 1, C. & D.; sub-sect. 2, A.]

C. Settlements of Leaseholds.

320. Covenant to settle leaseholds.—To correspond with settlement of realty.—Provision by court restricting absolute vesting.]—Covenant in a marriage settlement to settle leasehold estates in trust for such persons & such or the like estates, ends, intents & purposes, as far as the law would allow, as declared concerning real estates limited to the first & other sons in tail male, with several remainders, executed by giving the absolute interest in the leasehold estates to the first tenant in tail in possession, having attained the age of twenty-one.—*LINCOLN (COUNTS) v. NEWCASTLE (DUKE)* (1806), 12 Ves. 218; 33 E. R. 84, H. L.; *varying S. C. sub nom. NEWCASTLE (DUKE) v. LINCOLN (COUNTS)* (1797), 3 Ves. 387.

Annotations:—Consd. Ware v. Polhill (1805), 11 Ves. 257; *Banks v. Le Despencer* (1840), 10 Sim. 576; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Scarsdale v. Curzon* (1860), 1 John. & H. 40. *Refd. Carr v. Erroll* (1808), 14 Ves. 478; *Burrell v. Crutchley* (1809), 15 Ves. 544; *Jervoise v. Nothumberland* (1820), 1 Jac. & W. 559; *Tollemache v. Coventry* (1834), 8 Bl. N. S. 547; *Ibbetson v. Ibbetson* (1840), 5 My. & Cr. 26; *Morgan v. Rowland* (1848), 13 L. T. O. S. 4; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Cox v. Sutton* (1856), 25 L. J. Ch. 845; *Holmesdale v. West* (1866), L. R. 3 Eq. 474; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540; *Martelli v. Holloway* (1872), L. R. 5 H. L. 532; *Re Harcourt, Portman v. Portman*, [1921] 2 Ch. 491. *Mentd. Audsley v. Horn* (1859), 1 De G. F. & J. 226.

Articles operating as assignment.]—See LANDLORD & TENANT, Vol. XXXI., p. 396, No. 5420.

Beneficial interests in personalty.]—See Part VIII., post.

D. Settlements of Personality.

321. Usual form of settlement.—Of wife's personal estate.]—Ante-nuptial arts. were signed which provided for the wife's personal estate being vested in trustees, "the trusts of the income being for the benefit of the husband & wife during their lives, & the trusts of the capital being for & amongst the children according to the appointment of the husband & wife, or the survivor of them; & in default of appointment, to the children equally; & in the event of there being no children, & of the husband being the survivor, the trust property to be at his absolute disposal." After the marriage a settlement was executed which limited the income to the husband & wife during their joint lives, & to the survivor of them during his or her life, & then gave the capital to the children absolutely as tenants in common; but if there was no child, & the husband survived the wife, then to the husband. There was only one child of the marriage, & he died at the age of six months in the lifetime of the parents. The husband died in the lifetime of the wife:—*Held*: the capital of the fund & the arrears of income at the death of the husband belonged to the wife, for the ct. would have carried the arts. into effect by giving the wife the first life estate to her separate use, & by making the shares of sons contingent on their attaining twenty-one & of daughters on their attaining twenty-one or marrying, or by inserting clauses of survivorship & accruer on the death of sons under twenty-one, & of daughters under that age & unmarried, so that the husband would have had no title as next of

kin of his deceased infant child, & the settlement must be rectified accordingly.—*COGAN v. DUFFIELD* (1876), 2 Ch. D. 44; 45 L. J. Ch. 307; 34 L. T. 593; 24 W. R. 905, C. A.

Annotation:—Apld. Re Gowan, Gowan v. Gowan (1880), 17 Ch. D. 778.

322. Provision for husband to settle personal estate—Real estate purchased with personal.—To be construed as personal.]—Arts. before marriage for settling real estates of the husband & also all & singular his personal estate of what nature or kind soever; a proper execution would be by a covenant, that real estate, that should be purchased with the personal, should with respect to the objects of the settlement be considered personal; the settlement therefore, made after marriage, containing no such covenant, & being in other respects a defective execution, real estates purchased by the husband, according to the evidence in order to defeat the right of his wife, were decreed to be conveyed by his devisee according to the arts.

If a formal deed was executed before marriage, containing such a covenant, it is impossible, that I could do anything with it. But an art. is only the head & minute of an agreement, not to be followed literally (LORD LOUGHBOROUGH, C.).—*RANDALL v. WILLIS* (1800), 5 Ves. 262; 31 E. R. 577.

Annotations:—Distd. Lewis v. Madocks (1803), 8 Ves. 150. *Refd. Logan v. Wienholt* (1833), 7 Bl. N. S. 1; *Phillips v. James* (1865), 3 De G. J. & Sm. 72; *Cogan v. Duffield* (1876), 2 Ch. D. 44; *Re Clarke, Coombe v. Carter* (1887), 35 Ch. D. 109; *Churston v. Buller* (1897), 77 L. T. 45.

323. Provision for limitation to wife & husband successively for life—Remainder to children—Remainder over to stranger—Insertion of power of appointment to wife in default of children.]—Where marriage articles provide *simpliciter* for the limitation of the wife's property to herself & her husband successively for life, with remainder to their children, with remainder over to strangers, the ct. would *primâ facie* order the insertion in the settlement of a power of appointment to the wife in default of children; & it would be the duty of counsel preparing a settlement under similar instructions to insert such a power, or, at least, to call the attention of the parties to the propriety of introducing it.—*HARBIDGE v. WOGAN* (1846), 5 Hare, 258; 15 L. J. Ch. 281; 10 Jur. 703; 67 E. R. 909.

Annotations:—Refd. Welman v. Welman (1880), 15 Ch. D. 570. *Mentd. Henry v. Armstrong* (1881), 30 W. R. 472.

324. Provision for power of wife to dispose "as if still unmarried"—Life estate with power of appointment—Remainder to next-of-kin in default of appointment.]—A father by his will settled stock upon his daughter for life, remainder to her issue, subject to a life interest in any husband who might survive her. She married & had one only child, a son, & her husband died. When she had attained eighty years of age she married a gentleman, a member of the Irish & English bar, of about fifty-four years of age. She had accumulated much personal property, the savings of her income. Before the marriage, which it was agreed should be kept secret from the son, a very voluminous & long-continued correspondence took place between the lady & gentleman, in which she insisted that her property should be settled so that she should have the command of it "as if still

PART III. SECT. 3, SUB-SECT. 1.—D.

r. Provision for survivor of husband & wife to leave fraction to issue if any—Whether wife bound to hand over fraction immediately to children.]—*M'DONNELL v. M'DONNELL* (1843), 2 Con. & Law. 481.—*IR.*

t. Provision for power to husband to appoint to younger children of marriage—Appointment among children of first & second marriages—Fund to be equally divided between the two classes.]—*ALLEYNE v. ALLEYN* (1845), 8 I. Eq. R. 493; 2 Jo. & Lat. 544.—*IR.*

a. Limitation to husband & wife &

children of previous & intended marriage—Husband & wife take as joint tenants—Unborn children to be admitted as & when necessary.]—*O'HEA v. SLATTERY*, [1895] 1 I. R. 7.—*IR.*

b. Provision for power of appointment by survivor of husband & wife

unmarried," he being entitled, as husband, to a life interest, if surviving, in the stock bequeathed by the father's will. The intended husband drew two documents, in very obscure language, in one of which he bound himself to consent to her "disposition of a sum of £2,000 out of whatever funds or dividends she" should be "entitled to, be possessed of, or have legally acquired at the time of her decease." The marriage took place, & was kept secret from the son until the wife's decease, she continuing the use of her vidual name, which took place in about six months, without her having made any disposition of her savings, leaving her son sole next-of-kin. After her decease the husband filed a bill against the trustee of the fund settled by the father of the lady for payment of the life interest, & the son filed a bill against the husband praying, amongst other things, a declaration that, as next-of-kin, he was entitled to the savings of his mother's income. The validity of the marriage was conclusively established, before the final hearing of the two suits, by a ct. of competent jurisdiction:—*Held*: the correspondence showed that the lady implicitly relied upon the skill & integrity of the intended husband to prepare instruments to carry her wishes into effect; those wishes were proved to be that her property should be so settled as that she should dispose of it as if unmarried; the ct. would have given her a life estate, with power of appointment, & in default for her next-of-kin, to the exclusion of the husband, & no such settlement having been prepared, as it was the duty of the husband to have prepared, the husband could take no more than the life interest under his wife's father's will, & the son was entitled to the whole of his mother's savings.—*CORLEY v. STAFFORD* (LORD), *CAMPBELL v. CORLEY* (1857), 1 De G. & J. 238; 26 L. J. Ch. 865; 30 L. T. O. S. 77; 3 Jur. N. S. 1225; 5 W. R. 616; 44 E. R. 714, L. J.

Annotations:—*Refd.* *Hastie v. Hastie* (1875), 23 W. R. 242, *Clark v. Girdwood* (1877), 7 Ch. D. 9.

325. Provision for life interest to wife—"Free from marital control & liability"—*Restraint on anticipation not to be inserted.*—Where arts. for a settlement directed the property to be conveyed on trust to pay the income to the wife, or such person as she should appoint, during her life, for her own absolute use & benefit, free from marital control & liability:—*Held*: in the settlement a restraint against anticipation should not be inserted.—*SYMONDS v. WILKES* (1865), 12 L. T. 598; 11 Jur. N. S. 659; 13 W. R. 1026, L. J.

Whether settlor a trustee within Statute of Limitations.—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 501, No. 1627.

SUB-SECT. 2.—POWERS AND PROVISIONS.

A. Insertion of Usual Powers and Provisions.

326. What may be inserted in settlement—All powers tending to better enjoyment of estate.—By marriage arts. it was agreed that estates should be settled in strict settlement, & that there should be contained in the settlement powers to the husband to charge the estates, by way of mtge., with a certain sum, & also to charge the estates with another sum for younger children, & to create terms for raising those sums, & likewise all other powers, etc., usually inserted in settlements of the like

nature, & which should be proper for effecting any of the purposes aforesaid:—*Held*: a power of sale & exchange might be introduced into the settlement.

My opinion . . . is that the person who prepared these arts., intended that any usual power, provision, clause, covenant or agreement that would tend to the better enjoyment of the estates, should be inserted in the settlement, or, in other words that the clause in question should be taken as if it stood thus: " & likewise all other powers, provisions, clauses, covenants & agreements which shall be proper for effectuating any of the purposes aforesaid, & which are usually inserted in settlements of the like nature," which would include everything (*SHADWELL, V.-C.*).—*HILL v. HILL* (1834), 6 Sim. 136; 58 E. R. 545.

327. What are usual powers—**Power of sale & exchange.**—Powers of sale & exchange, inserted in a settlement under a clause in arts. for all usual powers.

Powers of selling, exchanging & investing in new purchases, usual.—*PEAKE v. PENNINGTON* (1813), 2 Ves. & B. 311; 35 E. R. 337.

Annotations:—*Consd.* *Brewster v. Angell* (1820), 1 Jac. & W. 625. *Apld.* *Wise v. Piper* (1880), 13 Ch. D. 818. *Refd.* *Horne v. Barton* (1822), Jac. 437.

328. ————.—*HILL v. HILL*, No. 326, *ante*.

329. ————.—*BEDFORD (DUKE) v. ABERCORN* (MARQUESS), No. 319, *ante*.

330. ————.—**Power to vary investments.**—*PEAKE v. PENNINGTON*, No. 327, *ante*.

331. ————.—A marriage contract, in the Portuguese language, between British subjects resident in Lisbon, expressed that the parties were desirous that it should be regulated, made binding & carried into full & complete effect according to the laws of England. Some years afterwards the parties, who were then resident in England, filed a bill, praying that a settlement in strict conformity with the contract & containing all the covenants, clauses, powers, etc., usually inserted in marriage settlements & deemed necessary, & at the same time, consistent with the substance of the contract, might be executed under the decree of the ct.:—*Held*: a power to appoint new trustees as often as should be necessary, & notwithstanding the contract provided that the settled moneys should be invested, as they had been, in the English & French funds, a power to change those securities for any other of the govt. stocks or funds of England or France or for real securities in Great Britain or Ireland, were proper powers to be inserted in the settlement.—*SAMPAYO v. GOULD* (1842), 12 Sim. 426; 11 L. J. Ch. 121; 59 E. R. 1196.

332. ————.—**Power of leasing.**—*BEDFORD (DUKE) v. ABERCORN* (MARQUESS), No. 319, *ante*.

333. ————.—**Not power to jointure future wife.**—*BEDFORD (DUKE) v. ABERCORN* (MARQUESS), No. 319, *ante*.

334. ————.—**Not power to charge portions for children of future marriage.**—*BEDFORD (DUKE) v. ABERCORN* (MARQUESS), No. 319, *ante*.

335. ————.—**Power to appoint new trustees.**—*SAMPAYO v. GOULD*, No. 331, *ante*.

336. ————.—**Not covenant to settle after-acquired property.**—By the marriage settlement of M., dated in 1854, property was settled upon trust, after the deaths of himself & his wife, for the children of the marriage as M. & his wife should jointly appoint; & in default of such appointment

among children—*Appointment of life estate with power of appointment*—*WRIGHT'S TRUSTEES v. WRIGHT* (1891), 21 R. (Cl. of Sess.) 568; 31 Sc. L. 11. 450; 1 S. L. T. 558.—*SCOT.*

PART III. SECT. 3, SUB-SECT. 2.—A.
a What are usual powers—*Vesting clauses to sons at twenty-one & daughters at twenty-one or marriage*—*With survivorship & accruer.*—*HYNES v. RED-*

INGTON (1834), L. & G. temp. Plunk. 33.—*IR.*

d. ————.—*Vesting clauses to sons at twenty-one, & daughters at twenty-one or marriage,*

Sect. 3.—Articles: Sub-sect. 2, A. & B.; sub-sect. 3, A. (a) & (b), & B.]

as the survivor should appoint; & in default of any appointment, in trust for all the children who should attain twenty-one in equal shares. There were only two children who attained twenty-one. One of them, C., by an ante nuptial agreement, agreed to settle "all her half or other share & interest whatsoever" in the property subject to the trusts of the original settlement. The agreement provided that the settlement should contain certain specified provisions, & generally such other agreements clauses, & provisions as were "usually inserted in settlements of a like kind." M. & his wife, who predeceased him, made no joint appointment under the deed of 1854, but by his will, in exercise of his power, he appointed the sum of £2,000 to C. absolutely:—*Held*: a covenant to settle after-acquired property was not a "usual" clause in settlements of a like kind with that to be executed in accordance with the agreement for a settlement & the £2,000 was not bound by the agreement.—*Re MADDY'S ESTATE, MADDY v. MADDY*, [1901] 2 Ch. 820; 71 L. J. Ch. 18; 85 L. T. 311; 45 Sol. Jo. 673.

B. Insertion of Particular Powers and Provisions.

337. What may be inserted in settlement—Provision for power of leasing for twenty-one years—Not power to grant building leases for longer period.]—Arts. for a settlement, with a power of leasing for twenty-one years, & other usual powers, etc., do not authorise the introduction of a power of granting building leases for longer terms.—*PEARSE v. BARON* (1821), Jac. 158; 37

Hill v. Hill (1834), 6 Sim. 136.

338. — Provision for power to alter terms of articles—Not power to jointure future wife.]—BEDFORD (DUKE) v. ABERCORN (MARQUESS), No. 319, ante.

339. — Not power to charge portions for children of future marriage.]—BEDFORD (DUKE) v. ABERCORN (MARQUESS), No. 319, ante.

340. — Provision for general & special powers by separate codicils—Necessity for inclusion of both powers.]—GREENE v. WIGLESWORTH, No. 48, ante.

Statutory powers in settlements.]—See Part XIII., post.

SUB-SECT. 3.—COVENANTS TO LEAVE PROPERTY BY WILL.

A. Covenant to leave Share.

(a) In General.

See, generally, WILLS.

341. "One full fourth part"—Fourth in value not in specie.]—A father, on the marriage of his

son, covenanted with trustees to bequeath one full fourth part of all his real & personal estate, after payment of his debts, to the trustees of the marriage settlement, who were to sell & convert same into money & stand possessed of the proceeds upon the trusts of the settlement. After the father's death, in a suit to administer his estate:—*Held*: the covenant meant a fourth in value & not a fourth in specie.—*BELL v. CLARKE* (1858), 25 Beav. 437; 27 L. J. Ch. 674; 31 L. T. O. S. 324; 4 Jur. N. S. 490; 6 W. R. 476; 53 E. R. 703.

Annotation:—Reid, Patch v. Shore (1862), 11 W. R. 142.

342. "Equal share"—Advances to other children—In lifetime of covenantor.]—P., on his daughter's marriage, settled a sum of money on her & her husband & their issue; &, after reciting that he had agreed to make a further provision for his daughter, equal to his other younger children, covenanted to settle, by his will or otherwise, on the husband & wife & their issue, as great a share of his property as he should, by his will or otherwise, provide for any of his other younger children, to take effect on the death of the survivor of himself & his wife; & if he died intestate, or omitted to make such provision, that his exors. should pay to the trustees as great a share of his property as any of his younger children should, in that event, become entitled to:—*Held*: the trustees had a claim upon the exors. in respect of subsequent advancements by the settlor to his other younger children in his lifetime, & not merely for a provision equal to that which any of the other children became entitled to at his death.—*WILLIS v. BLACK* (1828), 4 Russ. 170; 7 L. J. O. S. Ch. 3; 38 E. R. 769, L. C.

(b) Effect of Covenant.

343. Whether constituting debt—Charge on real estate.]—ANON. (1561), Benl. 9; Ben. 121; 3 Leon. 6; 73 E. R. 937.

344. — Bankruptcy of settlor.]—By a settlement, in the Scottish form, made upon the marriage of a Scotsman, domiciled in Scotland, with an Englishwoman, the husband covenanted to pay after his death an annuity to his widow & portions to his children, for which causes the wife assigned her real & personal estate "to & in favour of her husband, in conjunct fee & liferent & the children of the marriage, whom failing, the wife, her heirs, & assigns." For some years after the solemnisation of the marriage the husband & wife continued domiciled in Scotland, the wife in the meantime becoming entitled under her father's will to a share in the corpus of his personal estate. They then changed their domicile to England, after which the trustee of the will of the wife's father paid part of the wife's portion of testator's estate to the husband upon the joint receipt of the husband & wife:—*Held*: the husband having become

are proper to be introduced in a settlement in pursuance of articles directing "usual & proper clauses." So are clauses of survivorship & accruer, if the intent appears to be that no part of the property shall go over, unless all goes over.—*ROCHE v. ROCHE* (1845), 8 I. Eq. R. 714.—*IR.*

e. — — — — —.]—Re MARTIN'S TRUSTS (1857), 6 I. Ch. R. 211.—*IR.*

f. — — — — —.]—CRONIN v. ROCHE (1858), 8 I. Ch. R. 103.—*IR.*

g. — — — — —.]—HERRING-COOPER v. HERRING-COOPER, [1906] 1 I. R. 465.—*IR.*

PART III. SECT. 3, SUB-SECT. 2.—B.

h. What may be inserted in settlement—Not hotchpot clause.]—The ct. will not insert a hotchpot clause in

executory marriage articles in the absence of any words therein indicating the intention of the parties to introduce such clause.—*LEES v. LEES* (1871), 5 I. R. Eq. 649.—*IR.*

PART III. SECT. 3, SUB-SECT. 3.—A. (a).

343 i. "Equal share"—Advances to other children—In lifetime of covenantor.]—STEPHENS v. STEPHENS (1886), 19 L. R. Ir. 190.—*IR.*

k. Covenant for gift to daughter on marriage & to leave her one-fourth share of estate—Advance to husband before marriage charged to husband & wife—Set-off of advance against wife's share.]—A father, before his daughter's marriage, in 1857, wrote a letter to her intended husband, saying he would give her £2,500 when she came of age,

& one-fourth of his residuary estate at his death. In 1858, & before she came of age, the father advanced money to the husband, for which he took his note, but which he charged in his ledger to the joint account of the husband & wife, & intended, if the same was not repaid, to set off the amount against his daughter's share of his estate:—*Held*: in a suit by the wife in the husband's lifetime for the administration of the estate, that the exors. had a right to set off the advance against the wife's share.—*TORRANCE v. CHEWETT* (1866), 13 Gr. 407.—*CAN.*

PART III. SECT. 3, SUB-SECT. 3.—A. (b).

l. Position of covenantee—On performance of covenant—Property only bound

bkpt. before the filing of the bill, & the effect of the settlement, interpreted according to the Scottish law, being to give him a life interest in the fund, with remainder to his wife absolutely, his life interest could not be impounded to secure the performance of his covenant to pay the annuity & portions.—*DUNCAN v. CANNAN* (No. 2) (1855), 7 De G. M. & G. 78; 24 L. J. Ch. 460; 25 L. T. O. S. 2; 1 Jur. N. S. 291; 3 W. R. 318; 44 E. R. 31, L. J. J.

345. — Election.]—Settlor on the marriage of his daughter, covenanted that, immediately after his death, a share, which in the event became one-third of all & singular his real & personal estate should be settled for the benefit of the daughter, her husband & their children, in equal shares. One of the four children of the marriage, a daughter, died in the settlor's lifetime leaving a husband who also died in the settlor's lifetime & two infant children who survived the settlor. Settlor made a will whereby after directing payment of his debts he disposed of personal chattels, gave a number of legacies & amongst others a legacy of £4,500 & part of the residue of his estate, to his nephews & nieces & his two infant great grandchildren above-mentioned in equal shares:—*Held*: the liability under the covenant was not a debt to be paid before the division of residue, & the infants were bound to elect between the benefits under the settlement & under the will.—*BENNETT v. HOULDSWORTH* (1877), 6 Ch. D. 671; 46 L. J. Ch. 646; 36 L. T. 648.

Annotation:—*Folld. Re Vernon, Garland v. Shaw* (1906), 95 L. T. 18.

346. — —.]—V. on the marriage of his daughter covenanted with the trustees of her settlement that his heirs, exors., & administrators would, within twelve calendar months after his decease or that of his wife, pay to them a share, which ultimately became one-sixth, ascertained by the number of his children, of his real & personal estate upon trusts for his daughter for life for her separate use without power of anticipation, then to her husband J. for life, & subject to a joint power of appointment among their issue, & in default of such appointment as the survivor should appoint, to the children of the marriage at twenty-one or marriage. The settlement contained an agreement & declaration that any share passing to the daughter under her father's will should, if she elected to claim under the will, be a satisfaction of the covenant. The father subsequently made a will whereby he confirmed the covenant in the settlement, & after a trust for payment of his debts, directed his trustees to stand possessed of an equal share of his residuary estate upon trust for his daughter for life, & then for her children at twenty-one or marriage, in default of children for any husband of his daughter for life & subject thereto such share to fall into residue. The daughter having elected against the will, the question arose whether her husband & children could claim under the will & as to their rights having regard to the provisions of the settlement & will:—*Held*: the liability under the covenant in the settlement was not a debt to be deducted

before ascertaining the testator's residue.—*Re VERNON, GARLAND v. SHAW* (1906), 95 L. T. 48.

Annotation:—*Refd. Re Cooper, Townend v. Townend* (1917), 86 L. J. Ch. 507.

347. Position of covenantee—On performance of covenant—Position of ordinary legatee.]—A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee.—*JERVIS v. WOLFERSTAN* (1874), L. R. 18 Eq. 18; 43 L. J. Ch. 809; 30 L. T. 452.

Annotations:—*Mentd. Fraser v. Murdoch* (1881), 6 App. Cas. 855; *Robinson v. Murdoch* (1881), 30 W. R. 162; *Robbs v. Wayet* (1887), 36 Ch. D. 256; *Re Knott, Bax v. Palmer* (1887), 56 L. J. Ch. 318; *Whittaker v. Kershaw* (1890), 45 Ch. D. 320; *A.-G. v. Smith* (1892), 66 L. T. 557; *Hosgood v. Pedler* (1896), 66 L. J. Q. B. 18; *Re Nixon, Gray v. Boll* (1904), 73 L. J. Ch. 446; *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194.

348. Liability to lapse.]—*NEEDHAM v. SMITH*, No. 363, *post*.

349. —.]—A father, on the marriage of his daughter, covenanted that if she should survive him or leave any child, children, or issue, he would by will, give & devise, or otherwise effectually settle & assure to trustees, a share equal with his other children of the property he should have at his death to the uses therein mentioned, being uses for the benefit of the husband & wife & the children of the marriage, with a clause of survivorship & accruer in the event of children dying under twenty-one & without issue. Some years afterwards the father made a will, giving property to trustees upon the trusts therein declared, the limitations being in substance the same as those set out in the arts. The children of the marriage all died without issue in the lifetime of the covenantor, one of them only having attained twenty-one. The wife survived her father:—*Held*: the representatives of the child who attained twenty-one were not entitled to anything, for the covenantor was at liberty to make a settlement either by deed or will & he was not bound by the covenant so to frame his will as to guard the child's interest from lapse.—*Re BROOKMAN'S TRUST* (1869), 5 Ch. App. 182; 39 L. J. Ch. 138; 22 L. T. 891; 18 W. R. 199, L. J.

Annotation:—*Consd. Brookman v. Smith* (1871), L. R. 6 Exch. 291.

— **By disposition inter vivos.]**—*See* Part III., Sect. 3, sub-sect. 3, E., *post*.

— *See, generally, WILLS.*

B. Covenant to leave Specific Sum.

350. Effect of covenant—Whether creating debt.]—Covenant by a father in his son's marriage settlement, by will or otherwise, in his lifetime, to settle £3,000, to be charged upon all real & personal property of which he should at or immediately before his death be seised or possessed, so as, immediately after the decease of the survivor of himself & wife, to become well & effectually vested in the trustees of the settlement, upon trust for the son's widow & the issue of the marriage:—*Held*: to create a specialty debt, to be proved accordingly in the administration of the

after payment of debts.]—*ENNIS v. SMITH* (1839), Jo. & Car. 400.—*IR.*

m. — —.]—A covenant in a marriage settlement, that the wife shall, out of the property of which the husband shall die seized or possessed, receive an annuity, only binds the property remaining after payment of debts.—*ROWAN v. CHUTE* (1861), 13 1. Ch. R. 169.—*IR.*

PART III. SECT. 3, SUB-SECT. 3.—B.

350 i. Effect of covenant—Whether creating debt.]—A father, in his daughter's ante-nuptial marriage contract bound himself to pay at his death a sum of £1,000 to her marriage-contract trustees. He afterwards executed a trust-disposition & settlement, by which he directed his trustees to pay his debts, & divide the residue of his

estate equally among his children:—*Held*: the provision in the marriage contract was a debt due by the deceased, & was not to be deducted from the daughter's share of residue.—*ELLIOTT v. BOWHILL* (1873), 11 Macph. (Ct. of Sess.) 735; 45 Sc. Jur. 446.—*SCOT.*

n. — — Continuing covenant.]—*WOOD v. JAMIESON* (1844), 6 I. Eq. R. 420; 1 Jo. & Lat. 3.—*IR.*

Sect. 3.—Articles: Sub-sect. 3, B., C., D. & E.; sub-sect. 4.]

father's estate.—*Eyre v. Monro* (1857), 3 K. & J. 305; 26 L. J. Ch. 757; 30 L. T. O. S. 61; 3 Jur. N. S. 584; 5 W. R. 870; 69 E. R. 1124.

Annotations:—Held. Patch v. Shore (1862), 11 W. R. 142; *Graham v. Wickham* (1863), 32 L. J. Ch. 639; *Keays v. Gilmore* (1874), 22 W. R. 465.

351. ———.]—A covenant in a marriage settlement to bequeath a legacy of not less than £2,500 constitutes a specialty debt for £2,500, & is not merely payable out of such assets as are applicable for the payment of legacies.—*GRAHAM v. WICKHAM* (1863), 1 De G. J. & Sm. 474; 2 New Rep. 410; 32 L. J. Ch. 639; 8 L. T. 679; 9 Jur. N. S. 702; 11 W. R. 1009; 46 E. R. 188, C. A.

352. ———.]—Testator, who died in 1823, had covenanted in 1815 with trustees of a settlement made on the marriage of his son, that he, his heirs, exors., or administrators, would, during his life, or within three months after his death, pay to the trustees £3,000, to be held by them upon the trusts of the settlement. Testator, by his will, devised his P. estate to trustees for sale for payment of his debts, the trustees of that estate being also his exors., & he devised his D. estate to which he was entitled in remainder expectant on the death of F., who died in 1860, to trustees upon trust for T. for life, with remainders over. T. mortgaged his equitable life interest in 1863, the £3,000 not having been paid, though interest thereon had been paid down to 1849 by the exors. & trustees of the P. estate, the trustees of the son's marriage settlement instituted a suit for the purpose of having that sum, with interest, raised by sale or mtge. of the D. estate.—*Held:* the covenant was not a conditional, but an absolute covenant; at the end of three months after testator's death the £3,000 became demandable by the trustees under the covenant; & such demand then became a debt against the devisee of the estate under the statute against fraudulent devises.—*COOPE v. CRESSWELL* (1866), 2 Ch. App. 112; 36 L. J. Ch. 114; 15 L. T. 427; 15 W. R. 242; 11 Sol. Jo. 953, L. C.

Annotations:—Mentd. Pears v. Laing (1871), L. R. 12 Eq. 41; *British Mutual Investment Co. v. Smart* (1875), 10 Ch. App. 567, 569, n.; *Re Hollingshead, Hollingshead v. Webster* (1888), 37 Ch. D. 651; *Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609; *Re England, Steward v. England*, [1896] 2 Ch. 100; *Edwards v. Walters*, [1896] 2 Ch. 157; *Asbury v. Asbury*, [1898] 2 Ch. 111; *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225; *Re Atkinson, Hartley v. Atkinson* (1907), 98 L. T. 369; *Re Lacey, Howard v. Lightfoot*, [1905] 1 Ch. 330; *Re Atkinson, Proctor v. Atkinson*, [1908] 2 Ch. 307; *Read v. Price*, [1909] 2 K. B. 724.

——— **Liability to estate duty.**—*See* ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 39, 40, No. 253.

——— **Limitation of action.**—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 408, No. 869.

353. Security for payment—Not ordered.—One covenants on marriage arts. to pay £10,000 within six months after his death; & after growing old & infirm, covenantee would have obliged him to have given security.—*Held:* they could not alter this agreement of the parties, or make it better than they themselves had; & though exors. might be obliged to give better security for legacies payable *in futuro*, that is, because they are in nature of trustees, & there is no agreement one way or another.—*WARRINGTON (EARL) v. LANGHAM* (1699), Prec. Ch. 89; Colles, 149; 1 Eq. Cas. Abr. 132, pl. 14; 24 E. R. 43, L. C.

Annotations:—Held. Champnoon v. Gubbs (1700), Prec. Ch. 126; *Collins v. Plummer* (1708), 1 P. Wms. 104; *Flight v. Cook* (1755), 2 Ves. Sen. 619.

354. Provision for election to take share of property—In lieu of specified sum.—*WALLER v. FULLER* (1715), 2 Eq. Cas. Abr. 301, pl. 18; 22 E. R. 253, L. C.

355. Covenant to leave specified stock—Effect of conversion of stock.—B. covenanted, that his exors. should, within six months after his decease, settle £4,000 stock in the navy 5 per cent. annuities, on his wife & children. The navy 5 per cent. stocks having been reduced to 4 per cent. stock, & that stock having been converted into a 3½ per cent. stock.—*Held:* on the construction of the Acts of Parliament, that this covenant would be satisfied by a purchase of £4,200 in the 3½ per cent. annuities.—*MILWARD v. MILWARD* (1834), 3 My. & K. 311; 3 L. J. Ch. 141; 40 E. R. 119.

356. Sum payable at specified date—Default in payment—Interest payable at 5 per cent.—Testator in his lifetime covenanted by deed that within one month after his death a sum of £1,500 should be paid to certain trustees in trust for the benefit of children, as provided for by a marriage settlement. No rate of interest was provided for in the event of payment not having been made by his exors. within the time prescribed. Default was made in payment of the principal sum within that time.—*Held:* testator's estate should be charged with interest in the principal sum unpaid at 5 per cent. *per annum*.—*KNAPP v. BURNABY* (1861), 30 L. J. Ch. 844; 5 L. T. 52; 9 W. R. 765.

Annotation:—Folld. *Re Horner, Fooks v. Horner*, [1896] 2 Ch. 188.

357. ———.]—Testator covenanted that his exors. or administrators should pay a sum of £2,000 within six calendar months after his decease. Default was made in payment of the sum at the time named.—*Held:* the sum carried interest from the time named to the date of payment: the sum being payable at a certain time within Civil Procedure Act, 1833 (c. 42), s. 28.—*Re HORNER, FOOKS v. HORNER*, [1896] 2 Ch. 188; 65 L. J. Ch. 694; 74 L. T. 686; 44 W. R. 556; 40 Sol. Jo. 498.

Bankruptcy of covenantor.—*See* BANKRUPTCY, Vol. IV., pp. 261–263, 278, 279, Nos. 2469–2482, 2605; Vol. V., p. 850, Nos. 7151.

C. Covenant to leave by Will or Otherwise.

358. Whether performance by will sufficient—Although share thereby lapses.—*Re BROOKMAN'S TRUST*, No. 349, *ante*.

359. ———.]—*JERVIS v. WOLFERSTAN*, No. 347, *ante*.

D. Satisfaction and Performance.

See, generally, EQUITY, Vol. XX., pp. 449–499.

Satisfaction of covenant to provide for wife.—*See* EQUITY, Vol. XX., pp. 491, 492, Nos. 2184–2197.

Performance of covenant to provide money.—*See* EQUITY, Vol. XX., pp. 497–499, Nos. 2280–2297.

Presumption against double portions.—*See* EQUITY, Vol. XX., pp. 453–478, Nos. 1769–2032.

E. Dispositions Defeating Covenant.

360. General rule—Right of covenantor to dispose inter vivos.—Covenant by a father to give or leave by his will all his personal estate equally among his children does not deprive him of the right of unlimited expense, & of any fair application, even by gift, if absolute, & *bonâ fide*; but a disposition for the purpose of defeating the covenant cannot stand, therefore transfers of stock

to one of the children by the father were upon the circumstance of a reservation of the dividends for his life & other evidence of a partial intention, to elude the covenant, set aside.—*JONES v. MARTIN* (1798), 5 Ves. 266, n.; 6 Bro. Parl. Cas. 437; 8 Bro. Parl. Cas. App. I. 242; 31 E. R. 582, H. L.

Annotations.—*Consd.* *Lewis v. Madocks* (1803), 8 Ves. 150; *Fortescue v. Hennah* (1812), 19 Ves. 67; *Logan v. Wienholt* (1833), 7 Bl. N. S. 1; *Kyro v. Monro* (1857), 3 K. & J. 305. *Refd.* *Randall v. Willis* (1800), 5 Ves. 262; *Patch v. Shore* (1862), 11 W. R. 142.

361. — — — — —.]—Father under covenant for an equal division at his death of all the property he should die seised or possessed of between his two daughters or their families, though he retains the power of free disposition by act in his life, cannot defeat the covenant by a disposition in effect testamentary; as by reserving to himself an interest for life.—*FORTESCUE v. HENNAH* (1812), 19 Ves. 67; 34 E. R. 443.

Annotations.—*Consd.* *Logan v. Wienholt* (1833), 7 Bl. N. S. 1. *Refd.* *Patch v. Shore* (1862), 11 W. R. 142; *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510.

362. — — — — —.]—Where A. being seised of certain real estates, conveyed part of them to the uses of the settlement at the time of his second marriage, & also covenanted with the trustees that he would, by will or otherwise, give & devise all other his real estates, & also his personal estate & effects whatsoever & wheresoever, to & amongst the children both of his first & second marriage, share & share alike.—*Held*: this covenant was applicable only to such real & personal estate of which A. might die seised or possessed, & it did not prevent him from disposing freely, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the date of the settlement.—*NEEDHAM v. KIRKMAN* (1820), 3 B. & Ald. 531; 106 E. R. 755.

Annotations.—*Refd.* *Ravenshaw v. Hollier* (1835), 4 L. J. Ch. 119; *Synge v. Synge* (1893), 63 L. J. Q. B. 202.

363. — — — — —.]—By covenant in a marriage settlement, the husband was bound to give by his last will or otherwise, to his children in equal shares all his real estates, other than a settled estate, & personal property.—*Held*: (1) the covenant bound only such real estate as he should die seised of; (2) the covenant bound shares of the settled estate, which the husband became entitled to by devise from a child, who died in his lifetime; (3) children living at the death of the husband were alone entitled to the benefit of the covenant.—*NEEDHAM v. SMITH* (1828), 4 Russ. 318; 6 L. J. O. S. Ch. 107; 38 E. R. 825.

Annotations.—*As to* (1) *Refd.* *Ravenshaw v. Hollier* (1835), 4 L. J. Ch. 119. *As to* (3) *Refd.* *Re Brookman's Trust* (1869), 5 Ch. App. 182.

364. Exception to rule—Disposition defeating covenant.—A disposition in fraud of a covenant in marriage arts., to give a fourth part of the covenantor's real & personal estate at the time of his death, rescinded.—*GREGOR v. KEMP* (1722), 3 Swan. 404; 38 E. R. 926, L. C.

Annotation.—*Refd.* *Patch v. Shore* (1862), 11 W. R. 142.

365. — — — — —.]—*JONES v. MARTIN*, No. 360, *ante*.

366. — — — — —.]—Interest reserved to covenantor—*Life interest.*—*FORTESCUE v. HENNAH*, No. 361, *ante*.

367. — — — — —.]—A person who has covenanted that a certain share of his estate at his decease shall be settled upon certain trusts cannot, as against the persons entitled under the covenant, convey any portion of his property upon trust for himself for life, & after his decease

upon trusts different from those with respect to which the covenant was made.

By the marriage settlement of W. & R., certain property was settled in trust, after the decease of R., for W. for life. By the same indenture G., the father of R., covenanted that one-half of his property, at his decease, should go upon the trusts of the settlement. Shortly before he died, G. by deed conveyed a certain estate upon trust for himself for life, & after his decease to his two daughters in equal shares, for their sole & separate use respectively.—*Held*: the deed in question was fraudulent & void as against W., & must be set aside in equity.—*PHLEPS v. AMCOTT* (1809), 21 L. T. 167; 17 W. R. 703.

368. Testamentary disposition defeating covenant—Invalid.—Arts. in marriage to pay £500 with his daughter by such a time, & to secure to her all his real & personal estate when he died; & afterwards he devised all his personal estate to another, which being contrary to the arts., that agreement was decreed to be performed.—*HARMORE v. BROOK* (1674), *Cas. temp. Finch*, 183; 2 Rep. Ch. 92; 23 E. R. 101.

369. — — — — —.]—Covenant for interest greater than that bequeathed.—Covenant, in a settlement by A., to bequeath to B., his intended wife, all such goods, chattels, plate, & personal estate, of which A. should die possessed; or that, if he died intestate, B. should take possession, & enjoy all such goods, chattels, plate, & other personal estate, carried the whole personal estate & effects of A., & he could not make any alteration in the quantum of interest of B. therein.—*DAVIES v. DAVIES* (1831), 1 L. J. Ch. 31.

370. — — — — —.]—Covenant amounting only to provision against intestacy.—A covenant to settle on particular persons all the covenantor's personal estate, subject only, nevertheless, & without prejudice to any other dispositions, qualifications, or changes, which he should make by his will or concerning the same or any part thereof, is only a provision for a case of intestacy, & does not prevent the covenantor from bequeathing the whole of his personal estate to other persons.—*STOCKEN v. STOCKEN* (1838), 4 My. & Cr. 95; 7 L. J. Ch. 305; 2 Jur. 693; 41 E. R. 38, L. C.

Annotations.—*Refd.* *Thompson v. Griffin* (1841), Cr. & Ph. 317; *Plunkett v. Lewis* (1844), 8 Jur. 682; *Ransome v. Burgess* (1866), L. R. 3 Eq. 773; *Re Kerrison's Trusts* (1871), 40 L. J. Ch. 637; *Wilson v. Turner* (1883), 22 Ch. D. 521.

371. — — — — —.]—Breach of covenant by objects of settlement.—*MATHEW v. PHILLIPS* (1701), Colles, 347; 1 E. R. 319, II. L.

Defeat of covenant by lapse.—*See* Nos. 348, 349, *ante*.

SUB-SECT. 4.—COVENANTS TO SETTLE LANDS TO BE ACQUIRED OR OF SPECIFIED VALUE.

See Settled Land Act, 1925 (c. 18), s. 11.

372. Death of covenantor before settlement—Contract binding on heir.—*LANGTON v. NORTH* (1683), 2 Rep. Ch. 271; 21 E. R. 676.

373. Remarriage of covenantor before settlement—Different settlement made on remarriage—Original covenant binding.—C. by arts. on his marriage with his first wife, covenanted that all the lands which he should purchase during her life, should descend to, or be settled upon the heirs male of her body by him begotten. No settlement was made pursuant to these articles; but C. upon his marriage with a second wife, settled his estate to different uses.—*Held*: the eldest & only son of the first marriage was entitled

Sect. 3.—Articles: Sub-sects. 4, 5 & 6, A. (a) & (b), & B. (a) & (b).]

to a specific performance of these arts., & a conveyance was decreed accordingly.—*CUSACK v. CUSACK* (1714), 5 Bro. Parl. Cas. 116; 2 E. R. 570, H. L.

Annotation:—Refd. *Robinson v. Harcastle* (1788), 2 Term Rep. 241.

374. Covenant to settle lands of specified value—No purchase made by covenantor—Liability of estate for equivalent value—Payable to party entitled.]—A. covenants by marriage arts. that the estate agreed to be settled is worth £500 *per annum* clear of all incumbrances; & also to purchase other lands of £300 *per annum* & settle them to the same uses. The new purchase was never made, & the estate settled was incumbered beyond its value:—*Held*: out of the purchase-money of A.'s estate not settled, so much shall be paid to the eldest son, as is equivalent in value to £800 *per annum* computed at twenty-two year's purchase.—*BARKER v. IVERS* (1724), 5 Bro. Parl. Cas. 127; 2 E. R. 578, H. L.

375. ——— To be laid out in purchase of land.]—Covenant by husband, in consideration of the purchase-money of an estate of the wife, within two years to convey lands in the county of N. of the value of such purchase-money, by way of settlement. The husband having died without performing the covenant, performance of the same decreed, against his representatives, by laying out in the purchase of land so to be settled, a sum equal to the present value of estates in N., which, at the time when the covenant ought to have been performed, would have been worth the amount of the purchase-money, with interest at 4 per cent. from the death of the covenantor.—SUFFIELD (DOWAGER LADY) v. SUFFIELD (LORD) (1812), 3 Mer. App. 699; 36 E. R. 268.

376. ——— Covenant enforced.]—Covenant in consideration of a marriage to settle lands of £350 *per annum* on husband & wife & the issue male of the marriage, remainder to the brothers of the husband; equity will compel an execution of this covenant, & not put the party to an action of covenant in the trustee's name.—VERNON v. VERNON (1731), 2 P. Wms. 594; 24 E. R. 875, L. C.; *aff'd.*, 1 Bro. Parl. Cas. 267, H. L.
Annotations:—Consd. *Goring v. Nash* (1744), 3 Atk. 186; *Stephens v. Trueman* (1747), 1 Ves. Sen. 73. *Refd.* *Fag v. Harris* (1742), 2 Coop. temp. Cott. 535; *Hale v. Lamb* (1764), 2 Eden, 292; *Dowell v. Dew* (1848), 1 Y. & C. Ch. Cas. 345; *Patch v. Shore* (1862), 11 W. R. 142. *Mentd.* *Re Diggle*, *Gregory v. Edmondson* (1888), 39 Ch. D. 254, n.

377. Covenantor reserving option to convey—Or pay specified sum—Death before conveyance or payment—Conveyance ordered.]—Testator in a settlement of an estate, reserved to himself an election as to parcels, & afterwards, by indenture, he was to have an option of paying a certain sum within twenty-four calendar months; not having elected in his lifetime, & his personal estate being inadequate to payment of his debts, the estate covenantant shall be conveyed.—TYSSSEN v. BENYON (1785), 2 Bro. C. C. 5; 29 E. R. 3, L. C.

378. Covenant to settle part of specified estates—To provide specified income for wife—Life interest in one estate devised to wife—Contribution rateably from both.]—The owner of estates in the counties of Oxford & Berks covenanted on his marriage to convey such part of them to trustees as should be of the annual value of £900, to the use of himself for life, with remainder to the use & intent that

his intended wife should yearly receive for her jointure £800, to be charged upon the same hereditaments. The settlor, not having made any settlement in pursuance of the covenant, by his will, confirming the settlement, devised his estates in the counties of Oxford & Berkshire to his wife for life. He afterwards, by deed, revoked his will as to the estates in Oxfordshire, which, consequently on his death, descended to his heir at law. The jointress insisted that she was entitled to the Berkshire estate for her life, free from any contribution towards her jointure; & that the Oxfordshire estates were exclusively liable to satisfy the covenant:—*Held*: as no intention to benefit the jointress to the extent for which she contended appeared on the face of the will, the two estates were liable to contribute rateably to the satisfaction of the covenant.—*EYRE v. GREEN* (1846), 2 Coll. 527; 7 L. T. O. S. 223; 10 Jur. 384; 63 E. R. 846.

Conversion & reconversion.]—See EQUITY, Vol. XX., pp. 335–402, Nos. 772–1405.

SUB-SECT. 5.—VARIATION OF ARTICLES.

See Part VI., Sect. 2, sub-sect. 2, post.

SUB-SECT. 6.—ENFORCEMENT OF ARTICLES.

A. By and Against Whom Enforceable.

(a) *By Whom.*

379. Grandson of covenantor—Father with power to bar entail—Enforcement not granted.]—A. on the marriage of his son covenants to settle lands to the use of the son for life, then to the wife for life, remainder to the heirs male of the body of the son. A. dies & makes his son exor., who dies & makes a second wife extrix. The grandson brings a bill against the extrix. to have satisfaction on the covenant, or that he might sue it in the trustees' names. Bill dismissed, pltf.'s father being tenant in tail, & might have barred pltf. if a settlement had been made.—*CANN v. CANN* (1687), 1 Vern. 480; 23 E. R. 605, L. C.

Annotations:—Refd. *Milbourn v. Ewart* (1793), 5 Term Rep. 381. *Mentd.* *Blake v. Blake* (1786), 1 Cox, Eq. Cas. 266.

380. Remainderman.]—Chancery will not compel a purchase for the benefit of a remainder, or an estate tail.—ANON. (1701), 12 Mod. Rep. 521; 88 E. R. 1493.

Assignee in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 674, 934, Nos. 5962, 7633.

(b) *Against Whom.*

381. Death of covenantor—Enforcement against heir.]—HAYMER v. HAYMER (1678), 2 Vent. 343; 86 E. R. 476.

Annotation:—Refd. *Jones v. Meredith* (1739), 2 Com. 661.

382. ———.]—DOWNES (COUNTESS) v. MORETON (1681), 2 Cas. in Ch. 68; 22 E. R. 850, L. C.

383. ———.]—Heir bound by arts.—GELL v. VERMEDUN (1694), Freem. Ch. 199; 22 E. R. 1158.

384. ———.]—Marriage arts. were, that within a month after marriage the husband would surrender a copyhold to the wife for life, remainder to the issue, remainder to the heirs of the wife, & if he should neglect or refuse to make such

PART III. SECT. 3, SUB-SECT. 6.—A. (b).

a. Death of covenantor—Enforcement against executors.]—GORDON v. MURPHY (1867), 4 W. W. & A'B. 120.—AUS.

surrender, then he would leave the wife £500 at his death. No surrender is made; the husband dies after the month without assets. The judge decreed that the heir-at-law should surrender to pltf. & her heirs, & till surrender he was a trustee for her. Here was no election; if done after the month the £500 was not to be paid; those are two express covenants, & it is not put in the alternative, & here is no purchaser to be defeated; it is a charge in equity.—*WOOD v. PESEY* (1718), 2 Eq. Cas. Abr. 55; 22 E. R. 48, L. C.

385. Person taking inheritance—With notice of articles.]—A person deemed a trustee, if he takes an inheritance after notice of arts. to settle the estate.—*SKIRME v. MEYRICK* (1739), 2 Com. 700; 92 E. R. 1275.

B. Specific Performance.

(a) In General.

See, generally, EQUITY, Vol. XX., pp. 494-497, Nos. 2243-2279; SPECIFIC PERFORMANCE.

386. General rule.]—A man promises to assure lands in consideration of marriage, but after the marriage refuses; yet ordered.—*GERARD'S CASE* (1604), Toth. 162; 21 E. R. 155.

387. — Death of one of parties.]—*HAYMER v. HAYMER* (1678), 2 Vent. 343; 86 E. R. 476.

Annotation:—Refd. Jones v. Meredith (1739), 2 Com. 661.

388. — —.]—*HARRISON v. CONSTANTINE* (1709), 2 Eq. Cas. Abr. 147; 22 E. R. 126.

389. — —.]—Pltfs. file a bill to compel the execution of a settlement which was prepared, but never executed, by reason of the death of one of the parties. On the hearing it appeared that the settlement so prepared, differed materially from the arts. on which it was founded to the prejudice of pltfs. The ct. will direct a settlement according to the arts., notwithstanding pltfs. do not pray relief so beneficial to themselves.—*DURANT v. DURANT* (1783), 1 Cox, Eq. Cas. 58; 29 E. R. 1061.

390. Partial performance.]—*OTWAY v. HIBBLETHWAITE* (1613), Toth. 163; 21 E. R. 155.

391. — —.]—*FRYER v. COOKE*, No. 393, *post*.

392. Covenant to appropriate produce of estate—To raise sum of money.]—A covenant to appropriate one-third of the produce of a real estate, to raise a sum of money, is not a mere personal covenant suable at law, but creates a lien upon the land, & the covenantees are entitled to have it specifically performed.—*LEGARD v. HODGES* (1792), 3 Bro. C. C. 531; 1 Ves. 477; 29 E. R. 684, L. C.; *subsequent proceedings* (1793), 4 Bro. C. C. 421, L. C.

Annotations:—Refd. Legard v. Johnson (1797), 3 Ves. 352; *Talby v. Official Receiver* (1888), 13 App. Cas. 523; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

Foreign contracts & contracts relating to foreign property.]—*See CONFLICT OF LAWS, Vol. XI., pp. 434-440, Nos. 905-1008.*

Bonds for settlement.]—*See BONDS, Vol. VII., pp. 252, 253, Nos. 948-950.*

(b) Mutual Covenants Not Performed.

393. Covenant unperformed by party seeking enforcement.]—(1) *Semble*: a partial performance of a marriage contract will not be enforced by the ct.

(2) Where the whole right of pltf. depends on the execution of a contract which he has entered into, that right must be first established by him before he can make it a foundation for proceedings to enforce a right against another person.—*FRYER v. COOKE* (1843), 12 L. J. Ch. 487; 1 L. T. O. S. 408.

394. — —.]—By arts. made previously to a marriage, the wife's father covenanted to make certain payments during his life, & to settle three-tenths of his real & personal estate at his death upon the husband & wife during their respective lives, & after their death on their issue; & the husband covenanted to insure his life & to settle the policy, & also other property, in like manner. In default of issue, the property settled by the husband was to revert to him. The marriage took place, & the wife died without issue, & afterwards the father died. The husband did not insure his life or settle his property as agreed, & refused to execute the settlement which had been drawn in pursuance of the arts. A suit having been instituted for the administration of the father's estate, the husband claimed to prove for the value of his life interest in three-tenths of the father's real & personal estate:—*Held*: it was no answer to the husband's claim that he had refused to perform his part of the agreement, inasmuch as the contract between the parties had been partly performed by the marriage, & the performance by the husband was not a condition precedent to the performance by the father.—*JESTON v. KEY* (1871), 6 Ch. App. 610; 40 L. J. Ch. 503; 25 L. T. 522; 19 W. R. 864, L. JJ.

—*See, also, CONTRACT, Vol. XII., p. 418, Nos. 3360-3363.*

395. — Covenant for jointure not performed—Portion payable to husband.]—By marriage arts. a portion was agreed to be paid, & a jointure settled; the marriage took effect, & the wife died without issue before either was done; the husband sued for the portion, though no jointure was made, & it was decreed for him.—*HOLLIS v. CARR* (1676), *Cas. temp. Finch*, 261; *Freem. Ch. 3*; 2 Mod. Rep. 86; 3 Swan. 638; 23 E. R. 143, L. C.

Annotations:—Consd. Salton v. Houstoun (1824), 1 Bing. 433. *Distd. Young v. Smith* (1865), L. R. 1 Eq. 180. *Refd. Rashleigh v. S. E. Ry.* (1851), 10 C. B. 612; *Farrall v. Hilditch* (1859), 5 C. B. N. S. 841; *Buckland v. Buckland*, [1900] 2 Ch. 534.

396. — Jointure payable to wife—Husband's portion unpaid—Wife entitled to husband's estate as administratrix.]—*MEREDETH v. JONES* (1687), 1 Vern. 463; 23 E. R. 589, L. C.

397. — — Settlement by wife not made.]—*WOOD v. INGRAM* (1710), 2 Eq. Cas. Abr. 211; 22 E. R. 180.

— Husband becoming bankrupt—Enforcement sought by assignees.]—*See BANKRUPTCY, Vol. V., p. 931, No. 7620.*

seeking enforcement.]—*WALLACE v. WALLACE* (1842), 2 Dr. & War. 452.—*IR.*

393 ii. — —.]—*Re SMITH'S TRUSTS* (1890), 25 L. R. Ir. 439.—*IR.*

q. — Right of wife to retain sum assigned to husband unqualified by marriage contract.]—*Held*: a wife was not entitled, in a question with an executor-creditor of her deceased husband, to retention of a fund assigned to her husband, without qualification

PART III. SECT. 3, SUB-SECT. 6.— B. (a).

387 i. General rule—Death of one of parties.]—*DENNEY v. DELANEY* (1876), 10 L. R. Eq. 377.—*IR.*

387 ii. — —.]—*BAKER v. KER* (1889), 11 L. R. Ir. 3.—*IR.*

p. Specific performance preferred to damages.]—Father on marriage of son, settled certain lands & covenanted to pay off all incumbrances affecting

them. Ct. will decree specific performance without an inquiry whether any or what damage has been sustained, incumbrances having actually instituted suits, & lands being in danger of being sold.—*VEREKER v. GORT (LORD)* (1838), 1 I. Eq. R. 1.—*IR.*

PART III. SECT. 3, SUB-SECT. 6.— B. (b).

393 i. Covenant unperformed by party

Sect. 3.—Articles: Sub-sect. 6, B. (b) & (c), C. & D.
Sect. 4: Sub-sect. 1.]

398. Covenant to covenantor unperformed—Settlement conditional on payment of portion—Enforcement withheld pending payment.]—*BASKERVILLE v. BASKERVILLE* (1703), 2 Vern. 448; 23 E. R. 886; *affg. S. C. sub nom. BASKERVILLE v. GORE* (1701), Proc. Ch. 186.

399. Covenant unperformed by third party—Portion unpaid by wife's father—Jointure payable to wife.]—Agreement to settle a jointure in consideration of a portion by the father. Though the portion was never paid, yet the wife shall have her jointure.—*PERKINS v. THORNTON* (1741), Amb. 502; 27 E. R. 325, L. C.

*Annotations:—***Consd.** *Pyke v. Pyke* (1750), 1 Ves. Sen. 376. **Refd.** *Campbell v. Ingilby* (1856), 21 Beav. 567.

Enforcement sought by third party—Beneficiary of wife under settlement—Covenant unperformed by wife—Husband estopped by delay.]—*See ESTOPPEL*, Vol. XXI., p. 353, No. 1355.

(c) *Grounds for Refusal.*

400. Unreasonableness.]—*ANON.* (1679), 2 Cas. in Ch. 17; 22 E. R. 825, L. C.

401. Uncertainty.]—A. on the marriage of his daughter to B. covenants that B. should have his land called C. for £1,500 less than any other would give for it, & afterwards devises this estate to his grandson for life, with remainders over & dies. The ct. refused to decree specific executions of this agreement, by reason of the uncertainty of it, & it not being mutual.—*BROMLEY v. JEFFERIES* (1700), 2 Vern. 415; 1 Eq. Cas. Abr. 18; Proc. Ch. 138; 23 E. R. 867; *sub nom. BROMLEY v. FETTLPLACE*, Freem. Ch. 245.

*Annotation:—***Distd.** *Cave v. Cave* (1762), 2 Eden, 139.

402. Ambiguity.]—Specific performance of marriage arts. refused, on the ground of their being inconsistent, uncertain, & unintelligible.—*FRANKS v. MARTIN* (1760), 1 Eden, 309; 5 Bro. Parl. Cas. 151; 28 E. R. 704, H. L.

403. Adultery of wife.]—Where the wife sues the husband for a specific performance of her marriage arts., & that he may settle such & such lands on her for her jointure; it is no bar to her demand, that she has eloped with an adulterer; much less if this be not by the husband put in issue in the cause.—*SIDNEY v. SIDNEY* (1734), 3 P. Wms. 269; 2 Eq. Cas. Abr. 29; 24 E. R. 1060, L. C.

*Annotations:—***Consd.** *Clarke v. Perlam* (1741), 2 Atk. 333; *Seagrave v. Seagrave* (1807), 13 Ves. 439; *Jeo v. Thurlow* (1824), 2 B. & C. 547. **Apld.** *Duncan v. Campbell* (1842), 12 Sim. 616; *Evans v. Carrington* (1860), 2 De G. F. & J. 481; *Fearon v. Aylesford* (1884), 14 Q. B. D. 792. **Refd.** *Wheeler v. Trotter* (1737), 3 Swan. 174, n.; *Watkins v. Watkins* (1740), 2 Atk. 96; *Legard v. Johnson* (1797), 3 Ves. 352. **Mentd.** *Horton v. Bott* (1857), 2 H. & N. 249.

404. —.]—*BLOUNT v. WINTER, WINTER v. BLOUNT* (1781), 3 P. Wms. 276, n.; 24 E. R. 1063.

*Annotations:—***Apld.** *Seagrave v. Seagrave* (1807), 13 Ves. 439; *Evans v. Carrington* (1860), 2 De G. F. & J. 481; *Fearon v. Aylesford* (1884), 14 Q. B. D. 792.

405. Ante-nuptial incontinence—Not disclosed to husband.]—Non-disclosure of ante-nuptial incontinence on the part of a wife held not to be such

a fraud upon the husband as to entitle him to set aside a settlement made upon the marriage.—*EVANS v. CARRINGTON* (1860), 2 De G. F. & J. 481; 30 L. J. Ch. 364; 4 L. T. 65; 25 J. P. 195; 7 Jur. N. S. 197; 45 E. R. 707, L. C.

*Annotations:—***Consd.** *Fitzgerald v. Chapman* (1875), 1 Ch. D. 563. **Refd.** *Hulton v. Hulton*, [1916] 2 K. B. 642. **Mentd.** *Fearon v. Aylesford* (1884), 14 Q. B. D. 792; *Wasteneys v. Wasteneys*, [1900] A. C. 446; *Ord v. Ord*, [1923] 2 K. B. 432.

406. Incapacity of parties—Infant.]—(1) Where a mother who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate on the heirs male of the marriage; bill, for a specific performance by decreeing a strict settlement, dismissed: & even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, & none of the parties having asserted their rights, the ct. would not have interfered.

(2) Covenant in a marriage settlement that the husband shall, within one year, execute, he being then under age, does not show such an interest in him as to put a purchaser upon inquiry.

It appears that T. [the son] was an infant, & neither did nor could covenant by that deed (*NORTHINGTON, LORD KEEPER*).—*HOWORTH v. DEEM* (1758), 1 Eden, 351; 28 E. R. 720.

407. Laches—Rights not asserted over long period.]—*HOWORTH v. DEEM*, No. 406, *ante*.

408. Non-occurrence of contingency—Covenant to settle after death of third party—Covenantor survived by third party.]—In agreements no relief in equity where an action at law would not lie by reason of a substantial defect; such as a contingency not happening. Husband covenants in marriage arts., in six months after death of his mother, & that he should come to & be in possession of the estate in jointure, to settle, etc. He dies in mother's life, leaving no issue. The estate comes to his heir; who shall not be compelled by the wife to a specific performance.—*WHITMEL v. FARREL* (1749), 1 Ves. Sen. 256; 27 E. R. 1017, L. C.

409. Covenant contrary to public policy—Annuity on separation.]—By arts. before marriage, the husband covenanted to settle an annuity on the wife after marriage to be paid in the event of his death or any separation taking place:—*Held*: such a covenant was contrary to public policy & morality, & could not be enforced by a ct. of equity.—*COCKSEDGE v. COCKSEDGE* (1844), 14 Sim. 244; 13 L. J. Ch. 384; 3 L. T. O. S. 374; 8 Jur. 659; 60 E. R. 351; *subsequent proceedings* (1845), 5 Hare, 397.

*Annotations:—***Distd.** *Marlborough v. Marlborough* (1900), 83 L. T. 578. **Consd.** *Brodie v. Brodie*, [1917] P. 271.

Non-performance of mutual covenants.]—*See* Sub-sect. 6, B. (b), *ante*.

C. Lien.

See Settled Land Act, 1925 (c. 18), s. 11, & generally, LIEN, Vol. XXXII., pp. 212 *et seq.*

410. Covenant to settle lands of specified value—Subsequent jointure to second wife without notice.]

by marriage contract, upon the ground of non-implementation of the husband's counter obligation under the contract to make payment of a certain provision to her.—*ROSWELL v. MILLER* (1846), 8 Dunl. (Ct. of Sess.) 430; 18 Sc. Jur. 210.—*SCOT*.

PART III. SECT. 3, SUB-SECT. 6.—
B. (c).

401 i. Uncertainty.]—A., by marriage articles, agreed with trustees named therein, that he "should from time to time thereafter effect such assur-

ances on his own life, at such periods & for such amounts respectively as his income would fairly admit of," & assign the same to the trustees on trusts in the articles specified:—*Held*: this agreement was so uncertain that a ct. of equity would not decree specific performance of it.—*TOTTENHAM v. TOWNSEND* (1856), 5 I. Ch. R. 225.—*IR*.

r. Article contrary to powers in settlement.]—Equity will not decree specific execution of an article, which is contrary to the powers in a settle-

ment.—*STRATFORD v. ALDBOROUGH (EARL)* (1786), 1 Ridg. Parl. Rep. 281.—*IR*.

PART III. SECT. 3, SUB-SECT. 6.—C.

1. Covenant to settle specified lands.]—*THOMPSON v. SIMPSON* (1841), 1 Dr. & War. 459.—*IR*.

a. —.]—*WELDON v. BRADSHAW* (1873), 7 I. R. Eq. 168.—*IR*.

b. Covenant to charge all present & after-acquired personal & real estate with specified sum—Charge on personal

—A. on the marriage of his son, covenants for himself, his exors., without naming his heirs, to settle lands of £150 a year on the son, & the issue of the marriage, but dies before any settlement made. The son enters on the real estate as heir to his father, & settles it for the jointure of a second wife, who has no notice of the arts. Decreed the arts. to be a lien on the lands, whereof the father was then seised, though no particular lands are mentioned in the arts.—*ROUNDELL v. BREARY* (1704), 2 Vern. 482; 23 E. R. 909; but see report in 2 De G. & J. 319, n.

Annotations:—*Consd.* Wellesley v. Wellesley (1839), 4 My. & Cr. 561; *Mornington v. Keane* (1858), 2 De G. & J. 292. Had that case (*Roundell v. Breary*) been as reported in the books, it would have been very important to have considered how far it was a binding authority; but on examination of the record, it appears to have been a perfectly different case, & to have been one in which there was an intention to charge particular lands by reason of a schedule having been prepared for the purposes of the settlement (*TURNER, L.J.*). *Refd.* Deacon v. Smith (1746), 3 Atk. 323; *Ravenshaw v. Hollier* (1835), 4 L. J. Ch. 119; *Montagu v. Sandwich* (1886), 32 Ch. D. 525.

411. — No specific lien.—One covenants before marriage to settle certain lands on his wife for life & afterwards devises these lands for payment of debts; the covenant is a specific lien on the lands. But a covenant to settle lands of the value of £60 *per annum*, without mentioning any lands in certain, this is no specific lien, but the wife must come in as a creditor in general, & the master to value her estate for life, & the wife to come in for that valuation. But the wife to have the arrears before incurred, as well as the valuation of her estate for life.—*FREMOULT v. DEDIRE* (1718), 1 P. Wms. 429; 24 E. R. 458, L. C.

Annotations:—*Apd.* Williams v. Lucas (1789), 2 Cox, Eq. Cas. 160; *Ravenshaw v. Hollier* (1835), 4 L. J. Ch. 119. *Consd.* *Mornington v. Keane* (1858), 2 De G. & J. 292. *Refd.* *Plunket v. Penon* (1742), 2 Atk. 290; *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561; *Montagu v. Sandwich* (1886), 32 Ch. D. 525; *Central Trust & Safe Deposit Co. v. Snider*, [1916] 1 A. C. 266. *Mentd.* *Onychund v. Barker* (1745), 1 Atk. 21; *Lashley v. Hog* (1804), 2 Coop. temp. Cott. 449; *Powdrell v. Jones* (1854), 2 W. R. 513.

412. — — ——Covenant in marriage arts. to settle lands to the amount of £200 *per annum*, or to settle £4,000 to the same uses, held, not to constitute a specific lien on lands of which the covenantor was then seised.—*RAVENSHAW v. HOLLIER* (1835), 7 Sim. 3; 4 L. J. Ch. 119; 58 E. R. 738, L. C.

413. Covenant to settle specified lands—Lien.—*FREMOULT v. DEDIRE*, No. 411, *ante*.

414. Covenant to set apart profits of land—Lien against claimants with notice.—*LEGARD v. HODGES*, No. 392, *ante*.

415. Covenant by equitable tenant in tail—Entitled under prior covenant to settle lands—No lien under second covenant.—A party entitled as equitable tenant in tail, under a settlement in which is a covenant to convey lands to the uses of such settlement; afterwards & upon his own marriage, covenants also to convey lands of less value; though he obtains a decree for the execution of the first mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed.—*GARDNER v. TOWNSHEND* (MARQUIS) (1815), Coop. G. 301; 35 E. R. 506.

Agreement to settle wife's bonds—Bonds wrongfully disposed of by husband—Lien on remainder

of wife's property.—See LIEN, Vol. XXXII., p. 267, No. 490.

D. Other Cases.

416. Existence of agreement denied by covenantor—Depositions of terms admitted.—*BATES v. HEARD* (1612), 1 Dick. 4; 21 E. R. 167.

417. Covenant to settle specific lands—Supported against subsequent settlement—Non-conformance with covenant—Subsequent settlement procured by fraud.—A. on his marriage entered into arts., whereby he covenanted to settle his whole estate upon himself for life, with remainder to his first & other sons in tail. No settlement was made pursuant to these arts.; but A. when his eldest son attained twenty-one, prevailed on him by threats, promises, etc., & under a total ignorance of the arts., to join in a settlement, whereby the estate was limited to different uses, & a power given to the father of making a jointure. This settlement was set aside as against the eldest son for fraud, & the arts. were established, & the father having, on his marriage with a second wife, given a bond conditioned for making her a jointure, this bond was also set aside as against the heir, & the wife was put to seek satisfaction for the penalty of the bond, out of her husband's personal assets.—*JEVERS v. JEVERS* (1735), 1 Bro. Parl. Cas. 272; 1 E. R. 562; *sub nom.* *IVERS v. IVERS*, 2 Eq. Cas. Abr. 51, pl. 13, H. L.

— — — — — See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., p. 226, No. 540.

418. — Non-performance by husband—Wife maintained by husband—No account of wife's estate during coverture.—*HARRISON v. CONSTANTINE* (1709), 2 Eq. Cas. Abr. 147; 22 E. R. 126.

419. — — — Wife's fortune in trustees until settlement—Survives for her own benefit.—Covenant by husband before marriage to settle lands in jointure for wife, & other part for the issue of the marriage, her fortune to remain in trustees till such settlement made. The husband dying insolvent without performing it, the wife's fortune survives for her own benefit, & the issue not entitled to take it from her.—*PYKE v. PYKE* (1750), 1 Ves. Sen. 376; 27 E. R. 1091, L. C.

— — — — — See, also, Sub-sect. 6, B. (b), *ante*.
420. Covenant to exercise power of jointure—Power treated as exercised.—*COVENTRY (COUNTS) v. COVENTRY (EARL)*, No. 1265, *post*.

421. Covenant as to value of estate to be settled—Annual value free from incumbrances—Estate incumbered beyond value—Equivalent payable from settlor's estate.—*BARKER v. IVERS*, No. 374, *ante*.

Bonds relating to marriage.—See BONDS, Vol. VII., pp. 207, 208, 233, 234, 252, 253, Nos. 490–495, 757–761, 948–950.

SECT. 4.—COVENANTS TO SETTLE AFTER-ACQUIRED PROPERTY.

SUB-SECT. 1.—IN GENERAL.

422. Necessity for express covenant.—Settlement in consideration of the fortune of the wife

estate valid against creditors.—*GALAVAN v. DUNNE* (1879), 7 L. R. Ir. 144.—IR.

PART III. SECT. 3, SUB-SECT. 6.—D.

c. Validity of articles—Subsequent settlements must be considered.—When a party claims under marriage articles & settlements made in pursuance thereof, it is not sufficient to direct

an issue to try the validity of the articles only, but the issue should be extended to try the execution of the subsequent settlements.—*EDGORTH v. SWIFT* (1735), 4 Bro. Parl. Cas. 654.—IR.

d. Liability for interest—From death of settlor or date of contract.—*BERRY v. HENDERSON'S TRUSTEES* (1836), 14 Sh. (Ct. of Sess.) 1008.—SCOT.

e. Covenant to provide annuity—Purchase of annuity from limited company—Liability of estate continuing in case of default of company.—*COLVIN v. MCCLELLAND* (1879), 6 Ir. (Ct. of Sess.) 564.—SCOT.

PART III. SECT. 4, SUB-SECT. 1.

f. What amounts to.—A., on his marriage, charged £2,000 specifically,

Sect. 4.—Covenants to settle after-acquired property:
Sub-sects. 1 & 2, A. & B.]

confined to her fortune at the time; unless expressed to comprehend future accessions.—**MITFORD v. MITFORD** (1803), 9 Ves. 87; 32 E. R. 534.

Annotations:—*Reid*. *Hornby v. Lee* (1816), 2 Madd. 16; *Stanton v. Hall* (1831), 2 Russ. & M. 175; *Re Brown, Ex p. Turpin* (1832), 1 Deac. & Ch. 120; *Corsbie v. Free* (1840), Cr. & Ph. 64; *Greedy v. Lavender* (1850), 13 Beav. 62. **Mentd.** *Wright v. Morley, Morley v. St. Alban* (1805), 11 Ves. 12; *Purdew v. Jackson* (1823), 1 Russ. 1; *Honner v. Morton* (1828), 3 Russ. 65; *Pierce v. Thornely* (1828), 2 Sim. 167; *Re Severn, Ex p. King* (1835), 1 Deac. 143; *Re Courtney, Ex p. Pollard* (1837), 2 Deac. 367; *Sturges v. Champneys* (1839), 5 My. & Cr. 97; *Sherington v. Yates* (1844), 1 Dow. & L. 1032; *Drewe v. Long* (1853), 1 Eq. Rep. 58; *Re Barr's Trusts* (1858), 4 K. & J. 219; *Richbell v. Alexander* (1861), 10 C. B. N. S. 324; *Re Jackson, Ex p. Union Bank of Manchester* (1871), L. R. 12 Eq. 354.

423. Whether "usual clause."—*Re MADDY'S ESTATE, MADDY v. MADDY*, No. 336, ante.

424. What amounts to—Assignment of interest in settled funds.]—By marriage arts. dated in 1845 certain funds were settled upon trust for the husband, Sir R. W., for life, then for the wife, Lady W., for life, then for the children of the marriage as the husband should appoint, or in default of appointment by the husband as the wife should appoint. In 1876 Sir R. W. died without having exercised his power of appointment except as to a specific portion of the funds appointed in trust for a daughter. In 1879 Lady W. appointed that after her decease the trustees should stand possessed of the trust funds for the time being subject to the trusts of the arts., other than the sum appointed by Sir R. W. in trust for the remaining six children of the marriage in equal shares. In 1893 one of the sons, William, by his marriage settlement assigned to trustees his one-sixth share of the trust funds, which he specified in a schedule, to which he was entitled on the death of his mother, & all other, if any, his estate & interest of & in all other the trust funds for the time being, subject to the trusts of the arts. of 1845. By a codicil dated in 1878 Mrs. B. directed that the property which she had left by her will to Sir R. W. should be transferred to the trustees of the marriage arts. & be held upon the trusts thereof, & she died in 1900. Subsequently, in 1900, Lady W. appointed this property in trust for certain of her children, including William:—*Held*: (1) the appointment of 1879 did not operate as an appointment of any moneys not then subject to the trusts of the marriage arts.; (2) William's marriage settlement passed only such estate as he then had in the trust funds; & therefore, his share of the property bequeathed by Mrs. B.'s codicil was not included in that settlement.—*Re WALPOLE'S MARRIAGE SETTLEMENT, THOMSON v. WALPOLE*, [1903] 1 Ch. 928; 72 L. J. Ch. 522; 88 L. T. 419; 51 W. R. 587.

Annotation:—*As to (2) Distd.* *Re Beaumont, Re Trusts of Indenture of 29th April 1904, Beaumont-Nesbitt v. Packer* (1913), 57 Sol. Jo. 283.

425. — Agreement to execute settlement—Of property to which covenantor "may be entitled."]—By an ante-nuptial agreement the husband agreed that he would forthwith execute a settlement "of all my share, property or interest, as well vested or accruing, to which I may be entitled under any will or settlement." The settlement was never made, but many years after the agreement had been executed the husband became entitled to residue under the will of his father:—*Held*: such residue was not caught by

the words of the agreement.—*Re RIDLEY'S AGREEMENT, RIDLEY v. RIDLEY* (1911), 55 Sol. Jo. 838.

426. Powers included in settlement—Powers of sale & exchange.]—*WILLIAMS v. CARTER* (1818), Sugden on Powers, 8th ed. App. 945.

Annotations:—*Distd.* *Horne v. Barton* (1822), Jac. 437. *Reid*. *Hill v. Hill* (1834), 6 Sim. 136.

427. — Power of sale.]—A settlement of personal estate contained a power to alter & vary, & a covenant to settle future acquired real & personal estate on similar trusts:—*Held*: a power of sale might be introduced into a settlement of subsequently acquired real estate.—*ELTON v. ELTON* (No. 2) (1860), 27 Beav. 634; 54 E. R. 252.

428. — Power to grant mining leases—Covenant to settle subject to same powers.]—In a settlement of personal property, the parties covenanted to settle all future acquired property upon the same trusts, etc., & subject to the same powers, etc., or as near thereto as the nature & tenure of the property would admit of:—*Held*: this authorised the insertion of a power to grant mining leases in the settlement of subsequently acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them.—*SCOTT v. STEWARD* (1859), 27 Beav. 367; 54 E. R. 144.

429. Effect of subsequent settlement on different trusts—Original settlement not superseded.]—Two ante-nuptial settlements were executed, each contained a covenant to settle after-acquired property of the intended wife, but upon different trusts. In the absence of evidence of reasons for making the second settlement, the ct., without deciding whether the first settlement in point of time could have been superseded as to after-acquired property, refused to hold that the first settlement was superseded by the second.—*Re GUNDRY, MILLS v. MILLS*, [1898] 2 Ch. 504; 67 L. J. Ch. 641; 79 L. T. 438; 47 W. R. 137.

430. Remedy for breach of covenant—Measure of damages.]—Trustees can recover substantial damages for a breach of a covenant to settle after-acquired property, & the measure of damage is the value of the property which would have come to the hands of the trustees if the covenant had been duly performed.—*Re CAVENDISH BROWNE'S SETTLEMENT TRUSTS, HORNER v. RAWLE* (1916), 61 Sol. Jo. 27.

Operation of covenants.]—See Sub-sect. 7, post.
Effect of bankruptcy of settlor.]—See BANKRUPTCY, Vol. V., p. 851, Nos. 7153–7155; Supp. 3, No. 7153a.

Covenants by infants.]—See INFANTS, Vol. XXVIII., pp. 206–208, 213, 215, Nos. 658–660, 679, 730, 742, 743.

SUB-SECT. 2.—CONSTRUCTION.

A. In General.

See, generally, DEEDS, Vol. XVII., pp. 242 *et seq.*

431. Instrument construed by itself.]—*COWPER-SMITH v. ANSTREY*, [1877] W. N. 28.

432. Terms strictly construed.]—*Re VAN STRAUBENZEE, BOUSTEAD v. COOPER*, No. 683, *post*.

433. How far controlled by recitals.]—*PARKINSON v. DASHWOOD*, No. 440, *post*.

not only on the real estates then in his possession, but also on all his after-acquired real & personal estate. A. afterwards incurred large debts. On

a bill filed to raise that sum:—*Held*: it was a valid charge affecting the after-acquired property, if the lands named in the settlement, which were declared

the primary fund, proved insufficient. Priority was given accordingly.—*GUBBINS v. GUBBINS* (1825), 1 Dr. & Wal. 160, n.—*IR.*

434. —.] — **BURN-MURDOCH v. CHARLES-WORTH**, No. 601, *post*.

—.]—*See, generally*, **DEEDS**, Vol. XVII., pp. 362-369.

Construction of particular expressions.—*See* Sub-sect. 3, *post*.

B. Covenants to Settle Particular Interests.

435. Restriction of general words—"Or otherwise."—Covenant, in an infant's marriage settlement, that whatever should come to the wife from the mother or otherwise, shall be bound by the settlement, restrained to what shall come from the mother, not to property coming unexpectedly from other quarters.—**WILLIAMS v. WILLIAMS** (1782), 1 Bro. C. C. 152; 28 E. R. 1048, L. C.

Annotation.—*Re*ld. **Caruthers v. Caruthers** (1794), 4 Bro. C. C. 500.

436. —.]—Upon the marriage of one of several residuary legatees under her father's will, the intended husband & wife assigned to trustees all & every the sum & sums of money legacy & legacies, & other personal property then due & payable, or belonging to, or to become due & payable to the intended wife under or by virtue of her father's will, "or otherwise howsoever," upon trusts for her separate use for life, without power of anticipation, with trusts in remainder in favour of the children of the marriage. By the next witnessing part of the same settlement, it was agreed, that in case any real or personal property should, during the coverture, be given or bequeathed to the wife, the husband should settle it upon trust so that the wife should have the sole power of disposing of the same:—*Held*: a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for the children, the latter witnessing part of the settlement showing that the former must be read in a restricted sense.—*Re* **STEPHENSON'S TRUSTS**, *Ex p. STEPHENSON* (1853), 3 De G. M. & G. 969; 43 E. R. 379, L. J.J.

Annotation.—*Distd. Re* **Mainwaring's Settmt.** (1866), L. R. 2 Eq. 487.

437. —.]—By the marriage settlement of O., dated in 1821, a sum of money was settled upon the children of the marriage as O. should by deed or will appoint, & in default of appointment, to be divided among all the children at twenty-one equally. By his will, O. did not validly appoint the fund, but he gave certain legacies to his children of whom A. was one, at twenty-one. By the marriage settlement of A. dated in 1851, she being then an infant, after reciting that A. was entitled to certain sums & to other interests, & that it had been agreed that the intended husband should covenant to assign to trustees all the property which "under the will or otherwise of the said O.," A. might become entitled to, the husband covenanted to assign to trustees all the property which "under the will or otherwise of the said O. or otherwise howsoever," A. might become entitled to. A. attained twenty-one, & a share of the unappointed fund, under the settlement of 1821, becoming therefore payable to her:—*Held*: as between the trustees of the settlement of 1851 & the husband of A. the former were entitled.—*Re* **OWEN'S TRUST** (1855), 1 Jur. N. S. 1069.

438. —.]—H., being entitled under her father's will to a share of a fund, such share is

settled on her marriage, the words of the settlement referring to all the parts or shares, possible or contingent, to which H. was then or might thereafter be entitled to under the will "or otherwise." H. then became entitled to a share of her brother's residuary estate as one of his next of kin; & the question was, whether such share was included in her marriage settlement:—*Held*: it was not.—*Re* **NEWBOLT'S TRUST** (1856), 4 W. R. 735.

439. —.]—A marriage settlement recited the treaty to be, to settle all property which may come to the wife from H. by will, or codicil or codicils, or otherwise. The husband subsequently covenanted to settle all property which thereafter might come to the wife by any will or codicil or codicils of H., or otherwise:—*Held*: a gift to the wife by the will of one of the trustees of this marriage settlement, not being H., was not bound by this covenant; & the covenant only bound the husband to settle such property as should be derived by the wife from H.—*Re* **NEAL'S TRUSTS** (1857), 4 Jur. N. S. 6.

440. —.]—The words "or otherwise" construed as relating to a mode of acquisition *ejusdem generis* with survivorship & accruer previously mentioned.

By a marriage settlement, after reciting that the intended wife was entitled to a one-sixth part or share of & in certain specified funds, subject to the trusts of the will of W., & might become thereafter entitled to other shares under the trusts of such will, & that it had been agreed that all her shares in such trust funds under such will should be settled, it was witnessed that she assigned to trustees to hold upon the trusts of the settlement all the one-sixth part or share & all other the parts or shares vested or contingent to which she was then or might become entitled by accruer, survivorship, or otherwise, in such specified trust funds, & also all the share & interest, whether vested or contingent, or in expectancy, & of which she was then or might become entitled to in any property whatsoever under the will of W. The wife afterwards became entitled to a further share in the specified trust funds under the will or codicil, or as one of the next of kin of the person entitled thereto:—*Held*: as she did not take the last-mentioned interest under the will of W., it was not comprised in or subject to the trusts of the settlement.—**PARKINSON v. DASHWOOD** (1861), 30 Beav. 49; 4 L. T. 41; 7 Jur. N. S. 854; 9 W. R. 493; 54 E. R. 807.

Annotation.—*Folld. Edwards v. Broughton* (1863), 32 Beav. 667.

441. —.]—The five children of testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth of such residue, & all other her share by survivorship or otherwise, & all her right, contingent, reversionary or otherwise, possibility, etc., therein. She afterwards became entitled to a further share, by the death of a brother intestate:—*Held*: it was not included in the settlement.—**EDWARDS v. BROUGHTON** (1863), 32 Beav. 667; 2 New Rep. 476; 9 L. T. 41; 11 W. R. 1038; 55 E. R. 262.

442. —.]—*Re* **STRATTEN'S SETTLEMENT**, **HOPE v. MORLEY** (1905), 49 Sol. Jo. 651.

443. Whether restricted to particular interest—Land to be purchased in particular parish—Conveyance taken in name of son.]—A. by marriage

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g. Whether restricted to particular interest—Property to be acquired under will or as heir or next of kin of father—Interest in residue bound.]—A covenant by a woman in her marriage

settlement to do all things necessary for transferring & vesting in the trustees thereof all property she may become entitled to under the will, or as one of the heirs or next-of-kin, of her father will bind her interest in the residue of her father's estate

where no contrary direction appears, yet directions contained in the will, as to the application & investment of her interest, may overrule such covenant.—*Re* **NOIDHEIMER** (1914), 30 O. L. R. 327; 18 D. L. R. 501; 5 O. W. N. 748.—**CAN.**

*Secl. 4.—Covenants to settle after-acquired property :
Sub-sect. 2, B.; sub-sect. 3, A. & B.]*

articles covenanted, that all the lands which he should afterwards purchase in the parish of K should be to the uses of the articles. He purchased lands in K. & took a conveyance in fee in the name of his youngest son, but there was no declaration of trust:—*Held*: the son was a trustee for his eldest brother, who was entitled to these lands by virtue of the covenant.—*BLAKE v. BLAKE* (1721), 7 Bro. Parl. Cas. 241; 3 E. R. 157, 11. L.

444. — Property to accrue under particular settlement.]—A. being, under the marriage settlement of her father & mother, tenant in tail in remainder of certain lands, expectant on the failure of male issue of her only brother, there is made on her marriage a settlement containing a covenant, by which, after reciting that it was possible that she might, under & by virtue of the limitations contained in the former settlement, eventually become entitled to a certain estate, or a part of certain lands, it is agreed, that, in case she shall in her lifetime become entitled to any such estate as aforesaid, the same shall be conveyed to the uses & for the trusts therein mentioned; the brother afterwards suffers a recovery, & dies intestate without issue, whereupon the fee simple of one-fourth part of the lands comprised & referred to in the settlements descends upon her as one of his co-heiresses:—*Held*: the covenant does not affect the fee simple so coming to her by descent.—*TAYLEUR v. DICKENSON* (1826), 1 Russ. 521; 38 E. R. 201.

Annotation:—*Consd. Smith v. Osborne* (1857), 6 H. L. Cas. 375.

445. — Property to accrue under particular will.]—A covenant to settle land which the covenantor should succeed to under a will, does not bind him to settle whatever interest he might derive *aliunde* in the same land.

In a marriage settlement there was a recital that A., a party thereto, had a contingent remainder in land under a will, & he covenanted when the said remainder became vested in him in possession to convey the land to the uses of the settlement. A. was not in fact so entitled, but was entitled as expectant heir in tail. The tenant in tail in possession barred the entail & afterwards devised the land to A.:—*Held*: not having taken the land under the will, but *aliunde*, A. was not bound by his covenant to settle it.—*SMITH v. OSBORNE* (1857), 6 H. L. Cas. 375; 30 L. T. O. S. 57; 3 Jur. N. S. 1181; 6 W. R. 21; 10 E. R. 1340, H. L.

Annotations:—*Refd. Ford v. Tynte* (1865), 34 L. J. Ch. 452; *Re Harper's Settlement*, *Williams v. Harper*, [1919] 1 Ch. 270. *Mentd. Re Keop's Will* (1863), 32 Beav. 122; *Hurry v. Morgan* (1866), L. R. 3 Eq. 152; *Re Arnold's Trusts* (1870), L. R. 10 Eq. 252; *Waite v. Littlewood* (1872), 8 Ch. App. 70; *Re Johnson, Hickman v. Williamson* (1884), 53 L. J. Ch. 1116; *Askew v. Askew* (1888), 57 L. J. Ch. 629; *Re Bowman, Re Lay, Whythead v. Boulton* (1889), 41 Ch. D. 525; *Powell v. Heilcar*, [1919] 1 Ch. 138.

446. — — — — —.]—*Re NEAL'S TRUSTS*, No. 439, ante.

447. — — — — —.]—*PARKINSON v. DASHWOOD*, No. 440, ante.

448. — — — — — To wife or husband in her right.]—A husband covenanted to settle the share of his wife & of himself "in her right" in the stocks comprised in her great uncle's will. Under the will the fund was limited to the husband, in case of his surviving his wife & her father, & of there being no issue:—*Held*: the husband's interest was not comprised in his covenant.—*IBBETSON v. GROTE* (1858), 25 Beav. 17; 53 E. R. 541.

449. — — — — — Property appointed by testator.]—A covenant in a marriage settlement to settle property to be acquired "under or by virtue of" the will of the wife's father:—*Held*: not to comprise property, over which the father had by will exercised a power of appointment amongst his children, given to him by an earlier settlement.—*EVANS v. JENNINGS* (1862), 1 New Rep. 178.

Annotation:—*Refd. Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234.

450. — — — — —.]—*Re PRYCE, NEVILL v. PRYCE*, No. 719, post.

451. — Property to accrue on particular contingency.]—General words in the operative part of a deed controlled by the recitals. A mother had an exclusive power of appointment over a fund, in favour of her children, & which, in default, was divisible equally, the share of the daughters to vest at twenty-one or marriage. She had a son & a daughter, & she appointed £10,000 to her son on his marriage. His marriage settlement recited that he was entitled to the £10,000 & was also contingently entitled to the other moiety, in the event of his sister dying unmarried under twenty-one, & it recited an agreement to settle the £10,000 & "all other his part, share & interest, as well vested as contingent" in the trust funds. He then assigned his interest in the same terms. The daughter attained twenty-one & died, & the mother afterwards appointed the residue of the fund to her son:—*Held*: such residue did not pass under his settlement.—*CHILDERS v. EARDLEY* (1860), 28 Beav. 648; 3 L. T. 166; 6 Jur. N. S. 690; 8 W. R. 698; 54 E. R. 515.

SUB-SECT. 3.—WHAT INTERESTS INCLUDED.

A. In General.—Expression of Contrary Intention.

452. Whether property included.]—An assignment by an intended wife of her future property, followed by a covenant by the intended husband to settle the after-acquired property of the wife, will not extend to property given to the wife in terms which are inconsistent with the trusts of the settlement. Therefore, where an intended wife, by an ante-nuptial settlement, assigned all the personal estate to which she might at any time thereafter become entitled in any way howsoever upon the trusts of the settlement; & the deed contained a covenant by the intended husband to settle any real or personal estate whatsoever that should descend to, devolve upon, or vest in the wife; & where a legacy was, after the marriage, bequeathed to the wife, with a direction to the exors. to pay such part of the legacy to the wife as she might require for her separate use independent of her husband, & to be free in all respects from his debts & engagements:—*Held*: the settlement had no operation upon such part of the legacy as was required by the wife to be paid to her upon her separate receipt.—*Re MAINWARING'S SETTLEMENT* (1866), L. R. 2 Eq. 487; 14 W. R. 887.

Annotations:—*N.F. Re Allnutt, Pott v. Brassey* (1882), 22 Ch. D. 275. *Expid. Scholfield v. Spooner* (1884), 26 Ch. D. 94. *Refd. Re Portadown, Dungannon & Omagh Junction Ry., Ex p. Young* (1867), 15 W. R. 979; *Re Thorne, Thorne v. Campbell Preston*, [1917] 1 Ch. 360.

453. — — — — —.]—*SCHOLFIELD v. SPOONER*, No. 533, post.

454. — — — — —.]—By an ante-nuptial indenture of settlement made in 1898, the husband covenanted to settle all property to which during the continuance of the marriage he should become entitled not exceeding in the aggregate £1,000, upon trusts under which the wife & husband were

entitled to successive life interests with remainder over in favour of the children of the marriage.

Under the trusts of the will, made in 1920, of his father who died in 1926, the husband became entitled during his life to receive the income of certain property, until any event should happen in consequence of which he would cease to be so entitled; & after the determination of the trusts in his favour, there was a gift over of that property. The will contained an expression of testator's intention that the benefits accruing to the husband under his will were not to be affected by his covenant to settle after-acquired property:—*Held*: the equitable assignment of the husband's life interest under his father's will at the moment of testator's death would have constituted an event within the meaning of the will, if the covenant applied to it; but, as the effect of the covenant would thus be to destroy that interest at the moment of its creation, the husband's covenant had no application to it; with the result that his life interest was not forfeited, but continued to subsist under the trusts of his father's will.—*Re SMITH, FRANKLIN v. SMITH*, [1928] 1 Ch. 10; 97 L. J. Ch. 1; 138 L. T. 81; 71 Sol. Jo. 744.

B. Accumulations of Income and Property Purchased therewith.

455. Income laid up as capital.—Effect of a contract on marriage by bond to devise, convey or assure, all such goods, personal estate & effects, that the husband should at any time during the joint lives of him & his wife be possessed of, to the use of them & the survivor; attaching on capital; not income, unless laid up as capital; admitting therefore expenditure, & debts, in a fair application of income, not liable to a minute account. On that principle an estate purchased by the husband with money, partly his own, partly borrowed on his personal security, & some paid off by him, was after his death held to belong not to the trust, but to the heir, charged for the benefit of the trust with the money, that was his own, the debts paid on account of that purchase, & expenditure in repairs, improvements, etc.—*LEWIS v. MADOCKS* (1810), 17 Ves. 48; 34 E. R. 19, L. C.; *previous proceedings* (1803), 8 Ves. 150, L. C.

Annotations.—*Consd.* *St. Aubyn v. Humphreys* (1856), 22 Beav. 175; *Williams v. Thomas* (1862), 2 Drew. & Sm. 29. *Expld.* *Re Clint, Ex p. Bolland* (1873), L. J. 17 Eq. 115. *Consd.* *Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109; *Churston v. Buller* (1897), 77 L. T. 45. *Expld.* *Finlay v. Darling*, [1897] 1 Ch. 719. *Consd.* *Re Dowding's Settlement*. Trusts, *Gregory v. Dowding*, [1904] 1 Ch. 441. *Appld.* *Re Reals, Ex p. Clough*, [1904] 2 K. B. 769. *Distd.* *Re Clutterbuck's Settlement*, *Bloxam v. Clutterbuck*, [1905] 1 Ch. 200. *Expld.* *Mackenzie v. Allardes*, [1905] A. C. 285. *Refd.* *Fortescue v. Hennah* (1812), 19 Ves. 67; *Logan v. Wienholt* (1833), 7 Bl. N. S. 1; *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561; *Fyfe v. Arbutnot* (1857), 3 Sm. & G. 547; *Ford v. Tynch* (1865), 34 L. J. Ch. 452; *Cave v. Cave* (1880), 35 Ch. D. 639; *R. Clarke, Coombe v. Carter* (1887), 35 Ch. D. 109; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523. *Mentd.* *Imperial Paper Mills of Canada v. Quebec* (1913), 83 L. J. P. C. 67.

456. Income not originally included in covenant.—If income not originally included in a covenant in a marriage settlement to settle other & after-acquired property is so invested as to indicate a permanent intention on the part of the owner to turn it into capital, such investment becomes subject to the covenant, provided the terms are sufficiently large to include it as capital. The same result follows in the case of a sale of capital property not originally included in the covenant, where the proceeds are laid out in the purchase of other property coming within the terms of the covenant.

A wife during coverture purchased property
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partly out of the proceeds of property subject to a covenant to settle, partly out of accumulations of her income under the settlement, & partly out of a loan subsequently repaid by herself & her husband:—*Held*: the property so purchased belonged to her absolutely, but subject to a charge in favour of the settlement trustees for the amount (a) of the income accumulations, (b) of her contribution towards repaying the loan.—*Re BENDY, WALLIS v. BENDY*, [1895] 1 Ch. 109; 64 L. J. Ch. 170; 71 L. T. 750; 43 W. R. 345; 13 R. 95.

Annotations.—*N.F.* *Finlay v. Darling*, [1897] 1 Ch. 719. *Consd.* *Re Dowding's Settlement*. Trusts, *Gregory v. Dowding*, [1904] 1 Ch. 441. *N.F.* *Re Clutterbuck's Settlement*, *Bloxam v. Clutterbuck*, [1905] 1 Ch. 200. *Distd.* *Mackenzie v. Allardes*, [1905] A. C. 285.

457. ————If income not originally included in a covenant in a marriage settlement to settle other & after-acquired property is invested by the wife during the coverture, the investments so made do not become subject to the covenant.—*FINLAY v. DARLING*, [1897] 1 Ch. 719; 66 L. J. Ch. 348; 76 L. T. 461; 45 W. R. 445; 41 Sol. Jo. 405.

Annotations.—*Consd.* *Re Dowding's Settlement*. Trusts, *Gregory v. Dowding*, [1904] 1 Ch. 441. *Fold.* *Re Clutterbuck's Settlement*, *Bloxam v. Clutterbuck*, [1905] 1 Ch. 200. *Apprvd.* *Mackenzie v. Allardes*, [1905] A. C. 285.

458. "Savings out of income"—Expressly included in settlement—Portion of annuity unpaid on death of annuitant.—By an ante-nuptial settlement an annuity was assigned to trustees in trust for the lady for her sole & separate use for her life, with a provision that all savings arising from her income should be held by the trustees subject to her appointment, & in default of appointment in trust for her next of kin. The lady died in May 1847, without having made any appointment, & the last payment to her, in respect of the annuity, has been made in the Dec. preceding her death:—*Held*: the portion of the annuity remaining in the hands of the trustees between the last payment to & the death of the lady constituted "savings out of income" within the meaning of the settlement, & her administrator was not entitled to it as against the next of kin.—*Re ROSENTHALL'S SETTLEMENT* (1857), 6 W. R. 139.

459. Property purchased with savings—From separate estate of wife.—By a marriage settlement, dated in 1838, real estate was conveyed to such uses as M. B. N., the intended wife, should by deed or will appoint, & in default of appointment to certain uses for the benefit of the children of the marriage, with an ultimate remainder to the use of M. B. N. in fee; & it was provided that all property which during the coverture should come to or vest in the husband in right of said M. B. N., or in the said M. B. N. by descent, devise, limitation, gift, or otherwise, should be settled to the same uses, trusts & intents, etc., as were thereinbefore expressed concerning the hereditaments thereby granted & released. M. B. N. by her will, made shortly after the settlement, devised & bequeathed all the residue of her property, except such real & personal estate as might remain subject to the trusts of her marriage settlement by reason of no specific disposition thereof having been made by her under the power for that purpose therein contained, & of which that general devise & bequest was not to be taken as in execution, for the benefit of her children. If no children then over. In 1854 M. B. N. purchased real estate out of the savings of her separate property, & it was conveyed to the same uses & trusts as those declared by the settlement of 1838, omitting only the uses in favour of children:—*Held*: (1) the exception in the will referred only to the property subject to the trusts of the

*Sect. 4.—Covenants to settle after-acquired property :
Sub-sect. 3, B., C., D. & E. (a).]*

marriage settlement at the date of the will, & the real estate subsequently purchased by M. B. N. passed under her will; (2) a covenant to settle after-acquired property would not affect property purchased by a married woman out of the savings of her separate estate.—*HUGHES v. JONES* (1863), 1 Hem. & M. 765; 2 New Rep. 417; 32 L. J. Ch. 487; 9 L. T. 143; 11 W. R. 898; 71 E. R. 335.

460. — *From income of settled property.*—*Re BENDY, WALLIS v. BENDY*, No. 456, *ante*.

461. — *Property purchased with the savings of a wife's income under settled property is not within a covenant by her in her marriage settlement to settle property to which she may thereafter become entitled.*—*Re CLUTTERBUCK'S SETTLEMENT, BLOXAM v. CLUTTERBUCK*, [1905] 1 Ch. 200; 73 L. J. Ch. 698; 53 W. R. 10; 48 Sol. Jo. 621.

Annotation :—*Refd. Mackenzie v. Allardes*, [1905] A. C. 285.

462. — *Effect of change of investment.*—By ante-nuptial marriage contract executed in 1848 the wife bound herself to convey to trustees the whole funds & estate real & personal which she might hereafter “conquest & acquire by purchase succession or otherwise.” The trustees were directed to pay the income of the trust estate to the wife during her life for her own separate benefit & use exclusive of the *ius mariti*, & by a clause in the contract the provisions in favour of children were to bar any claim they might make under the head of *legitim* :—*Held* : (1) the clause of conquest did not extend to estate which at the dissolution of the marriage by the death of the husband consisted of or was purchased with accumulations of the wife's separate income; (2) the only child of the marriage was not entitled to *legitim* out of his mother's estate.

There are some considerations which it is as well to bear in mind as aids to the construction of such clauses. These considerations may, of course, be excluded either designedly or accidentally by the language used, but unless they are so excluded they are, I think, of general, if not universal, application. One is that change of investment—mere alteration in the outward form of property—is not “acquisition” within the meaning of a provision of this sort. Another is that property which has reached its destination through the medium of the trust, or property which, in accordance with the declarations of the parties to the contract, comes to be at the absolute disposal of one of those parties, does not again fall under the operation of the trust unless there is a clear direction to that effect (*LORD MACNAGHTEN*).—*MACKENZIE v. ALLARDES*, [1905] A. C. 285, H. L.

463. *Property purchased with proceeds of sale—Of capital not originally included in covenant.*—*Re BENDY, WALLIS v. BENDY*, No. 456, *ante*.

C. Estates Tail.

464. *General rule—Not included.*—A marriage settlement contained an agreement & declaration by the parties that, if the wife then was, or if, during the coverture, she, or her husband in her right, should become seised or possessed of or entitled to any real or personal property, of a specified value, for any estate or interest whatsoever, in possession, reversion, remainder, or

expectancy, then & in every such case, the husband & wife, & all necessary parties, should, as soon as circumstances would admit, convey, assign, & assure the real & personal property to, or otherwise cause same to be vested in, the trustees of the settlement, upon the trusts thereof :

—*Held* : an estate tail in possession to which the wife became entitled during the coverture was not bound by this agreement, & she could not be compelled either to execute a disentailing deed, & to convey the estate in fee thus acquired by her to the trustees, or to execute a conveyance of the property to the trustees, so that they could by enrolling the deed acquire an estate in fee simple. —*HILBERS v. PARKINSON* (1883), 25 Ch. D. 200; 53 L. J. Ch. 194; 49 L. T. 502; 32 W. R. 315.

Annotations :—*Distd. Re Antist, Chetwynd v. Morgan, Morgan v. Chetwynd* (1886), 31 Ch. D. 596. *Apprvd. Re Dunsany's Settltmt., Nott v. Dunsany* [1906] 1 Ch. 578. *Refd. Mills v. Fox* (1887), 37 Ch. D. 153; *Re E. D. S.*, [1914] 1 Ch. 618.

465. — *By a marriage settlement the husband & wife covenanted that if during the coverture the wife, or the husband in her right, should at one & the same time & from the same source become seised or possessed of or entitled to any real or personal property, except as therein mentioned, for any estate or interest in possession, remainder, or expectancy, then & in every such case he & she would convey, assign, settle, & assure the real & personal estate unto or otherwise cause same to be vested in the trustees of the settlement upon the trusts thereof. The wife during the coverture became entitled in possession as tenant in tail to certain estates :—Held* : the covenant was not applicable to an estate tail.—*Re DUNSANY'S SETTLEMENT, NOTT v. DUNSANY*, [1906] 1 Ch. 578; 75 L. J. Ch. 356; 94 L. T. 361; 50 Sol. Jo. 324, C. A.

Annotations :—*Appl. Re Pearce's Settltmt., Pearce v. Pearce* [1909] 1 Ch. 304. *Refd. Re Plumtre's Settltmt., Underhill v. Plumtre* (1910), 79 L. J. Ch. 340; *Re E. D. S.*, [1914] 1 Ch. 618. *Mentd. Re Gaskell & Walters' Contract* (1906), 94 L. T. 658.

466. *Contingent reversiory estate tail.*—(1) In a marriage settlement was contained a covenant by husband & wife that all the estate, property, & effects exceeding a certain value, which the husband & wife, or either of them in her right were or was then, or should at any time during the intended coverture, become seised or possessed of, or entitled to as therein mentioned, should be settled upon the trusts of that settlement. The wife was at the time entitled to a contingent reversiory estate tail, which remained contingent during the coverture :—*Held* : this was not subject to the covenant to settle.

(2) *Qu.* : whether under the covenant the wife could have been compelled to execute a disentailing deed, if during the coverture she had acquired an indefeasibly vested estate tail.—*DERING v. KYNASTON* (1868), L. R. 6 Eq. 210; 18 L. T. 346; 16 W. R. 819.

Annotations :—*As to* (1) *N.F. Agar v. George* (1876), 2 Ch. 1). 706. *Distd. Cornwell v. Keith* (1876), 3 Ch. D. 767. *Expld. Re Jackson's Will* (1879), 13 Ch. D. 189. *As to* (2) *Consd. Bankes v. Small* (1887), 36 Ch. D. 716.

467. *Indefeasibly vested estate tail.*—*DERING v. KYNASTON*, No. 466, *ante*.

D. Gifts from Husband to Wife.

468. *Whether included.*—An assignment by the intended wife in a marriage settlement of her

settlement to settle after-acquired property cannot capture gifts from the husband to the wife.—*LEIGH-WHITE v. RUTLEDGE*, [1914] 1 I. R. 135.—*IR.*

PART III. SECT. 4, SUB-SECT. 3.—D.

468 i. *Whether included.*—*FERGUSON v. BENYON* (1886), 17 L. R. Ir. 212.—*IR.*

468 ii. —.—*KINGAN v. MATIER*, [1905] 1 I. R. 272.—*IR.*

468 iii. —.—*There is no general rule that a covenant in a marriage*

property & fortune, both present & expectant or future, held not to comprise a sum of money of which the husband made a present to the wife long afterwards.—*COLES v. COLES*, [1901] 1 Ch. 711; 70 L. J. Ch. 324; 84 L. T. 142.

Annotation.—*Distd. Re Ellis's Settmt.*, *Ellis v. Ellis*, [1909] 1 Ch. 618.

469. —.]—There is no general rule of construction of covenants, in marriage settlements, to settle after-acquired property of the wife that a gift from the husband to the wife during coverture is to be excluded from the covenant.

A marriage settlement made in 1882 contained several covenants by the husband & wife to settle "all the real & personal estate whatsoever & wheresoever, if any, to which the wife or the husband in her right should upon the solemnisation of the intended marriage, or at any time afterwards during the intended coverture, be or become absolutely entitled for any estate or interest whatsoever in possession or reversion." In 1908 the husband transferred into his wife's name, as an absolute gift, stocks & shares of the value of £50,000.—*Held*: they were bound by the covenant.—*Re Ellis's SETTLEMENT*, *ELLIS v. ELLIS*, [1909] 1 Ch. 618; 78 L. J. Ch. 375; 100 L. T. 511; 26 T. L. R. 166.

Annotations.—*Fold.* *Re Plumptre's Marriage Settmt. Underhill v. Plumptre*, [1910] 1 Ch. 609; *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234.

470. —.]—By a marriage settlement made in 1878 certain funds coming from the wife's father were settled upon the usual trusts of a wife's fund, with an ultimate trust, in the events which happened, for the wife's statutory next of kin; & it was also agreed that all real & personal property to which the wife was entitled at the date of the marriage, or to which she, or her husband in her right, at any time during the coverture, should be or become entitled, whether in possession, reversion, or otherwise, should be assured & transferred by the husband & wife respectively to the trustees to be held upon the trusts of the settlement.

In Aug. 1884, a sum of £1,018 15s. was invested by the husband in the purchase of certain stock in the name of the wife. This was subsequently sold by the wife & reinvested in the purchase of £1,125 Grand Trunk Railway of Canada 4 per cent. debenture stock, which remained registered in her name down to the date of her death, intestate & without leaving any issue, on Feb. 2, 1909. The stock was now standing in the name of the husband, to whom letters of administration to his wife's estate had been granted.—*Held*: (1) the stock in question, which was a gift by the husband to the wife, was caught by the agreement to settle the wife's after-acquired property; (2) the next of kin of the wife being volunteers & strangers to the marriage consideration, could not enforce the contract to settle as against the administrator of the wife, & that therefore the trustees were not bound to take any steps to obtain a transfer of the stock.—*Re PLUMPTRE'S MARRIAGE SETTLEMENT*, *UNDERHILL v. PLUMPTRE*, [1910] 1 Ch. 609; 79 L. J. Ch. 340; 102 L. T. 315; 26 T. L. R. 321; 54 Sol. Jo. 326.

Annotations.—*As to* (1) *Fold.* *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234. *Reid.* *Re Torrington*, [1913] 2 Ch. 623. *As to* (2) *Consd.* *Pullan v. Koe*, [1913] 1 Ch. 9. *Generally*, *Reid.* *Re Cavendish Browne's Settmt.* *Trusts, Horner v. Rawle* (1916), 61 Sol. Jo. 27.

Gifts under will of husband.—*See* Sub-sect. 3, J. (a), *post*.

PART III. SECT. 4, SUB-SECT. 3.— E. (a).

473 i. *Property not mentioned in settlement.*—*STACK v. ROYSE* (1861),

12 I. Ch. R. 246; 14 Ir. Jur. 114; *affd.* (1862), 13 I. Ch. R. 213; 15 Ir. Jur. 249.—*IR.*

h. — *Loan from wife to hus-*

E. Interests Existing at Date of Covenant.

(a) In General.

471. **Not included.**—(1) A bond, conditioned to settle lands, "if the obligor shall become seised" will not affect lands of which he is seised at the date of the bond.

(2) Bond entered into by one on his marriage, to trustees conditioned to be void, if his intended wife should survive him, & if his heirs, etc., should pay to the obligees for her benefit £1,000; & also if the obligor should survive his intended wife, & there should be children of her by him living at his death & his heirs, etc., should pay to the obligees £1,000 in trust for the children; "& further, if the obligor should at any time during his natural life become seised of any messuages, etc., in possession & should settle the same upon his intended wife, & the issue of the marriage by such good conveyances in the law as counsel should advise in such parts & proportions & to such use & uses as should be thought requisite, the better to make a provision for her in case she should survive the obligor." The obligor survived his wife, had several children by her, but did not during that coverture acquire any land in possession; after her death he married a second wife, acquired lands in possession & died without making any settlement of such lands:—*Held*: the words of the condition were not confined to such lands as he should acquire during the continuance of the first marriage, but a settlement was decreed on the children of the first marriage as tenants in common in fee of the lands the obligor had acquired after the death of his first wife.—*PREBBLE v. BOGHURST* (1818), 1 Swan. 309; 1 Wils. Ch. 161; 36 E. R. 402, L. C.

Annotations.—*Generally*, *Reid.* *MacLurean v. Lane, Melhuish v. MacLurean* (1858), 5 Jur. N. S. 56. *Mentd.* *Maxwell v. Ward* (1822), 11 Price, 3; *Hill v. Gomme* (1839), 5 My. & Cr. 250; *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561.

472. — **Collateral agreement.**—By a settlement made on the marriage of a widow, all the property to which she was then known to be entitled was settled specifically in the usual way. The settlement did not, however, contain a covenant for the settlement of after-acquired property.

By an agreement of even date, made between the intended husband & wife, after reciting that by the settlement "certain moneys, shares & other property" belonging to the intended wife had been settled, & that "it has been agreed that any property that the intended wife may be entitled to, other than that included in the settlement should be settled" it was agreed that in case the intended wife "shall be entitled to any property, other than that contained in the said settlement, the same shall be settled" upon similar trusts.

Some years after the marriage the husband became bkpt., & a little later the wife became entitled to about £8,000 under an intestacy:—*Held*: the collateral agreement was intended, & must be deemed to apply not to any other property to which she was entitled at the date of the agreement, & which was not included in the settlement, but to any property to which she might afterwards become entitled & the £8,000 was therefore declared to be subject to the trusts of the settlement.—*Re BLOCKLEY*, *BLOCKLEY v. BLOCKLEY* (1884), 49 L. T. 805; 32 W. R. 385.

473. **Property not mentioned in settlement.**—*Testator made two wills, one of his English, the*

band.—By an ante-nuptial settlement, the intended husband & wife covenanted with the trustees thereof that all personal estate, save certain ex-

Sect. 4.—Covenants to settle after-acquired property:
Sub-sect. 3, E. (a) & (b) i.]

other of his American property. Neither of the wills referred to the other. His daughter, who was entitled to personal property under both wills, executed, previously to her marriage, a settlement of various descriptions of personal property, including specifically her property under the English will, but not mentioning or referring to her property under the American will. The settlement contained a clause providing that such further personal estate, if any, as should during her life become vested in or accrue to or be assignable by her & her husband, should be assigned upon the trusts of the settlement:—*Held*: this clause did not affect her American property.—*HOARE v. HORNBY* (1843), 2 Y. & C. Ch. Cas. 121; 12 L. J. Ch. 151; 7 Jur. 434; 63 E. R. 53.

Annotations:—*Consd.* *Otter v. Melvill* (1848), 2 De G. & Sm. 257. *Distd.* *Re London Dock Co., Ex p. Blake* (1853), 16 Beav. 463. *Appld.* *Wilton v. Colvin* (1856), 3 Drew. 617. *Consd.* *Archer v. Kelly* (1860), 1 Drew. & Sm. 300; *Williams v. Mercier* (1884), 10 App. Cas. 1. *Refd.* *Re Worsley's Trusts* (1867), 16 L. T. 826; *Re Clinton's Trust, Holloway's Fund, The Same, Wear's Fund* (1872), L. R. 13 Eq. 295.

474. —.]—A covenant in an ante-nuptial settlement, that all the personal estate "to which the wife shall become entitled" should be subject to the trusts of the settlement:—*Held*: not to extend to property to which, without the knowledge of the intended husband or the trustees, she was then absolutely & immediately entitled.—*OTTER v. MELVILL* (1848), 2 De G. & Sm. 257; 17 L. J. Ch. 345; 11 L. T. O. S. 307; 12 Jur. 845; 64 E. R. 115.

Annotations:—*Consd.* *Re London Dock Co., Ex p. Blake* (1853), 16 Beav. 463. *Appld.* *Wilton v. Colvin* (1856), 3 Drew. 617. *Refd.* *Re Worsley's Trusts* (1867), 16 L. T. 826; *Caldwell v. Followes* (1870), L. R. 9 Eq. 410; *Re Pedder's Settlement, Trusts* (1870), L. R. 10 Eq. 585.

475. —.]—In a settlement made before marriage there was an agreement to settle upon certain trusts all real & personal property to which the wife or the husband "in her right at any time during her now intended coverture shall become entitled, except jewels &" certain other articles "which it is hereby declared shall belong to" the wife "for her separate use." The trusts included a power of sale, the moneys arising from the sale to be held upon the trusts agreed & declared concerning such part of the personal estate of or to which the wife "now is or she or" the husband "in her right shall become possessed or entitled as aforesaid":—*Held*: on the true construction of the agreement, read in conjunction with the context, it included property to which the wife was entitled before marriage; & therefore jewels given to the wife before marriage were within the exception & belonged to the wife for her separate use.—*WILLIAMS v. MERCIER* (1884), 10 App. Cas. 1; 54 L. J. Q. B. 148; 52 L. T. 662; 49 J. P. 484; 33 W. R. 373, H. L.

Annotations:—*Expld.* *Re Garnett, Robinson v. Gandy* (1886), 33 Ch. D. 300. *Mentd.* *Perks v. Mylrea*, [1884] W. N. 64; *Floyd v. Lyons* (1897), 76 L. T. 251; *Masson, Templier v. De Fries*, [1909] 2 K. B. 831.

476. —.]—Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate & was also entitled in possession to two sums of stock, & in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a

covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband & wife, or either of them in right of the wife, should, "by gift, descent, succession or otherwise howsoever, become entitled" during the coverture; & the wife's contingent interest in remainder in the real estate fell into possession during the coverture:—*Held*: the words "become entitled" imported a change of condition in the property, & the parties contemplated the wife's becoming entitled during the coverture, & did not intend to include property to which she was entitled at the time of the coverture; & therefore, the wife's interest in the real estate having changed during the coverture, it fell within the covenant; but the wife having been absolutely entitled to the two sums of stock at the date of the marriage, & there having been no subsequent change in her interest, those sums of stock did not come within the terms of the covenant.—*ARCHER v. KELLY* (1860), 1 Drew. & Sm. 300; 29 L. J. Ch. 911; 2 L. T. 796; 6 Jur. N. S. 814; 8 W. R. 684; 62 E. R. 394.

Annotations:—*Consd.* *Re Worsley's Trusts* (1867), 16 L. T. 826. *Follid.* *Re Browne's Will* (1868), L. R. 7 Eq. 231. *Appld.* *Re Clinton's Trust, Holloway's Fund, The Same, Wear's Fund* (1872), L. R. 13 Eq. 295; *Lane v. Oakes*, (1874), 30 L. T. 726. *Expld.* *Re Michell's Trusts* (1878), 9 Ch. D. 5. *Appld.* *Re Garnett, Robinson v. Gandy* (1885), 31 Ch. D. 648. *Follid.* *Re Williams' Settlement, Williams v. Williams*, [1911] 1 Ch. 441. *Refd.* *Re Hill* (1863), 11 W. R. 930; *Rose v. Cornish* (1867), 16 L. T. 786; *Re Jackson's Will* (1879), 41 L. T. 494; *Reid v. Reid* (1886), 34 W. R. 332; *Re Bland's Settlement, Bland v. Perkin*, [1905] 1 Ch. 4; *Re Crook's Settlement, Re Glasier's Settlement, Crook v. Preston*, [1923] 2 Ch. 339.

477. — Covenant by husband to settle property acquired in right of wife.]—On the marriage of a lady, who was possessed of funded property & shares in water works, the funded property alone was settled; the settlement, however, contained a recital of an intention, that all property which the wife or her husband, in her rights, should after the marriage become entitled to, should be settled on similar trusts & a covenant by the husband & by the wife, that all property which she or her husband, in her right, should after the settlement become entitled to should be settled:—*Held*: the shares were subject to the trusts of the settlement.—*JAMES v. DURANT* (1839), 2 Beav. 177; 48 E. R. 1147; *sub nom.* *JAMES v. JAMES*, 9 L. J. Ch. 85.

Annotations:—*Distd.* *Otter v. Melvill* (1848), 2 De G. & Sm. 257. *Consd.* *Re London Dock Co., Ex p. Blake* (1853), 16 Beav. 463. *Distd.* *Wilton v. Colvin* (1856), 3 Drew. 617. *Appld.* *Re Hughes' Trusts* (1863), 4 Giff. 432. *N.F.* *Re Clinton's Trust, Holloway's Fund, The Same, Wear's Fund* (1872), L. R. 13 Eq. 295. *Refd.* *Hoare v. Hornby* (1843), 2 Y. & C. Ch. Cas. 121; *Archer v. Kelly* (1860), 1 Drew. & Sm. 300; *Seymour v. Lucas* (1860), 1 Drew. & Sm. 177.

478. — Tontine debenture.]—Though the tontine existed at the date of the settlement, & these four debentures were then existing, they are not mentioned in, or assigned by, the settlement; & I am of opinion that they are not comprised within the terms of the covenant. It is clear that the covenant points to after-acquired property; that is, property which the lady, or her husband in her right, should afterwards become possessed of or entitled to. The lady was at that time both possessed of & entitled to this property. The fact that from the nature of the property & the accident of the long life of the *cestui que vie*, it became more valuable year by year, does not, in my opinion,

accepted particulars, to which the wife or the husband in her right should become entitled during the coverture should be vested in the trustees upon the trusts of the settlement. A sum of money not mentioned in the settle-

ment was handed by the wife to the husband before the marriage took place, & the evidence, in the opinion of the ct., established that the transaction was simply a loan:—*Held*: the sum of money was caught by the

settlement, & was subject to the trusts thereof.—*HAMILTON v. JAMES* (1877), 11 L. R. Eq. 223.—*IR.*

k. Vested interest not in possession—*Money—Share of estate.*—*Re ATKIN*—

affect the question any more than if she had been possessed of a mine at the time of the settlement which subsequently became of very great value (ROMILLY, M.R.).—*Re BROWNE'S WILL* (1869) L. R. 7 Eq. 231; 38 L. J. Ch. 316.

Annotation.—*Reid*. *Re Harcourt, White v. Harcourt* (1911) 105 L. T. 747.

479. Stock-in-trade & effects—Covenant to settle first capital moneys.—By an ante-nuptial settlement, a trader covenanted with the trustees of it to pay them £3,000 out of the first capital moneys or real or capital personal estate, or capitalised income, of or to which he should be or become possessed or in anywise entitled after the solemnisation of the marriage within six months after he should "have become" so possessed or entitled. The trader was at the time possessed of stock-in-trade & effects exceeding in value £3,000, & so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bkpt. after the expiration of the six months:—*Held*: the event contemplated by the covenant had happened before the bkpcy., & there was a breach of the covenant entitling the trustees to prove.—*Re WASS, Ex p. EVANS* (1852), 2 De G. M. & G. 948; 22 L. J. Bcy. 5; 20 L. T. O. S. 149; 1 W. R. 69; 42 E. R. 1143, L. J.J.

Annotation.—*Reid*. *Re Tonnies, Ex p. Bishop* (1873), 42 L. J. Bcy. 107, n.

480. Vested interest not in possession—Leaseholds.—By a marriage settlement the husband covenanted to settle all the estates, etc., of or to which the wife should at any time become seised, possessed or entitled. She had at the time of the marriage a vested estate in a moiety of a leasehold house; & a vested interest in certain moneys, the amount of which was not ascertained & distributed till some years after:—*Held*: the settlement contemplated future acquired title; these were present titles, & not included in the covenant to settle.—*WILTON v. COLVIN* (1856), 3 Drew. 617; 25 L. J. Ch. 850; 27 L. T. O. S. 289; 2 Jur. N. S. 867; 4 W. R. 759; 61 E. R. 1039.

Annotations.—*Expld.* *Archer v. Kelly* (1860), 1 Drew. & Sm. 300. *Apld.* *Re Browne's Will* (1868), L. R. 7 Eq. 231; *Churchill v. Denny* (1875), L. R. 20 Eq. 534. *Reid*. *Re Hill* (1863), 11 W. R. 930; *Re Clinton's Trusts, Ex p. Holloway, Ex p. Wearo* (1872), 41 L. J. Ch. 191.

481. — Money.—*WILTON v. COLVIN*, No. 480, *ante*.

482. — Share of estate—Subsequent distribution.—By a settlement made in June, 1842, property of the wife was settled, & the husband covenanted that if, during the coverture, any real or personal estate should "descend or devolve to or vest" in his wife, or in him in her right, he would settle it. In Aug. 1842 a sum, part of the distributive share of the wife in the estate of her father, who died in 1821, & which had been overlooked, was recovered & paid to the trustees of the settlement, & the husband received the income for twelve years:—*Held*: it was not within the covenant to settle, & the husband had not so acquiesced as to make it subject to the trusts of the settlement.—*CHURCHILL v. SHEPHERD* (1863), 33 Beav. 107; 55 E. R. 307.

483. — Release set aside by court.—By marriage settlement in 1859, which recited that the wife was absolutely entitled, amongst other property, to £10,000, part of her share of the residue of A.'s estate in the hands of the exors. of his will, & secured by a mtge., & that it had been

agreed that the intended husband & wife should enter into covenants for the settlement of the future real & personal estate of the intended wife, this £10,000 was settled, & the husband & wife, in pursuance of the recited agreement, covenanted with the trustee for the settlement of all the estate property & effects, exceeding £300 at one time, which the husband & wife, or either of them in her right, should at any time or times subsequent to the marriage & during the coverture become seised or possessed of or entitled to at law or in equity by any means whatsoever. The day before the settlement the intended wife, then *sui juris*, had, in consideration of the payment of £10,500, executed to the exors. of A.'s will a general release of all her claims as residuary legatee. The release was executed by the intended wife without independent advice, & in ignorance that her share of residue was worth considerably more than £10,500. On Feb. 10, 1885, while the coverture was still subsisting, an order setting aside the release was made by the Ct. of Appeal:—*Held*: the covenant to settle after-acquired property did not apply to any existing property to which the wife was entitled at the moment of marriage other than the £10,000; but the setting aside the release of 1859 did not confer any new title, but merely removed a bar to the assertion of a pre-existing title, & accordingly the additional residuary property could not be treated as first acquired when the release was set aside, so as to be bound by the covenant.—*Re GARNETT, ROBINSON v. GANDY* (1886), 33 Ch. D. 300; 55 L. J. Ch. 773; 55 L. T. 562, C. A.

Property expressly excepted.—*See* Sub-sect. 4, *post*.

(b) Interests in Remainder or Reversion.

i. Indefeasible Interests.

484. Interest falling into possession during coverture.—By a marriage settlement £1,500 & £2,700 stock, of which the lady was possessed, were settled in trust for her separate use for life, remainder in trust for her intended husband for life, & after his death as the wife should appoint by will; & the intended husband covenanted that, if the marriage should take effect, he would, as often as occasion should require, join with his wife in doing all necessary acts for assigning to the trustees all the property to which his wife should become entitled during the coverture upon the trusts declared of the £1,500 & £2,700 stock. At the date of the settlement the wife had an absolute vested interest in £1,935 stock expectant on her father's death, but it was not mentioned in the settlement. During the marriage the husband became bkpt., & then the wife's father died:—*Held*: the £1,935 stock did not belong to the husband's assignee as part of his estate, but was bound by his covenant as being property to which the wife would become entitled during the coverture.—*BLYTHE v. GRANVILLE* (1812), 13 Sim. 190; 12 L. J. Ch. 82; 6 Jur. 961; 60 E. R. 74.

Annotations.—*Apld.* *Re London Dock Co., Ex p. Blake* (1853), 16 Beav. 463. *N.F.* *Wilton v. Colvin* (1856), 3 Drew. 617. *Consd.* *MacLurean v. Lane, Melhuish v. MacLurean* (1858), 5 Jur. N. S. 36; *Archer v. Kelly* (1860), 1 Drew. & Sm. 300. *Apld.* *Re Hill* (1863), 11 W. R. 930; *Re Clinton's Trust, Hollway's Fund, The Same, Wearo's Fund* (1872), L. R. 13 Eq. 295. *Consd.* *Re Bland's Settlement, Bland v. Perkin*, [1905] 1 Ch. 4. *Reid*. *Hoare v. Hornby* (1843), 2 Y. & C. Ch. Cas. 121; *Otter v. Melvill* (1848), 2 De G. & Sm. 257. *Mentd.* *Wilcox v. Smith* (1857), 4 Drew. 40.

SON'S TRUSTS, *Ex p. FITZROY*, [1895] 1 L. R. 230.—*IR*.

1. — *Legacies.*—*MACKEN v. HOGAN* (1862), 14 1 Ch. R. 285.—*IR*.

PART III. SECT. 4, SUB-SECT. 3.—*E. (b) i.*

m. *Interest falling into possession during coverture*—"Acquired from time

to time"—*Interests of which settlor then seised in reversion not bound.*—*RIDOUT v. GWYNNE* (1859), 7 Gr. 505.—*CAN*.

*Sect. 4.—Covenants to settle after-acquired property :
Sub-sect. 3, E. (b) i.]*

485. — “Descend, come to or vest in” — Proceeds of compulsory purchase.]—A covenant in a marriage settlement, that in case, at any time “thereafter” during the coverture, any real or personal estate should “descend, come to or vest in” the wife, who was then an infant, it should be settled, held to include the proceeds of real estate taken by a public co., to which the wife, at the execution of the settlement, was entitled in remainder.—*Re LONDON DOCK CO., Ex p. BLAKE* (1853), 16 Beav. 463; 21 L. T. O. S. 16; 51 E. R. 857.

*Annotations:—*Consd. *Feld v. Moore* (1855), 7 De G. M. & G. 691. *Distd.* *Willon v. Colvin* (1856), 3 Drew. 617. *Apld.* *Spring v. Pride* (1864), 12 W. R. 510. *Reid.* *Re Hill* (1863), 11 W. R. 930; *Re Clinton's Trusts, Ex p. Holloway, Ex p. Weare* (1871), 41 L. J. Ch. 191.

486. —.]—A covenant contained in A.'s marriage settlement, to settle any real or personal estate which, “during A.'s life may be given or devised, descend or devolve, be bequeathed or come to A. or her husband in her right,” includes a reversionary interest to which A., at the date of the marriage, was entitled, expectant on her mother's decease.—*SPRING v. PRIDE* (1864), 4 De G. J. & Sm. 395; 10 L. T. 473; 10 Jur. N. S. 646; 12 W. R. 892; 46 E. R. 971, L. J.

*Annotations:—*Apld. *Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund* (1872), L. R. 13 Eq. 295. *Mentd.* *Re Gaskell's Trusts* (1865), 12 L. T. 763; *Re Ellis's Trusts* (1874), L. R. 17 Eq. 409; *Harrison v. Harrison* (1888), 13 P. D. 180.

487. — “Become entitled.”]—*Re CLINTON'S TRUST, HOLLOWAY'S FUND, THE SAME, WEARE'S FUND*, No. 634, *post*.

488. — Wife or husband in her right.]—A widow entitled to a life interest in a fund, & also to a moiety of the capital, subject to her own life interest, married again. By the settlement on the second marriage her life interest was settled, & she & her intended husband covenanted to settle property to which she or he in her right should, during the coverture, become entitled:—*Held*: the words of futurity were satisfied in respect of the husband's interest, & the moiety of the fund was subject to the covenant.—*Re VIANT'S SETTLEMENT TRUSTS* (1874), L. R. 18 Eq. 436; 43 L. J. Ch. 832; 30 L. T. 544; 22 W. R. 686.

*Annotations:—*N.F. *Re Jones's Settmt.* (1870), 2 Ch. D. 362. *Consd.* *Re Michell's Trusts* (1877), 6 Ch. D. 618.

489. —.]—By marriage settlement executed by husband & wife in 1896, after a recital that provision should be made for the settlement of the future acquired property of the wife, it was agreed that if the wife during the coverture or the husband in her right should become by any means, except purchase for valuable consideration, seised, possessed, or entitled of or to any real or personal property or any estate or interest whatsoever in possession, reversion, remainder, or expectancy, except certain property which did not include the property in question, such property should be assured by the wife & all other necessary parties to the trustees upon trust that they should, but as to reversionary property not until it fell into possession unless it should appear to the trustees that an earlier title would be beneficial, sell & convert the same & should hold the proceeds upon trusts therein declared in favour of the wife & husband & their children. At the date of the marriage the wife was entitled in reversion under her parents' marriage settlement to certain policy moneys & the proceeds of sale of certain furniture, subject to the life interests of her parents therein. By the deaths of her parents during her coverture the wife became entitled in possession to the pro-

perty to which at the date of her marriage she was so entitled in reversion:—*Held*: (1) upon the assumption that the property was the property of the wife & therefore capable of being bound by her covenant, that upon the true construction of the settlement, notwithstanding that at the date of her marriage she was entitled to the property in reversion, yet, as she became entitled thereto in possession during the coverture, the property was, within the meaning of the covenant, property to which during the coverture the wife might become entitled in possession, & was therefore caught by the settlement; (2) if the property were not bound by the covenant of the wife, then, as the effect of Married Women's Property Act, 1882 (c. 75), s. 19, is to render Married Women's Property Act, 1882 (c. 75), s. 2, as if it were non-existent in the case of a settlement which would have bound the property but for that Act, the property on falling into possession belonged to the husband in right of his wife & he became bound by his covenant to settle the same.—*Re CROOK'S SETTLEMENT, Re GLASIER'S SETTLEMENT, CROOK v. PRESTON*, [1923] 2 Ch. 339; 92 L. J. Ch. 495; 129 L. T. 284.

490. —.]—By a marriage settlement made since the coming into operation of the Married Women's Property Act, 1882 (c. 75), it was agreed & declared that all property to which the wife during her then intended coverture should “become entitled” should be vested in the trustees of the settlement upon trust for sale & conversion subject to a proviso forbidding the trustees to sell any property of a reversionary nature during the lives of the husband & wife without their consent:—*Held*: property to which the wife was entitled in reversion at the date of the marriage would not, in the event of its falling into possession during the coverture, be included in the covenant.—*Re BLAND'S SETTLEMENT, BLAND v. PERKIN*, [1905] 1 Ch. 4; 74 L. J. Ch. 28; 91 L. T. 681.

*Annotations:—*Distd. *Re Brook, Brook v. Hirst* (1914), 111 L. T. 36. *Fold.* *Re Capel's Trusts, Arbuthnot v. Galloway*, [1914] W. N. 378. *Consd.* *Re Cazenove, Perkin v. Bland* (1919), 122 L. T. 181. *Reid.* *Re Williams's Settmt., Williams v. Williams*, [1911] 1 Ch. 441; *Re Crook's Settmt., Re Glasier's Settmt., Crook v. Preston*, [1923] 2 Ch. 339.

491. — Entitled in interest or possession.]—*Re CAPEL'S TRUSTS, ARBUTHNOT v. GALLOWAY*, [1914] W. N. 378.

*Annotation:—*Reid. *Re Crook's Settmt., Re Glasier's Settmt., Crook v. Preston*, [1923] 2 Ch. 339.

492. —.]—*Re THOMPSON'S SETTLEMENT, ALLEN v. PACK* (1915), 139 L. T. Jo. 211.

493. — “Interest in possession.”]—*Re CROOK'S SETTLEMENT, Re GLASIER'S SETTLEMENT, CROOK v. PRESTON*, No. 489, *ante*.

494. — “Become possessed of or entitled to.”]—Where there was a clause of forfeiture of benefits under her father's will if the daughter did not settle after-acquired property which she should “become possessed of or entitled to” of over the value of £1,000, the words “possessed of or entitled to” were held to be not cumulative but alternative & separate meanings must accordingly be found for them & accordingly property of over the value of £1,000 in respect of which the daughter had before her father's death a vested reversionary interest was held to be subject to this clause of forfeiture.—*Re BROOK, BROOK v. HIRST* (1914), 111 L. T. 36; 58 Sol. Jo. 399.

495. Interest falling into possession after coverture—Death of husband & wife.]—By a marriage settlement certain specified property of the wife was settled, with an ultimate limitation, in default of children, to her next of kin, & the husband covenanted to settle any property which his

wife, or he in her right, should thereafter, during the coverture, succeed to the possession of, or acquire on like trusts. At the time of the marriage, a sum of money, which was not mentioned in the settlement, stood settled, in trust, for the wife for life, with remainder to her children, with remainder as she should appoint, & in default thereof, "to her exors., administrators & assigns." The husband survived the wife; there were no children, & the wife made no appointment:—*Held*: after the death of the husband & wife, the next of kin of the wife, & not the representatives of the husband, were entitled to the fund.—*GRAFFTEY v. HUMPAGE* (1838), 1 Beav. 46; 8 L. J. Ch. 98; 48 E. R. 855; *affd.* (1839), 3 Jur. 622.

Annotations:—*Distd.* *Otter v. Melvill* (1848), 2 De G. & Sm. 257. *Consd.* *Re London Dock Co., Ex v. Blake* (1853), 16 Beav. 463; *Wilton v. Colvin* (1856), 3 Drew. 617. *Foll.* *Hughes v. Young* (1862), 1 New Rep. 166; *Re Hughes's Trusts* (1863), 4 Giff. 432. *Distd.* *Re Wyndham's Trusts* (1865), L. R. 1 Eq. 290. *Foll.* *Rose v. Cornish* (1867), 16 L. T. 786. *Consd.* *Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund* (1872), L. R. 13 Eq. 295. *Refd.* *Hoare v. Hornby* (1843), 2 Y. & C. Ch. Cas. 121; *Holloway v. Clarkson* (1843), 2 Hare. 521; *Acherley v. Du Moulin* (1855), 2 K. & J. 186; *Archer v. Kelly* (1860), 1 Drew. & Sm. 300; *Cornwall v. Keith* (1876), 3 Ch. D. 767. *Mentd.* *Morris v. Howes* (1846), 5 L. T. O. S. 345; *A. G. v. Malkin* (1846), 10 Jur. 955.

498. ——— "Become entitled."]—*Re HUGHES'S TRUSTS*, No. 672, *post*.

497. ——— ———]—*Re CLINTON'S TRUST, HOLLOWAY'S FUND, THE SAME, WEARE'S FUND*, No. 634, *post*.

498. ——— ———]—By a marriage settlement, dated in 1852, it was agreed & declared by & among the parties thereto, & the husband covenanted with the trustees of the settlement, that all such real & personal estates & effects as the wife should be, at the time of the marriage, or as she, or the husband in her right, should during the coverture become possessed of or entitled to, should, when & so far as the rights, interests, or powers of the husband & wife, or either of them, in or over the same would allow, be conveyed & assigned to the trustees of the settlement upon the trusts therein declared. At the date of the marriage the wife was entitled to a vested reversion in certain personal property. After the death of the husband & wife the reversion fell in:—*Held*: although the clause as to settling after-acquired property contained no express covenant by the wife to do so, the act contemplated & intended to be done was an act as much to be done by the wife as by the husband, & consequently the reversionary interest was bound by the settlement.—*Re D'ESTAMPES, D'ESTAMPES v. HANKEY* (1884), 51 L. T. 502; 32 W. R. 978.

Annotation:—*Refd.* *Re Do Ros, Hardwicke v. Willmot* (1885), 53 L. T. 524.

499. ——— Death of wife—"Come to or devolve upon."]—A marriage settlement contained a covenant to settle any property which should come to or devolve upon the intended wife, or her husband in her right, "at any time or times after the solemnisation of the said intended marriage & during the continuance thereof." At the date of the settlement, the intended wife was entitled to a reversionary interest in personality, subject to the life interest of her mother. The wife died before the tenant for life, leaving the husband surviving:—*Held*: the wife's reversionary interest was bound by the covenant.—*ROSE v. CORNISH* (1867), 16 L. T. 786.

Annotation:—*N.F.* *Re Clinton's Trusts, Re Holloway's Fund, The Same, Weare's Fund* (1872), L. R. 13 Eq. 295.

500. ——— ———]—By a marriage settlement the intended husband & wife severally covenanted with the trustees that all the real & personal property, if any, not thereinbefore settled, to which

the wife or the husband in her right, "shall at any time or times during the said intended coverture become beneficially entitled in possession or reversion, or in any matter whatever, derivable directly or indirectly from" J., should be settled as therein mentioned. At the date of the settlement & of the marriage the wife was entitled to a fund bequeathed by J., subject to the life interest of a person who outlived the wife:—*Held*: the fund was not subject to the covenant.—*Re JONES' WILL* (1876), 2 Ch. D. 362; 45 L. J. Ch. 428; 24 W. R. 697; *sub nom.* *Re JONES' SETTLEMENT TRUSTS*, 35 L. T. 25.

Annotation:—*Consd.* *Re Michell's Trust* (1877), 6 Ch. D. 618.

501. ——— Covenant by husband alone.]—*FISHER v. SHIRLEY*, No. 561, *post*.

502. ——— Death of husband.]—By a marriage settlement, it was expressed to be agreed between the parties thereto, & the husband covenanted, that if any personal property should, during coverture, come to or vest in the wife, or in him in her right, the same should be transferred, by all proper parties, upon the trusts of the settlement. The wife became entitled to a reversionary interest in a chose in action, which did not fall into possession until after the death of the husband:—*Held*: the wife was bound to settle it.—*BUTCHER v. BUTCHER* (1851), 14 Beav. 222; 51 E. R. 272.

Annotations:—*Distd.* *Ramsden v. Smith* (1854), 2 Drew. 298; *Young v. Smith* (1865), L. R. 1 Eq. 180; *Dawes v. Tredwell* (1881), 44 L. T. 740. *Foll.* *Re D'Estampes' Settlement, D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117. *Refd.* *Hammond v. Hammond* (1854), 19 Beav. 29; *Reid v. Kenrick* (1855), 3 Eq. Rep. 1031; *Willoughby v. Middleton* (1862), 2 John. & H. 344; *Re Haden, Colling v. Haden*, [1898] 2 Ch. 220.

503. ——— ———]—*DICKINSON v. DILLWYN*, No. 549, *post*.

504. ——— ———]—Covenant by husband alone.]—A marriage settlement to which the wife was a party recited that it had been agreed that all moneys should be settled to which she then was or thereafter during the coverture, or to which her husband in her right might become entitled, & that the husband should enter into the covenant to that effect thereafter contained. The covenant was by the husband that he would settle all such moneys & execute all deeds, etc., for carrying out such settlement:—*Held*: the wife was not bound by the covenant, & was entitled her husband's death to receive a fund

her at the marriage,

had not been reduced into possession during the coverture.—*Re WEBB'S TRUSTS* (1877), 46 L. J. Ch. 769.

Annotation:—*Refd.* *Dawes v. Tredwell* (1881), 44 L. T. 740.

505. ——— "Become seised or possessed of or entitled to."]—By a marriage settlement the intended wife & husband severally covenanted , that in case the marriage should

, that in case the marriage should

any time or times during the said intended coverture become seised or possessed of, or entitled to," should be settled. At the date of the settlement & of the marriage the wife was entitled to a vested remainder in land, expectant on the death of a tenant for life, who outlived the coverture:—*Held*: the land was not subject to the trusts of the settlement.—*Re PEDDER'S SETTLEMENT TRUSTS* (1870), L. R. 10 Eq. 585; 40 L. J. Ch. 77.

Annotations:—*Apld.* *Re Clinton's Trusts, Holloway's Fund, The Same, Weare's Fund* (1872), L. R. 13 Eq. 295. *Distd.* *Re Viant's Settlement, Trusts* (1874), L. R. 18 Eq. 436. *Apld.* *Re Jones' Will* (1876), 2 Ch. D. 362. *Consd.* *Re Michell's Trusts* (1877), 6 Ch. D. 618. *Refd.* *Cornwall v. Keith* (1876), 3 Ch. D. 767; *Re Bland's Settlement, Bland v. Perkin*, [1905] 1 Ch. 4.

*Sect. 4.—Covenants to settle after-acquired property :
Sub-sect. 3, E. (b) i. & ii.]*

506. Covenant expressly including wife's existing property.]—A marriage settlement contained a covenant that if the wife then was, or should at any time during the coverture become, entitled to any real or personal property of the value of £400, for any estate or interest whatsoever, it should be settled upon certain trusts. At the date of the settlement the wife was entitled on the death of her mother, to a share in a sum of stock in her own right, & a further share as one of the next of kin of a deceased brother. The value of the two shares taken together was above £400, but the value of the wife's reversionary interest in them at the date of the settlement was much less than £400. On the death of the mother, the husband & wife presented a petition to have the two shares paid to the husband :—*Held* : (1) the share in the trust fund was included in the first part of the covenant, as property to which the wife was entitled at the time of her marriage ; (2) the covenant referred to the value of the property, not to the value of the wife's reversionary interest in it ; (3) in estimating the value of the share, the aggregate value of the two sums must be taken, & not the value of each sum separately. *Qu.* : whether succession duty & costs should be deducted in estimating such value.—*Re MACKENZIE'S SETTLEMENT* (1867), 2 Ch. App. 345 ; 36 L. J. Ch. 320 ; 16 L. T. 138 ; 15 W. R. 662, L. J.J.

Annotations :—As to (1) Apd. Agar v. George (1876), 2 Ch. D. 706 ; *Cornwall v. Kelth* (1876), 3 Ch. D. 767. *Refd. Re Clinton's Trusts, Hollway's Fund, The Same, Weare's Fund* (1872), L. R. 13 Eq. 295 ; *Re Michell's Trusts* (1877), 6 Ch. D. 618. *As to (2) Consd. Agar v. George* (1876), 2 Ch. D. 706. *Refd. Re Worsley's Trusts* (1867), 16 L. T. 826. *Generally, Consd. Re Jackson's Will* (1879), 13 Ch. D. 189. *Refd. Re Parson's, Stockley v. Parsons* (1890), 45 Ch. D. 51 ; *Re Hughes's Settltmt., Hughes v. Schooling, Re Smith, Hughes v. Schooling*, [1924] 2 Ch. 356.

507. —.]—CALDWELL v. FELLOWES, No. 526, post.

ii. Contingent or Defeasible Interests.

508. Covenant expressly including existing interests—Interest liable to be divested by appointment.]—A marriage settlement contained a covenant by the husband & wife to settle all property then vested in the wife. At the time of the marriage the wife was entitled, in default of appointment to the children, grandchildren or issue of her father's marriage, to the funds settled by her father's marriage settlement. These funds were afterwards appointed to the wife absolutely for her separate use :—*Held* : they were subject to the above mentioned covenant.—*Re FROWD'S SETTLEMENT* (1864), 4 New Rep. 54 ; 10 L. T. 367.

Annotations :—Dtd. De Serro v. Clarke (1874), L. R. 18 Eq. 587. Although my own opinion might coincide with that view, I consider that the law is settled the other way (MALINS, V.C.). *Distd. Sweetapple v. Horlock* (1879), 11 Ch. D. 745.

509. —.]—By an ante-nuptial settlement the husband & wife, after settling certain trust funds belonging to the wife, covenanted with the trustees "that if at the time of the solemnisation of the intended marriage the wife shall be, or if at any time thereafter & during the joint lives of the husband & wife, she, or her husband in her right, shall become beneficially entitled to any real or personal property, estate or effects, for any estate or interest whatsoever, then & in every such case the husband & wife & all other necessary parties shall, as soon as circumstances will permit," assure such property & effects to the trustees in trust for sale, & to hold the proceeds upon the

trusts thereinbefore declared of the wife's trust funds, "or as near thereto in all respects as the deaths of parties & other circumstances will admit" :—*Held* : a reversionary interest in personalty vested in the wife at the date of the marriage, but liable to be divested by the exercise of a power of appointment, was included in the covenant.—*Re JACKSON'S WILL* (1879), 13 Ch. D. 189 ; 49 L. J. Ch. 82 ; 41 L. T. 494 ; 28 W. R. 209.

Annotations :—Distd. Hilbers v. Parkinson (1883), 25 Ch. D. 200. *Apd. Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 269 ; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302 (*see*, [1923] 1 Ch. 56). *Refd. Re Hewett, Howett v. Hallett*, [1894] 1 Ch. 362. *Mentd. Re Ball, Slattery v. Ball* (1887), 36 Ch. D. 508 ; *Clay v. Coles* (1887), 57 L. T. 682 ; *Re Bogle, Bogle v. Yorstoun* (1898), 78 L. T. 457.

510. —.]—Under a marriage settlement real estate stood limited to H., the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint ; & in default of appointment, to the use of the children of the marriage equally as tenants in common in fee. There was issue of the marriage two children only, a son & a daughter. The daughter married, & by her marriage settlement she & her intended husband covenanted with the trustees for the conveyance & settlement of all property which she then was "seised of, or interested in, or entitled to," upon the trusts therein mentioned, including in effect reversionary interests. The daughter survived her husband, & thereupon H. by deed appointed the real estate comprised in the original settlement, subject to his life estate, to his son & daughter equally in fee, the daughter thus taking the same share as she would have taken in default of appointment :—*Held* : inasmuch as the reversionary moiety appointed to the daughter constituted a new interest acquired by her subsequently to the date of her settlement, such moiety was not bound by the covenant in her marriage settlement.—*SWEETAPPLE v. HORLOCK* (1879), 11 Ch. D. 745 ; 48 L. J. Ch. 660 ; 41 L. T. 272 ; 27 W. R. 865.

Annotations :—Expld. Re Jackson's Will (1879), 13 Ch. D. 189. *Consd. A.-G. v. Selborne*, [1902] 1 K. B. 388 ; *Parr v. A.-G.*, [1926] A. C. 239. *Refd. Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 269 ; *Re Maddy's Estate, Maddy v. Maddy*, [1901] 2 Ch. 820 ; *Jackson v. Stamps Comrs.*, [1903] A. C. 350 ; *Re Walpole's Marriage Settltmt., Thomson v. Walpole*, [1903] 1 Ch. 928 ; *Re Bath's Settltmt., Thynne v. Stewart* (1914), 111 L. T. 153 ; *Re Bulteel's Settltmts., Bulteel v. Manley*, [1917] 1 Ch. 251 ; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302.

Divesting of vested interests.]—*See POWERS, Vol. XXXVII., pp. 476–479, Nos. 743–764.*

511. —.]—DERING v. KYNASTON, No. 466, ante.

512. —.]—By a marriage settlement certain property of the wife was settled upon trust for her for life, with remainder to her children, & in default of children, for her brother absolutely, & the husband & wife jointly & severally covenanted that if the wife "now is or at any time during the coverture she, or her husband in her right, shall become entitled by gift, descent, succession, or otherwise howsoever, to any real or personal estate, property or effects, of the value of £100 or upwards," except property belonging to her for her separate use, "the same shall be forthwith conveyed, assured & paid to the trustees upon the trusts herein declared concerning the property" settled by the wife, "or such of them as shall be then subsisting & capable of taking effect, or as near thereto as the natures & qualities of the said properties respectively shall admit" :—*Held* : the covenant included certain personal estate which, at the date of the settlement, was under a will vested in the wife in remainder expectant on her death without issue, subject to

the life interest of any husband who might survive her; & accordingly, on the death of the husband & wife, & failure of children of the marriage, the property passed under the settlement to the brother absolutely.

I may observe, that as to the words, of the value or to the amount of £100 or upwards, it has been decided that they do not mean the actual value of the thing, if reversionary, but the property as if in possession, *i.e.* considering it as if in possession though in fact in reversion (HALL, V.-C.).—CORNMELL *v.* KEITH (1876), 3 Ch. D. 767; 45 L. J. Ch. 689; 35 L. T. 29; 24 W. R. 633.

*Annotations:—*Consd. *Re Michell's Trusts* (1877), 6 Ch. D. 618. *Reid. Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51; *Re Hughes' Settlement*, *Hughes v. Schooling*, *Re Smith, Hughes v. Schooling*, [1924] 2 Ch. 356.

513. Interest falling into possession during coverture.—A marriage settlement, executed in 1819, recited an agreement that one moiety "of all such property & effects as the said A. B., the settlor, should or might at any time during the said intended coverture, be or become seised or possessed of, or interested in or entitled unto" should be settled as therein mentioned. The settlement also contained a covenant by the said A. B. for himself, his heirs, etc., "that in case any lands, tenements, etc., or other real or personal estate, should at any time during the said then intended coverture, accrue unto or vest in him the said A. B. upon the death, or by the settlement, devise or bequest, gift or disposition of any of the relations of the said A. B. or of any person or persons whomsoever," he the said A. B. should & would convey, settle & assign the same. At the date of the settlement, the settlor had a vested remainder in tail in certain lands, expectant on the death of his father, & defeasible under the father's power of appointment.

The father died in 1828, without having exercised the power of appointment; whereupon the estate tail vested in the settlor in possession. A disentailing deed was afterwards executed by the settlor:—*Held*: upon the true construction of the settlement, taking the covenant with reference to the recital, the estate tail which had become vested in the settlor in possession was an estate which had "accrued" to him on the death of his father; & consequently it was included within the covenant, & was subject to the trusts of the settlement.—MCLURCAN *v.* LANE, MELHUSH *v.* MCLURCAN (1858), 32 L. T. O. S. 172; 5 Jur. N. S. 56; 7 W. R. 135.

*Annotations:—*Consd. *Reid v. Reid* (1886), 31 Ch. D. 402. *Reid. Archer v. Kelly* (1860), 1 Drew. & Sm. 300.

514. —.—*ARCHER v. KELLY*, No. 476, *ante*.

515. —.—Where a covenant to settle afterwards acquired property was contained in a settlement executed on the marriage of a lady, who at the time was entitled to a contingent interest liable to be divested, but which afterwards fell into possession; & who afterwards became entitled to property to her separate use, as to part of which there was a proviso against alienation:—*Held*: the property to which the lady was contingently entitled at the time of her marriage came within the terms of the covenant, but the property settled to her separate use, & as to which there was a proviso against alienation, was not included in it.—BROOKS *v.* KEITH (1861), 1 Drew. & Sm. 462; 4 L. T. 541; 7 Jur. N. S. 482; 9 W. R. 565; 62 E. R. 455.

*Annotations:—*N.F. *Re Jackson's Will* (1879), 41 L. T. 494. *Expld. Re Allnutt, Pott v. Brassey* (1882), 22 Ch. D. 275.

516. —.—An infant *feme sole*, being entitled to property under a will if she attained twenty-one, married, & by the settlement made immediately

previously to such marriage the intended husband covenanted with the trustees that all the estate, property, & effects, real & personal, which he & his intended wife, or either in her right, should at any time during the coverture become seised or possessed of or entitled to at law or in equity, of the value of £200 & upwards, under any gift, devise or bequest, or by descent, representation, or any other means whatsoever, should be settled, & that they should do all necessary acts, etc.:—*Held*: the contingent interest, to which the intended wife was entitled was within the covenant.—*Re WORSLEY'S TRUSTS* (1867), 16 L. T. 826.

517. —.—*Re YARDLEY'S SETTLEMENT, MILWARD v. YARDLEY* (1908), 124 L. T. Jo. 315.

518. —.—Upon attaining the age of twenty-one years in 1907, *pltf.* became absolutely entitled in possession to one-third of her parents' marriage settlement funds & was contingently entitled to a further one-third share in the same funds upon the death of either of her two younger brothers before attaining the age of twenty-one years. In contemplation of her marriage in 1909 *pltf.* by deed assigned (*inter alia*) her one-third share of certain *mtge.* debts constituting part of her late mother's marriage settlement fund " & all other if any her share & interest in the said *mtge.* debts " to trustees upon trust after the marriage to raise thereout, & out of certain stocks, funds, & securities already transferred, the sum of £12,000, & subject thereto to stand possessed of the premises thereby assigned & the said stocks, funds, & securities in trust for *pltf.* absolutely. By her marriage settlement of even date the £12,000 was settled upon the usual trusts of a wife's fund, & *pltf.* thereby covenanted with the trustees that if she should at any time during the intended coverture " become entitled in any manner & for any estate or interest " to any real or personal estate exceeding in value £500 at one time & from one & the same source, except as therein mentioned, she would convey the same to the trustees upon trust to sell & convert, a reversionary interest not to be sold except for special reason before it fell into possession, & to hold the proceeds upon the trusts of the wife's fund. Her younger brother F. died under the age of twenty-one years shortly after *pltf.*'s marriage:—*Held*: *pltf.*'s interest on attaining twenty-one in the shares to which her younger brothers were entitled contingently on their attaining twenty-one in their parents' marriage settlement funds was a contingent & not a vested interest. *Pltf.*'s share in her parents' marriage settlement funds, other than the *mtge.* debts, which fell into possession on her brother F.'s death was caught by the covenant in her settlement.—*Re WILLIAMS' SETTLEMENT, WILLIAMS v. WILLIAMS*, [1911] 1 Ch. 441; 80 L. J. Ch. 249; 104 L. T. 310; 55 Sol. Jo. 236.

*Annotations:—*Distd. *Re Casenove, Perkin v. Bland* (1919), 122 L. T. 181. *Consd. Re Crook's Settlement, Re Glasier's Settlement, Crook v. Preston*, [1923] 2 Ch. 339.

519. Interest falling into possession after coverture—Death of husband.—"Be or become entitled."—By an ante-nuptial settlement the intended husband & wife covenanted with the trustees that if the intended husband & wife, or either of them in her right, should at any time during the coverture "be or become entitled" to any personal property of the value of £100 or upwards, the same should be settled. At the time of executing the settlement the wife was interested in a legacy, which had been bequeathed in trust for all the daughters of her father living at the time of his death, who should attain twenty-one or marry, in equal shares. The marriage was solemnised, &

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Sub-sect. 3, E. ii., F. & G.]

the wife's father survived her husband:—*Held*: the interest of the wife in the legacy during the coverture was contingent, & it was not within the covenant in the settlement.—*ATCHERLEY v. DU MOULIN* (1855), 2 K. & J. 186; 69 E. R. 746.

Annotations:—*Distd.* *Hughes v. Young* (1862), 1 New Rep. 166. *Consd.* *Hood v. Franklin* (1873), L. R. 16 Eq. 496. *Distd.* *Cornmell v. Keith* (1876), 3 Ch. D. 767. *N.F. Re* *Jackson's Will* (1879), 41 L. T. 494. *Consd.* *Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51. *Refd.* *Dering v. Kynaston* (1868), L. R. 6 Eq. 210.

520. — *Death of wife—Share under will payable on death without issue.*—Gift to daughters for life, with remainder to the child or children of such daughters, as they should appoint; in default of appointment equally, & on the death of such of the said daughters after attaining the age of twenty-one years as should die without issue, her share to be paid to her personal representative. The husband of one of the daughters, after the death of testatrix, by post-nuptial deed covenanted with a trustee that all the real & personal property which might thereafter at any time during the joint lives of himself & his wife devolve on her, should be held & disposed of by her as separate property, notwithstanding coverture:—*Held*: the before-mentioned property, on the wife's death without children, was not subject to the covenant & did not pass by her will, but went to her husband as general administrator.—*Re WYNDHAM'S TRUSTS* (1865), L. R. 1 Eq. 290.

Annotations:—*Mentd.* *Stockdale v. Nicholson* (1867), L. R. 4 Eq. 359; *Re Thompson, Machell v. Newman* (1886), 55 L. T. 85.

521. — — — — —.]—By a post-nuptial settlement a husband covenanted to settle any property to which the wife, or he in her right, either then was or at any time during the coverture should become entitled to:—*Held*: a contingent interest in a fund standing in ct. to the credit of a cause, which fell into possession after the termination of the coverture was bound by the covenant.—*AGAR v. GEORGE* (1876), 2 Ch. D. 706; 34 L. T. 487; 24 W. R. 696.

Annotations:—*Consd.* *Re Michell's Trusts* (1877), 6 Ch. D. 618. *Refd.* *Re Jackson's Will* (1879), 41 L. T. 494.

522. — *Dissolution of marriage.*—Two daughters of testator, P. C., E. F. C., who became E. F. P., & E. C., who became E. H., testator having died in 1880 & divided his converted estate into nine equal parts or shares, were respectively entitled to one-ninth share under his will. The shares were given upon trust to pay the income unto each of his daughters during their lives, & after their respective decease & the decease of their surviving husbands each daughter's share was to be in trust for the daughter's children at twenty-one or marriage in equal shares, & testator directed that if any of his daughters should die without leaving children her surviving then the share of such daughter should be divisible amongst brothers & sisters then living & the children of such of them as should be dead, such children to take equally their parent's share only. One share of residue was held in trust for E. F. P. the mother of the first & second depts. The first dept., a daughter of E. F. P. was married in 1895. Her father died in 1910, her mother, E. F. P., in 1914, & her marriage was dissolved in July, 1917.

By her marriage settlement, dated June 15, 1895, she covenanted that all property to which she should during her then intended coverture become entitled should be vested in the trustees as soon as circumstances permitted upon trusts as to the income as therein directed.

E. H., another of testator's daughters, married, & having survived her husband, died, aged ninety-three, without having had a child. On E. H.'s death one-fifth of her share passed to the first dept., who had previously mortgaged her reversionary interest in P. C.'s estate to the second dept.:—*Held*: the first dept.'s interest in the one-ninth share being contingent on the death of her mother & of E. H. without issue, & not having belonged to her absolutely during the coverture, since the ct. could not take into consideration that E. H. was from the date of the marriage settlement past the age of child bearing, was not caught by her covenant to settle after-acquired property.—*Re CAZENOVE, PERKIN v. BLAND* (1919), 122 L. T. 181.

523. *Interest becoming indefeasibly vested during coverture.*—*DERING v. KYNASTON*, No. 466, *ante*.

524. — — — — —.]—A marriage settlement which recited an agreement to settle certain specified property upon the trusts thereafter declared, & that it had been agreed that the husband should enter into the covenant thereafter contained for settling upon the same trusts any future property to which the wife might become entitled after the solemnisation of the marriage, contained a covenant by the husband that if at any time during the joint lives of the husband & wife any future portion, or real or personal estate, should "come to or devolve upon" the wife, or upon the husband in her right, & whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling, such future portion, real or personal estate upon the trusts declared by the settlement concerning the settled funds. At the time of the marriage the wife was entitled under a will to a contingent reversionary interest in personal estate, which during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife:—*Held*: it was not within the covenant.—*Re MICHELL'S TRUSTS* (1878), 9 Ch. D. 5; 48 L. J. Ch. 50; 38 L. T. 462; 26 W. R. 762, C. A.

Annotations:—*Expld.* *Lloyd v. Prichard*, [1908] 1 Ch. 265. *Refd.* *Re Garnett, Robinson v. Gandy* (1885), 31 Ch. D. 648; *Re Williams Settmt.*, *Williams v. Williams*, [1911] 1 Ch. 441. *Mentd.* *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.* (1894), 12 R. 112.

F. Joint Tenancies.

525. *Husband & wife joint tenants.*—*EDVE v. ADDISON*, No. 569, *post*.

526. *Wife joint tenant with strangers—Interest in remainder.*—A covenant in a settlement to settle all the property of the wife of which she was possessed at the date thereof:—*Held*: to include property to which she was entitled jointly with other persons in remainder after an estate in tail, though the covenant was in terms only the covenant of the husband & not of the wife, & though the recitals in the settlement specified certain property to which the wife was then entitled in expectancy but did not mention this particular interest.—*CALDWELL v. FELLOWES* (1870), L. R. 9 Eq. 410; 39 L. J. Ch. 618; 22 L. T. 225; 18 W. R. 486.

Annotations:—*Appld.* *Cornmell v. Keith* (1876), 3 Ch. D. 767. *Foll.* *Baillie v. Treharne* (1881), 17 Ch. D. 388. *Appl.* *Re Hewett, Hewett v. Hallett*, [1894] 1 Ch. 362. *Refd.* *Burnaby v. Equitable Reversionary Interest Soc.* (1885), 28 Ch. D. 416.

527. — — — — —.]—By their marriage settlement the intended husband & wife each covenanted to assign & settle any personal estate which should during the coverture vest in the wife or in the husband in her right. At that time the wife was

seised or possessed, or to have an absolute power of disposing. Testatrix left a moiety of her residuary estate, which moiety exceeded £200

*Sect. 4.—Covenants to settle after-acquired property :
Sub-sect. 3, G. & H.]*

535. Life interest determinable on alienation.]—

By an agreement in contemplation of marriage the intended husband agreed that he would settle (*inter alia*) the sum of £5,000, & any further moneys & property which he should receive & be entitled to under the will of his mother. Under the trusts of the settlement the intended wife was to have the first life interest in the settled funds. The mother afterwards by her will, in exercise of a power of appointment contained in the will of her father, gave to the husband a life interest subject to forfeiture upon alienation or attempted alienation by him:—*Held*: the husband was entitled to this life interest under a will of his mother; it was not comprised in the agreement for a settlement & there had been no forfeiture.—*Re CRAWSHAY, WALKER v. CRAWSHAY*, [1891] 3 Ch. 176; 60 L. J. Ch. 583; 65 L. T. 72; 39 W. R. 682.

Annotations:—*Appl. Re Smith, Franklin v. Smith* (1927), 71 Sol. Jo. 744. *Reid. Re Dowling's Settmt. Trusts, Gregory v. Dowling*, [1904] 1 Ch. 441; *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234.

536. Bonus paid on sale of life estate—Irish Land Act—"Interest in real estate."]—A. was

tenant for life of real estate under a deed of settlement of real estate, & also tenant for life under a deed of settlement of personalty containing a covenant to settle after-acquired property, with certain specified exceptions, including (*inter alia*) the real estates settled by the realty settlement, or "A.'s estate or interest" therein. Part of the real estate was situate in Ireland, & under Irish Land Act, 1903 (c. 37), was purchased by the occupying tenants for a gross sum of £340,380, with the result that A. was entitled, as vendor, to a bonus of £40,845 by Irish Land Act, 1903 (c. 37), s. 8:—*Held*: this bonus was not subject to the covenant to settle after-acquired property contained in the personalty settlement, as it was an interest in real estate specifically excepted from the operation of the covenant.—*Re ANNALY'S (LADY) TRUSTS, ANNALY (LADY) v. BOURKE* (1904), 92 L. T. 13; 53 W. R. 150; 49 Sol. Jo. 118.

Annotations:—*Follid. Tremayne v. Rashleigh*, [1908] 1 Ch. 681. *Reid. Re Livingstone, Livingstone v. Durell* (1917), 61 Sol. Jo. 384.

537. ———.] — TREMAYNE v. RASHLEIGH, No. 544, post.

538. Life interest subject to restraint on anticipation—Where intention to include life interests.]—In 1877 a domiciled Scotsman married a domiciled Englishwoman.

By a marriage settlement in Scottish form made between the husband & the wife with her father's consent, funds belonging to the husband were settled for the life-rent use of the wife if she survived him, with remainder to the children of the marriage as therein expressed, the provisions to be in bar of claims to *jus relictae & legitim* out of the husband's movable estate.

By a contemporaneous settlement in English form made between the wife's father, the wife, the husband, & the trustees funds belonging to the wife were settled in trust for the wife for life for her separate use without power of anticipation with remainder to the husband for life until he died, or alienation, & subject thereto on the usual trusts for the issue of the marriage, with an ultimate trust in default of issue for the wife if

she survived the husband, or her statutory next of kin if she predeceased him.

The after-acquired property clause included life interests. The income of these life interests was to be paid to the wife for her separate use without power of anticipation. They were excluded from the trust for conversion & could only be sold with her consent. Under the wills of her mother & brother, who died after the passing of Married Women's Property (Scotland) Act, 1881 (c. 21), the wife became entitled to life interests in movables for her separate use without power of anticipation.

The wife died on Aug. 19, 1909, domiciled in Scotland. She was possessed of considerable free movable estate, representing savings of income of movable property settled to her separate use. By her will she disposed of this property to the exclusion of her husband & child:—*Held*: the after-acquired life interests were caught by the English settlement, notwithstanding the restraint on anticipation imposed by the donors.—*Re MACKENZIE, MACKENZIE v. EDWARDS-MOSS*, [1911] 1 Ch. 578; 80 L. J. Ch. 443; 105 L. T. 154; 27 T. L. R. 337; 55 Sol. Jo. 406.

Annotation:—*Mentd. Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146.

II. Property Subject to Power of Appointment in Covenantor.

539. General power of appointment—Power exercised in own favour—Appointment of annuity.]

—In a marriage settlement the intended wife assigned all the property to which she then was, or to which she or her intended husband in her right should, during the coverture, become entitled, to trustees, upon the trusts thereby declared, for herself, the husband & the children of the marriage. After the marriage her father died, having by his will given her a general power of appointment over his residuary estate. The wife, during the coverture, in exercise of the power contained in the will, appointed to herself, for her separate use, a gross sum of £1,000, & an annuity of £100 for her life, & amongst her family the residue, upon trusts differing from those of the marriage settlement, reserving a power of revocation:—*Held*: (1) the terms of the assignment by the wife in the marriage settlement did not amount to a covenant to exercise a general power of appointment in favour of the objects & in conformity with the trusts of such settlement, & property over which the wife afterwards acquired a general power of appointment was not by that circumstance brought within the operation of the settlement; (2) upon the appointment by the wife of the £1,000 for her own absolute use that sum became bound by the trusts of the settlement, & the power of revocation was ineffectual; (3) the interest in the annuity of £100 for her own life for her separate use, which the wife took under her appointment, an interest which was in conformity with that which she would have taken under the trusts of the settlement if the annuity had been otherwise acquired, was not disturbed by the effect of the settlement, inasmuch as it was not the intention of the contract expressed therein that any after-acquired property should be converted, or taken otherwise than in the state in which it should be so acquired.—*EWART v. EWART* (1853), 11 Hare, 276; 1 Eq. Rep. 536; 17 Jur. 1022; 1 W. R. 466; 68 E. R. 1278.

Annotations:—*As to (2) Reid. Carter v. Carter* (1869), L. R.

in value, to her trustees in trust to apply it in the purchase of an annuity to W. V. during her life:—*Held*: this moiety of the residuary estate was

captured by the covenant to settle.—*Re BUTLER, BEATTY v. VANCE*, [1916] 1 I. R. 66.—*IR.*

n. Bonus paid on sale of life estate—Trust Land Acts.]—Re POWER'S ESTATE, [1907] 1 I. R. 51.—*IR.*

8 Eq. 551. *As to (3) Rejd. Ramsden v. Smith* (1854), 2 Drew. 298. *Generally, Rejd. Re Lawley, Zaiser v. Lawley* (1902), 2 Ch. 673.

540. ———.] — *TOWNSHEND v. HARROWBY*, No. 530, *ante*.

541. Donee entitled in default—Power exercised in favour of stranger.]—*STEWART v. POPPLETON*, [1877] W. N. 29.

Annotations:—Distd. Re Gerard, Oliphant v. Gerard (1888), 58 L. T. 800. *Follid. Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574. *N.F. Tremayne v. Rashleigh*, [1908] 1 Ch. 681. *Rejd. Re Davies, Harrison v. Davis*, [1897] 2 Ch. 204.

542. ——— Power exercised in own favour.]—By a marriage settlement, made in 1878, it was agreed that if M., the intended wife, or her husband in her right, should at one & the same time, & from the same source become entitled to any real or personal property of the value of £500 or upwards, then & in every such case the husband & wife should cause the same to be vested in the trustees of the settlement, to be held by them upon the trusts of the property assigned by M. By his will, made in 1884, the father of M. bequeathed to the trustees of the will a sum of £4,000 upon trust for such persons & purposes as M. should appoint in writing, & in default of or subject to any such appointment in trust for her sole & separate use, & testator declared it to be his intention that M. might be able, by exercising her power of appointment, to defeat the operation of the covenant contained in her marriage settlement for the settlement of her after-acquired property. Testator died in 1887. M. appointed that the sum of £4,000 should be held in trust for her separate use by nine separate appointments, made in separate days, & each under £500 in amount:—*Held*: the sum of £4,000 had been properly appointed by M., & was payable to her, & was not bound by her covenant to settle after-acquired property.—*Re GERARD (LORD), OLIPHANT v. GERARD* (1888), 58 L. T. 800.

Annotations:—Consd. Re O'Connell, Mawle v. Jagoe, [1903] 2 Ch. 574; *Tremayne v. Rashleigh*, [1908] 1 Ch. 681.

543. ———.]—A covenant for settlement of after-acquired property extends to property which is limited to such purposes as the covenantor shall appoint, & in default of appointment to him or her absolutely.

A marriage settlement contained a covenant that any property exceeding £200 in value which the wife should become possessed of or entitled to should be brought into settlement. Property, exceeding £200 in value, was subsequently bequeathed in trust for such purposes as she should appoint, & in default of appointment to her absolutely for her separate use. She executed deeds-poll purporting to appoint out of the property several sums of £199 each to herself absolutely:—*Held*: notwithstanding the general power of appointment, the bequeathed property was bound by the covenant, & the deeds-poll were therefore ineffectual.—*Re O'CONNELL, MAWLE v. JAGOE*, [1903] 2 Ch. 574; 72 L. J. Ch. 709; 89 L. T. 166; 52 W. R. 102.

Annotation:—N.F. Tremayne v. Rashleigh, [1908] 1 Ch. 681.

544. ——— After termination of coverture.]—By a voluntary settlement dated Mar. 26, 1902, appct., a married woman, covenanted to settle all real & personal property to which she was then, or should at any time during her then present coverture become, entitled for any estate or interest whatsoever in possession, reversion, remainder, contingency, or expectancy. There was no child of the marriage, which was dissolved on the wife's petition as from June 9, 1904, & the property of the wife comprised in her marriage

settlement was ordered to be conveyed to her as if the husband had died in her lifetime.

In these circumstances questions arose whether the trustees of the voluntary settlement were entitled by virtue of the above-mentioned covenant to the following moneys, namely:—(a) A sum of £2,800, which became payable on Apr. 12, 1905, representing appct.'s fund settled by her marriage settlement, & at the date thereof neither ascertained nor payable, over which fund, in the event of there being no child of the marriage, appct. had a general power of appointment exercisable by deed while not under coverture, or by will whether covert or sole, & to which fund in default of any such appointment she was absolutely entitled if she survived her husband. On Dec. 4, 1905, appct. had appointed the marriage settlement funds to herself absolutely. (b) A sum of £241 4s. arising upon the sale by appct. as tenant for life, of certain land in Ireland comprised in the voluntary settlement, sold by her, after the dissolution of her marriage, under the provisions of the Irish Land Act, 1903 (c. 37). The sum in question represented the 12 per cent. bonus payable to vendors under s. 48 (1) of that Act, & by virtue of the provisions of Irish Land Act, 1904 (c. 34), belonged to appct., as tenant for life, as her "own proper moneys for" her "own use & benefit":—*Held*: (1) on (a) the determination of the question of title to the sum of £2,800 turned upon the distinction between power & property, & although the exercise of the power after the dissolution of her marriage created property, yet during the coverture all that appct. had was a power of appointment over the fund, & a power not being within the scope of the covenant, the sum of £2,800 belonged to her absolutely; (2) on (b) adopting the view taken of the nature of the bonus in *Re Annaly's (Lady) Trusts, Annaly (Lady) v. Bourke*, No. 536, *ante*, the bonus was not merely a by-product of appct.'s life estate, but was an interest in the settled hereditaments accruing to her when the Irish Land Act, 1903 (c. 37), interpreted by Irish Land Act, 1904 (c. 34), came into operation on Nov. 1, 1903, & the bonus was caught by the covenant & must be retained by the trustees of the voluntary settlement.—*TREMAYNE v. RASHLEIGH*, [1908] 1 Ch. 681; 77 L. J. Ch. 292, 365; 98 L. T. 615; 24 T. L. R. 298; 52 Sol. Jo. 263.

Annotation:—As to (1) Follid. Vetch v. Elder, [1908] W. N. 137.

545. ——— Power exercised in favour of husband.]—*VETCH v. ELDER*, [1908] W. N. 137.

546. Gift over to stranger in default.]—A marriage settlement contained a covenant that all property afterwards acquired by the wife, of the value of £500 or upwards, should be settled, capital sums to be held on the trusts of the settlement, & any annuity or interest for the life of the wife to be paid to her separate use, without power of anticipation.

The wife's father, reciting that he wished to give her property without the obligation of having it settled, bequeathed a share of his estate, exceeding £5,500 in value to such uses & on such trusts as she might appoint, & in default of appointment, in trust for her for life, for her separate use, with remainders over.

The wife then executed eleven deeds, each appointing to her separate use £499 19s. 11d., four of the deeds being executed on one day, six on another, & one on another:—*Held*: the wife was entitled to the eleven sums of £499 19s. 11d. for her separate use, without any obligation to settle them.—*BOWER v. SMITH* (1871), L. R. 11

*Sect. 4.—Covenants to settle after-acquired property :
Sub-sect. 3, H. & J. (a).]*

Eq. 279; 40 L. J. Ch. 194; 24 L. T. 118; 19 W. R. 399.

*Annotations:—***Expld.** *Steward v. Poppleton*, [1877] W. N. 29. **Fold.** *Re Gerard, Oliphant v. Gerard* (1888), 58 L. T. 800. **Consd.** *Re Davies, Harrison v. Davies*, [1897] 2 Ch. 204; *Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574; *Tremayne v. Rashleigh*, [1908] 1 Ch. 681. **Refd.** *Re Hinckes, Dashwood v. Hinckes*, [1920] 2 Ch. 511.

J. Property Acquired after Termination of Coverture.

(a) In General.

547. General rule.—Not included.—Clause in a marriage settlement, that the future property of the wife should be limited upon the trusts of the settlement:—**Held:** to apply to such property only as should accrue to her during the continuance of the coverture.—**HOWELL v. HOWELL, HOWELL v. JAMES** (1835), 4 L. J. Ch. 242.

*Annotations:—***Apld.** *Carter v. Carter* (1869), L. R. 8 Eq. 551; *Dickinson v. Dillwyn* (1869), L. R. 8 Eq. 546.

548. ———.—In a marriage settlement a covenant to settle the wife's after-acquired property will be construed as applying only to property acquired during the coverture, although the words "during the coverture" are not inserted.

A joint & several covenant by an intended husband & wife, that if the wife, her exors. or administrators, or the husband, his exors. or administrators, in her right, should "at any one time thereafter" become absolutely entitled to any real or personal estate, the husband & wife respectively, or their respective exors. or administrators, would bring it into settlement:—**Held:** not to apply to real & personal estate coming to the wife under the husband's will.—**CARTER v. CARTER** (1869), L. R. 8 Eq. 551; 39 L. J. Ch. 268; 21 L. T. 194.

*Annotations:—***Fold.** *Re Edwards* (1873), 9 Ch. App. 97. **Apld.** *Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76. **Consd.** *Re Ellis's Settlement*, *Ellis v. Ellis*, [1909] 1 Ch. 618. **Refd.** *Agar v. George* (1876), 2 Ch. D. 706; *Davenport v. Marshall*, [1902] 1 Ch. 82.

549. ———.—A marriage settlement contained a joint covenant by husband & wife to concur & join in conveying to the trustees, upon the trusts of the settlement, all property which the wife, or the husband in her right, might thereafter become entitled to, either under the will or intestacy of, or by gift from the wife's father; or under the will or intestacy of, or by gift from any other person or persons whomsoever. The husband died & left all his property to his wife absolutely. The wife's father died before the husband; & by events which happened after the husband's death, a sum of £100, previously reversionary, devolved on the widow in possession under her father's will:—**Held:** the property left by the husband was not subject to the covenant but the £100 was.

According to the literal meaning of the expression, "all the property which A. [the wife], or G. [the husband] in her right, may thereafter become entitled to or interested in, by, through, or under the will, or intestacy of, or by gift from J. [the father]; or under the will, or intestacy of, or by gift from any other person or persons whomsoever," it means what may be acquired at any time during the life of A.; but in the absence of authority I should have said it was intended to apply only to property acquired during coverture (**MALINS, V.-C.**).—**DICKINSON v. DILLWYN** (1869), L. R. 8 Eq. 546; 39 L. J. Ch. 266; 22 L. T. 647; 17 W. R. 1122.

*Annotations:—***Fold.** *Carter v. Carter* (1869), L. R. 8 Eq. 551; *Re Edwards* (1873), 9 Ch. App. 97. **Apld.** *Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76; *Coles v. Coles*, [1901] 1 Ch. 711. **Consd.** *Re Ellis's Settlement*, *Ellis v. Ellis*, [1909] 1 Ch. 618. **Refd.** *Agar v. George* (1876), 2 Ch. D. 706; *Davenport v. Marshall*, [1902] 1 Ch. 82.

550. ———.—In a marriage settlement a covenant to settle the wife's after-acquired property will, in the absence of expressions showing a contrary intention, be construed as applying only to property acquired during the coverture, although the words "during the intended coverture" are omitted.—**Re EDWARDS** (1873), 9 Ch. App. 97; 43 L. J. Ch. 265; 29 L. T. 712; 22 W. R. 144, L. J. J.

*Annotations:—***Fold.** *Alleyne v. Hussey* (1873), 22 W. R. 203. **Apld.** *Holloway v. Holloway* (1877), 25 W. R. 575. **Consd.** *Fisher v. Shirley* (1889), 43 Ch. D. 290. **Fold.** *Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76. **Apld.** *Davenport v. Marshall*, [1902] 1 Ch. 82. **Consd.** *Re Simpson, Simpson v. Simpson*, [1904] 1 Ch. 1; *Re Ellis's Settlement*, *Ellis v. Ellis*, [1909] 1 Ch. 618. **Refd.** *Agar v. George* (1876), 34 L. T. 487.

551. ———.—A covenant in a settlement to settle the wife's after-acquired property does not apply to property acquired by her after the death of the husband, although such property may have been specifically referred to in the settlement.—**Re CAMPBELL'S POLICIES** (1877), 6 Ch. D. 686; 46 L. J. Ch. 142; 25 W. R. 268.

552. ———.—Though settlement contains assignment of after-acquired property.—The rule laid down in *Re Edwards*, No. 550, ante, that in a marriage settlement a covenant to settle after-acquired property applies only to property acquired during the coverture, governs those cases in which the settlement contains an assignment of after-acquired property.—**HOLLOWAY v. HOLLOWAY** (1877), 25 W. R. 575.

*Annotation:—***Refd.** *Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76.

553. ———.—A marriage settlement contained a covenant to settle all property to which the wife or her husband in her right should, during the intended marriage become beneficially entitled in possession or reversion. A judicial separation was subsequently decreed between the husband & wife. At the date of the settlement the wife was entitled to a reversionary interest, which fell into possession during the separation; & she became entitled during the separation to some personal property under the will of her mother:—**Held:** the reversionary interest was bound by the covenant; but the property acquired during the separation was not bound, because the object of the covenant was to exclude the husband, & inasmuch as he was excluded by Matrimonial Causes Act, 1857 (c. 85), s. 25, the covenant was inoperative during the separation.—**DAVENPORT v. MARSHALL**, [1902] 1 Ch. 82; 71 L. J. Ch. 29; 85 L. T. 340; 50 W. R. 39; 46 Sol. Jo. 30.

*Annotation:—***Distd.** *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333.

554. Property acquired by wife after death of husband.—Covenant to settle after-acquired property of the wife:—**Held:** to extend to property acquired after the death of the husband.—**STEVENS v. VAN VOORST** (1853), 17 Beav. 305; 51 E. R. 1051.

*Annotations:—***Distd.** *Dickinson v. Dillwyn* (1869), L. R. 8 Eq. 546. **Overd.** *Re Edwards, Re London, Brighton & South Coast Railways Act* (1873), 9 Ch. App. 97. **Refd.** *Reid v. Kenrick* (1855), 3 Eq. Rep. 1031; *Davenport v. Marshall*, [1902] 1 Ch. 82.

555. ———.—**REID v. KENRICK**, No. 675, post.
556. ———.—**Under husband's will.**—**CARTER v. CARTER**, No. 548, ante.

557. ———.—**DICKINSON v. DILLWYN**, No. 549, ante.

558. ———.—Specifically referred to in settlement.—**DICKINSON v. DILLWYN**, No. 549, ante.

559. ———.—**Re CAMPBELL'S POLICIES**, No. 551, ante.

560. ———.—By a covenant in a marriage

settlement it was provided that in case the wife, or the husband in her right, "should at any time thereafter, by descent, devise, bequest, or under Statute of Distributions, acquire, succeed to, or become possessed of or entitled to any property, real or personal, which should at any time be of the value of £100," same should be conveyed or assigned to the trustees of the settlement. The wife survived her husband :—*Held* : this covenant only applied to such property of the wife as she became entitled to during the coverture, & she had a right to have paid over to her a sum of money in ct. exceeding £100, to which she became entitled after the death of her husband.—*ALLEYNE v. HUSSEY* (1873), 22 W. R. 203.

561. —.]—A general covenant to settle a wife's future property will not be restricted to property falling in during the coverture if the husband survives, though it will be so restricted when the wife survives.

By a marriage settlement made in 1841 certain property belonging to the wife, who was a minor, was settled, & it was agreed & declared & the husband covenanted with the trustees that if the wife, or he in her right, should become entitled to any other property whatsoever the same should be settled on the trusts of the settlement. At the date of the marriage the wife was, under a settlement made in 1833, entitled to a vested interest in an unascertained share of a settled fund in reversion expectant upon the death of the survivor of certain persons. The wife died in 1852, leaving the husband her surviving, & the reversionary fund did not become divisible until 1888, when the husband was still living :—*Held* : the wife's share in the fund was bound by the husband's covenant & must be paid to the trustees of the marriage settlement.—*FISHER v. SHIRLEY* (1889), 43 Ch. D. 290 ; 59 L. J. Ch. 29 ; 61 L. T. 668 ; 38 W. R. 70.

Annotation :—*Consd. Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76.

562. —.]—By a marriage settlement, after reciting an agreement that the husband & wife should covenant in manner thereafter mentioned as to any personal property which "during their joint lives" should be given or bequeathed to the wife or the husband in her right, the husband & wife jointly & severally covenanted with the trustees that, "if at any time after the marriage & during the life" of the wife any personal estate should be given or bequeathed or come to her or the husband in her right, the husband & wife would settle same. The husband also covenanted for the settlement of any personal estate that should "at any time thereafter" come to him. The wife survived the husband, & after his death became entitled to a fund in ct. as next of kin of an intestate :—*Held* : the wife's covenant was to be read as operative during coverture only, & this construction was assisted by the recital, which might be referred to in order to explain the ambiguity in the covenant.—*Re COGHLAN, BROUGHTON v. BROUGHTON*, [1894] 3 Ch. 76 ; 63 L. J. Ch. 671 ; 71 L. T. 186 ; 42 W. R. 634 ; 8 R. 384.

563. *Spes successions*.—Whether "estate or interest in personal property."—A wife's mere *spes successions*, such as her hope of succession to a share of her husband's personal property upon his death, under the Scottish law of the *jus relicta*, which *jus* vests in the wife only upon the death of the husband, even though coupled with an indemnity by the husband in damages if the *spes* should be disappointed, is not an "estate or interest in personal property" coming to her "during the coverture," within the meaning of the

usual covenant in a marriage settlement for the settlement of the wife's after-acquired property.

An ante-nuptial settlement, made in 1873, contained a covenant by the husband & wife that if during the coverture the wife or husband in her right should become entitled to any personal property which should amount to £200, for any estate or interest whatsoever, they would respectively assure same to the trustees upon the trusts of the settlement. The husband & wife separated, & by a separation deed made in 1894 the husband, who was a domiciled Scotsman, agreed that in the event of his death in the lifetime of the wife her rights in his means & estate should not be less than she would have been entitled to by the law of Scotland if he had been a domiciled Scotsman at the date of his death. The husband died, leaving net personal estate of £16,000, to one-third of which the wife would by the law of Scotland have been entitled under her *jus relicta* :—*Held* : the equivalent share to which the wife was entitled under the separation deed was not bound by her covenant to settle her after-acquired property.—*Re SIMPSON, SIMPSON v. SIMPSON*, [1904] 1 Ch. 1 ; 73 L. J. Ch. 53 ; 89 L. T. 542 ; 52 W. R. 310 ; 48 Sol. Jo. 83, C. A.

Annotations :—*Distd. Re Mudge*, [1913] 2 Ch. 92. *Mentd. Re Fitzgerald, Surman v. Fitzgerald* (1904), 73 L. J. Ch. 436.

564. —.]—By a marriage settlement of 1898 a sum of £10,000, which included a sum of £5,539 secured to the trustees by the covenant of the wife's father, was settled on certain trusts for the wife, husband & children, the wife taking the first life interest, & covenanting to settle after-acquired property, to which she became entitled during the coverture, on substantially the same trusts. By his will of 1905 the father gave one-third of his residuary real & personal estate to the wife for her separate use absolutely. The father died during the coverture. His clear residuary estate, subject only to the covenant, was £80,000, all personality :—*Held* : the bequest was a satisfaction as to the wife's life interest in the £5,539 secured by the covenant, but not as to the interest of other *cestuis que trust* not mentioned in the will, taking no direct interest in the bequest, & only in fact taking derivatively under the after-acquired property clause, because the bequest happened to take effect during the coverture. The wife was therefore the only person put to election.

The covenant only extends to property to which the wife becomes entitled "during the said intended coverture." If her husband had died during testator's lifetime the wife would have taken her share absolutely, free from the covenant. So if she had died in testator's lifetime leaving issue who survived testator, her share would have formed part of her estate, under Wills Act, 1837 (c. 26), s. 33, but would not have been bound by the covenant (SWINFEN EADY, J.).—*Re BLUNDELL, BLUNDELL v. BLUNDELL*, [1906] 2 Ch. 222 ; 75 L. J. Ch. 561 ; 94 L. T. 818 ; 22 T. L. R. 570.

565. *Property acquired after death of wife*.—*Covenant by husband alone*.—As to property acquired during his life.]—*PREBBLE v. BOGHURST*, No. 471, *ante*.

566. — *Bequest to wife*.]—Property bequeathed by testator to his daughter, who died in his lifetime, but whose child & husband survived him :—*Held* : not to be within a covenant to settle property coming to the daughter "during coverture."—*PEARCE v. GRAHAM* (1863), 1 New Rep. 507 ; 32 L. J. Ch. 359 ; 8 L. T. 378 ; 9 Jur. N. S. 568 ; 11 W. R. 415.

Annotations :—*Expld. Re Hone's Trusts* (1883), 22 Ch. D. 663. *Reld. Re Scott*, [1900] 1 Q. B. 372.

Sect. 4.—Covenants to settle after-acquired property:
Sub-sect. 3, J. (a) & (b), & K. (a) & (b).]

567. ———.]—*Re BLUNDELL, BLUNDELL v. BLUNDELL*, No. 564, *ante*.

568. ——— *Share of reversionary fund.*—*Fisher v. Shirley*, No. 561, *ante*.

569. *Property not vesting in possession during coverture.*—Covenant in marriage settlement by husband & wife to settle all property of the value of £200 which the husband & wife, or either of them in her right, should during the coverture become entitled to other than separate property or life interests of the wife:—*Held*: property devised & bequeathed to the husband & wife as joint tenants was not within the covenant; *semble*: property which does not vest in possession during the coverture is not within a covenant so framed.—*EDYE v. ADDISON* (1863), 1 Hem. & M. 781; 3 New Rep. 66; 33 L. J. Ch. 132; 9 L. T. 373; 12 W. R. 97; 71 E. R. 342; *sub nom.* *EDGE v. ADDISON*, 9 Jur. N. S. 1320.

Annotations:—*Consd.* *Burn-Murdoch v. Charlesworth* (1875), 23 W. R. 743; *Ward v. Ward* (1880), 14 Ch. D. 506.

Reversionary interests.—*See* Sub-sect. 3, K., *post*.

— *Interests existing at date of covenant.*—*See* Sub-sect. 3, E., *ante*.

(b) *Termination by Divorce or Separation.*

Sec. generally, HUSBAND & WIFE, Vol. XXVII., pp. 96 *et seq.*

570. *Effect of decree nisi.*—A husband & wife, by their marriage settlement, covenanted to assign to the trustees of the settlement upon the trusts thereof, any property which the wife or the husband in her right should at any time become possessed of or entitled to during the coverture. A decree *nisi* for the dissolution of the marriage was pronounced; but pending the decree being made absolute, the husband & wife appointed a new trustee of the settlement & property fell into possession of the wife. Subsequently the wife married again:—*Held*: the property was not bound by the covenant in the settlement.—*Re PEARSON'S TRUSTS* (1872), 26 L. T. 393; 20 W. R. 522.

Annotation:—*N.F. Sinclair v. Fell*, [1913] 1 Ch. 155.

571. ———.]—By a marriage settlement dated in 1879, it was expressly agreed that if the wife during the then intended coverture, or her husband in her right, should at one & the same time & from the same source become entitled to any real or personal property of the value of £200 or upwards, the property should be settled. On Jan. 12, 1911, a decree *nisi* for the dissolution of the marriage was pronounced. On Jan. 22, 1911, the wife became entitled under her mother's will to certain funds which exceeded in value the amount mentioned in the settlement. On July 24, 1911, the decree *nisi* was made absolute:—*Held*: the funds fell into possession during the coverture contemplated by the settlement & were therefore bound by the covenant to settle after-acquired property.—*SINCLAIR v. FELL*, [1913] 1 Ch. 155; 82 L. J. Ch. 105; 108 L. T. 152; 29 T. L. R. 103; 57 Sol. Jo. 145.

572. *Effect of judicial separation.*—A married woman subsequently to obtaining a decree of judicial separation from her husband, became absolutely entitled to certain sums of stock:—*Held*: under

Matrimonial Causes Act, 1857 (c. 85), s. 25, the stock belonged to her as if she were a *feme sole*, & was not included in a covenant in her marriage settlement to settle all property which she or her husband in her right might acquire "during the coverture."—*DAWES v. CREYKE* (1885), 30 Ch. D. 500; 54 L. J. Ch. 1096; 53 L. T. 292; 33 W. R. 869.

Annotations:—*Consd.* *Davenport v. Marshall*, [1902] 1 Ch. 82. *Refd.* *Waite v. Morland* (1888), 38 Ch. D. 135.

573. ———.]—*DAVENPORT v. MARSHALL*, No. 553, *ante*.

574. ——— *Under decree of foreign court.*—

By a settlement in English form executed in 1878 in contemplation of a marriage between a domiciled Italian & an Englishwoman, it was agreed that the trustee should hold a sum of money secured upon an English mtge. upon trust to invest in English securities & to hold the same upon trusts for the benefit of the wife & husband & their issue. The settlement contained a covenant to settle after-acquired property of the wife. The marriage took place in Italy, where the husband & wife continued to reside. In 1898 a decree for the voluntary separation of the husband & wife was made by the Italian Ct., & they had since lived apart from each other. In 1881 the wife's father died, having by his will bequeathed to the wife certain legacies subject to his widow's life interest therein. The will contained a declaration that all money payable to any female should during coverture be paid to her for her separate use without power of anticipation. The widow died in 1899:—*Held*: (1) assuming English law to be applicable, the restraint on anticipation lasted until the date of payment, namely, the death of the widow, & the legacies were therefore bound by the covenant; (2) inasmuch as the decree of the Italian Ct. for separation did not, like an English decree for judicial separation, affect the rights of property of the parties, *Davenport v. Marshall*, No. 553, *ante*, did not apply, & the covenant to settle after-acquired property was still binding.—*Re BANKES, REYNOLDS v. ELLIS*, [1902] 2 Ch. 333; 71 L. J. Ch. 708; 87 L. T. 432; 50 W. R. 663; 46 Sol. Jo. 601.

Annotations:—*Generally, Refd.* *Lloyd v. Pritchard*, [1908] 1 Ch. 265. *Mentd.* *Bagot v. Chapman* (1907), 23 T. L. R. 562.

K. *Reversionary Interests.*

(a) *In General.*

575. *Covenant to settle any share or interest.*—A reversion of a moiety of a farm was settled on a marriage, & the trustees were empowered to sell it when in possession; & the intended husband & wife covenanted that if they should thereafter acquire any other share or interest in the farm, they would, immediately thereupon, convey the same so that it might become vested in the trustees upon the trusts & subject to the powers declared of the settled moiety. After that moiety had fallen into possession, a moiety of the other moiety descended to the wife, not in possession but subject to a life interest:—*Held*: nevertheless, it, as well as the settled moiety, were saleable under the power.

As soon as Mrs. J. became entitled to the interest in reversion or remainder expectant on her sister's death in a moiety of a moiety of the farm, she & her husband were bound to convey it, so that it might become subject immediately, & not when it

PART III. SECT. 4, SUB-SECT. 3.—
 J. (a).

563 i. *Property not vesting in possession during coverture.*—*Held*: a conveyance by a wife in her marriage contract to the marriage contract

trustees, of the whole estate "now belonging to her or to which she may acquire right during the subsistence of the marriage," did not include a *spes successionis* to estate which did not vest in her during the subsistence

of the marriage, there being nothing in the other parts of the deed to indicate that she intended to convey it.—*M'EWAN'S TRUSTEES v. MACDONALD*, [1909] S. C. 57; 46 Sc. L. R. 31; 16 S. L. T. 432.—*SCOT*.

should become an interest in possession, to the trusts & powers of the settlement (SHADWELL, V.-C.).—*GILES v. HOMES* (1846), 15 Sim. 359; 60 E. R. 657.

576. Interest omitted from settlement by mistake.—Upon the marriage of a ward, the intended husband proposed to settle the whole of her fortune. The master, in ascertaining her fortune, omitted to state a reversionary interest. Her property was settled, omitting the reversionary interest, & the husband covenanted to settle any property to which the wife or he, in her right, "should at any time during the marriage" become entitled:—*Held*: the reversionary interest ought to be settled.—*BUTE (MARQUIS) v. HARMAN* (1846), 9 Beav. 320; 50 E. R. 367.

577. Interest falling into possession after coverture—**Covenant to carry property coming to or vesting in wife—Reversionary interest in chose in action.**—*BUTCHER v. BUTCHER*, No. 502, *ante*.

578. ——*REID v. KENRICK*, No. 675, *post*.

579. ——A reversionary interest bequeathed to a married woman, which did not fall into possession until after the termination of the coverture:—*Held*: bound by a covenant in her marriage settlement to settle any property to which she or her husband in her right might become entitled during the coverture.—*HUGHES v. YOUNG* (1862), 1 New Rep. 166; 32 L. J. Ch. 137; 9 Jur. N. S. 376.

Annotation:—*Reid*. *Lloyd v. Prichard*, [1908] 1 Ch. 265.

580. ——*COWPER-SMITH v. ANSTEY*, [1877] W. N. 28.

581. — Covenant to convey property in any manner accruing.—*Re ROY'S SETTLEMENT, JEBB v. ROY* (1906), 50 Sol. Jo. 256.

Interests existing at date of covenant.—*See* Sub-sect. 3, E., *ante*.

(b) *Contingent or Defeasible Interests.*

582. Interest subject to divestment by appointment—Falling into possession during coverture.—*McLURCAN v. LANE, MELHUISS v. McLURCAN*, No. 513, *ante*.

583. — "Come to or vest in."—A marriage settlement contained a covenant by the husband for the settlement of all personal estate which at any time during the coverture should come to or "vest" in him in right of his intended wife, or in her by bequest, gift or otherwise:—*Held*: a reversionary interest in a legacy in default of appointment, which vested in the wife during the coverture, though liable to be divested by the exercise of the power of appointment was included in this covenant.—*Re WARE, CUMBERLEGE v. CUMBERLEGE-WARE* (1890), 45 Ch. D. 269; 59 L. J. Ch. 717; 63 L. T. 52; 38 W. R. 767; 6 T. L. R. 388.

584. Contingent interest under voluntary settlement—Becoming vested during coverture.—A covenant by an intended husband & wife to settle the wife's after-acquired property:—*Held*: to sever the wife's joint interest in personal estate created by a subsequent instrument.

Three years after that marriage settlement a voluntary settlement is made by P., in which there is an ultimate trust, if certain prior trusts fail, for his next of kin. That, as soon as the settlement was executed, did give a contingent interest to any person who might prove to be entitled under those words. Of course, it could not then be ascertained that these parties could take anything

under it, because the next of kin of P. were the persons contingently entitled, & they could only be ascertained at the time at which he died. I do not, therefore, agree in the view that the settlement did affect this particular property at the time at which the voluntary settlement was made in 1883; though, no doubt, a possibility of succeeding to that property as one of the next of kin might thenceforward have been in the contemplation of the parties. But when P. died it was known who his three next of kin were, & those persons at once had an immediate interest. I do not say an interest in possession, but they had a clear interest in the property, although, no doubt, it might be a very remote interest, & possibly might fail; but there was an interest which vested in the next of kin at that time, & Mrs. H.'s [the wife's] share in which, according to my view of the covenant, the parties had bound themselves to convey & assure when circumstances should permit (NORTH, J.).—*Re HEWETT, HEWETT v. HALLETT*, [1894] 1 Ch. 362; 63 L. J. Ch. 182; 70 L. T. 393; 42 W. R. 233; 38 Sol. Jo. 113; 8 R. 70.

Annotation:—*Mentd.* *Goddard v. Lewis* (1909), 101 L. T. 528.

585. Contingent reversionary interest under will.—A settlement made in 1870, on the marriage of L., the husband & D., the wife, contained a covenant by both of them with the trustees of the settlement that all other, if any, the present & future real & personal estate & effects whatsoever, whether in possession or expectancy, of or to which L. & D., or either of them in her right, or by marital right, should at any time or times during the coverture become seised, possessed, or entitled, or of or to which L., or any person claiming through or under him, should by any means whatsoever become, in her right or by marital right, at any time or times after solemnisation of the marriage, seised, possessed, or entitled, except only such estate & effects as should be settled on her for her separate use, should from time to time, as soon as might be thereafter, or after they or he should become possessed of or entitled to the same, be conveyed, assigned, transferred, or paid unto the trustees, & be settled & assured upon the trusts of the settlement, or such of them as should be subsisting & capable of taking effect.

D. in 1871, during the coverture, became entitled under her mother's will to a contingent reversionary interest in part of the proceeds of sale of realty & personalty which was given for her separate use, & under a codicil to the same will to a contingent reversionary interest in another part of the proceeds, which was not given for her separate use. After L.'s death the interest under the will fell into possession; the interest under the codicil was still reversionary:—*Held*: (1) the interest under the will was not within the operation of the covenant; (2) the interest under the codicil was within the covenant.

Semble: it always has been possible, whether before or after Malins' Act [Married Women's Reversionary Interests Act, 1857 (c. 57)], by a properly framed covenant as to after-acquired property in a marriage settlement, to bind a married woman's reversionary interests, whether contingent or otherwise, acquired during coverture, but not falling into possession until afterwards; & the ct. can & always could, notwithstanding technical difficulties as to getting an actual conveyance, bind the property in the hands of every

PART III. SECT. 4, SUB-SECT. 3.—K. (b).

585 i. Contingent reversionary interest under will.—*DOWLING v. DOWLING*, [1917] V. L. R. 208.—AUS.

Sect. 4.—Covenants to settle after-acquired property:
Sub-sect. 3, K. (b), L. & M.]

one, including the heir or legal personal representative of the husband or wife, as the case may be.—*LLOYD v. PRICHARD*, [1908] 1 Ch. 265; 77 L. J. Ch. 183; 97 L. T. 904; 52 Sol. Jo. 58.

586. — Given for separate use of wife—Falling into possession after coverture.]—*LLOYD v. PRICHARD*, No. 585, *ante*.

Interests existing at date of covenant.]—See Sub-sect. 3, E., *ante*.

L. Property Subject to Restraint on Anticipation.

Restraint on anticipation generally.]—See *HUSBAND & WIFE*, Vol. XXVII., pp. 101–132.

587. Whether included.]—By a Scotch marriage settlement all the property which the wife might acquire during the coverture was settled upon the husband for life, with remainder to the wife absolutely. A legacy of £2,000 was afterwards bequeathed upon trust for the wife for her separate use for life, without power of anticipation, with trusts over in favour of the husband & the children of the marriage. The husband having become bankrupt:—*Held*: his assignees had no interest in the dividends on the £2,000, which were ordered to be paid to the wife during her life.—*DUNCAN v. CANNAN* (No. 2) (1855), 21 Beav. 307; 4 W. R. 2; 52 E. R. 877.

Annotation:—*Refd. Re Dowding's Settltmt. Trusts*, Gregory v. Dowding, [1904] 1 Ch. 441.

588. —.]—A married woman became entitled to a fund in ct., under a will, whereby the property was directed to be paid into her hands, or to such person as she should appoint, so as that the same should not be subject to the control of her husband, nor be alienable by herself or him. Their marriage settlement contained a covenant by the husband to settle her after-acquired property. Upon a petition by the wife for payment of the fund to her:—*Held*: the intention in the will was to restrain alienation during coverture, & the fund ought to be retained, & the dividends only paid to the wife.—*Re SAREL* (1864), 4 New Rep. 321; 10 L. T. 691; 10 Jur. N. S. 876.

Annotations:—*Refd. Re Gaskell's Trusts* (1865), 12 L. T. 763; *Re Ellis's Trusts* (1874), 22 W. R. 448; *Re Bown, O'Halloran v. King* (1884), 27 Ch. D. 411.

589. —.]—A restraint on anticipation is equivalent to a restraint on alienation, & accordingly the shares of married women in residuary real & personal estate given to them by will for their separate use without power of anticipation, are not bound by covenants for settlement of after-acquired property contained in their respective marriage settlements; & the capital of the personal estate is not payable to them on their separate receipt.—*Re CURREY, GIBSON v. WAY* (1886), 32 Ch. D. 361; 55 L. J. Ch. 906; 54 L. T. 665; 34 W. R. 541.

Annotation:—*Distd. Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333.

590. — Restraint attaching to income only.]—On June 5, 1860, A. & B. in exercise of the power of appointment in favour of children contained in their marriage settlement, dated in 1830, appointed £3,500 to their daughter M., afterwards M. S.

By the marriage settlement of N. S. & M. S. dated June 6, 1860, M. S. assigned the £3,500 to the trustees, upon trusts under which N. S. had the first life interest, & in default of children, M. S. had a general testamentary power of appoint-

ment. There was also a covenant by N. S. & M. S. that if they, or either of them, should during the coverture become entitled to any real or personal property, except certain specified interests, the same should be forthwith assured to the trustees.

On June 20, 1860, A. & B. appointed that a moiety of the residue unappointed of the trust funds under the settlement of 1830 should, after the decease of the survivor of them, go to M. S., during her coverture, for her sole & separate use, without power of anticipation, her receipt to be a sufficient discharge for the payment thereof. There was a proviso that if M. S. should die in the lifetime of N. S., leaving no children, the same moiety should go to the brother of M. S. absolutely, & that if M. S. should survive her husband, the same moiety should go to M. S. absolutely.

M. S. died in 1887 leaving children, & having by her will appointed & bequeathed all her property to N. S. & appointed him sole exor. A. & B. had both pre-deceased M. S.:—*Held*: the appointment by A. & B., of June 20, 1860, showed an intention to exclude N. S. & any interest which he would take if the fund was caught by his marriage settlement; though the restraint on anticipation must be rejected, yet taken together with the gift over in default of children & the receipt clause, it showed an intention that the separate use should apply only to the income accruing during the particular coverture, & that M. S. should have no power of disposition over the corpus, such a limitation was clearly good & therefore, the fund having accrued during the coverture, the corpus was caught by the after-acquired property clause.—*SHUTE v. HOGGE* (1888), 58 L. T. 546.

591. — Restraint attaching only while interest reversionary.]—*Re BANKES, REYNOLDS v. ELLIS*, No. 574, *ante*.

592. — Property given to wife with gift over on alienation.]—*BROOKS v. KEITH*, No. 515, *ante*.

593. —.]—*Re CRAWSHAY, WALKER v. CRAWSHAY*, No. 535, *ante*.

594. —.]—*Re SMITH, FRANKLIN v. SMITH*, No. 454, *ante*.

M. Other Cases.

595. Freehold leases for lives—Whether chattels "real."—A. on his marriage, covenanted that if his wife should die before him, leaving issue of their bodies, he would pay, grant, secure, or sufficiently settle to & for such issue, one-third part of all his chattels, real & personal, which at the death of the wife he should be possessed of, to be divided between them, if more than one, as he should direct. The wife died, leaving two daughters, & the husband, during the coverture, acquired some freehold leases for lives:—*Held*: these leases were included in the covenant, but the daughters were not entitled to a division until after the father's death; which he was decreed to give security to make.—*HANKES v. JONES* (1756), 5 Bro. Parl. Cas. 136; 2 E. R. 583, H. L.

596. Personal estate & effects.]—*LEWIS v. MADOCKS*, No. 455, *ante*.

597. — Leasehold interest.]—By marriage arts. made in 1886 between W. Y. B., L. K. B., his intended wife, & pltf. & three other trustees, it was agreed that so soon as might be after the marriage a settlement should be made of the property therein mentioned & W. Y. B. agreed to settle any property which he might acquire during the intended coverture. The marriage took place,

p. —.]—*DRYSDALE v. DRYSDALE*, [1906] V. L. R. 87.—**AUS.**
q. Separate personal property of wife

PART III. SECT. 4, SUB-SECT. 3.—L.
587 I. Whether included.]—*RUSSELL v. JAWDER*, [1904] 1 I. R. 328.—**IR.**

PART III. SECT. 4, SUB-SECT. 3.—M.
o. Insurance policies.]—*Re FAWNS* (1905), 2 Tas. L. R. 18.—**AUS.**

& a settlement was executed accordingly. Subsequently *pltf.* demised certain property to W. Y. B. for twenty-one years, W. Y. B. covenanting to keep the property in repair, & not to assign or underlet without leave of the lessor. W. Y. B. thereafter became *bkpt.*, & the premises were surrendered to *pltf.* by the trustees in *bkpcy.* In an action by *pltf.* against L. K. B. claiming possession of the premises:—*Held*: the covenant in the settlement *prima facie* included the premises, that, as the difficulty as to underletting could be got over in the manner pointed out in *Re Turcan*, No. 609, *post*, the trustees would be able to apply the income arising therefrom for the benefit of the *cestuis que trust*, & consequently the premises must be held bound by the trusts of the settlement.—*CHURSTON (LORD) v. BULLER* (1897), 77 L. T. 45.

598. Household goods, etc.]—*ANON.*, [1875] W. N. 203; *Bitt. Prac. Cas.* 19; 1 *Char. Cham. Cas.* 31.

599. Capital not income.]—*LEWIS v. MADOCKS*, No. 455, *ante*.

600. Property given for separate use of wife.]—*BROOKS v. KEITH*, No. 515, *ante*.

601. —.]—A marriage settlement recited that it had been agreed that the intended husband & wife should covenant for the settlement of such property as should devolve upon the wife or the husband in her right through M.; & the husband & wife thereby severally covenanted that if the husband & wife or the husband in right of the wife should become possessed of or entitled to any such property, except interests given to the wife for her life, & which, as was thereby stated, should, unless settled to her separate use, be so settled, then such property should be settled upon the trusts of the settlement:—*Held*: the terms of the covenant did not include property bequeathed by M. to the wife absolutely for her separate use, & the construction was not altered by the recital or the words of exception.—*BURN-MURDOCH v. CHARLESWORTH* (1875), 23 W. R. 743.

602. —.]—By a marriage settlement, after a recital that on the treaty for the marriage it was agreed that all real & personal property which during the coverture should devolve upon or vest in the wife or the husband in her right to the value of £200 at any one time should be settled upon the trusts thereafter declared, it was witnessed that it was thereby agreed & declared between & by the parties thereto, & the husband thereby covenanted with the trustees that if at any time during the coverture any real or personal estate should devolve on or vest in the wife or the husband in her right to the amount in value of £200 at any one time, the husband would make, do, & execute, or cause & procure to be made, done, & executed, & join & concur in making, doing, & executing all such conveyances, etc., as would effectually vest such real & personal estate in the trustees upon the trusts therein declared. After the marriage a deed was executed by the wife's mother, under which, during the coverture, a sum exceeding £200 became payable to the wife for her separate use:—*Held*: as the operative part of the deed was clear, the recital could not control it; as the operative part of the deed only related to acts to be done by the husband, the agreement & declaration between & by the parties that those acts should be done did not import a covenant

by any other party that they should be done, & there was, therefore, no covenant by any one but the husband; the covenant by him could not be held to relate to property over which he had no power & in which he had no interest & the wife therefore was not bound to bring into settlement property given to her separate use.—*DAWES v. TREDWELL* (1881), 18 Ch. D. 354; 45 L. T. 118; 29 W. R. 793, C. A.

Annotations:—*Consd. Re D'Estampes' Settlement*, *D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117. *Distd. Re De R. Trust*, *Hardwicke v. Wilmot* (1885), 31 Ch. D. 81. *Consd. Hancock v. Hancock* (1888), 38 Ch. D. 78. *Apld. Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518; *Re Smith, Robson v. Tidy*, [1900] W. N. 75. *Refd. Re Macpherson, Macpherson v. Macpherson* (1886), 55 L. J. Ch. 922; *Re Haden, Colling v. Haden*, [1898] 2 Ch. 220; *Crouch v. Crouch*, [1912] 1 K. B. 378.

603. —.]—*LLOYD v. PRICHARD*, No. 585, *ante*.

604. —.]—By her marriage settlement a lady covenanted to bring under the trusts of the settlement any property exceeding in value £200. A legacy was subsequently left to her absolutely & for her separate use & with the condition "so as to be free from any covenant contained in her marriage settlement to settle after acquired property":—*Held*: the condition was void & the legacy must be bound by the covenant.—*Re WHARTON, WHARTON v. BARMY* (1910), 102 L. T. 531.

Annotation:—*Refd. Re Torrington*, [1913] 2 Ch. 623.

605. Trinkets.—Whether "real or personal estate or effects."—*WILLOUGHBY v. MIDDLETON*, No. 679, *post*.

—Expressly excepted in covenant.]—*See Sub-sect. 4, post*.

606. Property acquired through medium of settlement.—Covenant in separation deed.]—By a marriage settlement certain personal property was settled upon the usual trusts, as to the wife's property, in trust to her for life to her separate use, with remainder to the children of the marriage. By a subsequent deed of separation the husband covenanted that all such estates, real & personal, which might at the date of the marriage settlement, or which during the joint lives of husband & wife, should descend or come to, or devolve upon or be given or devised or bequeathed, or conveyed to or in trust for him, should be holden, enjoyed, sold, given away, devised, bequeathed & disposed of by the wife, her heirs, exors., administrators & assigns respectively. Two children of the marriage attained their ages of twenty-one, & died intestate, leaving the husband their sole next of kin:—*Held*: (1) the beneficial interests which the children had acquired under the settlement, & which devolved upon the husband as next of kin, were not bound or affected by the husband's covenant in the separation deed; (2) such beneficial interests formed part of the husband's personal estate.—*HUDSON v. KING* (1862), 6 L. T. 856.

607. —.]—*MACKENZIE v. ALLARDES*, No. 462, *ante*.

608. Commutation money.—Naval officer's half pay.]—D., by his marriage settlement, agreed that if he then was, or should during the intended coverture, at one time & from one source, become entitled to any real or personal property of the value of £100 or upwards for any estate or interest whatsoever, he & all necessary parties should execute & do such assurances & things as should

—Not included in settlement.]—It is evident from the scope of C. S. U. C., c. 73, that notwithstanding a marriage settlement any separate personal property of a married woman acquired

after marriage & not coming under or being affected by such settlement, shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, & as to

such property the married woman shall be considered as having married without settlement.—*DAWSON v. MOPFATT* (1888), 13 O. R. 170.—*CAN. r. Property of bankrupt.*]—*LYSTER*

Sect. 4.—Covenants to settle after-acquired property:
Sub-sect. 3, M.; sub-sect. 4, A. (a).]

be necessary for vesting the same in the trustees of the settlement. D. was at the time of his marriage in receipt of half pay, as lieutenant in the navy, which he subsequently commuted, under Pensions Commutation Act, 1871 (c. 36), for £2,175:—*Held*: the commutation money was not bound by the agreement in the settlement.—*CHURCHILL v. DENNY* (1875), L. R. 20 Eq. 534; 44 L. J. Ch. 578; 23 W. R. 825.

Annotations:—*Apld. Re Clutterbuck's Settltmt.*, *Bloxam v. Clutterbuck*, [1905] 1 Ch. 200; *Re Biscoe, Biscoe v. Biscoe* (1914), 111 L. T. 902.

609. Insurance policies — Whether property to which covenantor entitled by purchase.—A trader by his marriage settlement covenanted that if at any time during the marriage he should become possessed or entitled by devise, bequest, purchase, or otherwise, of or to any property, real or personal, he would assign it to the trustees of the settlement. Afterwards he effected certain life & accident policies, one of which contained a clause against assignment:—*Held*: the covenant was severable; the policies fell within the class defined by the covenant as property to which he became entitled by purchase, & therefore were bound by the covenant, notwithstanding the clause against assignment, the object of which was treated as being merely the protection of the co.—*Re TURCAN* (1888), 40 Ch. D. 5; 58 L. J. Ch. 101; 59 L. T. 712; 37 W. R. 70, C. A.

Annotations:—*Refd. Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109; *Churston v. Buller* (1897), 77 L. T. 45; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769. *Mentd. Laurie v. West Hartlepool Steamship Thirds Indemnity Assn. & David* (1899), 15 T. L. R. 486.

610. Interests expressly included in settlement deed—*Left to revert to settlor.*—By a marriage settlement, dated in 1875, personal property of the wife was settled upon trust for the wife for life, & after her death upon trust to pay the income to the husband "so long as he shall remain unmarried, & from & after the death of the survivor," to hold the capital in trust for the children of the marriage, as the husband & wife or the survivor should appoint, & in default for sons at twenty-one & daughters at that age or marriage. There was a power of advancement exercisable with the consent of the husband & wife or the survivor during their lives. The ultimate trust in default of issue was for the wife if she survived, & if the husband survived for the appointee of the wife by will, & in default for her next of kin, as if she had died without having been married. The settlement also comprised a policy on the life of the husband which was settled upon like trusts, except that if the wife survived & married again the policy moneys were to be held upon the same trusts as if she were then dead. Then there was a covenant in the common form for the settlement of other & after-acquired property of the wife. There were six children of the marriage. The wife died in 1886, & the husband took out administration to her estate. In Jan. 1889 he married again. The question was, who since the husband's second marriage was entitled to the income of the property of the wife which was included in the settlement:—*Held*: upon the marriage again of the surviving husband, there was a resulting trust of the income during the rest of his life, to the legal personal representative of the wife; & the husband as administrator

of his wife was entitled to the undisposed of income.

Such a command is not intended to settle such part of the property expressly included in the deed as is left to revert to the settlor, but to settle property which otherwise the deed would not affect at all (*KAY, J.*).—*Re WYATT, GOWAN v. WYATT* (1889), 60 L. T. 920.

611. Arrears of annuity—Paid after death of husband & wife.—*TWEEDALE v. TWEEDALE* (1894), 39 Sol. Jo. 134.

612. — Under terms of separation deed.—*Re SIMPSON, SIMPSON v. SIMPSON*, No. 563, *ante*.

613. — Whether interest "in expectancy."—*Testatrix* by her will, dated in 1862, gave a fifth share of her residuary estate to her daughter W. for life, with remainder to her children, but if she should die without issue, which event happened, "her share to go to her next of kin as if she had not been married." In 1868 J., another daughter of testatrix, married, & by her marriage settlement covenanted that any real or personal property to which she then was entitled for any estate or interest whatsoever in reversion, remainder, or expectancy should be settled upon the trusts of the settlement. W. died in 1912 without issue, & leaving J. her sole next of kin:—*Held*: inasmuch as the covenant did not relate to any defined *spes successionis* it was too vague to be enforceable in equity; & consequently the property to which J. became entitled as next of kin of her sister was not comprised in the settlement.—*Re MUDGE*, [1914] 1 Ch. 115; 83 L. J. Ch. 243; 109 L. T. 781; 58 Sol. Jo. 117, C. A.
Annotation:—*Refd. Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

614. Property at absolute disposal of one party.—*MACKENZIE v. ALLARDES*, No. 462, *ante*.

615. Property altered in outward form — By change of investments.—*MACKENZIE v. ALLARDES*, No. 462, *ante*.

616. Property not capable of being transferred by lex loci—Land in Jersey.—A marriage settlement, executed in 1897, contained a covenant whereby it was agreed that all real & personal property to which A. M. H., the intended wife, then was or at any time during her coverture should be or become entitled, "except her freehold & leasehold property in Jersey, & any cash, stocks, funds, or other securities, now in the actual possession, or standing in the name of A. M. H." should be assured & transferred by A. M. H., & all other necessary parties, if any, to the trustees of the settlement upon trust to sell & hold the proceeds upon the trusts relating to the wife's trust fund. At the date of the settlement A. M. H. was absolutely entitled to certain real estate in Jersey. In 1901 she became absolutely entitled to a share in certain other freehold property in Jersey. By the law of that country trusts of this character were not recognised, & all transfers of property were required to be made for adequate pecuniary consideration:—*Held*: although the words of the exception in the covenant did not exclude the subsequently acquired property of the wife in Jersey, yet, having regard to the law of Jersey which rendered the transfer of such property to the trustees inoperative, it was not caught by the covenant to settle.—*Re PEARSE'S SETTLEMENT, PEARSE v. PEARSE*, [1909] 1 Ch. 304; 78 L. J. Ch. 73; 100 L. T. 48; 53 Sol. Jo. 82.

v. BURROUGHS (1837), 1 Dr. & Wal. 149.—*IR.*

t. Exception of property intended by donor to be excepted.—*PURCELL v.*

SHEEHY (1885), 16 L. R. Ir. 439.—*IR.*

a. What property affected—Covenant to take title to lands to be purchased to

wife & self in joint fee & life rent to secure annuity—Title taken to self & heirs alone.—*OGILVIE v. DUNDAS* (1826), 2 Wils. & S. 214.—*SCOT.*

617. Sum raised by appointment under power in will.—By a settlement, made on the marriage of B., she was empowered to appoint that the trustees of the settlement should raise out of the settled fund any sums not exceeding in the whole £2,000, & pay the same to B. for her separate use. The settlement contained a covenant by B. to settle any after-acquired property of the value of £200 or upwards.

The father of B., who died in her lifetime, gave a fourth of his residuary estate in trust for each of his two daughters, & directed his trustees to hold the shares "upon the same trusts & with & subject to the same powers, including the powers of investment, as are in their respective marriage settlements contained with respect to the funds thereby settled." There were separate settlors, separate funds, & separate sets of trustees:—*Held*: B. was entitled to raise by appointment, out of her share of residue, the sum of £2,000 & the £2,000 was subject to the covenant as to after-acquired property.—*Re BEAUMONT, BRADSHAW v. PACKER*, [1913] 1 Ch. 325; 82 L. J. Ch. 183; *sub nom. Re BEAUMONT, BEAUMONT-NESBITT v. PACKER*, 108 L. T. 181; 57 Sol. Jo. 283.

Annotations:—*Consd. Re Campbell's Trusts*, Public Trustee v. Campbell, [1922] 1 Ch. 551. *Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 224; *Re Arnell, Re Edwards, Prickett v. Prickett* (1924), 93 L. J. Ch. 276.

618. Mortgage granted by husband—In consideration of release of rentcharge.—A marriage settlement dated in 1884 contained a covenant for the settlement of the after-acquired property of the wife. The husband covenanted to secure to her a yearly rentcharge of £500, which he charged upon certain property. He subsequently executed a deed for that purpose. Some years later the wife released to her husband the rentcharge, & the husband mortgaged the property to the wife to secure the payment to her of £10,000. This mtg. was subject to a first mtg. of even date. By his will the husband devised the property upon trust for his wife for life, with remainder to such son of his as should first attain twenty-one. After the death of the husband the widow, in exercise of her power as tenant for life, sold the property. The first mtg. was then paid off:—*Held*: the widow was entitled to the £10,000 with interest & the £10,000 was not subject to the covenant to settle after-acquired property.—*Re BISCOE, BISCOE v. BISCOE* (1914), 111 L. T. 902.

SUB-SECT. 4.—EXCEPTIONS PROVIDED BY COVENANT.

A. Limitations as to Amount, Time and Source.

(a) In General.

619. What property within exception—Property not given so as to be capable of settlement—Residuary bequest to trustees to settle upon trusts of settlement.—By a marriage settlement, the intended husband & wife covenanted that if the wife should become thereafter entitled to property exceeding in value £500, it should be settled upon the trusts of the settlement under which the wife & husband took life interests, with limitations over:—*Held*: in computing this value, a residuary bequest to the trustees of the settlement upon the trusts of it ought not to be reckoned, but that the value was to be that of the future property, which could be settled.—*FORSTER v. DAVIES* (1861), 4 De G. F. & J. 133; 31 L. J. Ch. 276; 5 L. T. 532; 8 Jur. N. S. 65; 10 W. R. 180; 45 E. R. 1134, L. J.

Annotation:—*Mentd. Re Wrightson, Wrightson v. Cooke*, [1908] 1 Ch. 789.

620. — Only property of prescribed value—Arising at any one time and from any one source.—A marriage settlement contained a covenant that property to which the wife then was, or she or the husband in her right should, at any time during the coverture, become entitled, to the value of £500, should be settled:—*Held*: the covenant must be construed to affect only property of the prescribed value arising "at any one time, & from any one source."—*Re HOOPER'S TRUSTS* (1865), 5 New Rep. 463; 12 L. T. 137; 11 Jur. N. S. 479; 13 W. R. 710.

Annotations:—*Apld. Hood v. Franklin* (1873), L. R. 16 Eq. 496; *Re Hughes' Settlement, Hughes v. Schooling, Re Smith, Hughes v. Schooling*, [1924] 2 Ch. 356.

621. — Legacy & share in residue under same will.—By a marriage settlement it was agreed that all property which, during the joint lives of the husband & wife, should devolve upon the wife or the husband in her right, & which should, at the time when the same should respectively so devolve, exceed the value of £500, should be settled upon the trusts of the settlement. By a subsequently executed will a legacy of £200 was left to the wife, & a share of the residuary estate of testator was also given to her for her separate use, such share being declared to be in addition to the legacy of £200. The share of the residue exceeded £500 & was paid to the trustees of the settlement:—*Held*: the legacy of £200 need not be settled.—*Re MIDDLETON'S WILL* (1868), 16 W. R. 1107.

Annotation:—*Follid. Re Davies, Harrison v. Davis*, [1897] 2 Ch. 201.

622. — — — — ——A wife married in 1877 became, under the will of testator who died in 1880, entitled to a sum of £180, & also to an unascertained share of residue assumed to exceed somewhat the sum of £20:—*Held*: as between the husband & wife, although the wife took the £180 & share of residue under the same instrument, she did so under different titles, & therefore Married Women's Property Act, 1870 (c. 93), s. 7, must be applied to each sum separately & not to both in the aggregate, so that the £180, being by itself "a sum of money not exceeding £200," belonged to the wife "for her separate use."—*Re DAVIES, HARRISON v. DAVIS*, [1897] 2 Ch. 204; 66 L. J. Ch. 512.

623. — Legacy & share in legacy as next of kin to legatee.—By a marriage settlement it was provided that all such further or other portion or personal estate, if any, as should during the life of the intended wife become vested in or accrue to her or as should or might be assignable in law or equity either for a vested or contingent interest should be assigned to the trustees of the settlement, & it was also provided that this proviso should not extend to any chattel or interest which the intended wife might from time to time become entitled to either in possession or reversion unless every such legacy or interest should at each time amount to £500. The wife became entitled under the will of her mother to a sum of £1,000 & also to a sum of £350 on the death of one of her sisters as one of her next of kin. The property of which the £350 was a part was also derived from the will of the mother by which it was bequeathed to the sister for life with remainder to her, the sister's, next of kin:—*Held*: the £350 was not subject to the covenant.—*BULLER v. HORNBY* (1871), 25 L. T. 901; 20 W. R. 198.

624. — Sums below amount acquired under several appointments—Executed in immediate succession to one another.—*BOWER v. SMITH*, No. 510, *ante*.

Sect. 4.—Covenants to settle after-acquired property: Sub-sect. 4, A. (a) & (b), & B. (a), (b) & (c).]

625. — — — — —.]—*Re GERARD (LORD), OLIPHANT v. GERARD*, No. 542, *ante*.

626. — — — — —.]—*Re O'CONNELL, MAWLE v. JAGOE*, No. 543, *ante*.

627. — — — — — *Omission of proviso as to source—Whether implied.*—(1) Where a covenant to settle after-acquired property is limited to funds of a specified amount which shall at any time be acquired, a condition is implied that the amount shall be made up of funds derived from the same source.

(2) Where a party having entered into such a covenant, becomes entitled in possession to property which would be subject to the settlement if sufficient in amount, & which has been reduced below the specified amount by the exercise of powers of advancement, the amount received by anticipation must be included for the purpose of determining whether the fund is large enough to be brought into settlement.—*HOOD v. FRANKLIN* (1873), L. R. 16 Eq. 496; 21 W. R. 724.

Annotation.—As to (1) *Apld. Re Hughes' Settlement*, *Hughes v. Schooling, Re Smith, Hughes v. Schooling* (1924), 94 L. J. Ch. 57.

628. — — — — — *Covenant to settle property arising at one time—Sums from different sources falling in at same time.*—*ST. LEGER v. MAGNIAC*, [1880] W. N. 183.

629. — — — — — *Reversionary interest falling in after termination of coverture—Below amount at date of settlement—Amount reached after coverture.*—By a marriage settlement it was agreed that if the wife, at the date of the settlement, or if during the coverture she or her husband in her right, should become seized, possessed of or entitled to any real or personal property of the value of £500, or upwards, the same should as soon as circumstances would admit, be conveyed to the trustees of the settlement.

Under a will which came into operation prior to the date of the settlement, an annuity was given to trustees to be applied wholly or in part for the benefit of a widow, as the trustees should in their discretion think fit, the unapplied balance to be accumulated, and the accumulations remaining at the death of the widow to be divided among a class of persons, of whom the wife, party to the marriage settlement, was one.

The period for division happened after the determination of the coverture, & the share of each person participating then amounting to over £500, but neither at the date of the settlement nor at any time during the coverture, did such share amount to £500.—*Held*: the share was not subject to the covenant contained in the settlement.—*Re WELSTEAD, WELSTEAD v. LEEDS* (1882), 47 L. T. 331.

630. — — — — — *Legacy out of general estate & another out of real estate—Given by separate codicils of same will.*—*Re PARES, Re SCOTT CHAD, SCOTT CHAD v. PARES*, No. 632, *post*.

631. — — — — — *Reversionary interest belonging to wife at time of settlement.*—An ante-nuptial settlement contained a clause providing that "All real & personal property, if any, not hereinbefore settled to which the intended wife at the time of the intended marriage or at any time during her now intended coverture shall be or become entitled whether in possession, reversion or otherwise, except moneys, chattels & effects . . . & except also any legacy or other property acquired at one & the same time not exceeding in amount or value the sum of £200 . . . shall as soon as circumstances admit" be brought into settlement:—

Held: (1) the exception of "any legacy or other property acquired at one & the same time not exceeding in amount or value the sum of £200" applied to a reversionary interest belonging to the wife at the date of the settlement; (2) in ascertaining for the purpose of the exception the value of reversionary interests acquired at one & the same time from different sources (a) the value of these interests ought not to be aggregated & (b) the value of each interest must be ascertained as at the date when it vested in possession.—*Re HUGHES' SETTLEMENT, HUGHES v. SCHOOLING, Re SMITH, HUGHES v. SCHOOLING*, [1924] 2 Ch. 356; 94 L. J. Ch. 57; 133 L. T. 470; 68 Sol. Jo. 791.

(b) *Ascertainment of Value.*

632. What must be regarded—Beneficial receipt of covenantor—Not amount of gift.—(1) A legacy of £500, which by payment of duty at 10 per cent. has been reduced to £450, is not within a covenant to settle any after-acquired property of the value of £500 or upwards.

The legatee in each case has to suffer a deduction of duty at the rate of 10 per cent., so that each of these sums becomes, as far as her beneficial receipt of it is concerned, £450 only, & is therefore not caught by the covenant (*BUCKLEY, J.*).

(2) A legacy out of general estate given by a codicil to a will, & a legacy given by another codicil to the same will out of the proceeds of sale of real estate which has not yet been sold, are acquired at one & the same time, namely, the death of testatrix, & from one & the same source, namely, testatrix. They must therefore be added together & treated as one sum for the purpose of a covenant to settle any property to which a married woman should become entitled "at one & the same time and from one & the same source."—*Re PARES, Re SCOTT CHAD, SCOTT CHAD v. PARES*, [1901] 1 Ch. 708; 70 L. J. Ch. 426; 84 L. T. 385.

633. — — — — — *Reversionary interest—Value of interest if in possession—Not actual value as reversion.*—*Re MACKENZIE'S SETTLEMENT*, No. 506, *ante*.

634. — — — — —.]—(1) A covenant, by husband & wife, to settle property to which the wife or the husband in her right "shall become entitled" during the coverture, held to include property vested in reversion before the coverture, & falling into possession during the coverture, but not to include property to which they are entitled only in reversion during the coverture, & which falls into possession after the coverture.

By the marriage settlements of H. & W., two ladies who were each absolutely entitled to a share of the proceeds of the sale of certain real property subject to a life estate, each of the husbands & wives covenanted jointly & separately that if at any time during the coverture they or either of them should become entitled to any property, it should be conveyed to the trustees of the settlement upon the trusts thereof. H. & her husband survived, & W. & her husband predeceased the tenant for life.—*Held*: the share of H. was bound, & the share of W. was not bound, by the covenant.

(2) "The property to be acquired is to be" of the value of £100 or upwards. That seems to me to mean the actual value, & not the estimated value of a remainder acquired during coverture, & not falling into possession till many years afterwards (*WICKENS, V.-C.*).—*Re CLINTON'S TRUST, HOLLWAY'S FUND, THE SAME, WEARE'S FUND* (1871), L. R. 13 Eq. 295; 41 L. J. Ch. 191; 26 L. T. 159; 20 W. R. 826.

Annotations.—As to (1) *Consd. Reid v. Reid* (1880), 31

Ch. D. 402; *Re Bland's Settlement*, *Bland v. Perkin*, [1905] 1 Ch. 4. *Re Parson's, Stockley v. Parsons* (1890), 45 Ch. D. 51; *Re Cazenove, Perkin v. Bland* (1919), 122 L. T. 181; *Re Crook's Settlement*, *Re Glasier's Settlement*, *Crook v. Preston*, [1923] 2 Ch. 339. *As to (2) Distd. Re Hughes' Settlement*, *Hughes v. Schooling, Re Smith, Hughes v. Schooling* (1924), 94 L. J. Ch. 57. *Re Commell v. Keith* (1876), 3 Ch. D. 767. *Generally, Re Lane v. Oakes, Mackenzie, Garnishoe* (1874), 30 L. T. 726.

635. ————.] — *CORNMELL v. KEITH*, No. 512, *ante*.

636. ————.] — *Re HUGHES' SETTLEMENT, HUGHES v. SCHOOLING, Re SMITH, HUGHES v. SCHOOLING*, No. 631, *ante*.

637. — **Endowment policy—Value of policy at time when effected.**]—A marriage settlement contained a covenant to settle all real & personal property, if any, not thereinbefore settled to which the wife after the intended marriage or at any time during her then intended coverture should be or become entitled, either in possession, reversion, remainder, or otherwise, except jewels, etc., & except also any legacy or other property acquired at one & the same time not exceeding in amount or value the sum of £200. The husband three years after the marriage effected an endowment policy for £500 on his own life. He paid the premiums & died in 1909, & his wife received the money. There was one son surviving:—*Held*: the value of the policy must be ascertained at the time it was effected, when it was not worth £200, & the policy moneys were not caught by the covenant.—*Re HARCOURT, WHITE v. HARCOURT* (1911), 105 L. T. 747; 56 Sol. Jo. 72.

638. **What must be deducted—Death duties.**]—*Re MACKENZIE'S SETTLEMENT*, No. 506, *ante*.

639. ————.] — *Re PARES, Re SCOTT CHAD, SCOTT CHAD v. PARES*, No. 632, *ante*.

640. — **Costs.**] — *Re MACKENZIE'S SETTLEMENT*, No. 506, *ante*.

B. Excepted Property.

(a) Personal Chattels.

641. **Necessity for express words—Exception of jewelry.**]—*WILLOUGHBY v. MIDDLETON*, No. 679, *post*.

642. — **Exception of consumable goods.**]—*WILLOUGHBY v. MIDDLETON*, No. 679, *ante*.

643. **Share of personal estate including chattels—Chattels included in aggregate.**]—In a post-nuptial settlement A. covenanted to bring into settlement any property coming to him under an intestacy, except chattels of the kinds mentioned. A. subsequently became entitled as one of the next of kin of an intestate to a share in the intestate's personal estate, which included chattels of the kinds excepted from the covenant. In the course of administration of the estate these chattels were sold:—*Held*: the interest of A. in the intestate's estate, so far as the estate consisted of such chattels, was not an interest in each of the chattels specifically, & therefore the interest of A. in such chattels, or in the proceeds of sale thereof, did not fall within the exception of the covenant, but, together with A.'s interest in the rest of the estate, was subject to the covenant.—*VANNECK v. BENHAM*, [1917] 1 Ch. 60; 86 L. J. Ch. 7; 115 L. T. 588.

(b) Property Otherwise Settled.

644. **On what property binding—Property subsequently bequeathed to wife for her separate use.**]—

(1) A covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but such a covenant of the husband & wife does. Such a covenant to settle

does not bind property over which a wife is deprived of the power of disposition.

(2) Covenant by husband & wife to settle all after-acquired property, "not being already settled for her separate use":—*Held*: not to bind property subsequently bequeathed to the wife for her separate use.—*COVENTRY v. COVENTRY* (1863), 32 Beav. 612; 2 New Rep. 349; 8 L. T. 819; 9 Jur. N. S. 613; 11 W. R. 868; 55 E. R. 240.

645. ————.] — Covenant in a marriage settlement to settle the wife's after-acquired property, save & except "any estate or effects already settled to her separate use":—*Held*: a legacy afterwards bequeathed to her for her separate use was not included in the covenant.—*WHITGREAVE v. WHITGREAVE* (1864), 33 Beav. 532; 55 E. R. 475.

646. ————.] — A marriage settlement, in which the wife's property was vested in trustees for her separate use, without power of anticipation, contained a covenant by the husband & wife that if at any time during the joint lives of them any further portion, fortune, or estate should come to or devolve upon either of them by or under any will, or otherwise, they would effectually settle the same, except such future portion, fortune, or estate as should be otherwise settled previously to the same devolving as aforesaid, upon the trusts of the settlement:—*Held*: a gift of a legacy to the wife for her own sole & separate use, free from the debts, control, & engagements of her husband, was excluded from the operation of the covenant.—*KANE v. KANE* (1880), 16 Ch. D. 207; 50 L. J. Ch. 72; 43 L. T. 667; 29 W. R. 212.

Annotations:—*Fold, Re Berens' Settlement, Berens v. Benyon* (1888), 59 L. T. 626; *Lloyd v. Prichard*, [1908] 1 Ch. 265. *Reid, Bosworthick v. Bosworthick*, [1926] P. 159.

647. ————.] — A marriage settlement made in Jan. 1877, contained a covenant by the husband & wife that all property not thereinbefore settled to which the wife or the husband in her right then was, or should during the intended coverture become, beneficially entitled, except jewels, trinkets, etc., & except also any property which might be settled by the instrument under which it was derived, should be assured & transferred to or otherwise vested in the trustees upon certain trusts. Under an appointment made by an indenture, dated July 30, 1883, the wife had become entitled to a sum of £10,000 which by such indenture, was declared should be for her sole & separate use, & should not be subject to any trust or agreement for settlement contained in any settlement executed upon or in contemplation of her marriage:—*Held*: the £10,000 was settled by the instrument under which it was derived, & was not within the covenant.—*Re BERLNS' SETTLEMENT TRUSTS, BERENS v. BENYON* (1888), 59 L. T. 626.

648. ————.] — **Contingent reversionary interests not falling into possession during coverture.**]—*LLOYD v. PRICHARD*, No. 585, *ante*.

(c) Other Cases.

649. **Exception of particular freehold & leasehold property—Covenant to settle present & future property—Exception confined to present interests.**]—At the date of her marriage in 1897 A. was seized of freehold property in Jersey, & she afterwards became entitled to other freehold property in the island. The settlement contained the usual trusts for the wife, husband, & children, & a covenant by A. alone to assure & transfer to the trustees, with certain exceptions her then & after-acquired property, "except her freehold & leasehold property in Jersey" & any cash, etc.,

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"now in the actual possession or standing in" her name. A. & her husband mortgaged her interests in the properties:—*Held*: having regard to the contest, the exception did not exclude from the operation of the covenant the property of which A. was not possessed at the time of the marriage.—*Re PEARSE'S SETTLEMENT, PEARSE v. PEARSE*, [1909] 1 Ch. 304; 78 L. J. Ch. 73; 100 L. T. 48; 53 Sol. Jo. 82.

650. Exception of property intended by donor to be excepted.]—*THORNTON v. BRIGHT*, No. 654, *post*.

651. — Gift for purpose inconsistent with covenant—Donor ignorant of covenant.]—Where a covenant to settle after-acquired property contains an exception of "any property as to which in the instrument under which it is acquired . . . an intention is expressed that it shall be exempt from this present covenant or from any provision of a like nature" a gift for a declared purpose wholly inconsistent with its application under the covenant is within the exception, whether the donor is aware of the covenant or not.—*Re THORNE, THORNE v. CAMPBELL-PRESTON*, [1917] 1 Ch. 360; 86 L. J. Ch. 261; 116 L. T. 540; 61 Sol. Jo. 268.

SUB-SECT. 5.—SEVERAL AND JOINT COVENANTS BY HUSBAND AND WIFE.

A. Covenant by Husband Alone.

See Married Women's Property Act, 1907 (c. 18), ss. 2, 4.

652. What property affected—Property not reduced into possession during coverture.]—*BASH v. DALWAY*, No. 301, *ante*.

653. — — —.]—By a marriage settlement in 1859 real estate was settled for the benefit of S. & her husband W. for their lives & then for the children of S. as she should by deed or will appoint, & in default, to them in equal shares, & if no such child then for such persons as S. should by deed or will appoint, & in default for S., her heirs & assigns. & in the settlement was a covenant by W. that after-acquired property of S. should be conveyed to the trustees to be held by them upon the trusts of the settlement. W. & S. married & had four children, one only of whom was now living. W. died in 1891. By her will made in that year S. "in pursuance of all powers & authorities in anywise enabling me thereto" directed, limited, & appointed her residuary estate as to a moiety for her son M. & his wife & children, & as to the other moiety to persons not objects of the special power. She died in 1898. During her coverture she had become entitled to certain real & personal estate which was never conveyed to the trustees of the settlement:—*Held*: (1) the after-acquired property was not bound by the covenant in the settlement; (2) there was not sufficient evidence to show an intention on the part of testatrix to exercise her special power of appointment in favour of her son M.—*Re RICKMAN, STOKES v. RICKMAN* (1899), 80 L. T. 518.

654. — Property subject to directions inconsistent with settlement.]—A. by his marriage settlement, covenanted, that if his intended wife, or he in her right, should, during coverture, become entitled to any property, he would, unless otherwise expressly directed by the deed or will under which she should become entitled, convey the same on the trusts of the settlement:—*Held*: the

covenant did not extend to property left to the wife's separate use.—*THORNTON v. BRIGHT* (1836), 2 My. & Cr. 230; 6 L. J. Ch. 121; 40 E. R. 628, L. C.

Annotations:—Distd. Butcher v. Butcher (1851), 14 Beav. 222. *Apld. Ewart v. Ewart* (1853), 11 Hare, 276. *Consd. Ramsden v. Smith* (1854), 2 Drew. 298. *Apld. Re Mainwaring's Settlement*, (1866), L. R. 2 Eq. 487. *Re D'Estampes' Settlement, D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117; *Re Thorne, Thorne v. Campbell-Preston*, [1917] 1 Ch. 360. *Mentd. Fry v. Capper* (1853), Kay, 163; *Morse v. Martin* (1865), 34 Beav. 500; *Re Teague's Settlement*, (1870), 22 L. T. 742; *Re Cunynghame's Settlement*, (1871), L. R. 11 Eq. 324; *Re Pocock's Policy* (1871), 6 Ch. App. 449, n.; *Busk v. Aldam* (1874), L. R. 19 Eq. 16; *Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645; *Cooper v. Laroche* (1881), 17 Ch. D. 368; *Seotney v. Lomer* (1885), 29 Ch. D. 535; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125.

655. — Property for wife's separate use without power of anticipation.]—A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was on the part of the husband alone, to execute all necessary deeds, as that such property should, so far as he was concerned, be vested in the trustees on the trusts of the settlement:—*Held*: property afterwards given to the separate use of the wife was not liable to be settled.—*HAMMOND v. HAMMOND* (1854), 19 Beav. 29; 3 Eq. Rep. 119; 3 W. R. 36; 52 E. R. 259.

Annotation:—Refd. Young v. Smith (1865), 35 Beav. 87.

656. — — —.]—*COVENTRY v. COVENTRY*, No. 644, *ante*.

657. — — —.]—Husband covenanted with his wife & the trustees of his marriage settlement that he would at the request of the trustees join with the wife in or otherwise do all such acts as might be required on his part in settling the after-acquired property of the wife; & it was thereby agreed & declared that in the meantime until such settlement should be made the property should be held upon the trusts upon which the same was thereby covenanted to be settled:—*Held*: after-acquired separate property of the wife was not bound by the covenant.—*Re MACPHERSON, MACPHERSON v. MACPHERSON* (1886), 55 L. J. Ch. 922.

658. — Reversionary property of wife—Covenant merely executory.]—By marriage arts. the intended husband agreed to settle, when required, one moiety of the wife's reversionary interests, & after the death of the tenant for life reduced one moiety into possession & gave a release for the same, but he never executed a settlement or assignment of the other, & died in the lifetime of the wife:—*Held*: as the covenant was only the covenant of the husband & not of the wife, & merely executory, he never having executed any assignment, the wife was not bound.—*CRAMER v. MOORE* (1855), 3 Sm. & G. 141; 25 L. T. O. S. 31; 1 Jur. N. S. 915; 3 W. R. 347; 65 E. R. 598.

659. Husband's covenant contained in operative part—Whether controlled by agreement in recitals.]—A marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled. The corresponding operative part was a covenant by the husband alone, without the usual words, "It is hereby agreed":—*Held*: the covenant was not controlled by the recital, & was not binding on the wife.—*YOUNG v. SMITH* (1865), L. R. 1 Eq. 180; 35 Beav. 87; 11 Jur. N. S. 963; 55 E. R. 827.

Annotations:—Distd. Lee v. Lee (1876), 4 Ch. D. 175. *Consd. Re De Ros' Trust, Hardwicke v. Wilmot* (1885), 31 Ch. D. 81. *Apld. Re Macpherson, Macpherson v. Macpherson* (1886), 55 L. J. Ch. 922. *Refd. Buckland v. Buckland*, [1900] 2 Ch. 534. *Mentd. Crouch v. Crouch*, [1912] 1 K. B. 378.

660. ———.]—A marriage settlement contained a recital of an agreement that all such personal estate above a certain value as should during the coverture be given or bequeathed to or otherwise vest in the wife should be settled, & that the husband should enter into the covenant in that behalf thereafter contained. The corresponding operative part of the deed was a covenant by the husband alone, without the usual words "It is hereby agreed," that he & his wife would settle such property, & that until such settlement the husband & wife should stand possessed of the same upon the trusts of the settlement. The wife as well as the husband executed this settlement, & during the coverture property was given to the wife for her separate use:—*Held*: the operative words were sufficiently ambiguous to enable the ct. to look at the recitals, & on the whole instrument the wife's after-acquired separate property was bound by the covenant.—*Re DE ROS' TRUST, HARDWICKE v. WILMOT* (1885), 31 Ch. D. 81; 55 L. J. Ch. 73; 53 L. T. 524; 34 W. R. 36, C. A.

Annotations:—*Apld.* *Re Macpherson, Macpherson v. Macpherson* (1886), 55 L. J. Ch. 922. *Consd.* *Re Cochlan, Broughton v. Broughton*, [1894] 3 Ch. 76. *Distd.* *Re Haden, Colling v. Haden*, [1898] 2 Ch. 220. *Refd.* *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518.

661. Wife a party to & executing deed.]—By an ante-nuptial agreement, signed by the intended husband & wife & the parents of the wife, the parents agreed to appoint a share of certain real estate, which was subject to their life interest & to the appointment of them & the survivor of them, to the wife, & the husband agreed that "he would settle" his wife's reversionary share of the said real estate upon the usual trusts for the husband & wife, & their children. The wife's father having survived her mother, released the power & granted the estate after his death, giving his said daughter a share. The wife predeceased the husband & left two children. The property being still reversionary, an action was brought by the husband & one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement:—*Held*: the agreement bound the wife as having assented to her father's stipulation, & also her heir-at-law, & specific performance ordered accordingly.—*LEE v. LEE* (1876), 4 Ch. D. 175; 46 L. J. Ch. 81; 36 L. T. 138; 25 W. R. 225.

Annotations:—*Fold.* *Re De Ros' Trust, Hardwicke v. Wilmot* (1885), 31 Ch. D. 81; *Re Haden, Colling v. Haden*, [1898] 2 Ch. 220. *Consd.* *Lloyd v. Prichard*, [1908] 1 Ch. 265. *Refd.* *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518. *Mentd.* *Eccl. Comrs. v. Pinney*, [1899] 1 Ch. 99.

662. ———.]—*Re DE ROS' TRUST, HARDWICKE v. WILMOT*, No. 660, *ante*.

663. ———.]—A marriage settlement contained a covenant by the husband alone that all the real & personal estate above a certain value which should at any time during the coverture by any means be acquired by the wife or the husband in her right should forthwith be settled upon the trusts of the settlement. The wife was a party to & executed the deed. During the coverture she became entitled under the will of her father to certain real estate:—*Held*: the property in question was bound by the covenant.—*Re HADEN, COLLING v. HADEN*, [1898] 2 Ch. 220; 67 L. J. Ch. 428.

Annotations:—*Consd.* *Lloyd v. Prichard*, [1908] 1 Ch. 265. *Refd.* *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518.

664. Covenant by husband for "all other necessary parties"—*Wife not bound.*]—*Re GRAY,*

v. MACLEAN (1899), cited in [1900] W. N. at p. 76.

Annotation:—*Fold.* *Re Smith, Robson v. Tidy*, [1900] W. N. 75.

665. ———.]—*Re SMITH, ROBSON v. TIDY*, [1900] W. N. 75.

Reversionary interests not falling into possession during coverture.]—*See* Nos. 495, 501, 504, 507, 521 524, 583, *ante*.

B. Covenant by Wife Alone.

See Married Women's Property Act, 1907 (c. 18), ss. 2, 4.

666. What property affected—Only property within disposition of wife.]—*COVENTRY v. COVENTRY*, No. 644, *ante*.

C. Express Covenant by Husband and Wife.

See Married Women's Property Act, 1907 (c. 18), ss. 2, 4.

667. What property affected—Separate property of wife.]—A *feme* being entitled to a reversionary interest in property for her separate use, both she & her intended husband separately covenanted to settle any property which she, or her husband in her right, was or might become entitled to, upon certain trusts; the above interest having fallen into possession:—*Held*: it was subject to the trusts of the settlement.—*TAWNEY v. WARD* (1839), 1 Beav. 563; 8 L. J. Ch. 319; 48 E. R. 1059.

Annotation:—*Mentd.* *Pritchard v. Norris* (1855), 25 L. T. O. S. 60.

668. ———.]—Husband & wife covenanted to vest in the trustees of their settlement, upon the trusts thereof, "all property which should come to her absolutely, & not bound by any trust or provision, otherwise than for her absolute use":—*Held*: property bequeathed to her "for her separate use absolutely" was bound by the covenant.—*MILFORD v. PELLE* (1854), 17 Beav. 602; 2 W. R. 181; 51 E. R. 1169.

Annotations:—*Refd.* *Ramsden v. Smith* (1851), 2 Drew. 298; *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779.

669. ———.]—*COVENTRY v. COVENTRY*, No. 644, *ante*.

670. ———.]—By an ante-nuptial settlement the husband & wife covenanted with the trustees to settle all property to which the wife then was or during the coverture she or her husband in her right should become entitled by devise, bequest or otherwise "for any estate or interest whatsoever." During the coverture the wife's father died, having by his will devised & bequeathed a moiety of his residuary real & personal estate to her "for her separate use, independently of any husband":—*Held*: the moiety was bound by the covenant.—*Re ALLNUTT, POTT v. BRASSEY* (1882), 22 Ch. D. 275; 48 L. T. 155; 31 W. R. 469; *sub nom.* *Re ALNUTT, POTT v. BRASSEY*, 52 L. J. Ch. 299.

Annotations:—*Re Spooner* (1884), 26 Ch. D. 34. *Re Walker v. Crawshaw*, [1891] 3 Ch. 176; *Re Thorne, Thorne v. Campbell-Preston*, [1917] 1 Ch. 360.

671. ——— **Property accruing to husband after bankruptcy.**]—Arts. were executed previous to a marriage, by which the husband & wife agreed, that all property, estate & effects to which the husband or wife might thereafter become entitled, should be settled to such uses as the wife should appoint; & in default, on trusts for the husband, wife & children. At the time, neither husband nor wife had any property, the husband was insolvent, & soon after the marriage took the benefit of Insolvent Act. Property subsequently

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descended on him :—*Held* : as against his assignee, it was bound by the arts.—*HARDEY v. GREEN* (1849), 12 Beav. 182; 18 L. J. Ch. 480; 14 L. T. O. S. 366; 13 Jur. 777; 50 E. R. 1029.

Annotations :—*Reid*. *Re Clint*, *Ex p. Bolland* (1873), L. R. 17 Eq. 115; *Churston v. Buller* (1897), 77 L. T. 45; *Re Reils*, *Ex p. Clough*, [1904] 2 K. B. 769. *Mentid*. *Re Clarke*, *Coombe v. Carter* (1887), 35 Ch. D. 109.

**672. — Reversionary interest in personalty—
Falling into possession after death of husband.]—**

Previous to her marriage A. was entitled to a reversionary interest in personal property. By settlement before marriage, after a recital that it had been agreed that any property to which the husband & A., or either of them in her right, "should by any means become absolutely entitled to," should be settled, the husband & A. jointly & severally covenanted with the trustees, that if at any time "during the marriage" the husband & A. or either of them in her right, should by gift, etc., "or otherwise howsoever, become entitled to any real or personal property" to the amount of £100 and upwards, the same should be assigned to the trustees, "so far as the estates or interests in such future property would extend." After the death of A. & her husband the property fell into possession :—*Held* : it was included within the terms of the above covenant.—*Re HUGHES'S TRUSTS* (1863), 4 Giff. 432; 66 E. R. 776; *sub nom Re HILL'S TRUSTS*, 8 L. T. 825; 9 Jur. N. S. 942; 11 W. R. 930.

Annotation :—*N.F.* *Re Clinton's Trusts*, *Holloway's Fund*, *The Same*, *Weare's Fund* (1872), L. R. 13 Eq. 295.

—*See, also*, Nos. 496, 498–500, 502, 503, 505, 508–511, 519, 580, 585, *ante*.

Effect of general words of agreement.]—See
Sub-sect. 5, D., *post*.

D. General Words of Agreement.

See Married Women's Property Act, 1907 (c. 18), ss. 2, 4.

673. Effect of—Actual covenant by husband alone.]—By the settlement made on the marriage of an English lady with a foreigner, her Bank annuities were settled in trust for her, her husband, & their children; & her real estates were directed to be sold & the produce held on similar trusts, & it was agreed between all the parties, & the husband covenanted, that in case any real or personal estate should vest in the wife, or in him in her right, he, as far as he lawfully could, would, either alone or in concurrence with his wife, settle the same upon the trusts, & subject to the powers, etc., therein expressed concerning the Bank annuities. Real estates descended on the wife. The husband & some of the children were aliens :—*Held* : the lands descended were bound by the covenant, & they ought to be sold & the produce invested on the same trusts as the Bank annuities.—*MASTER v. DE CROISMAR* (1848), 11 Beav. 184; 17 L. J. Ch. 466; 11 L. T. O. S. 530; 12 Jur. 762; 50 E. R. 787.

Annotation :—*Reid*. *Re Pearce's Settlement*, *Pearse v. Pearce*, [1909] 1 Ch. 304.

674. — —.]—A marriage settlement contained a clause, by which it was agreed, & the husband covenanted that if any real or personal estate should descend or devolve to or vest in the wife or in any person in trust for her, the husband should make, do & execute or cause or procure to be made, done or executed or join or concur with the wife in making doing or executing all such acts, deeds, etc., as should be necessary for settling such property on the trusts of the settlement. A legacy was left to the wife for her

separate use :—*Held* : it did not come within the agreement & covenant to settle, contained in the settlement.—*RAMSDEN v. SMITH* (1854), 2 Drew. 298; 2 Eq. Rep. 660; 23 L. J. Ch. 757; 23 L. T. O. S. 166; 18 Jur. 566; 2 W. R. 435; 61 E. R. 734.

Annotations :—*Distd.* *Campbell v. Bainbridge* (1868), L. R. 6 Eq. 269. *Apld.* *Dawes v. Tredwell* (1881), 18 Ch. D. 354. *Consd.* *Re D'Estampes' Settlement*, *D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117. *Apld.* *Re Macpherson*, *Macpherson v. Macpherson* (1886), 55 L. J. Ch. 922; *Re Smith*, *Robson v. Tidy*, [1900] W. N. 75. *Reid.* *Willoughby v. Middleton* (1862), 2 John. & H. 344; *Re Portadown Dungannon & Omagh Junction Ry.*, *Ex p. Young* (1867), 15 W. R. 979; *Lee v. Lee* (1876), 4 Ch. D. 175; *Re Campbell's Policies* (1877), 6 Ch. D. 686; *Hancock v. Hancock* (1888), 38 Ch. D. 78; *Re Rickman*, *Stokes v. Rickman* (1899), 80 L. T. 518.

675. — —.]—(1) A deed of settlement to which the wife, the husband & trustees were parties, executed before marriage, contained the following clause : It is hereby declared & agreed by & between the parties hereto, & the husband, does hereby for himself, his heirs, exors. & administrators, covenant, promise, & agree to & with the trustees, their exors. & administrators that if the wife, or the husband in right of the wife shall, at or upon the marriage, or at any time thereafter, become interested in or entitled to any sum or sums of money, or real or personal estate, etc., which already has or have been, or shall or may at any time or times hereafter be given or bequeathed, or which shall descend to the wife, that then same shall be & remain, etc., upon the same trusts, etc., as are hereinbefore mentioned, etc., of & concerning the trust-moneys, stocks & premiums hereinbefore assigned. The husband died, & after his death certain property in which his wife, during his life, had a reversionary interest, fell into possession :—*Held* : the covenant was binding on the husband alone.

(2) Clause in a marriage settlement relative to the settlement of the wife's after-acquired property :—*Held* : upon the construction of the language, not to comprise, as against the wife surviving, either property coming to the wife after her husband's death, or property in which a reversionary interest vested in her during the coverture, but which did not vest in possession until after the husband's death.—*REID v. KENRICK* (1855), 3 Eq. Rep. 1031; 24 L. J. Ch. 503; 25 L. T. O. S. 193; 1 Jur. N. S. 897; 3 W. R. 530.

Annotations :—*Consd.* *Re D'Estampes' Settlement*, *D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117. *Reid.* *Carter v. Carter* (1869), L. R. 8 Eq. 551; *Dickinson v. Dillwyn* (1869), L. R. 8 Eq. 546.

676. — —.]—*DAWES v. TREDWELL*, No. 602, *ante*.

677. — Covenant by husband on behalf of himself & others.]—*BUTCHER v. BUTCHER*, No. 502, *ante*.

678. — —.]—*TOWNSHEND v. HARROWBY*, No. 530, *ante*.

679. — —.]—(1) A marriage settlement contained a recital of an agreement that the husband should covenant to settle future property coming to the wife, followed by an agreement by all parties, & a covenant by the husband, that the wife's future property should be settled :—*Held* : property bequeathed to the wife's separate use was bound by the covenant.

The covenant being to settle "any real or personal estate or effects" on trusts for sale & investment :—*Held* : (2) no exception could be implied as to specific jewels; (3) the words "any real or personal estate or effects" included trinkets.

(4) Goods *quae ipso usu consumuntur* would not be included, but everything else, unless the election should be against the settlement, must pass to

the trustees (PAGE-WOOD, V.-C.).—*WILLOUGHBY v. MIDDLETON* (1862), 2 John. & H. 344; 31 L. J. Ch. 683; 6 L. T. 814; 8 Jur. N. S. 1055; 10 W. R. 460; 70 E. R. 1089.

Annotations.—*As to* (1) *Apld.* *De Serre v. Clarke* (1874), L. R. 18 Eq. 587. *Reid.* *Coventry v. Coventry* (1863), 8 L. T. 819; *Smith v. Lucas* (1881), 18 Ch. D. 531. *Generally.* *Reid.* *Re Queade's Trusts* (1845), 54 L. J. Ch. 786; *Codrington v. Codrington* (1875), 45 L. J. Ch. 660; *Re D'Estampes' Settmt.*, *D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117; *Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Vardon's Trusts* (1885), 31 Ch. D. 275; *Bateman v. Faber*, [1898] 1 Ch. 144. *Mentd.* *Brown v. Brown* (1866), L. R. 2 Eq. 481.

680. ———.]—In a marriage settlement, it was declared, & the husband covenanted, that in case at any time during the coverture any real, personal, or mixed estate of the value of £500 should come to or vest in the wife, or the husband in her right, at law or in equity, by devise, descent, gift, or otherwise, it should be conveyed & assigned from time to time without delay by the husband, his exors. & administrators, & the wife upon the trusts of the settlement:—*Held*: a legacy given to the separate use of the wife was within the covenant.—*CAMPBELL v. BAINBRIDGE* (1868), L. R. 6 Eq. 269; 37 L. J. Ch. 634; 19 L. T. 254; 17 W. R. 3.

Annotations.—*Consd.* *Re D'Estampes' Settmt.*, *D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117. *Reid.* *Dawes v. Tredwell* (1881), 18 Ch. D. 354.

681. ———.]—By a settlement executed in contemplation of a marriage between C. & W. certain stocks were settled by W. upon the trusts therein declared, & it was also thereby agreed & declared by & among the parties thereto, & W. did thereby covenant with the trustees of the settlement, that all such real & personal estates & effects as C. should be at the time of the solemnisation of the intended marriage, or as she, or W. in her right, should during the intended coverture become seised or possessed of or entitled to, should or might, when & so soon & so far as the rights, interests, & powers of W. & C., or either of them, in or over the same would allow, be conveyed, assigned, assured, & made over respectively & vested in the trustees of the settlement upon the trusts therein declared. C. at the date of the marriage was entitled to a vested reversionary interest in certain personal property under her father's marriage settlement, subject to her mother's life interest therein. W. died in 1872. The mother died in 1883:—*Held*: the covenant to settle property to which C. was entitled at the date of the marriage, or might afterwards become entitled to, was not merely the covenant of the husband, but the words of the covenant applied to both husband & wife, & C.'s vested reversionary interest was bound by the settlement.—*Re D'ESTAMPES' SETTLEMENT*, *D'ESTAMPES v. CROWE* (1884), 53 L. J. Ch. 1117.

Annotation.—*Reid.* *Re De Ros, Hardwicke v. Wilmot* (1885), 55 L. J. Ch. 73.

SUB-SECT. 6.—EFFECT OF MARRIED WOMEN'S PROPERTY ACTS.

See HUSBAND & WIFE, Vol. XXVII., pp. 86–88, Nos. 671–681.

SUB-SECT. 7.—OPERATION OF COVENANTS.

682. Whether operating as conversion—No immediate trust—Without request of husband & wife.]—A settlement contained the usual covenant by the husband & wife to assign after acquired property of the wife to trustees, with a proviso that

it should be lawful for the trustees at the request of the husband & wife during their joint lives & of the survivor during his or her life, & afterwards at the discretion of the trustees, to sell & dispose of such property & invest the proceeds upon the trusts of the settlement. The wife afterwards became entitled to leaseholds & specific personal chattels:—*Held*: the trustees were not for the present to convert these things without the request in writing of the husband & wife.—*HOPE v. HOPE* (1855), 1 Jur. N. S. 770; 3 W. R. 617.

Annotation.—*Consd.* *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779.

683. ———.]—*Application of rule in Howe v. Dartmouth.*—(1) The rule in *Howe v. Earl of Dartmouth*, No. 2090, *post*, does not apply in the case of a settlement by deed, & apparently only applies where there is a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession.

(2) The covenant to settle after-acquired property is a contract which has to be performed in strict accordance with its terms (COZENS-HARDY, J.).—*Re VAN STRAUBENZEE, BOUSTEAD v. COOPER*, [1901] 2 Ch. 779; 70 L. J. Ch. 825; 85 L. T. 541; 17 T. L. R. 755; 45 Sol. Jo. 738.

Annotation.—*Reid.* *Re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111.

684. Whether operating as trust—Post-nuptial settlement.]—A covenant by a settlor to transfer, convey, & assure property, if any, which he might thereafter acquire, if of a certain value, does not amount either to an imperfect declaration of trust, or to an incomplete assignment of the property, if any, which afterwards came to be acquired, upon which this ct. will operate.

W., by a post-nuptial settlement, in consideration of natural love & affection, & for divers other good causes & considerations, covenanted to transfer, & convey, & assure all property to which he might thereafter become entitled “at any time or times, by gift, descent, succession, or otherwise, from or through his mother,” if of a certain amount in value at any one time, to trustees upon the trusts of that settlement. At the date of the settlement he was entitled to certain interests in remainder, subject to his mother's life interest. Afterwards he became entitled in reversion to another fund, subject to a life interest given to his mother; & lastly, his mother died, leaving him property by will:—*Held*: none of all these funds were in equity affected by the trusts of the settlement by virtue of the covenant.

Qu.: whether any & which of such funds are comprised in the covenant at all?—*WILKINSON v. WILKINSON* (1857), 4 Jur. N. S. 47.

685. ———.]—A covenant to settle after-acquired property upon certain trusts binds such property in equity immediately it becomes receivable into the settlement funds, & even though it is not in fact added to such settlement funds it is nevertheless trust property, & if it can be traced into the possession of a mere volunteer the trustees of the settlement can claim it from such volunteer or his legal personal representatives.—*PULLAN v. KOE*, [1913] 1 Ch. 9; 82 L. J. Ch. 37; 107 L. T. 811; 57 Sol. Jo. 97.

Annotation.—*Mentd.* *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

686. Whether operating as incomplete assignment.]—*WILKINSON v. WILKINSON*, No. 684, *ante*.

687. Effect of bankruptcy of covenantor.]—Debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, “& all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof.” Debtor

Sect. 4.—Covenants to settle after-acquired property: Sub-sect. 7. Parts IV. & V. Sects. 1 & 2: Sub-sects. 1 & 2, A. & B.]

became bkpt., & after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bkpty.:—*Held*: the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign for the breach of which the assignor incurred a liability provable in his bkpty., & from which he was released by the order of discharge; consequently the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale. *Qu.*: whether the same rule applies to a

covenant in a marriage settlement to settle future property.—*COLLYER v. ISAACS* (1881), 19 Ch. D. 342; 51 L. J. Ch. 14; 45 L. T. 567; 30 W. R. 70, C. A.

Annotations:—*Distd. Re Reis, Ex p. Clough*, [1904] 2 K. B. 769. *Reid. Robinson v. Ommanney* (1882), 21 Ch. D. 780; *Pullan v. Koe*, [1913] 1 Ch. 9. *Mentd. Clements v. Mathews* (1882), 47 L. T. 251; *Joseph v. Lyons* (1884), 15 Q. B. D. 280; *Aberdare & Plymouth Co. v. Hankey* (1887), 3 T. L. R. 493; *Re Bastable, Ex p. Trustee*, [1901] 2 K. B. 518; *Re Lawley, Zaisor v. Lawley* (1902), 71 L. J. Ch. 895; *Re Dallas*, [1904] 2 Ch. 385; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1; *Re Wait*, [1927] 1 Ch. 606.

See, further, BANKRUPTCY, Vol. IV., p. 310, Nos. 2901, 2902; Vol. V., pp. 733, 851, 852, Nos. 6350, 7153, 7154, 7160.

Part IV.—Capacity of Parties.

Infants—Avoidance of contracts by infants generally.]—*See* INFANTS, Vol. XXVIII., pp. 156 *et seq.*

Infants' settlements on marriage—At common law.]—*See* INFANTS, Vol. XXVIII., pp. 205–214, Nos. 652–731.

Under statute.]—*See* INFANTS, Vol. XXVIII., pp. 214, 215, Nos. 732–755.

Settlements on marriage of ward of court.]—*See* INFANTS, Vol. XXVIII., pp. 344 *et seq.*

As to jurisdiction of court in respect of wards of court generally.]—*See* INFANTS, Vol. XXVIII., pp. 335 *et seq.*

Lunatics.]—*See* LUNATICS, Vol. XXIII., p. 139, Nos. 165–170.

Part V.—Consideration for Settlements.

SECT. 1.—IN GENERAL.

See, generally, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 162–178, 229–242.

688. Grant of estate tail.]—*LLINASTON v. LLOYD* (1622), Palm. 213; 81 E. R. 1048.

689. Agreement to free from incumbrances & settle—Death of husband before settlement made.]—*MEREDITH v. WYNNE* (1710), Gilb. Ch. 70; *Prec. Ch.* 312; 25 E. R. 49.

Annotation:—*Reid. Salwey v. Salwey* (1770), Amb. 692.

690. Portion settled on wife—Agreement by husband & wife to release rights—In father's personal estate.]—A. & his wife covenant in articles before marriage, in consideration of £2,000, the wife's portion, to release all the right that might accrue to them out of her father's personal estate, by the custom of London.

In this case there appeared to be a valuable consideration for the agreement in the articles because at the time the £2,000 was given debts, wife was entitled to no part of the estate of her father & it was given for her advancement in the world (*LORD HARDWICKE, C.*).—*IVES v. MEDCALFE* (1737), 1 Atk. 63; 26 E. R. 42, L. C.

Annotations:—*Consd. Lee v. Head* (1855), 1 K. & J. 620. *Reid. Morris v. Burroughs* (1737), 1 Atk. 399; *Herne v. Herne* (1741), Barn. Ch. 430; *Ridout v. Palm* (1747), 3 Atk. 486; *Honner v. Morton* (1828), 3 Russ. 65. *Mentd. Campbell v. Twemlow* (1814), 1 Price, 81; *Bolleau v. Rutlin* (1848), 2 Exch. 665.

691. Settlement on trust to pay debts, etc.—Hir in tail joining to charge settled estate.]—A. having an estate in fee of £8,000 a year, & being tenant for life without impeachment of waste of

another estate of £5,000 a year, with the reversion in fee after an estate in tail male in B. his only son by a former marriage, became indebted by mtge., annuities, & otherwise, to the amount of near £100,000. A. & B. joined in conveying both estates to trustees, upon trust by sale or mtge., sale of timber, or by rents & profits, to pay debts, & to apply so much of the rents & profits of what should remain unsold as should seem meet to them, as a sinking fund, & to pay the residue to A. & to settle the remaining trust estates, subject to an annuity of £1,000 to B. for the joint lives of him & A., upon A. for life without impeachment of waste, with power to lease for twenty-one years only; remainder to trustees to preserve, etc., remainder, subject to a jointure to the wife of A. & portions for children by her, to the joint appointment of A. & B.; in default thereof to the appointment of B. surviving; in default thereof to B. in tail male; remainder to the other sons of A. in tail male; remainder to B. in tail; remainder to the daughters of A. in tail, with cross remainders; remainder to B. in fee; with powers of leasing & full powers of management in the trustees, & a provision for the appointment of new trustees, as vacancies should happen. The trustees raised £50,000 by mtge. of the settled estate, which they applied to the debts; & they paid £2,500 a year to A. & £1,000 a year to B. from the date of the settlement. Upon the bill of A. to set aside the deed, except the trust for the debts, upon a general charge of fraud, misapprehension & misrepresentation or to control the management

PART V. SECT. 1.

*b. Release of dower.]—*The release by a married woman since 1837, of her dower rights, is not a valuable consideration for a settlement of lands

on her, so as to defeat a subsequent sale by the settlor, to a purchaser for value.—*CONOLE v. HORGAN* (1882), 8 V. L. R. (Eq.) 239.—*AUS.*

*c. Meritorious consideration.]—*A

post-nuptial agreement, in writing, by which a father undertook to make a provision for a child, will be specifically executed, being a contract, founded on a meritorious consideration.—

of the trust, & for an account against the trustees :—*Held* : B.'s joining to subject the settled estate was sufficient consideration.—*MYDDLETON v. KENYON* (LORD) (1794), 2 Ves. 391; 30 E. R. 689, L. C.

Annotations :—*Refd.* *Ford v. Stuart* (1852), 15 Beav. 493. *Mentd.* *Towart v. Sellars* (1817), 5 Dow, 231; *Foulkes v. Davies* (1868), L. R. 7 Eq. 42.

692. Settlement of estate of intestate—Personalty in consideration of realty—Realty non-existent.]—On the occasion of the death of a person, intestate, & without wife or children, in one of the colonies, a deed was executed between the parents & brothers & sisters of the intestate, by which it was recited, that the intestate was, at his death, possessed of real & personal estate, & the real estate was settled, in consideration of the settlement of the personal estate, by the eldest brother as heir-at-law; & the personal estate together with other property of the father was settled by the father as sole next of kin, in consideration of the settlement of the real estate. The intestate, as it afterwards appeared, had no real estate :—*Held* : the possibility of there being real estate was a valuable consideration, sufficient to support the settlement against the father.—*REFFELL v. KING* (1833), 2 L. J. Ch. 155.

693. Covenant to pay premiums—On policy assigned to trustees.]—A post-nuptial settlement made in order to avoid proceedings for contempt being taken against the husband, who had married a ward of ct. without leave, contained a covenant to settle the wife's after-acquired property & a covenant by the husband to pay the premiums on a policy of assurance which he had assigned to the trustees of the settlement :—*Held* : there was sufficient consideration for the covenant to settle the wife's property, & it was capable of being enforced by the ct.—*STEPHENS v. GREEN, GREEN v. KNIGHT*, [1895] 2 Ch. 148; 64 L. J. Ch. 546; 72 L. T. 574; 43 W. R. 465; 39 Sol. Jo. 448; 12 R. 252, C. A.

SECT. 2.—MARRIAGE SETTLEMENTS.

SUB-SECT. 1.—MARRIAGE AS CONSIDERATION.

See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 168–177, 233–237, Nos. 137–199, 604–635.

694. Valuable consideration.]—*WATKINS v. STEEVENS* (1690), Nels. 160; 21 E. R. 815.

Annotation :—*Mentd.* *I. R. Comrs. v. Gribble* (1913), 108 L. T. 887.

695. —.]—*CHURCHMAN v. HARVEY* (1757), Amb. 335; Amb. App. I. 824; 27 E. R. 225.

Annotation :—*Refd.* *Thornton v. Bright* (1836), 2 My. & Cr. 230.

696. —.]—The consideration of marriage alone constituted the father a purchaser & the benefit of the trust was part of his contract (*SHADWELL, V. C.*).—*STOCKEN v. STOCKEN* (1831), 4 Sim. 152; 58 E. R. 58; *on appeal* (1833), 2 My. & K. 489, L. C.; (1838), 4 My. & Cr. 95, L. C.

Annotations :—*Refd.* *Thompson v. Griffin* (1841), Cr. & Ph. 317; *Plunkett v. Lewis* (1844), 8 Jur. 682; *Ransome v. Burgess* (1866), L. R. 3 Eq. 773; *Re Kerrison's Trusts* (1871), 40 L. J. Ch. 637; *Wilson v. Turner* (1883), 22 Ch. D. 521.

ELLIS v. NIMMO (1835), L. & G. temp. Sugd. 333.—*IR.*

d.—*Natural love & affection.]*—*RE LUBY'S ESTATE* (1908), 43 I. L. T. 141.—*IR.*

PART V. SECT. 2, SUB-SECT. 1.

a. Meritorious consideration.]—A

marriage took place at B. between two persons natives of Scotland, the marriage settlement was executed as a deed of indenture in English form within four weeks after the marriage another deed of indenture also in English form was executed at Bath, whereby new provisions were settled

697. —.]—*DAVENPORT v. BISHOPP*, No. 725, *post*.

698. — Marriage without portion.]—Marriage without a portion is itself a consideration for an agreement.—*Ex p. MARSH* (1744), 1 Atk. 158; 26 E. R. 102, L. C.

Annotations :—*Refd.* *Darby v. Smith* (1798), 8 Term Rep. 82. *Mentd.* *Ryall v. Rolle* (1749), 1 Atk. 165; *Caffrey v. Darby* (1801), 6 Ves. 488.

Post-nuptial settlement.]—*See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 172–177, 234–237, Nos. 160–194, 609–635.

Consideration ex post facto.]—*See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 240, 241, Nos. 667, 673, 674.

SUB-SECT. 2.—PERSONS WITHIN CONSIDERATION.

A. In General.

See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 177, 178, 237–239, Nos. 200–208, 636–664.

699. Consideration runs through whole settlement.]—*STEPHENS v. TRUEMAN*, No. 727, *post*.

700. —.]—In marriage settlements, etc., on good or valuable consideration, as between the immediate “parties,” such consideration will run through all the limitations for the benefit of the remotest persons; even of those in respect of whom the deeds would otherwise have been voluntary.—*JTHELL v. BEANE* (1749), 1 Ves. Sen. 215; 27 E. R. 990, L. C.

Annotations :—*Consd.* *Price v. Jenkins* (1876), 4 Ch. D. 483; *Gale v. Gale* (1877), 6 Ch. D. 144. *Mentd.* *Andrew v. Wrigley* (1792), 4 Bro. C. C. 125.

701. —.]—The consideration of marriage runs through the whole settlement: & especially supports every provision with regard to the husband & wife. She is interested in the provision for her husband, enabling him to provide for her & the children, & it is not affected by subsequent events, as the death of the wife without children.—*NAIRN v. PROWSE* (1802), 6 Ves. 752; 31 E. R. 1291.

Annotations :—*Mentd.* *Mackreth v. Symmons* (1808), 15 Ves. 329; *Re Lightoller, Ex p. Peake* (1816), 1 Madd. 316; *Winter v. Anson* (1827), 6 L. J. O. S. Ch. 7.

B. Parties to the Marriage.

See, generally, *PERPETUITIES*, Vol. XXXVII., pp. 5 *et seq.*

702. Wife.]—A. on his marriage agrees & gives bond to settle lands for the benefit of his wife & their issue, & afterwards aliens part of those lands. Jointress decreed to have the deficiency of her jointure made good out of the inheritance of the lands remaining unsold, but that decree was reversed. Where the jointress & the issue claim by the same settlement, they shall contribute proportionably in the discharge of any prior incumbrance on the estate.—*CARPENTER v. CARPENTER, WASBORNE v. DOWNES* (1866), 1 Vern 440; 1 Eq. Cas. Abr. 114; 23 E. R. 572, L. C.

703. —.]—*NAIRN v. PROWSE*, No. 701, *ante*.

704. — For benefit of children.]—Husband & wife purchasers by the marriage for their

upon the wife :—*Held* : the legal import & effect of the latter deed must be judged by the law of England & it formed part of the marriage settlements & was duly executed for meritorious considerations & was irrevocable.—*RAMSAY v. COWAN* (1833), 11 Sh. (Ct. of Sess.) 967.—*SCOT.*

Sect. 2.—*Marriage settlements: Sub-sect. 2, B., C.*

children.—**PARKES v. WHITE** (1805), 11 Ves. 209; 32 E. R. 1068, L. C.

*Annotations:—***Refd.** Jackson v. Hobhouse (1817), 2 Mer. 483; Scott v. Davis (1838), 4 My. & Cr. 87; Baker v. Bradley (1855), 7 De G. M. & G. 597; Taylor v. Meads (1865), 34 L. J. Ch. 203; Hood Barrs v. Heriot, [1896] A. C. 174. **Mentd.** Chalmer v. Bradley (1819), 1 Jac. & W. 51; Digby v. Howard (1831), 4 Sim. 588; Johnson v. Freeth (1836), Donnelly, 16; Johnson v. Gallagher (1861), 3 De G. F. & J. 494.

705. Husband.]—NAIRN v. PROWSE, No. 701, ante.

706. — Settlement in consideration of wife's fortune—Part consisting of bond not recovered—Husband's representative entitled.]—The husband upon marriage, in consideration of his wife's fortune, computed at £500, agrees to yearly payments to her separate use, that she may dispose of £100 by will in his life time; that if she survive, he is to leave her £200, apparel, plate, etc. Part of her fortune was a bond of £200. The husband dies, having made his will, & pltf. residuary legatee, but had not recovered the £200 due on the bond; then the wife dies: this bond shall go to the representative of the husband, he being a purchaser of it by the settlement on her.—**ADAMS v. COLE** (1735), Cas. temp. Talb. 168; 25 E. R. 720, L. C.

*Annotations:—***Consd.** Lanov v. Athol (1742), 2 Atk. 444. **Refd.** Salwey v. Salwey (1770), Amb. 692.

707. — For benefit of children.]—PARKES v. WHITE, No. 704, ante.

708. — Settling own property—Not purchaser in respect of ultimate limitation in fee.]—An estate was devised to the eldest son of testator, in fee, charged with four portions of £5,000 each for younger children. The eldest son, on his marriage, settled the estate to the use of his intended wife after his decease, for her life, if she should survive him, with remainder to himself in fee, & covenanted within six months to pay off the four sums of £5,000 & release the estate therefrom. He paid off one sum of £5,000, & died intestate:—**Held:** the husband was not a purchaser under the settlement, & the covenant in the settlement could not be taken to have been for indemnity only; but, so far as the wife & younger children were concerned, the husband had adopted the portions as his own debt, & he had also made them his debt as between his real & personal representatives.—**BARHAM v. CLARENDON (EARL)** (1852), 10 Hare, 126; 22 L. J. Ch. 1057; 17 Jur. 336; 1 W. R. 96; 68 E. R. 867.

C. Issue.

Issue—Construction of.]—See Part II., Sect. 3, sub-sect. 3, E., ante.

709. Issue of the marriage.]—CARPENTER v.

CARPENTER, WASBORNE v. DOWNES, No. 702, ante.

710. — Posthumous child—Provision for such children as should be living at death of father or mother.]—A posthumous child within a provision in marriage arts. for such children of the marriage, as should be living at the death of the father or mother.—**MILLAR v. TURNER** (1748), 1 Ves. Sen. 85; 27 E. R. 907, L. C.

*Annotations:—***Refd.** Thellusson v. Woodford (1798), 4 Ves. 227. **Mentd.** Doe d. Lancashire v. Lancashire (1792), 5 Term Rep. 49; Doe d. Clarke v. Clarke (1795), 2 Hy. Bl. 399.

711. — Purchasers under both father & mother.]—An infant is bound by a settlement made on her marriage, where it was made with the approbation of parents & guardians.

Infants may contract marriage, males at fourteen, females at twelve; & these agreements differ from all others; the principal consideration is the marriage; . . . as soon as the marriage is had, the principal contract is executed, & cannot be set aside or rescinded, the estate & capacities of the parties are altered, the children born of the marriage are equally purchasers under both father & mother, & therefore it has been truly said that marriage contracts ought not to be rescinded, because it would affect the interests of third persons, the issue (**LORD HARDWICKE, C.**).—**HARVEY v. ASHLEY** (1748), 3 Atk. 607; Wilm. 219, n.; 26 E. R. 1150, L. C.

*Annotations:—***Consd.** Buckinghamshire v. Drury (1762), Wilm. 177; Caruthers v. Caruthers (1794), 4 Bro. C. C. 500. **Refd.** Durnford v. Lane (1781), 1 Bro. C. C. 106; Clinton v. Hooper (1791), 1 Ves. 173; Field v. Moore, Field v. Brown (1855), 25 L. J. Ch. 66; Campbell v. Inghly (1856), 21 Beav. 567.

712. — Grandchild.]—There can be no doubt that according to the law of England a stipulation on behalf of a grandchild of the marriage would be regarded as within the consideration of marriage & as completely binding as any stipulation in favour of a child (**LORD HERSCHELL, C.**).—**MACDONALD v. SCOTT**, [1893] A. C. 642, H. L.

—**See FRAUDULENT & VOIDABLE CONVEYANCES**, Vol. XXV., pp. 177, Nos. 202, 203.

713. Issue of former marriage—Settlement on remarriage.]—NEEVE v. KECK (1724), 9 Mod. Rep. 106; 2 Eq. Cas. Abr. 24; 88 E. R. 345.

714. ——**]**—The marriage consideration for an ante-nuptial settlement does not extend to the wife's children by a former husband. Such children are "volunteers" in relation to the settlement.—**A.-G. v. JACOBS SMITH**, [1895] 2 Q. B. 341; 64 L. J. Q. B. 605; 72 L. T. 714; 59 J. P. 468; 43 W. R. 657; 11 T. L. R. 411; 39 Sol. Jo. 538; 14 R. 531, C. A.

*Annotations:—***Refd.** I. R. Comrs. v. Gribble, [1913] 1 K. B. 220. **Mentd.** Miles v. R. (1897), 41st Report of Inland Revenue Comrs. [Cd. 9020], p. 167.

—**See FRAUDULENT & VOIDABLE CONVEY-**

PART V. SECT. 2, SUB-SECT. 2.—B.

705 i. Husband.]—In an ordinary marriage settlement, when the lands settled are the property of the husband, he cannot be considered a purchaser, for value, of the life estate in those lands limited to him by the settlement.—**Re BROWN'S ESTATE** (1863), 13 L. Ch. R. 283; 14 Ir. Jur. 289.—**IR.**

PART V. SECT. 2, SUB-SECT. 2.—C.

709 i. Issue of the marriage.]—Re TRENCH'S ESTATE (1856), 8 Ir. Jur. 406; 7 I. C. L. R. 338.—**IR.**

709 ii. —.]—JOYCE v. HUTTON (1861), 12 I. Ch. R. 71; 13 Ir. Jur. 274.—**IR.**

709 iii. —.]—Re BIRON'S CONTRACT (1878), 1 L. R. Ir. 258.—**IR.**

709 iv. —.]—Re BELL'S ESTATE, Ex p. HOPPS (1883), 11 L. R. Ir. 512.—**IR.**

709 v. —.]—CUMMING'S TRUSTEE v. CUMMING (1896), 24 R. (Ct. of Sess.) 153; 34 Sc. L. R. 77; 4 S. L. T. 146.—**SCOT.**

713 i. Issue of former marriage—Settlement on remarriage.]—A widow who contemplated second marriage, settled in the year 1889 by a deed of settlement certain of her property on herself for life, & after her death on two of her children by a former marriage. By the words of the deed this settlement declared to be "in consideration of the said intended marriage." The settlor died in 1891.—**Held:** the trusts in favour of the children of the former marriage were

not within the marriage considerations: the children were mere volunteers: the provisions made in their favour were not made for valuable consideration, & as to real estate could be avoided by 27 Eliz. ch. 4, by a subsequent conveyance to a purchaser.—**NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. v. R.** (1893), 19 V. L. R. 132.—**AUS.**

713 ii. —.]—Re DEANE, Ex p. OFFICIAL ASSIGNEE & DEANE (1906), 6 S. R. N. S. W. 560; 23 N. S. W. W. N. 203.—**AUS.**

713 iii. —.]—A second marriage, in contemplation of which a father executes a deed providing for children by a former marriage, is not a valuable consideration.—**Re GREER** (1877), 11 I. R. Eq. 502.—**IR.**

ANCES, Vol. XXV., pp. 178, 238, 239, Nos. 204–206, 656–659.

Issue of second marriage.]—See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., p. 238, Nos. 651–655.

Illegitimate issue.]—See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., p. 239, Nos. 660, 661.

D. Next of Kin.

715. Whether within the consideration — Ultimate trust for next of kin—Right to enforce.]—Among the trusts of a settlement, the subject of the settlement being property limited to the separate use of the wife, it was provided that the trustees should effect a policy of assurance to the amount of £3,000 on the life of the wife, & annually pay the premium out of the trust money during the life of the wife, & stand possessed of the assurance in trust after the decease of the wife to invest the £3,000 when received, & pay the interest to the husband for his life, if he should survive the wife, & after the decease of the husband to pay the £3,000 to such person or persons as the wife should by will, notwithstanding her coverture, appoint; & in default of such appointment, to the persons entitled under Statute of Distributions.

There were no children of the marriage, & the wife, having survived her husband, & being unwilling to continue the payment of the annual premium, joined with the surviving trustee of the settlement in making a voluntary assignment of the policy to her cousin, who paid the annual premium during his life, & by his will appointed G. his exor. & residuary legatee. G. continued to pay the premium, & on the death of the assured, received the value of the policy. On a bill filed by the next of kin of the wife against G. & against the exor. & residuary legatee of the wife:—*Held*: the assignment was valid, & G. was entitled to the value of the property.—*GODSAL v. WEBB* (1838), 2 Keen, 99; 7 L. J. Ch. 103; 48 E. R. 566.

Annotations.]—*Reid*. *Meek v. Kettlewell* (1842), 11 L. J. Ch. 293; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Reid v. Kenrick* (1855), 3 Eq. Rep. 1031; *Carter v. Carter* (1869), L. R. 8 Eq. 551; *Dickinson v. Dillwyn* (1869), L. R. 8 Eq. 546.

716. — — — —.]—In a marriage settlement, the intended wife being an infant, the husband covenanted that one-half of the wife's personal & of the proceeds of her real property when sold, should be settled upon trust for himself for life, then for her for her life, & then, in default of issue, upon trust for her next of kin. The property was duly vested in the trustees. The husband died, & there was no issue of the marriage:—*Held*: the trust for the next of kin was not binding against the wife, & she had absolute power to deal with the trust funds.—*GRIBBS v. GRADY* (1871), 41 L. J. Ch. 163; 20 W. R. 257.

717. — — — —.]—By a marriage settlement made in the name of a lady, then an infant, it was agreed that the intended husband & infant, & all other necessary parties would, as soon as the case would admit, assign unto the trustees of the settlement certain personal estate to which the infant became, under her father's will, entitled upon her marriage, upon trust for investment, with the consent of the husband & wife, & to pay the income to the wife for her separate use, & on her death to her husband for life, or until bkpey. or alienation, & in trust for the issue of the marriage, & in default of issue becoming absolutely entitled in trust for such person or persons as the wife should by deed, with or without power of revocation & new appointment, or by

will appoint, & in default of such appointment, if the wife should survive the husband, for the wife absolutely, but if he should survive her, in trust for the persons who, under Statute of Distributions, should be her next of kin. The infant by a deed poll exercised the power of appointment by appointing the property, subject to the trusts in the settlement in favour of herself, husband & issue, to the husband absolutely, reserving to herself a power of revocation & new appointment. The wife died an infant without issue. Her interest in the fund agreed to be settled was at the date of the settlement, & at her death still remained reversionary, & no further settlement was made by the husband. The husband went into liquidation, & pltf. was appointed his trustee, & brought an action claiming the settled property against the next of kin, who also claimed it:—*Held*: the next of kin were volunteers, & could not, as against pltf., obtain specific performance of the covenant to settle the fund.—*Re D'ANGIBAU, ANDREWS v. ANDREWS* (1880), 15 Ch. D. 228; 49 L. J. Ch. 756; 43 L. T. 135; 28 W. R. 930, C. A.

Annotations.]—*Consd.* *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89. *Fold.* *Re Plumtre's Marriage Settlement, Underhill v. Plumtre*, [1910] 1 Ch. 609. *Consd.* *Pullan v. Koe*, [1913] 1 Ch. 9. *Apld.* *Re Hewett, Hewett v. Eldridge* (1913), 49 L. Jo. 10; *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234. *Consd.* *Re Sutton, Boscawen v. Wyndham*, [1921] 1 Ch. 257. *Refd.* *Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1881), 44 L. T. 414; *Shupway v. Ball* (1881), 16 Ch. D. 376; *Re Newcastle's Estates* (1883), 24 Ch. D. 129; *Poucey v. Hordern*, [1900] 1 Ch. 492; *Re Torrington*, [1913] 2 Ch. 623. *Mentd.* *Re Wernher, Wernher v. Belt*, [1918] 2 Ch. 82.

718. — — — —.]—*Re PLUMPTRE'S MARRIAGE SETTLEMENT, UNDERHILL v. PLUMPTRE*, No. 470, *ante*.

719. — — — —.]—A marriage settlement made in 1887 contained a covenant to settle the wife's after-acquired property upon the trusts of the wife's funds, which were in the usual form, & an agreement by the husband to settle any sums to which he became entitled under the will of his father. By a deed of gift in 1904 certain interests in reversion belonging to the husband were assured by him absolutely to his wife. The husband was also entitled to a one-third share in two sums of £9,000 & £4,700 appointed to him by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement come to in 1889. The share of the £9,000 fell into possession in 1891 on the death of his father, & was paid to him, unknown to the trustees of his marriage settlement, & spent. The interests given by the husband to the wife & his share of the £1,700 came into possession in 1916 on the death of the husband's mother, & were now outstanding in the trustees of his parents' settlement & of the deed of family arrangement respectively. The husband died in 1907, & there was no issue of the marriage. Subject to his widow's life interest in both funds, the ultimate residue of the wife's fund was held in trust for her statutory next of kin, & the husband's fund was held in trust for him absolutely. The widow was also tenant for life under her husband's will.

Upon a summons by the trustees of the marriage settlement to have it determined whether these interests & funds were caught by the provisions of the settlement, & if so, whether they should take proceedings to enforce them:—*Held*: (1) they were caught by the covenant of the wife & the agreement by the husband respectively; but (2) the trustees ought not to take steps to recover any of them. In the case of the wife's fund her next of kin were volunteers, who could neither maintain an action to enforce the covenant, nor

Sect. 2.—Marriage settlements: Sub-sect. 2, D., E. & F.; sub-sect. 3, A.]

for damages for breach of it, & the ct. would not give them by indirect means what they could not obtain by direct procedure.—*Re PRYCE, NEVILL v. PRYCE*, [1917] 1 Ch. 234; 86 L. J. Ch. 383; 116 L. T. 149; 61 Sol. Jo. 183.

720. ———.] — *PAUL v. PAUL*, No. 1124, *post*.

721. ——— *Right of settlor to revoke.*] — *PAUL v. PAUL*, No. 1124, *post*.

Trusts for next of kin.] — *See* Part VIII., Sects. 10, 12, *post*.

E. Collaterals.

722. *Whether consideration extends to collaterals.*] — *Covenant in marriage settlement, that the settlor would surrender certain copyholds which were intermixed with his freeholds, to be settled upon the issue of the marriage, with limitations to collateral branches of the family; his eldest son, upon his marriage, covenants to suffer a recovery of the freehold, which was done, & to settle the copyhold, to which he was admitted in fee; upon a bill brought by a nephew of the first settlor, on failure of issue of that marriage, for a specific performance of the covenant, to surrender in favour of collaterals:—Held: though the consideration of marriage extended to collaterals, yet the son by the covenants on his marriage, & by his admission in fee, had taken the copyholds discharged of the specific limitations.*—*HALE v. LAMB* (1764), 2 Eden, 292; 28 E. R. 910, L. C.

723. ———.] — *The arts. made previous to the marriage of F. decreed to be carried into execution for the benefit of pltf. his eldest sister.*—*GORING v. NASH* (1744), 3 Atk. 186; 26 E. R. 909, L. C.

Annotations:—Consd. *Estcourt v. Estcourt* (1760), 1 Cox. Eq. Cas. 20. *Apld.* *Davenport v. Bishopp* (1846), 1 Ph. 698. *Consd.* *Barham v. Clarendon* (1852), 10 Harc. 126. *Refd.* *Stephens v. Trueman* (1747), 1 Ves. Sen. 73; *Ramsden v. Hylton* (1751), 2 Ves. Sen. 304; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Cramer v. Moore* (1855), 25 L. T. O. S. 31.

724. ——— *Settlement on marriage of eldest son—Limitation to second son.*] — *A limitation to a second son in remainder in tail, on a settlement made on the marriage of the first son, & in consideration of the wife's portion, makes not the second son a purchaser.*—*STAPLEHILL v. BULLY* (1703), Prec. Ch. 224; 24 E. R. 109.

725. ——— *Trust in default of issue—Party to settlement claiming specific performance—Settlement executed in toto.*] — *In a marriage settlement, which comprised only the property of the wife, it was agreed between the intended husband & wife, & each of them covenanted with the trustees, that any property to which the wife might become entitled during the coverture, should be conveyed to such uses as she should by deed or will appoint, & in default of appointment, to the use of herself for life, remainder to the use of the husband for his life, remainder to the use of the wife's children, & in default of such children, to the use of A. B., her niece, & her heirs. After the death of the wife without children, & without having exercised her power of appointment, the husband filed a bill against her heir-at-law, praying that a real estate, to which she had become entitled during her lifetime, might be conveyed to the uses of the settlement. On the question whether the decree for specific performance should be confined to the*

life estate of the husband, or should extend to the limitation to the niece, who was also dead:—*Held: it should extend to the latter, on the ground that the right of the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value.*

This covenant was entered into for a valuable consideration, namely, the marriage between the parties (LORD COTTENHAM, C.).—DAVENPORT v. BISHOPP (1846), 1 Ph. 698; 9 L. T. O. S. 33; 41 E. R. 798.

Annotations:—Consd. *Barham v. Clarendon* (1852), 10 Harc. 126; *Paul v. Paul* (1880), 15 Ch. D. 580; *Re Cameron & Wells* (1887), 37 Ch. D. 32. *Refd.* *Kekewich v. Manning*, (1851), 1 De G. M. & G. 176; *Hewison v. Negus* (1853), 22 L. J. Ch. 655; *Scott v. Scott* (1854), 23 L. T. O. S. 27; *Cramer v. Moore* (1855), 3 Sm. & G. 141; *Campbell v. Ingilby* (1856), 21 Beav. 567; *Westbury v. Clapp* (1864), 3 New Rep. 633; *Stephens v. Green, Green v. Knight* (1895), 72 L. T. 574; *Re Cavendish Browne's Settlement*. *Trusts*, *Horner v. Rawle* (1916), 61 Sol. Jo. 27. *Mentd.* *Fletcher v. Fletcher* (1844), 4 Harc. 67; *Drew v. Martin* (1864), 2 Hem. & M. 130; *Touche v. Metropolitan Ry. Warehousing Co.* (1871), 6 Ch. App. 671.

726. ——— *Trustees becoming entitled to other property—In different character.*] — *Re HEWETT, HEWETT v. ELDRIDGE* (1913), 49 L. Jo. 10.

.] — *See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 178, 237, 238, Nos. 208, 638–650.

F. Other Persons.

727. *Remainderman.*] — *In marriage arts. & settlements, on good & valuable considerations, such considerations will run through all the limitations in favour of the remotest remainderman.*—*STEPHENS v. TRUEMAN* (1748), 1 Ves. Sen. 73; 27 E. R. 899, L. C.

Annotation:—Refd. *Davenport v. Bishopp* (1846), 1 Ph. 698.

728. ———.] — *BRADBURY v. HUNTER* (1796), 3 Ves. 260; 30 E. R. 1000, L. C.

729. *Persons usually outside consideration—If participation necessary to persons within.*] — *The general rule of law is that the cts. will not enforce a marriage settlement in favour of stranger volunteers who are not parties to the contract, on the ground that they are not within the consideration of the marriage. But when the persons who are within the consideration of the marriage take only on terms which admit to a participation with them others who would not otherwise be within the consideration, then, not the matrimonial consideration, but the consideration of the mutual contract extend to & comprehend them.*—*MACKIE v. HERBERTSON* (1884), 9 App. Cas. 303, H. L.

Annotations:—Consd. *De Mestre v. West*, [1891] A. C. 264; *Macdonald v. Scott*, [1893] A. C. 642. *Refd.* *Re Cameron & Wells* (1887), 37 Ch. D. 32; *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341; *A.-G. for Ireland v. Rathdonnell*, [1896] W. N. 141.

730. *Strangers—Right to enforce settlement.*] — *MACKIE v. HERBERTSON*, No. 729, *ante*.

.] — *See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., p. 239, Nos. 663, 664.

Rights & liabilities of strangers to contract.] — *See, generally, CONTRACT*, Vol. XII., pp. 42–50.

731. *Heirs of settlor—Right to enforce settlement.*] — *By a marriage settlement in 1853, certain property was settled upon the usual trusts, & in case there should be no issue on trust for the wife absolutely. There was a covenant by the husband & wife to settle all after-acquired property coming*

PART V. SECT. 2, SUB-SECT. 2.—D.

720 I. *Whether within the consideration—Ultimate trust for next of kin.*] — *DAY v. DAY* (1870), 13 W. R. 417.—*IR.*

PART V. SECT. 2, SUB-SECT. 2.—F.

I. *Brother.*] — *A father's voluntary settlement upon his children, otherwise unprovided for by him, may, when neither creditor, purchaser, nor*

any other having claim on the father's estate is concerned, be carried into execution by a ct. of equity, as answering the father's natural obligation to provide for his children. But this

to the wife for any estate or interest whatsoever or over which she should have an absolute power of appointment. By a voluntary settlement in 1873 certain real estate was settled on the wife for life for her separate use without power of anticipation, & after her death to such uses as she should appoint. There was no issue of the marriage, & the wife survived her husband, having made her will in his lifetime, which she did not confirm after his death. The real estate was never settled upon the trusts of the marriage settlement. Upon the wife's death a claim was made by her heir-at-law to the real estate on the ground that it had become subject to the covenant to settle after-acquired property, & so subject to the trusts of the settlement, & that her will was inoperative to dispose of it as she had not confirmed it since her husband's death, & that, therefore, she died intestate:—*Held*: though the property was within the terms of the covenant, it had not actually become & could not be treated as subject to the trusts of the settlement in favour of the heir who was not within the consideration of the settlement, & so not entitled to enforce the covenant; therefore, the property passed under the will made in pursuance of the power of appointment in the settlement of 1873.—*Re ANSTIS, CHETWYND v. MORGAN, MORGAN v. CHETWYND* (1886), 31 Ch. D. 596; 54 L. T. 742; 34 W. R. 483; 2 T. L. R. 335, C. A.

Annotations:—*Refd.*, *Re Gundry, Mills v. Mills* (1898), 79 L. T. 438; *Re Plumtre's Marriage Settlement*, *Underhill v. Plumtre*, [1910] 1 Ch. 609.

—*See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., p. 237, Nos. 636, 637.

SUB-SECT. 3.—FAILURE OF CONSIDERATION.

A. What Amounts to Failure.

732. Incapacity to contract valid marriage.]

—Where a widower married the sister of his deceased wife:—*Held*: the relation thus constituted imposed upon the widower, claiming the benefit of a settlement made on him by his wife's sister, the *onus* of showing that at the time of entering into the transaction she was fully, fairly & truly informed of its character & of her legal status. Such a marriage & consequent cohabitation held not a sufficient consideration to support a conveyance by the wife's sister of her property to the widower absolutely.—*COULSON v. ALLISON* (1860), 2 De G. F. & J. 521; 3 L. T. 763; 6 Jur. N. S. 1140; 45 E. R. 723, L. C.

Annotations:—*Consd.*, *Chapman v. Bradley* (1863), 33 Beav. 61. *Distd.*, *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275. *Apld.*, *Phillips v. Probyn*, [1899] 1 Ch. 811.

733. —[In 1854 A. went through the marriage ceremony, in Prussia, with C., his deceased wife's sister. After the marriage, & in consideration thereof, C. settled property upon certain trusts, reserving to herself, however, a power of appointment. Subsequently by her will C. confirmed the trusts of the settlement. On the death of C. both the will & settlement were admitted to probate:—*Held*: the settlement was valid.

The settlement can in no sense be considered as void & the utmost that can be said of it is that it is an instrument which might have been set aside

by the lady herself or by a purchaser for valuable consideration. It is impossible to say that it is not a voluntary settlement (STUART, V.-C.).—*SEALE v. LOWNDES* (1868), 17 L. T. 555.

734. —[On Apr. 30, 1873, a widower executed a deed, by which, in contemplation of a marriage which “had been agreed upon & was intended shortly to be solemnised” between himself & C., he conveyed real estate to trustees in fee, to the use of himself & his assigns during his life, with remainder to the use of C. during her life, “provided she shall remain a widow & unmarried; & from & immediately after her decease or marriage, whichever event shall first happen,” to such uses as the settlor should by deed or will appoint, & in default of appointment, to the use of such person or persons as would be entitled thereto if the deed had not been executed. C. was in fact a sister of the settlor's deceased wife, though this was not stated in the deed. On Mar. 5, 1877, he went through the ceremony of marriage with her, & she afterwards lived with him as his wife. He died in Nov. 1891, intestate. He had not exercised the power of appointment by deed reserved to him by the settlement. During the life of his son & heir-at-law C. received the rents of the property without objection on his part. Upon a summons taken out after the son's death by the trustees of the settlement against C. & the son's heir-at-law & administratrix to determine who was entitled to the property:—*Held*: the trust for C. was illegal & invalid & the property was held on trust for the son's administratrix, she being, under Land Transfer Act, 1897 (c. 65), his real representative.—*PHILLIPS v. PROBYN*, [1899] 1 Ch. 811; 68 L. J. Ch. 401; 80 L. T. 513; 15 T. L. R. 324; 43 Sol. Jo. 456.

735. —[Meaning of “solemnise.”]—J. P., previously to going through the ceremony of marriage with his deceased wife's sister, executed a settlement reciting the intended marriage, by which certain property was assigned to trustees in trust for the settlor until the solemnisation of the marriage, & after the solemnisation thereof, & after the decease of J. P., to pay the interest to the intended wife for life, & then for the benefit of his two children by his former wife & such children as he should have by his intended marriage; but if there should be no such child or children, then for J. P., his exors., administrators, & assigns:—*Held*: as no valid marriage could take place between J. P. & his deceased wife's sister, the trust in favour of himself until the solemnisation of such marriage continued, & the subsequent trusts never having arisen, the property remained in J. P., & formed part of his general estate.—*PAWSON v. BROWN* (1879), 13 Ch. D. 202; 49 L. J. Ch. 193; 41 L. T. 339; 44 J. P. 233; 28 W. R. 652.

Annotations:—*Apld.*, *Neale v. Neale* (1898), 79 L. T. 629. *Refd.*, *Hay v. Northcote* (1900), 82 L. T. 656; *Dormer v. Ward*, [1901] P. 20.

736. —[Ceremony performed abroad.]—Testator in this suit executed a settlement in contemplation of his then intended marriage with J., who was his deceased's wife's niece, & “in consideration of that intended marriage, & of his natural love for his children by his then late wife, & for divers other good causes & considerations,” assigned certain funds to trustees upon trusts for himself until the said marriage should

obligation extends not to the nearest collaterals, consequently, no such settlement, by one brother upon another, can be entitled to the aid of a ct. of equity.—*FITZEDWARD v. RYVES* (1735), 7 Bro. Parl. Cas. 419.—*IR.*

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PART V. SECT. 2, SUB-SECT. 3.—A.

g. Nullity of marriage.]—Where a man has made a settlement upon his intended wife, followed by the ceremony of marriage & cohabitation, there is a sufficient consideration to

support the settlement, so that he cannot, after a decree of nullity on the ground of his impotence, enforce the prior trust of the settlement, i.e. for himself, until solemnisation of the marriage.—*BISHOP v. SMITH* (1875), 1 V. L. R. (Eq.) 313.—*AUS.*

M M

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Sects. 3, 4 & 5: Sub-sects. 1 & 2.]

be solemnised, & from & after the solemnisation thereof for himself & the lady for their lives, with remainder for the children of his late & contemplated marriages. The marriage ceremony was performed in Switzerland according to Swiss law, & testator having died insolvent this suit was instituted by a creditor to administer his estate, & to have the settlement declared void. The master of the Rolls so decreed, on the ground that the two considerations could not be separated, & that the intended marriage was a wholly illegal consideration. On appeal, their Lordships affirmed the decree, but on the ground that no marriage had ever been solemnised within the proper meaning of the settlement, & the first trust in favour of the settlor remained therefore in force.—*CHAPMAN v. BRADLEY* (1863), 4 De G. J. & Sm. 71; 3 New Rep. 182; 9 L. T. 495; 10 Jur. N. S. 5; 12 W. R. 140; 46 E. R. 842, L. J.J.

Annotations:—Apld. *Pawson v. Brown* (1879), 13 Ch. D. 202; *A. v. M.* (1884), 10 P. D. 178; *Neale v. Neale* (1898), 79 L. T. 629. *Consd.* *Re Garnett, Richardson v. Greenep* (1905), 74 L. J. Ch. 570. *Refd.* *Hay v. Northcote* (1900), 82 L. T. 656; *Dormer v. Ward*, [1901] 1 P. 20; *Re Wombwell's Settlement*, *Clerke v. Menzies*, [1922] 2 Ch. 298.

737. ——— Admissibility of extrinsic evidence.]—*NEALE v. NEALE*, No. 746, *post*.

See, now, Deceased Wife's Sister's Marriage Act, 1907 (c. 47); Deceased Brother's Widow's Marriage Act, 1921 (c. 24).

738. Nullity of marriage—Allegation of nullity.]—In an action by the covenantors trustees of a marriage settlement, on a covenant in consideration of marriage therein contained to pay an annuity during the life of the covenantor's intended son-in-law, it is not competent to deft., the covenantor, as a third party to plead equitably the nullity of the marriage by reason of the husband's impotence & the consequent failure of consideration for the covenant, the parties to the marriage themselves having taken no steps to set the marriage aside on that ground, not elected to treat the contract as void.—*CAVELL v. PRINCE* (1866), L. R. 1 Exch. 246; 4 H. & C. 368; 35 L. J. Ex. 162; 15 L. T. 83; 12 Jur. N. S. 475; 14 W. R. 968.

739. ——— Marriage declared null.]—*Re GARNETT, RICHARDSON v. GREENEP*, No. 744, *post*.

740. ———.]—By a settlement made in contemplation of marriage a father transferred £25,000 to the trustees of the settlement to be held upon trust for him "until the said intended marriage," & thereafter upon the trusts of the settlement. The marriage took place, but afterwards a decree absolute was made declaring it "to be & to have been absolutely null & void" on the ground of the husband's impotence:—*Held*: "until the said intended marriage" meant a valid & effectual marriage, & as the marriage had been declared null & void *ab initio*, the settlor was absolutely entitled to the settled funds, under the express trust in favour.—*Re WOMBWELL'S SETTLEMENT, CLERKE v. MENZIES*, [1922] 2 Ch. 298; 92 L. J. Ch. 18; 127 L. T. 295.

Annotation:—Refd. *Nepean v. Nepean* (1925), 94 L. J. P. 42.

—*See* *HUSBAND & WIFE*, Vol. XXVII, p. 528, Nos. 5704–5709.

PART V. SECT. 2, SUB-SECT. 3.—B.

741 i. Rights of beneficiaries defeated.]—No party to a marriage settlement who is himself a contracting party, & has failed to fulfil his part of the contract, can take anything under it.—

HOUSTON v. BARRY (1843), 5 I. Eq. R. 294.—*IR.*

*h. Default in payment of consideration—Whether marriage contract vitiated.]—*Default of payment of the

B. Effect of Failure.

741. Rights of beneficiaries defeated.]—By an indenture, made in contemplation of marriage, certain leasehold property, belonging to the intended wife, was conveyed to trustees on certain trusts; & the trusts of a sum of stock, also belonging to the intended wife, which had been transferred into the names of the trustees, were declared. The marriage did not take effect, & soon after the date of the indenture, the lady married another person. In a suit instituted by the husband & wife against the trustees, it was ordered that the leasehold property should be conveyed to the husband, & the stock transferred into his name.—*THOMAS v. BRENNAN* (1846), 15 L. J. Ch. 420; 11 Jur. 95.

Annotation:—Distd. *Re Guindry, Mills v. Mills*, [1898] 2 Ch. 504.

742. ——— Property remains in settlor.]—*CHAPMAN v. BRADLEY*, No. 736, *ante*.

743. ———.]—*PAWSON v. BROWN*, No. 735, *ante*.

744. ——— Marriage subsequently declared null.]—By a settlement made in contemplation of the marriage of his daughter, a father covenanted that if the marriage were "solemnised" his exors. would, within twelve months from his death, pay £25,000 to the trustees of the settlement. The marriage took place. Under an order made in an action for the administration of the estate of the father his exors. were directed to pay & did pay over the £25,000, being unaware of the fact that on the previous day a decree absolute had been made in the Divorce Ct. declaring the marriage to have been & to be absolutely null & void on the ground of the impotence of the husband:—*Held*: inasmuch as the marriage had been declared null *ab initio*, it had never been "solemnised"; consequently the covenant to pay the £25,000 never became operative, & the money in question must be repaid to the exors. of testator.—*Re GARNETT, RICHARDSON v. GREENEP* (1905), 74 L. J. Ch. 570; 93 L. T. 117.

Annotation:—Folld. *Re Wombwell's Settlement*, *Clerke v. Menzies*, [1922] 2 Ch. 298.

745. ———.]—*Re WOMBWELL'S SETTLEMENT, CLERKE v. MENZIES*, No. 740, *ante*.

746. ——— Heir-at-law entitled.]—A widow, being about to marry her deceased husband's brother, executed a settlement by which her real estate was conveyed to trustees to hold to her use in fee "until the intended marriage" & "from & after the solemnisation of the intended marriage" upon trust for her for life with remainder in fee to her younger son. She shortly afterwards went through the form of marriage with her deceased husband's brother, & subsequently died intestate:—*Held*: the words "solemnisation of marriage" could be construed only as meaning a valid marriage, & extrinsic evidence was not admissible to show that this was not the intention of the parties; & the heir-at-law was entitled to the property.—*NEALE v. NEALE* (1898), 79 L. T. 629; 15 T. L. R. 20, C. A.; *revisg.* *S. C. sub nom. NEALE v. MITCHELL & Co.* (1897), 14 T. L. R. 154.

747. ———.]—*PHILLIPS v. PROBYN*, No. 734, *ante*.

—*See, also*, *BONDS*, Vol. VII., p. 234, No. 767.

748. Suit to set aside settlement—As founded on illegal consideration—By personal representatives

consideration on one part, does not vitiate a marriage contract. But the defaulting party cannot enforce the contract against the party injured by his default.—*CROFTON v. ORMSBY* (1806), 2 Sch. & Lef. 383, 602.—*IR.*

of settlor.]—A ct. of equity will not, at the instance of settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the fact of the instrument.

A widower, two days before going through the ceremony of marriage with his deceased wife's sister, which ceremony was known to both parties to be invalid, executed a deed by which it was recited that he was desirous of making a settlement & provision for the lady, & had transferred certain shares into the names of trustees upon the trusts thereafter declared, being for the separate & inalienable use of the lady during her life, & after her death as she should by deed or will appoint; & they afterwards lived together as man & wife until the widower's death. Ten years after such death, & some time after the lady had married, the legal personal representative of the settlor instituted a suit to set aside the settlement, as being founded on a bad & illegal consideration:—**Held:** the suit could not be maintained.—**AYERST v. JENKINS** (1873), L. R. 16 Eq. 275; 42 L. J. Ch. 690; 29 L. T. 126; 38 J. P. 37; 21 W. R. 878, L. C.

Annotations:—**Distd.** *Pawson v. Brown* (1879), 13 Ch. D. 202; *Phillips v. Probyn*, [1899] 1 Ch. 811.

SECT. 3.—SETTLEMENTS ON SEPARATION.

749. Settlement in consideration of separation—Validity as against assignee in bankruptcy of settlor.]—By a separation deed in 1864, after reciting that differences had arisen between the husband & wife, & that they had agreed to live apart, the husband assigned to trustees leaseholds upon trust to pay the rents to the wife for life for her separate use, & after her death upon trust for sale, & in the events which happened the proceeds were to be in trust for the husband, & the husband covenanted if the rents should not amount to £300 a year to make up the income to £300. There was a proviso for determination if the wife should return to cohabitation, & a covenant by the husband that the wife should live apart from him, but there was no covenant by the wife or trustees either for payment of debts or otherwise. The husband became bkpt. in 1868, & obtained his discharge in the same year, but, as the law then stood, the discharge did not release him from his obligations under the covenant. On the death of the wife in 1899, a large sum was due from the husband's estate under the covenant to make up the income to £300:—**Held:** the deed, having regard to the recital, was not voluntary, & the trustees were entitled, as against the assignee in bkpcy. of the husband, to retain the trust property until the arrears due under the covenant were satisfied.

Qu.: whether the right claimed by the trustees would not exist even in the case of a voluntary settlement effectually completed so as to be enforceable by the ct.—**Re WESTON, DAVIES v. TAGART**, [1900] 2 Ch. 164; 69 L. J. Ch. 555; 82 L. T. 591; 48 W. R. 467.

Annotation:—**Reid.** *Re Jewell's Settlement*, *Watts v. Public Trustee*, [1919] 2 Ch. 161.

PART V. SECT. 5, SUB-SECT. 1.
k. Arrears under voluntary deed surrendered—In consideration of new deed—Whether new deed voluntary.]—A voluntary deed, & arrears due on foot of it, if the arrears are surrendered in consideration of a new deed, such

now deed is not voluntary.—*Nixon v. HAMILTON* (1838), 1 I. Eq. R. 49.—**IR.**

1. *Actions & statements of testatrix constituting voluntary settlement.*—**BAYLEY v. PUBLIC TRUSTEE** (1908), 27 N. Z. L. R. 659.—**N.Z.**

Consideration in contracts of separation.]—*See generally*, **HUSBAND & WIFE**, Vol. XXVII., pp. 224–227, Nos. 1950–1980.

Effect of reconciliation.]—*See* **HUSBAND & WIFE**, Vol. XXVII., p. 246, Nos. 2165–2167.

SECT. 4.—RESETTLEMENTS.

See, generally, **FAMILY ARRANGEMENTS**, Vol. XXIV., pp. 945 *et seq.*

SECT. 5.—VOLUNTARY SETTLEMENTS.

SUB-SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), ss. 172, 173.

750. Distinguished from settlement for valuable consideration.]—There are no doubt various circumstances which may be connected with a voluntary deed which will induce this ct. either to set the deed aside, or to refuse to execute the trusts contained in it. There are also statutory enactments which may defeat a voluntary deed which would be otherwise valid; but assuming a voluntary deed to be complete, *bonâ fide*, valid, & to be unaffected by any statutory disability I know of no distinction between such a deed & one executed for valuable consideration. The estates & limitations created in such a deed have the same operation & effect as in a deed executed for value, & must be construed in the same manner, & it carries with it all the same incidents & rights attached to the property conveyed as are carried by a deed executed for value, & the grantee, in this respect, stands exactly in the same situation as if he had paid value for the property conveyed (*ROMILLY, M.R.*).—*DICKINSON v. BURRELL, STOURTON v. BURRELL* (1866), L. R. 1 Eq. 337; 35 Beav. 257; 35 L. J. Ch. 371; 13 L. T. 660; 12 Jur. N. S. 199; 14 W. R. 412; 55 E. R. 894.

Annotations:—**Reid.** *Bruty v. Edmundson* (1915), 113 L. T. 1197. **Mentd.** *Dawson v. G. N. & City Ry.*, [1905] 1 K. B. 260; *Defries v. Milne*, [1913] 1 Ch. 98; *Ellis v. Torrington*, [1920] 1 K. B. 399.

What is voluntary settlement—Post-nuptial settlement.]—*See* Sub-sect. 2, *post*.

For purpose of estate duty.]—*See* **ESTATE & OTHER DEATH DUTIES**, Vol. XXI., pp. 13, 14, Nos. 61–67.

For purpose of legacy duty.]—*See* **ESTATE & OTHER DEATH DUTIES**, Vol. XXI., pp. 49, 50, Nos. 324, 325.

751. Right to surrender voluntary settlement.]—A. makes a voluntary settlement on B., who after agrees to deliver it up without consideration. This agreement shall bind in equity, for a voluntary settlement may be surrendered voluntarily.—*WENTWORTH v. DEVERGINY* (1696), *Precc.* (Ch. 69; 2 Eq. Cas. Abr. 51; 24 E. R. 33).

SUB-SECT. 2.—POST-NUPTIAL SETTLEMENTS.

752. Whether voluntary—General rule.]—I agree there are cases where a father contracting for an infant child shall bind the child especially if the child claim anything under the settlement, but then it must be before marriage & in considera-

PART V. SECT. 5, SUB-SECT. 2.
m. Whether voluntary.]—A postnuptial settlement was in fact made, in consideration of the wife's separate estate, which had been given by her to the husband, who lent a portion, & applied the residue to his own

Sect. 5.—Voluntary settlements: Sub-sects. 2 & 3.]

tion of the marriage for the ct. will not suffer her to claim benefit one way & not be bound the other, but this being after marriage is voluntary & being the next day after the marriage does not differ the case, for whether two days or six, or six years, it is the same thing. No recital of the father will bind the property of the daughter but there must be some proof of the father's intention to do it (LORD HARDWICKE, C.).—SEAMER v. BINGHAM, STRODE v. STRODE (1743), 3 Atk. 54; 26 E. R. 834.

*Annotation:—*Refd. Exel v. Wallace (1751), 2 Ves. Sen. 117.

753. ———.]—A husband who had £1,733 stock devised to him after marriage vests it in trustees for the benefit of himself for life, of his wife for life, & afterwards for the benefit of his children. The settlement is void both as to creditors before & after the marriage & the trust estate was decreed to be sold & applied to the payment of the husband's debts.—TAYLOR v. JONES (1743), 2 Atk. 600; 26 E. R. 758.

*Annotations:—*Dibtd. Dundas v. Dutens (1790), 2 Cox, Eq. Cas. 235. *Consd.* Legard v. Johnson (1797), 3 Ves. 352.

Refd. Kidder v. Kidder (1805), 10 Ves. 360; Graham v. Barber (1834), 14 C. B. 410.

754. ———.]—Settlement pursuant to ante-nuptial agreement.]—A settlement made after marriage on the wife & children, pursuant to arts. entered into previous to the marriage, though not exactly agreeing with them, not voluntary nor fraudulent against bond creditors.—BRUNSDEN v. STRATTON (1719), Prec. Ch. 520; 2 Eq. Cas. Abr. 52, 260; 21 E. R. 233.

755. ———.]—A mtge. term being made the subject of a settlement after marriage with a second wife, but recited to be in pursuance of arts. previous to the marriage, the settlor having children by the deceased wife under the uses of which pltf. claimed; was afterwards conveyed by the settlor & his wife, by fine & settlement, to uses, for the benefit of the children, by the first marriage, who, & their representatives, have been in possession thirty years, pltf.'s bill dismissed, as the ct. will presume that the former settlement was known to be voluntary, or the children by the second wife to have had a compensation for their claims.—TOWNSHEND v. TOWNSHEND (1783), 1 Bro. C. C. 550; 1 Cox, Eq. Cas. 28; 28 E. R. 1292.

*Annotations:—*Mentd. Beckford v. Wade (1805), 17 Ves. 87; Wedderburn v. Wedderburn (1838), 4 My. & Cr. 41; Soar v. Ashwell, [1893] 2 Q. B. 390.

756. ———.]—Settlement after marriage of the wife's property, reciting a parol agreement before marriage to such settlement. The creditors of the husband cannot set aside such settlement.—DUNDAS v. DUTENS (1790), 1 Ves. 196; 2 Cox, Eq. Cas. 235; 30 E. R. 298, L. C.

*Annotations:—*Consd. Randall v. Morgan (1805), 12 Ves. 67. *Dibtd.* Warden v. Jones (1857), 23 Beav. 487; Goldcuitt v. Townsend (1860), 28 Beav. 445. *Refd.* Shaw v. Jakeman (1803), 4 East, 201; Idler v. Kidder (1805), 10 Ves. 360; Lassence v. Tierney (1849), 1 Mac. & G. 551; Surcome v. Pinniger (1853), 17 Jur. 196; Warden v. Jones (1857), 6 W. R. 180; Trowell v. Shenton (1878), 8 Ch. D. 318; *Re* Holland, Gregg v. Holland, [1902] 2 Ch. 360. *Mentd.* Sims v. Thomas, Strachan v. Thomas (1840), 12 Ad. & El. 536; Bligh v. Tredgett (1851), 5 De G. & Sm. 74; Norton v. Cooper, *Re* Manby & Hawksford, *Ex p.* Bittleston (1856), 3 Sm. & G. 375; Nurse v. Durnford (1879), 13 Ch. D. 764; Colonial Bank v. Whitney (1886), 11 App. Cas. 426; British Mutoscope & Biograph Co. v. Homer, [1901] 1 Ch. 671.

757. ———.]—Burden of proof.]—A post-nuptial settlement made by a husband in favour

of his wife & children contained a recital that it was made in accordance with an ante-nuptial agreement. The wife obtained a decree for a divorce on the ground of her husband's cruelty & adultery. The husband afterwards advertised part of the real estate included in the settlement for sale by auction:—*Held*: the burden of proof that the settlement was a voluntary one was upon the husband, & granted an injunction to restrain him from selling, dealing with, or incumbering the settled property.—WATTS v. WATTS (1876), 24 W. R. 489; *on appeal*, 24 W. R. 623, C. A.

758. ———.]—Necessity for proof that agreement actually made.]—A recital in a post-nuptial deed of settlement that the settlement is made in pursuance of a parol ante-nuptial agreement is a memorandum in writing sufficient to satisfy Stat. Frauds, but it does not dispense with the necessity of proving that the recited ante-nuptial agreement was actually made.—*Re* GILLESPIE, *Ex p.* KNAPMAN, THE TRUSTEE v. GILLESPIE (1913), 20 Mans. 311.

———.]—See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 172-174, 235, Nos. 160-170, 618-621.

759. ———.]—Settlement in consideration of portion.]—The settlement in 1694, being in consideration of a portion paid at the time, though made after marriage, cannot be impeached by subsequent creditors.—STILEMAN v. ASHDOWN (1742), 2 Atk. 477; 26 E. R. 688, L. C.; *subsequent proceedings* (1743), 2 Atk. 608; Amb. 13, L. C.

*Annotations:—*Dibtd. Taylor v. Jones (1743), 2 Atk. 600. *Refd.* Dummer v. Pitcher, Pitcher v. Dummer (1833), 2 My. & K. 262; Mackay v. Douglas (1872), L. R. 14 Eq. 106. *Mentd.* Burroughs v. Elton (1805), 11 Ves. 29; Crabb v. Crabb (1834), 1 My. & K. 511; Bott v. Smith (1856), 21 Beav. 511; Doswell v. Rooce (1865), 13 L. T. 156.

760. ———.]—Agreement by husband to settle wife's property on herself.]—An agreement made by A., the husband, after marriage, to settle half his wife B.'s fortune on herself, is not a voluntary agreement, but amounts to a purchase of the wife's equity, & cannot be waived by the wife to the prejudice of her children.—FENNER v. TAYLOR (1831), 2 L. J. Ch. 99.

761. ———.]—Settlement in confirmation of ante-nuptial settlement by wife.]—E. B., a single woman, transferred certain stock, her property, into the joint names of herself & two trustees; & on the day of the transfer, she & the trustees, without reference to any marriage on her part, executed an indenture, by which it was declared that the trustees should hold the property in trust, to pay the dividends to E. B. for her life, for her sole & separate use, independent of any husband whom she might marry; & after her death, upon such trusts as E. B. should by will, notwithstanding her coverture, appoint; & in default of such appointment, in trust for E. B., her exors., administrators, & assigns. E. B. afterwards married, & by a deed, reciting the settlement, & executed by her husband & herself, she, by the direction of her husband, assigned the dividends of the stock in trust, for the punctual payment of an annuity granted by the husband:—*Held*: whether or not under the deed of settlement the wife had power, as against her husband, to make this assignment, the joining the husband in the deed of assignment was a confirmation of the deed of settlement, & consequently that the assignment

purposes. The settlement did not state the money to be the separate estate of the wife. It appeared *alunde* to

be so:—*Held*: the consideration was sufficient, & the settlement not voluntary.—BUTLER v. BUTLER (1851), 4

Ir. Jur. 133.—IR.

n. ———.]—*Re* LYNCH, LYNCH v. LYNCH (1879), 4 L. R. Ir. 210.—IR.

by the wife was valid.—*MABER v. HOBBS* (1836) 2 Y. & C. Ex. 317; 6 L. J. Ex. Eq. 12.

Annotations:—*Refd.* *Nedby v. Nedby* (1839), 4 My. & Cr. 367; *Blackie v. Clark, Cock v. Clark* (1852), 22 L. J. Ch. 377.

762. — Settlement of after-acquired property.—*ANDERSON v. ABBOTT*, No. 787, *post*.

763. — Containing assignment of insurance policy by husband.—*STEPHENS v. GREEN, GREEN v. KNIGHT*, No. 693, *ante*.

764. — Settlement in consideration of mortgage—Deeds not referring to one another.—A. being indebted to pltf. but not insolvent, applied to his mother for a loan of £190. She consented to advance the money on condition that A. would settle a certain freehold estate on his children. Two deeds were accordingly executed; by one of which A. mortgaged certain other estates to his mother to secure the repayment of £400; & by the other he settled the first-mentioned estate on himself for life, & after his death on his children & their issue. Neither deed contained any reference to the other. A. afterwards became insolvent:—*Held*: the settlement was made for valuable consideration, & was within the proviso contained in 13 Eliz. c. 5, s. 6; & it was not material whether the whole of the £400 secured by the mtg. was actually due from A.—*THOMPSON v. WEBSTER* (1859), 4 De G. & J. 600; 28 L. J. Ch. 700; 33 L. T. O. S. 340; 5 Jur. N. S. 921; 7 W. R. 648; 45 E. R. 233, L. JJ.; *affd.* (1861), 4 L. T. 750, H. L.

Annotations:—*Consd.* *Bayspoole v. Collins* (1871), 40 L. J. Ch. 289; *Hance v. Harding* (1887), 4 T. L. R. 185; *Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111. *Refd.* *Smith v. Cherrill* (1867), L. R. 4 Eq. 390; *Re Johnson, Golden v. Gillam* (1881), 20 Ch. D. 389; *Re Maddever, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523; *Godfrey v. Poole* (1888), 13 App. Cas. 497; *Edmunds v. Edmunds* (1904), 73 L. J. P. 97.

765. — Settlement securing separate provision for wife during coverture—Effect of subsequent bankruptcy of husband.—A post-nuptial settlement, in so far as it secured a separate provision for the wife during coverture:—*Held*: to have been voluntary & gratuitous, & to have been revoked & superseded by the husband's subsequent bkcy.—*DUNLOP v. JOHNSTON* (1867), L. R. 1 Sc. & Div. 109, H. L.

766. — Part of money settled provided by wife's brother—Part by husband.—A settlor's brother-in-law provided a sum of £4,000, upon the understanding that the settlor would settle it, & also a sum of £990 Madras stock, the property of the settlor, upon the wife of the settlor for life, for her separate use, & after her death upon the settlor for life, or until bkcy. or alienation, & then upon the children of the marriage. A settlement to the above effect was executed in July, 1862, & in the following Oct. the wife of the settlor died.

In 1866 the settlor executed a bond which operated as a determination of his interest under the settlement. In 1867 he became a bkpt., & in 1868 he died:—*Held*: notwithstanding that the £990 stock was the property of the settlor, regard being had to the much larger sum which was brought into settlement, the settlement was valid.—*HAMMONDS v. BARRETT* (1869), 21 L. T. 321; 17 W. R. 1078.

Annotation:—*Consd.* *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

767. What stipulations may be inserted—Provision against attachment for debt.—The *legitim* of the wife is the property of her husband &

subject to his debts. A provision without consideration in a post-nuptial contract that the income of the *legitim* "should be alimentary & in nowise attachable for debt":—*Held*: insufficient to exclude the claim of the husband's creditors, he having become bkpt.

A stipulation of this kind in a post-nuptial contract is neither valid nor permissible (*LORD CAIRNS, C.*)—*LEARMOUTH v. MILLER* (1875), L. R. 2 Sc. & Div. 438, H. L.

Annotation:—*Consd.* *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

SUB-SECT. 3.—VALIDITY.

768. General rule—Settlor must do everything necessary to transfer property.—*VANE v. FLETCHER* (1717), 1 P. Wms. 352; 24 E. R. 422, L. C.

769. — — — — —]—The ct., in order to give effect to voluntary settlements, requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership; & where he is the equitable owner, clear & distinct evidence of a declaration of trust in favour of the donee.—*BENTLEY v. MACKAY* (1851), 15 Beav. 12; 51 E. R. 440.

Annotations:—*Refd.* *Dipple v. Corles* (1853), 11 Hare, 183; *Re Chimes, Locovitch v. Chimes*, [1917] 1 Ch. 30.

770. — — — — —]—In order to render a voluntary settlement valid & effectual, the settlor must do everything which, according to the nature of the property comprised in the settlement, is necessary to transfer the property, & render the settlement binding upon him; as by actually transferring the property to the persons for whom he intends to provide, or to trustees for the purposes of the settlement, or by declaring that he himself holds the property in trust for those purposes; & if the property be personal the trust may be declared either by writing or by parol; but there is no equity in this ct. to protect an imperfect gift. If, however, the gift is intended to take effect by transfer, the ct. will not hold the intended transfer to operate as a declaration of trust.

T., by deed poll, dated Mar. 6, 1862, purported to transfer fifty shares in the L. Bank to a trustee for E. At that time the trustee held a general power of attorney from T. for the transfer of the stock of any incorporated co. standing in his name. T. afterwards gave the trustee a special power of attorney to receive the dividends on the shares in the L. Bank, but no actual or other transfer of the fifty shares was ever made. The trustee, however, received the dividends on the shares under the second power, & paid them to E. sometimes directly, & sometimes through the intervention of T.:—*Held*: the gift of the fifty shares was imperfect, & under the circumstances T. could not himself be considered a trustee of them.—*MILROY v. LORD* (1862), 4 De G. F. & J. 264; 31 L. J. Ch. 798; 7 L. T. 178; 8 Jur. N. S. 806; 45 E. R. 1185, L. JJ.

Annotations:—*Apld.* *Warriner v. Rogers* (1873), L. R. 16 Eq. 349; *Moore v. Moore* (1874), L. R. 18 Eq. 474; *Richards v. Delbridge* (1874), L. R. 18 Eq. 11; *Bottle v. Knocker* (1876), 46 L. J. Ch. 159. *Consd.* *Re Breton's Estate, Breton v. Woollen* (1881), 17 Ch. D. 416; *Re Shield, Pethybridge v. Burrow* (1885), 53 L. T. 5. *Apld.* *Re Ashcroft, Ex p. Todd* (1887), 19 Q. B. D. 186; *Re Patrick, Bills v. Tatham* (1890), 63 L. T. 752. *Consd.* *Coleman v. North* (1898), 47 W. R. 57. *Apld.* *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; *Re Smith, Bull v. Smith* (1901), 84 L. T. 835; *Re Williams, Williams v. Ball*, [1917] 1 Ch. 1; *Macedo v. Stroud*, [1922] 2 A. C. 330.

193.—CAN.

p. Validity as against sheriff's deed.—*DOE d. ROOP v. TRENTOWSKY* (1863), 10 N. B. R. (5 All.) 636.—*CAN.*

PART V. SECT. 5. SUB-SECT. 3.

o. General rule.—A voluntary settlement will be valid & effectual if the settlor transfer the property to a

trustee for the purpose of the settlement, or declares that he himself took it in trust for those purposes.—*CLATFENBURG v. MORINE* (1895), 40 N. S. R.

Sect. 5.—Voluntary settlements: Sub-sect. 3.]

Consd. *I. R. Comrs. v. Allan* (1925), 9 Tax Cas. 234. **Refd.** *Heartley v. Nicholson* (1875), L. R. 19 Eq. 233; *Bizzey v. Flight* (1876), 45 L. J. Ch. 852; *Re King, Sewell v. King* (1879), 14 Ch. D. 179; *Johnstone v. Mappin* (1891), 60 L. J. Ch. 241; *Mallott v. Wilson*, [1903] 2 Ch. 494; *Carter v. Hungerford*, [1917] 1 Ch. 260.

771. ———.]—*Re ASHCROFT, Ex p. TODD* (1887), 19 Q. B. D. 186; 57 L. T. 835; 35 W. R. 676; 3 T. L. R. 562; *on appeal*, 19 Q. B. D. 191, C. A.

772. Conveyance retained in settlor's power.]—If a parent make a voluntary conveyance in trust for his children & keep it in his own power or in the hands of his agent, & this is got from him, it ought not to bind him; but where a *feme* having issue by her first husband makes a suitable provision for them before her treaty for a second marriage, this is good, & not liable to be avoided by a second husband.—*COTTON v. KING* (1726), 2 P. Wms. 358; 2 Eq. Cas. Abr. 53, pl. 10; 24 E. R. 764, L. C.; *subsequent proceedings, sub nom. KING v. COTTON* (1732), 2 P. Wms. 674, L. C.

Annotations:—**Refd.** *Cecil v. Butcher* (1821), 2 Jac. & W. 565; *St. George v. Wake* (1833), 1 My. & K. 610; *Roberts v. Williams* (1841), 11 L. J. Ch. 65; *Downes v. Jennings* (1863), 32 Beav. 290; *Re Way's Trusts* (1864), 34 L. J. Ch. 49.

773. S. P. KING v. COTTON (1732), 2 P. Wms. 674; 2 Eq. Cas. Abr. 131, pl. 4; 24 E. R. 912, L. C. **Annotations:—****Refd.** *Strathmore v. Bowes* (1788), 2 Bro. C. C. 345; *Cecil v. Butcher* (1821), 2 Jac. & W. 565; *St. George v. Wake* (1833), 1 My. & K. 610.

774. Settlement of equitable interest.]—A voluntary assignment by deed of the assignor's interest in a sum of stock standing in the names of trustees upon trust for him is a complete transfer of such interest as between the donee & the representatives of the donor although no notice of the deed was given to the trustees in the donor's lifetime because no further act on the part of the donor was requisite to complete the gift. In such a case the donee could compel the trustees to transfer the stock to him without making the donor or his representatives parties to the suit.—*DONALDSON v. DONALDSON* (1854), Kay, 711; 23 L. J. Ch. 788; 23 L. T. O. S. 306; 1 Jur. N. S. 10; 2 W. R. 691; 69 E. R. 303.

Annotations:—**Distd.** *Lambe v. Orton* (1860), 1 Drew. & Sm. 125. **Consd.** *Re Lucan, Harding v. Cobden* (1890), 45 Ch. D. 470. **Refd.** *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365; *Re Wallhampton Estate* (1884), 26 Ch. D. 391; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82; *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408.

775. ——— Reversionary interest.]—T., who was contingently entitled to a prospective share in certain property, voluntarily assigned it, in 1880, to trustees upon trust, among other trusts, to pay a sum of £500 to one K., & as to the residue upon other trusts. T. became entitled to her share in the property in 1894, & by a letter, in 1895, directed that a portion of it should be transferred to the trustees of the voluntary assignment of 1880. K. died in 1888, intestate, & the question now arose as to his £500, which was claimed by his personal representative, by those entitled to residue, & by the settlor as upon a resulting trust:—**Held:** (1) a person dead at the date of the execution of a deed could take no benefit under it, & the confirmation of the deed by the letter in 1895, only set up such trusts as were then subsisting, & had no retrospective effect; (2) the failure of the gift to K. did not make it fall into residue, & the donees of the residue could only take an aliquot portion; & (3) the £500 belonged to T., the settlor, by way of resulting trust.—*Re TILT, LAMPET v. KENNEDY* (1896), 74 L. T. 163; 12 T. L. R. 162; 40 Sol. Jo. 224.

Annotation:—**Generally.** **Refd.** *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697.

776. ———.]—Residuary estate consisting of money in the funds, was bequeathed to a mother & daughter in trust for the mother for life, & afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees, upon trust for the issue of the intended marriage, & for a niece of the daughter & the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death:—**Held:** even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter, & the trustees of another settlement which she made upon a second marriage inconsistent with the former settlement; *qu.*: whether the first settlement was voluntary as regarded the trust for the niece.—*KEKEWICH v. MANNING* (1851), 1 De G. M. & G. 176; 21 L. J. Ch. 577; 18 L. T. O. S. 263; 16 Jur. 625; 42 E. R. 519, L. JJ.

Annotations:—**Distd.** *Bridge v. Bridge* (1852), 16 Beav. 315. **Appld.** *Donaldson v. Donaldson* (1854), Kay, 711. **Consd.** *Voyle v. Hughes* (1854), 2 Sm. & G. 18. **Distd.** *Cramer v. Moore* (1855), 3 Sm. & G. 141. **Consd.** *Gilbert v. Overton* (1864), 10 L. T. 900. **Appld.** *Richardson v. Richardson* (1867), L. R. 3 Eq. 686. **Consd.** *Baddeley v. Baddeley* (1878), 48 L. J. Ch. 36; *Re King, Sewell v. King* (1879), 14 Ch. D. 179; *Paul v. Paul* (1880), 15 Ch. D. 580. **Appld.** *Re Wallhampton Estate* (1884), 26 Ch. D. 391; *Johnstone v. Mappin* (1891), 60 L. J. Ch. 241; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82. **Distd.** *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697. **Appld.** *Re Spark's Trusts, Spark v. Massey*, [1904] 1 Ch. 451. **Refd.** *Page v. Cox* (1852), 10 Hare, 163; *Paterson v. Murphy* (1853), 11 Hare, 88; *Beech v. Keep* (1854), 18 Beav. 285; *Scales v. Maude* (1856), 6 De G. M. & G. 43; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192; *Pownall v. Anderson* (1856), 2 Jur. N. S. 857; *Wilkinson v. Wilkinson* (1857), 4 Jur. N. S. 47; *Clarke v. Wright* (1861), 6 H. & N. 849; *Wright v. Dickenson* (1861), 4 L. T. 21; *Dilrow v. Bone* (1862), 31 L. J. Ch. 417; *Milroy v. Lord* (1862), 7 L. T. 178; *Penfold v. Mould* (1867), L. R. 4 Eq. 562; *Glegg v. Rees* (1871), 7 Ch. App. 71; *Warriner v. Rogers* (1873), L. R. 16 Eq. 340; *Richards v. Delbridge* (1874), L. R. 18 Eq. 11; *Price v. Jenkins* (1876), 4 Ch. D. 483; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89; *Re Lucan, Harding v. Cobden* (1890), 45 Ch. D. 470; *Vavasseur v. Vavasseur* (1909), 25 T. L. R. 250. **Mentd.** *Bartlett v. Bartlett* (1857), 3 Sm. & G. 533; *Consolidated Investment Insee. v. Riley* (1859), 29 L. J. Ch. 123.

777. ———.]—*A feme sole* made a voluntary assignment by deed of her reversionary interest in stock held under a settlement. The deed was irrevocable. It was duly executed by herself & attested but was not communicated either to the trustees of the paramount settlement or to the trustees of the deed itself or to any of the parties who were to take under it. The lady subsequently destroyed the deed & made a different disposition of the stock by a codicil to her will:—**Held:** the assignor having done all that she could for transferring her interest the assignment was complete & effectual notwithstanding the absence of notice.—*Re WAY'S TRUSTS* (1864), 2 De G. J. & Sm. 365; 5 New Rep. 67; 34 L. J. Ch. 49; 11 L. T. 495; 10 Jur. N. S. 1166; 13 W. R. 149; 46 E. R. 416, L. JJ.

Annotations:—**Appld.** *Re Patrick, Bills v. Tatham* (1890), 63 L. T. 752. **Refd.** *Garnham v. Skipper* (1885), 2 T. L. R. 64; *Re Lucan, Harding v. Cobden* (1890), 45 Ch. D. 470. **Mentd.** *Hall v. Hall, Hall v. Hall* (1872), L. R. 14 Eq. 365; *U. v. Paulson*, [1921] 1 A. C. 271.

778. ——— Necessity for declaration of trust.]—*BENTLEY v. MACKAY*, No. 769, *ante*.

779. ——— In real estate.]—Pltf. being entitled to shares in cos., foreign bonds, consols, cash & real estate, which were vested in the trustees of his uncle's will, executed a voluntary deed, whereby he granted the realty to A. & B., to the use of himself & A. & B., upon trust to sell, & he

directed that the produce & the bonds, etc., should thenceforth be considered vested in him & A. & B. on certain trusts for volunteers:—*Held*: the deed was (1) valid as to the shares & bonds, which had been transferred to pltf. & A. & B.; (2) ineffectual as to foreign bonds, stock & cash, of which there had been no transfer, & no acceptance of the trust by the trustees of the uncle's will, in whom they were vested; (3) ineffectual also as to the realty, the legal estate not having passed.—*BRIDGE v. BRIDGE* (1852), 16 Beav. 315; 22 L. J. Ch. 189; 20 L. T. O. S. 75; 16 Jur. 1031; 1 W. R. 4; 51 E. R. 800.

Annotations:—*As to* (1) *Refd.* *Donaldson v. Donaldson* (1834), 1 Jur. N. S. 10. *As to* (2) *Apld.* *Beech v. Keep* (1854), 18 Beav. 285. *Follid.* *Re Way's Trusts* (1864), 4 New Rep. 453. *As to* (3) *Distd.* *Gilbert v. Overton* (1864), 2 Hem. & M. 110. *Generally.* *Refd.* *Tierney v. Wood* (1854), 19 Beav. 330; *Hogarth v. Phillips* (1858), 4 Drew. 360; *Lambe v. Orton* (1860), 1 Drew. & Sm. 125; *Re King*, *Sewell v. King* (1879), 14 Ch. D. 179.

780. — Legal estate subsequently acquired.—But not transferred to trustees.]—A. by a voluntary settlement assigned land, held by him under an agreement for a building lease to trustees upon trust for himself for life with remainder for his children & grandchildren. Shortly afterwards A. obtained a lease of the land but he did not assign the legal estate to the trustees. There was no evidence that A. could have obtained the lease at the time when he executed the settlement:—*Held*: the settlement was complete, & the *cestuis que trustent* were entitled to have it enforced against a person in possession of the legal estate, who derived his title through A.'s will.—*GILBERT v. OVERTON* (1864), 2 Hem. & M. 110; 4 New Rep. 420; 33 L. J. Ch. 683; 10 L. T. 900; 10 Jur. N. S. 721; 12 W. R. 1141; 71 E. R. 402.

781. — Equity of redemption.]—A. having mortgaged estates in fee simple, subsequently made a voluntary settlement of the same estates & all his interest therein to grantees to uses to hold, subject to the mtgee. & to a power of raising a sum of money for himself, to the use of himself for life with remainder to his first & other sons in tail, with remainders over. The mtgee. afterwards sold the estates under the power of sale in the mtgee., & after retainer of his debt & costs paid the balance of the sale moneys into ct. under Trustees Relief Act. Upon a petition for payment out A. contended that the sale had destroyed the voluntary settlement, & that the persons claiming thereunder had no equity against the sale moneys, which must be treated as if the sale had been made by A. himself:—*Held*: the voluntary settlement was a complete disposition by the settlor of the proceeds of the sale of the estate in case the prior mtgee. should exercise his power, & the volunteers under the settlement were entitled as against the settlor to the fund in ct.—*Re WALHAMPTON ESTATE* (1884), 28 Ch. D. 391; 53 L. J. Ch. 1000; 51 L. T. 280; 32 W. R. 874.

Annotation:—*Refd.* *Re Holland*, *Gregg v. Holland* (1901), 49 W. R. 476.

782. — Shares transferred to settlor.]—*BRIDGE v. BRIDGE*, No. 779, *ante*.

783. — Stock ineffectually transferred to settlor.]—*BRIDGE v. BRIDGE*, No. 779, *ante*.

784. —]—Under the provisions of Cos. Act, 1845 (c. 16), a deed of transfer of shares or stock does not pass the legal interests to the transferee until it has been delivered to the secretary of the coy. If he returns it because it does not comply with the requisitions of the Act it is to be considered as not delivered to him. Trustees who held railway stock in trust for H. absolutely, executed a deed of transfer to him,

& delivered it to the secretary of the co. who returned it because it was not properly stamped & dated. After this H. made a voluntary settlement purporting to include this stock. Several years afterwards the defects in the deed of transfer were supplied & it was delivered to the secretary, who received it & registered the stock in H.'s name:—*Held*: at the time of the execution of the voluntary settlement the stock was not legally vested in H., but that he was only equitable owner; the voluntary settlement of it therefore was effectual & H.'s representative was bound to transfer the stock to the trustees of the voluntary settlement.—*NANNEY v. MORGAN* (1887), 37 Ch. D. 346; 57 L. J. Ch. 311; 58 L. T. 238; 36 W. R. 677; 4 T. L. R. 129, C. A.

Annotations:—*Consd.* *Roots v. Williamson* (1888), 38 Ch. D. 485; *Re Dodds*, *Er p. Brown v. Coates* (1891), 60 L. J. Q. B. 599. *Apld.* *Powell v. London & Provincial Bank* (1893), 62 L. J. Ch. 795. *Refd.* *Blimmer v. Webster*, [1902] 2 Ch. 163.

785. Covenant to settle.]—Bkpt. had covenanted to pay a sum to be invested on the trusts of his marriage settlement for the benefit of his wife & the issue of the marriage. He became bkpt. without having done so. Proof ordered in the usual way, & the dividends to be paid into the bank, & the interest thereof to be paid to the parties entitled under the settlement.—*Re MAY*, *Ex p. MAY* (1833), 2 L. J. Brev. 72.

786. —]—By a deed reciting a marriage between T. & O., & that previously to such marriage S. did promise & agree that in case such marriage should take place, he would make a provision for O. & the issue of the marriage; in consideration of such marriage & for better confirming said promise, S. promised & agreed, to & with T. & O., that he would in his lifetime or by his will give unto T. & O., & G. & J., or unto some other person or persons to be by him S. in such will or settlement named, the full sum of £3,000 £5 per cent. navy annuities, upon certain trusts, for the benefit of T. & O. & their children & if no children, for the survivor of T. & O., absolutely. S. did not perform his covenant, & T. survived O. his wife, without there being issue. & on the death of S. a creditor's bill was filed by the assignee of T. against the representatives of S. to recover the £3,000:—*Held*: on demurrer, such bill could be sustained, & in the event that had happened, the trustees named in the deed were not necessary parties to the suit.—*WATSON v. PARKER* (1843), 6 Beav. 283; 12 L. J. Ch. 221; 7 Jur. 143; 49 E. R. 835; *subsequent proceedings* (1846), 1 Coop. temp. Cott. 54, L. C.

787. — Part paid over to trustees.]—By a post-nuptial settlement, a husband & wife covenanted with trustees to settle all the property which the wife might become entitled to during the coverture on themselves for life, with remainder to their children. During the coverture part of such property was allowed by the husband to be paid over to the trustees; the other part was not reduced into possession at the husband's death:—*Held*: (1) originally, the settlement was binding on neither party; (2) the part paid over had been effectually made subject to the trusts by the husband.—*ANDERSON v. ABBOTT* (1857), 23 Beav. 457; 29 L. T. O. S. 223; 3 Jur. N. S. 833; 5 W. R. 381; 53 E. R. 180.

Annotations:—*As to* (1) *Refd.* *Willoughby v. Middleton* (1862), 2 John. & H. 344. *Generally.* *Mentd.* *Brown v. Brown* (1866), L. R. 2 Eq. 481; *Codrington v. Lindsay* (1873), 8 Ch. App. 578.

788. —]—By deed dated Aug. 8, 1868, A. covenanted to pay to trustees at or before twelve months from that date the sum of £20,000, upon trust, after the death of the survivor of A. & his

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wife M., for such uses & upon such trusts as M. should by will appoint. By her will, executed the same day, M. appointed the £20,000 to the same trustees, upon trust, after paying thereout certain legacies, to pay the residue to such persons & for such purposes as she should by deed poll direct; & by a deed poll, also executed the same day, M. directed the same trustees to pay the trust fund to certain other trustees to be applied to certain charitable purposes. A. did not pay the £20,000 during his lifetime, & died in 1877, his wife having predeceased him. In an action to administer A.'s estate, which hardly amounted to £20,000 in all, & the greater part of which was invested in an equitable mtge. of leaseholds:—*Held*: as the £20,000 was a debt due by A. to the trustees, the payment of which could have been enforced during his lifetime, it was enforceable against his estate, whether consisting of pure or impure personality.—*Re ROBSON, EMLEY v. DAVIDSON*, (1881), 19 Ch. D. 156; 51 L. J. Ch. 337; 45 L. T. 418; 30 W. R. 257, C. A.

Annotations:—*Mentd.* *Re Holburne, Coates v. Mackillop* (1885), 53 L. T. 212; *Re Watts, Cornford v. Elliott* (1885), 29 Ch. D. 947.

789. Conveyance of freehold to trustees.]—A father having, by a voluntary settlement, conveyed certain freehold & covenanted to surrender certain copyhold estates to trustees in trust for the benefit of his daughters, afterwards devised part of the same estates to his widow, who, after his death, was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect, & to compel the widow to surrender the copyholds to which she had been admitted, a decree was made for carrying into effect the trusts as far as they related to the freeholds, *pltf.'s* title to them being complete; but as to the copyholds, the bill was dismissed, with costs.—*JEFFERYS v. JEFFERYS* (1841), Cr. & Ph. 138; 41 E. R. 443, L. C.

Annotations:—*Consd.* *Price v. Price* (1851), 14 Beav. 598. *Distd.* *Crouch v. Waller* (1859), 4 De G. & J. 302. *Refd.* *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Gale v. Gale* (1877), 6 Ch. D. 144; *Gandy v. Gandy* (1885), 30 Ch. D. 57; *Re Holland, Gregg v. Holland*, [1901] 2 Ch. 145.

790. Covenant to surrender copyholds.]—*JEFFERYS v. JEFFERYS*, No. 789, *ante*.

791. Direction to trustees to pay—Subsequent recognition of gift of settlor.]—*BENTLEY v. MAC-KAY*, No. 769, *ante*.

792. Assignment of stock & money—Property not transferred.]—A settlor, by a voluntary settlement, assigned a sum of Consols standing in his name, & also his money at his banker's, to trustees, upon trust for himself for life, & upon trust after his decease to settle the same, so that his three reputed daughters should receive the income for their lives without anticipation, with trusts over.

The stock remained untransferred, & the £8,000 continued at his banker's, in the settlor's name, until his decease twelve days afterwards:—*Held*: the trusts of the voluntary settlement were effectually fastened upon both the Consols & money.—*AIREY v. HALL* (1856), 3 Sm. & G. 315; 27 L. T. O. S. 196; 2 Jur. N. S. 658; 4 W. R. 587; 65 E. R. 675.

Annotation:—*Refd.* *Dilrow v. Bone* (1862), 3 Giff. 538.

793. Approval of draft declaration of trust—Where property transferred.]—Upon evidence that a married woman desiring to execute a voluntary settlement transferred stock, to which she was entitled for her separate use, into the names of trustees, & approved of a draft declaration of trust:

—*Held*: there was a *locus penitentiae*, & the trusts did not attach, unless the draft had been finally authorised before the transfer to the trustees; & an inquiry to that effect being answered in the negative, the fund ordered, on the petition of the married woman, to be retransferred for her separate use.—*Re SYKES'S TRUSTS* (1862), 2 John. & H. 415; 6 L. T. 350; 70 E. R. 1120.

Annotations:—*Mentd.* *Re Ellis's Trusts* (1874), L. R. 17 Eq. 409; *Roberts v. Watkins & Howells* (1877), 46 L. J. Q. B. 552; *Re Croughton's Trusts* (1878), 8 Ch. D. 460; *Pike v. Fitzgibbon, Martin v. Fitzgibbon* (1881), 17 Ch. D. 454; *Re Quartz Hill, etc., Co., Ex p. Young* (1882), 21 Ch. D. 642; *Re Bown, O'Halloran v. King* (1884), 27 Ch. D. 411.

794. Deposit of promissory notes & deeds.]—Testator deposited certain promissory notes in the hands of a trustee as a provision for his illegitimate children, & at the same time deposited certain deeds as security to meet the notes:—*Held*: the deposit of the deeds amounted to a trust to provide for the payment of the notes, & the settlement was good.—*ARTHUR v. CLARKSON* (1866), 35 Beav. 458; 14 W. R. 754; 55 E. R. 974.

Annotation:—*Dbtd* *Re Whitaker* (1889), 42 Ch. D. 119.

795. Assurance not communicated to trustee—Until after death of settlor.]—A settlement whereby lands are assured to a trustee to the use of the settlor for life, & afterwards in trust for volunteers, & which is not communicated to the trustee until after the settlor's death is valid, notwithstanding the disclaimer of the trustee.—*JONES v. JONES* (1874), 31 L. T. 535; 23 W. R. 1. *Annotation*:—*Follid.* *Mallott v. Wilson*, [1903] 2 Ch. 491.

796. Assignment of property by letters—Policies of life insurance—No notice given to insurance offices.]—K., who in 1850 made a settlement for the benefit of himself, wife, & children of the marriage being a widower in 1863 with four children about to contract a second marriage, wrote to one of the two trustees of the settlement, a letter in which he said he was desirous of making a settlement upon his four children of six policies of assurance on his own life, the particulars of which he gave. Three of the policies were handed to the trustee but the other three were deposited with the office as a collateral security & were to be subject thereto; but he undertook to pay off the amount claimed so as to leave the policies free for the children. The trusts & provisions of the settlement were to be similar to those of the settlement of 1850 & he undertook to execute to the trustee written to & another trustee to be named an assignment of the six policies to contain covenants to keep up the policies & to pay the mtge. debt, & until the settlement should be executed he was to be bound by the agreement in the same manner as if the settlement were actually executed. In a letter written to the same trustee two days later inclosing the former letter K. said, "The inclosed is the formal letter of assignment previous to a deed, & as binding." No notice of the letters was ever given to the offices no formal settlement of the policies was ever executed & no notice was ever given to the other trustee of the settlement. The trustee written to died in 1871; & the settlement of 1850, the two letters, & the three policies were returned to K. who by his will in 1875 gave the residue of his property to trustees for the benefit of all his eleven children:—*Held*: what was done by K. was sufficient to make a complete assignment of the six policies for the benefit of his four children.—*Re KING, SEWELL v. KING* (1879), 14 Ch. D. 179; 49 L. J. Ch. 73; 28 W. R. 344.

Annotations:—*Refd.* *Re Richardson, Weston v. Richardson* (1882), 47 L. T. 514; *Re Hughes* (1888), 59 L. T. 586.

797. Settlements of debts—Payments in lifetime of settlor.]—P. executed a voluntary settlement, by which he assigned certain personal property, including four debts which were due to him on the security of bills of sale, to trustees, with power to sue for the debts, upon trust to sell & convert into money the trust premises & execute & do such assurances & things as should be expedient & to apply the proceeds for the benefit of his wife & other relatives. But he made no express assignment of the securities for the debts, nor did he give them up to the trustees. The settlor afterwards received payment of these four debts & died intestate. In an action for the administration of the estate & of the trusts of the settlement:—*Held*: the debts were completely assigned by the voluntary settlement & the trustees were entitled to prove as creditors against the estate of intestate in respect of the debts received by him.—*Qu.*: whether the trustees might have sued the intestate at law for the amount received by him.—*Re* PATRICK, *BILLS v. TATHAM*, [1891] 1 Ch. 82; 60 L. J. Ch. 111; 63 L. T. 752; 39 W. R. 113; 7 T. L. R. 124, C. A.
Annotation:—*Re* Griffin, *Griffin v. Griffin*, [1899] 1 Ch. 408.

798. Effect of disclaimer by trustee.]—By an indenture of voluntary settlement of 1866 M. declared that W. should stand possessed of certain hereditaments & effects of the settlor's upon certain trusts therein declared. There was the usual covenant for further assurance but no power of revocation. On Mar. 9, 1867, W. disclaimed the trusts of this settlement by deed poll, & on Apr. 5, 1867, M. executed a deed poll purporting to put an end to the settlement. In 1888, M. mortgaged part of the hereditaments comprised in the settlement, & in 1899 a transfer of this mtge. was executed in favour of the trustees & exors. of M.

This was a claim by pltf., to whom the only son of the settlor, who became absolutely entitled under the settlement of 1866, had bequeathed all his real & personal property absolutely, to be entitled to so much of the proceeds of the settlor's estate as represented the property comprised in the settlement of 1866; & also to have the settlor's assets marshalled & the mtge. discharged out of the unsettled property:—*Held*: the trusts of the settlement still subsisted & had revested in the settlor on the trustee's disclaimer.—*MALLOTT v. WILSON*, [1903] 2 Ch. 494; 72 L. J. Ch. 664; 89 L. T. 522.

799. Covenant to pay off incumbrances on property settled—On payment of money owing—Settlor not trustee of money received.]—By a voluntary settlement various properties were settled upon trust for such persons as the settlor should by writing direct & subject thereto upon certain trusts, a power being reserved to the settlor to revoke by deed the trusts wholly or partially & to declare new trusts. The settlor covenanted that on certain moneys owing to him being paid he would with such moneys pay off two mtges. to which certain of the property settled was subject. The settlor, having received the moneys owing to him, paid off one of the mtges., & instead of paying off the other mtge., invested the balance of the moneys so received in the purchase of three reversionary interests. The solr. to the trustees of the settlement having

called his attention to the fact that he had only partially fulfilled his covenant, the settlor arranged with him, acting on behalf of the trustees, that, in lieu of paying off the other mtge., he should bring into settlement the three reversionary interests, & accordingly on Dec. 1, 1904, the settlor wrote a letter to the trustees directing them to hold the settled property subject to the mtge. he had not paid off in accordance with his covenant, & in lieu of the same being paid off, undertook to assign to them the three reversionary interests to be held by them on the trusts of the settlement. The settlor died in 1905 without having assigned to the trustees the three reversionary interests. After his death the mtge. subject to which one of the reversionary interests was purchased was paid off by the trustees, & in the reassignment to them of this interest by the mtge. it was recited that the equity of redemption was vested in the trustees. The reassignment was executed with the knowledge of the exors. of the will of the settlor, who allowed the trustees at all times to deal with the three reversionary interests as part of the settled property:—*Held*: the effect of the settlement was not to make the settlor a trustee of the moneys owing to him when received for the trustees of the settlement.—*CARTER v. HUNGERFORD*, [1917] 1 Ch. 260; 86 L. J. Ch. 162; 115 L. T. 857.

800. Spes successions.]—L., having an expectation of succeeding by will or under intestacy to property belonging absolutely to her brother & sister respectively, executed a voluntary settlement, purporting to assign to trustees all the real & personal estate to which in the event of their respective deaths she might become entitled by will or under intestacy. On the death of the brother intestate & a bachelor, L., as heiress-at-law & sole next of kin obtained letters of administration to the estate:—*Held*: the trustees of the settlement could not compel her to hand over the property to them.—*Re ELLENBOROUGH, TOWRY LAW v. BURNE*, [1903] 1 Ch. 697; 72 L. J. Ch. 218; 87 L. T. 714; 51 W. R. 315; 47 Sol. Jo. 255.

Annotations:—*Re* Mudge, [1914] 1 Ch. 115. *Mentd.* (*legg v. Bromley*, [1912] 3 K. B. 471).

Enforcement of voluntary settlements.]—*See* Sub-sect. 4, *post*.

Avoidance of voluntary settlements.]—*See* Sub-sect. 5, *post*.

SUB-SECT. 4.—ENFORCEMENT.

801. Whether specifically performed.]—*WISEMAN v. ROOPER* (1645), 1 Rep. Ch. 158; 1 Eq. Cas. Abr. 16; 21 E. R. 537.

Annotation:—*Re* Skirne, *Skirne v. Meyrick* (1739), 2 Com. 700.

802. —.]—No carrying a voluntary settlement into execution.—*BROWNSMITH v. GILBORNE* (1727), 2 Stra. 738; 93 E. R. 818, L. C.

803. —.]—By a voluntary settlement, a husband & wife assigned all the property to which the wife then was, or which she or her husband in her right might become, entitled to, in trust for the wife for life, for the husband for life, & for the children of the wife living at her death, whether begotten by her present or any future husband. The ct. refused to give effect to the settlement.—

PART V. SECT. 5, SUB-SECT. 4.

8011. Whether specifically performed.]—If a voluntary deed is regularly executed & delivered over to a trustee, & so put out of the control of the

party, showing the design to divest the power of revocation, the party is bound, & the person intended to be benefited by that deed would have a right to come into this ct. against

the trustee, to call upon him to secure the deed & deposit it so as to be available for him.—*UNIAKE v. GILES* (1828), 2 Mol. 267.—*IR.*

q. Gift by voluntary settlement—Of

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HOLLOWAY v. HEADINGTON (1837), 8 Sim. 324; 6 L. J. Ch. 199; 59 E. R. 128.

Annotations:—Consd. Meek v. Kettlewell (1842), 1 Hare, 464. *Refd.* Kekewich v. Manning (1851), 1 De G. M. & G. 176; Price v. Price (1851), 21 L. J. Ch. 53.

804. Whether defect supplied in equity—Settlement by way of provision for children.]—A defect in a voluntary conveyance not supplied in equity. Otherwise, if made for a provision for children.—**THOMPSON v. ATTFIELD** (1882), 1 Vern. 40; 2 Rep. Ch. 216; 23 E. R. 294.

Annotation:—Refd. Saltern v. Melhuish (1754), Amb. 247.

805. ———.]—**HARVEY v. HARVEY**, No. 1270, post.

806. Priority of beneficiaries under settlement—Settlement of one of two mortgaged estates—Priority of judgment creditor.]—**GIRLING v. LOWTHER** (1882), 2 Rep. Ch. 262; 21 E. R. 673; sub nom. **GIRLING v. LEE**, 1 Vern. 63.

Annotations:—Dtd. Beavan v. Oxford (1856), 6 De G. M. & G. 507. *Refd.* Barton v. Vanheythuyssen, Stone v. Vanheythuyssen (1853), 11 Hare, 126. *Mentd.* Silk v. Prime (1766), 1 Dick. 381.

807. Right of wife to sue—In name of trustees.]—**MILDMAY v. MILDMAY** (1882), 2 Cas. in Ch. 102; 1 Vern. 53; 22 E. R. 866, L. C.

Annotations:—Refd. Bullock v. Sadler (1776), Amb. 764. *Mentd.* Feilders v. Winchester (1729), 1 Barn. K. B. 323; Legard v. Johnson (1797), 3 Ves. 352.

808. Remedy of trustee—Recovery of money lent to settlor—For purpose of settlement.]—A husband made a post-nuptial settlement of £4,000 in favour of his wife & children, & then in consideration of the £4,000, expressed to have been lent to him by the trustees of the settlement, made a mtge. to them of a real estate to secure that sum, & covenanted to repay it. The husband never, in fact, paid the £4,000 to the trustees:—*Held*: nevertheless, they were specialty creditors of the husband.—**TANNER v. BYNE** (1827), 1 Sim. 160; 5 L. J. O. S. Ch. 125; 57 E. R. 539.

809. ——— Account against settlor's estate.]—A. assigned choses in action & other personal chattels, to a trustee, in trust for himself for life, & after his death, for his nephew & niece. Some years afterwards, he made a will, bequeathing the settled property, to other persons. After his death, the trustee & *cestuis que trust*, filed a bill against the exors. & the legatees, praying that the deed might be established, that an account might be taken of A.'s personal estate & that the exors. might deliver over the residue to the trustee. The bill was dismissed, but, *semble*, if the bill had been filed, by the trustee alone, for indemnity against conflicting claims, or by the *cestuis que trust* alone, to have the benefit of the deed, the ct. would have granted relief.—

WARD v. AUDLAND (1837), 8 Sim. 571; 59 E. R. 226; *affd.* (1838), Coop. Pr. Cas. 146; 8 Sim. 576, n.; 2 Jur. 652, L. C.; *subsequent proceedings* (1845), 8 Beav. 201.

Annotations:—Consd. Parnell v. Hingston (1856), 3 Sm. & G. 337. *Refd.* Walrond v. Walrond (1858), 28 L. J. Ch. 97.

810. ——— On breach of covenant for further assurance—Property not legally vested in trustee.]—A trustee under a voluntary settlement of chattels, policy of assurance & mtge., filed a bill against the representatives of the settlor for the recovery thereof:—*Held*: if the property was legally vested in ptff., he might recover it at law & apply it on the trusts; but if otherwise, then as the deed was voluntary, the ct. could afford ptff. no assistance in recovering it.—**WARD v. AUDLAND** (1845), 8 Beav. 201; 14 L. J. Ch. 145; 9 Jur. 384; 50 E. R. 79; *subsequent proceedings*, sub nom. **HERVEY v. AUDLAND**, 14 Sim. 531.

Annotations:—Refd. Kekewich v. Manning (1851), 1 De G. M. & G. 176; *Re* Jones, Farrington v. Forrester, [1893] 2 Ch. 461.

811. ——— Measure of damages.]—W., by voluntary conveyance, assigned to ptff., the exors., etc., his furniture, effects, etc., in trust, to the use of W., the settlor, for his life, & at his death, in equal moieties, to the use of two nieces of W., named. Covenant by W., for himself & his heirs & exors., to do all further reasonable acts & things for further & better assigning & transferring the furniture, etc., to ptff., on the same trusts as by ptff. or his counsel should be reasonably advised. W. was in possession of the furniture, etc., till his death. On that event, deft., his exor., became possessed, & sold the whole. Ptff. sued deft. as exor. of W., on the above covenant for further assurance, averring, in his declaration, that it was at no time necessary to sell any of W.'s chattels, to pay any debt of W., & that there were no creditors of his who could impeach the validity of the indenture, & assigning, by way of breaches, first, that deft. refused to deliver possession of the furniture to ptff.; & secondly, that deft. converted & sold same, not alleging that he sold it in market overt:—*Held*: ptff. was entitled to recover, at least on the last breach, the value of the furniture possessed by W. from time of his executing the deed to his death & afterwards sold by deft. as his exor., though trover might have been sustained for the same cause of action.—**WARD v. AUDLAND** (1847), 16 M. & W. 863; 9 L. T. O. S. 105; 153 E. R. 1441.

Annotations:—Consd. Aulton v. Atkins (1856), 18 C. B. 249. *Appld.* *Re* Cavendish Browne's Settlement, Trusts, Horner v. Rawle (1916), 61 Sol. Jo. 27. *Refd.* Parnell v. Hingston (1856), 3 Sm. & G. 337. *Mentd.* Winter v. Winter (1861), 9 W. R. 747; *Re* Harcourt, Danby v. Tucker (1883), 31 W. R. 578; *Re* Riddgway, *Ex p.* Riddgway (1885), 15 Q. B. D. 447; *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

*mortgage debts, deposits in bank, & shares—How far complete & enforceable.]—***ELLIOTT v. ELLIOTT** (1898), 19

N. S. W. Eq. 162; 15 N. S. W. W. N. 186.—**AUS.**

r. Creation of irrevocable trust —

*Whether affected by purported release.]—***EDMISON v. COUCH** (1899), 26 A. R. 537.—**CAN.**

Part VI.—Rectification and Variation of Settlements and Articles.

SECT. 1.—RECTIFICATION.

SUB-SECT. 1.—IN GENERAL.

812. When effect given to intention—As declared by letter of instructions for drawing settlement.]—Settlement after marriage reformed in favour of the issue against the devisee of the husband, claiming under the reversion, by his letter of instructions for drawing the settlement: but this equity did not prevail against creditors.—*JENKINS v. QUINCHANT* (1745), 5 Ves. 596, n.; 31 E. R. 761, L. C.

*Annotations:—***Apld.** *Barstow v. Kilvington* (1800), 5 Ves. 593. **Consd.** *Bedford v. Abercorn* (1836), 1 My. & Cr. 312.

813. — As declared in recital.]—Settlement reformed according to intention declared in recital.—*PAYNE v. COLLIER* (1790), 1 Ves. 170; 30 E. R. 285, L. C.

814. — Letter varying settlement.]—Settlement reformed in favour of the younger children against the heir of the mother, claiming the reversion, by a letter from her on the marriage of her daughter, stating the intention.—*BARSTOW v. KILVINGTON* (1800), 5 Ves. 593; 31 E. R. 755, L. C.

815. — Intended settlement of copyholds & freeholds—Omission of certain freeholds in settlement—No evidence of intention.]—Bill to reform a settlement on the marriage of a lady entitled to freeholds & copyholds under a will, on the ground that certain freeholds which passed under the will were not included in the settlement, dismissed, there being no evidence of intention.—*CHAPMAN v. CHAPMAN, CHAPMAN v. HALL* (1837), 1 Jur. 473.

816. — Omission making instrument unintelligible—Amount left blank.]—In a settlement, made between persons severally entitled to interests under a will, A. B., the settlor, who took a life interest under the settlement, covenanted that if he became entitled to any property exceeding in value the sum of —, he would assign the same to the trustees. A. B. afterwards became entitled to a reversionary interest, & filed a bill to have the settlement rectified, or that it might be declared that the covenant was void. One of the Vice Chancellors dismissed the bill, without costs:—*Held*: (1) this decision was correct, as the ct. would not make a declaration of right beforehand; (2) the covenant could not be considered insensible, as it must apply to capital, & not income.—*FYFE v. ARBUTHNOT* (1857), 1 De G. & J. 406; 26 L. J. Ch. 646; 29 L. T. O. S. 306; 3 Jur. N. S. 651; 5 W. R. 793; 44 E. R. 780, L. C.

*Annotations:—***As to** (1) **Distd.** *Carroll v. Graham* (1865), 11 Jur. N. S. 1012. **As to** (2) **Apld.** *Re Clarke, Coombe v. Carter* (1887), 35 Ch. D. 109.

817. — No written instructions for settlement.]—No written instructions were given for the preparation of a marriage settlement, & it was afterwards sought to rectify an alleged error in it. Upon the evidence of the husband, & the solr. who had prepared it, as to the intention of

the parties to it, & the trustees of the settlement not opposing, it was, on a bill filed by the sole child, an infant, of the marriage, & his father, as next friend:—*Held*: the rectification might be made.—*TOMLINSON v. LEIGH* (1865), 13 L. T. 516; 11 Jur. N. S. 962; 14 W. R. 121.

818. — Clear intention to pass fee simple—Omission of word “heirs.”]—By a marriage settlement the wife's interest in real estate was granted & assigned to trustees, their exors., administrators, & assigns, upon the usual trusts in a settlement, with the omission of the word “heirs” in every case in which the fee simple was evidently intended to be passed:—*Held*: the deed must be rectified by the insertion of the word “heirs,” in order to effect the intention of the parties.—*Re Bird's Trusts* (1876), 3 Ch. D. 214.

*Annotations:—***Consd.** *Re Tringham's Trusts, Tringham v. Greenhill*, [1901] 2 Ch. 487. **Refd.** *Re Sinclair's Settlement, Crump v. Leicester* (1886), 56 L. T. 83. **Mentd.** *Re Hoffe's Estate Act*, 1885 (1900), 82 L. T. 556.

819. — Necessity for clear proof of intention.]—(1) The *onus* lies on those who seek to alter an instrument to show why it should be altered, not on those who support it to show why it should not be altered.

(2) A settlement on marriage will not be rectified or altered unless it is shown that at the time when the deed was executed there was some definite arrangement in accordance with which it ought to have been prepared as it is desired to rectify or alter it.

(3) On the marriage of a daughter who is living on affectionate terms with her father, he is the proper person to recommend & advise her, & her natural guardian in matters relating to the preparation of her marriage settlement, & there is no occasion for any independent legal adviser beyond the family solr.—*TUCKER v. BENNETT* (1887), 38 Ch. D. 1; 57 L. J. Ch. 507; 58 L. T. 650, C. A.

*Annotation:—***As to** (2) **Refd.** *Bonhote v. Henderson*, [1895] 2 Ch. 202.

820. — —.]—*WEIR v. VAN TROMP* (1900), 16 T. L. R. 531.

821. Whether rectification of voluntary settlement granted.]—The circumstances under which a voluntary settlement may be rectified considered.

Although it be true the ct. will not interfere on either side in voluntary transactions, yet when it makes out that the deed cannot stand as a deed of gift, & that, therefore, the result would be that there would be simply in the hands of deft. a sum of money which pltf. was entitled to, the ct. in order to avoid circuity of action, will, on putting an end to & cancelling a deed, instead of requiring pltf. to bring an action at law for payment of the money direct deft. to pay the money to pltf. (LORD ROMILLY, M.R.).—*LISTER v. HODGSON* (1867), L. R. 4 Eq. 30; 15 W. R. 547.

*Annotation:—***Consd.** *Weir v. Van Tromp* (1900), 16 T. L. R. 531.

822. — At instance of volunteer.]—*WEIR v. VAN TROMP* (1900), 16 T. L. R. 531.

PART VI. SECT. 1, SUB-SECT. 1.
t. When effect given to intention.]—Marriage settlement not providing for a bond by husband to trustee for wife's fortune, being provable in the

event of his bankruptcy, amended accordingly; such being the intention of the parties.—*Ex p. VERNER* (1808), 1 Ball & B. 260.—*IR.*
a. —.]—*KEOGH v. M'GRATH*

(1879), 5 L. R. Ir. 478.—*IR.*

b. — So as to grant estate tail.]—*FITZGERALD v. FITZGERALD*, [1902] 1 I. R. 477.—*IR.*

Sect. 1.—Rectification : Sub-sects. 1, 2, 3 & 4.]

823. Settlor's attention not drawn to omission of usual clause.]—(1) The trusts of a marriage settlement of property of the wife were such that upon the death of the husband in her lifetime, without leaving issue of the marriage, she had a mere life interest in the property, the subsequent trusts being in favour of her nephews & neices, & being irrevocable. She had no power to control the investment of the property or the appointment of trustees:—*Held*: as it appeared that the position she was in had not been fully explained to her before she executed the settlement, she was entitled to a decree for rectification, & as the marriage consideration had failed & did not support any of the existing trusts, the existing trusts must be declared void as in the case of a purely voluntary deed.

(2) A person taking a benefit under a voluntary gift which is not subject to a power of revocation has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable.—*WOOLLASTON v. TRIBE* (1869), L. R. 9 Eq. 44; 21 L. T. 449; *sub nom.* *WOOLLASTON v. TRIBE*, 18 W. R. 83.

Annotations:—*As to* (1) *Consd.* *Paul v. Paul* (1880), 15 Ch. D. 580. *Apld.* *James v. Couchman* (1885), 29 Ch. D. 212. *Dtd.* *Tucker v. Bennett* (1887), 38 Ch. D. 1. *Refd.* *Phillips v. Mullings* (1871), 7 Ch. App. 244; *Welman v. Welman* (1880), 15 Ch. D. 570.

824. —.]—*JAMES v. COUCHMAN*, No. 855, *post*.

825. Plaintiff claiming to retain benefit under improper settlement.—Whether bar to rectification.]—*LOVESY v. SMITH*, No. 840, *post*.

SUB-SECT. 2.—SETTLEMENT DEVIATING FROM ARTICLES.

826. Whether rectification granted.]—*Arts. & settlement mentioned to be made in pursuance thereof, were both made before the marriage, but the settlement varied from the uses in the arts.: decreed to go according to the arts.—*HONOR v. HONOR (1710), 1 P. Wms. 123; 2 Vern. 658; 2 Eq. Cas. Abr. 38; 24 E. R. 321, L. C.

Annotations:—*Refd.* *Price v. Powel* (1729), 1 Barn. K. B. 201; *Partyn v. Roberts* (1756), Amb. 315; *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543.

827. —.]—Settlement made more strictly than articles intend—*Provision for daughters postponed.]—*BURTON v. HASTINGS (1715), Gilb. Ch. 113; 25 E. R. 79.

828. —.]—*TREVOR v. TREVOR*, No. 292, *ante*.

829. —.]—*LEGG v. GOLDWIRE*, No. 876, *post*.

830. —.]—A settlement under arts., deviating from them, set right & made to agree with the arts. & what the estate was damaged, by the tenant for life not upholding it as he ought, declared to be a specialty debt, & to be answered out of his assets.—*LANGLEY v. FURLONG* (1758), 1 Dick. 315; 21 E. R. 290.

831. —.]—Settlement set aside as being contrary to arts., & a new settlement to be executed agreeably to the arts.—*NEAL v. CUST* (1775), 2 Dick. 513; 21 E. R. 369.

832. —.]—*BOLD v. HUTCHINSON*, No. 214, *ante*.

833. —.]—Previously to the marriage of an

infant, on whose behalf an order for maintenance had been made, the draft of a proposed ante-nuptial settlement was approved by the intended husband. The draft contained a covenant by the intended husband to settle after-acquired property of the wife; but no provisions as to the husband & children of a future marriage. The marriage took place, but the draft was never engrossed, nor was any settlement previous to marriage executed. A post-nuptial settlement was made, but it contained no provision for the husband & children of the wife by a future marriage, & no covenant to settle after-acquired property.

Settlement varied so as to comprise after-acquired property of the wife, but not so as to extend to the husband & children of a future marriage.—*Re HOARE'S TRUSTS* (1862), 4 Giff. 254; 1 New Rep. 161; 7 L. T. 523; 9 Jur. N. S. 167; 11 W. R. 181; 66 E. R. 700.

Annotations:—*Refd.* *Re Bird's Trusts* (1876), 3 Ch. D. 214; *Re Wall* (1883), 50 L. T. 435.

834. —.]—A father being seised in fee of a large estate, & having a small estate for life with remainder to his son in tail male, the father & son executed a deed of conveyance to the father in fee of the small estate, & a deed of settlement of the large estate to the use of the father for life, with remainder to the son for life, with remainder to the eldest & other sons of the son successively in tail male. The deed contained no powers of jointuring widows or of raising portions for younger children. A joint power of revocation appeared in the draft as originally prepared by counsel, but had been struck out. The father & son had each a wife & a large family, & each declared that had he been aware of the effect of the deed he would not have executed it:—*Held*: under the circumstances the deed must be rectified by adding a power of revocation, & with pltf.'s consent it was directed that a new settlement with all proper powers, should be made under the direction of the ct.—*WELMAN v. WELMAN* (1880), 15 Ch. D. 570; 49 L. J. Ch. 736; 43 L. T. 145.

Annotations:—*Consd.* *Paul v. Paul* (1880), 15 Ch. D. 580. *Refd.* *Shurmur v. Sedgwick* (1883), 49 L. T. 156.

835. Settlement must carry out intent of articles.—Not sufficient that articles followed verbatim.]—Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the arts. *verbatim*, & both made before marriage.—*ROBERTS v. KINGSLEY* (1749), 1 Ves. Sen. 238; 27 E. R. 1005.

Annotation:—*Refd.* *Head v. Godlee*, *Reynolds v. Godlee* (1859), John. 536.

836. —.]—*COGAN v. DUFFIELD*, No. 321, *ante*.

837. Necessity for clear proof of intention.—That settlement should pursue articles.]—The ct. will not rectify a settlement which varies the interest of an adult from what it appears to be under the arts. to his disadvantage, unless where it was clearly intended that the settlement should pursue the arts.—*PARTYN v. ROBERTS* (1756), Amb. 315; 27 E. R. 213.

SUB-SECT. 3.—FRAUD AND UNDUE INFLUENCE.

838. Husband acting as wife's agent.—Settlement by wife.]—*CORLEY v. STAFFORD (LORD)*, *CAMPBELL v. CORLEY*, No. 324, *ante*.

PART VI. SECT. 1, SUB-SECT. 2.
826.1. Whether rectification granted.]—*KING v. KING-HARMAN* (1873), 7 L. R. Eq. 446.—*IR.*

PART VI. SECT. 1, SUB-SECT. 3.
a. Alleged exercise of undue influence by daughter.—Settlement made by reason of "trouble & care" taken by

*daughter.]—**TAYLOR v. YEANDLE* (1912), 27 O. L. R. 531; 4 O. W. N. 531; 8 D. L. R. 733.—*CAN.*

839. ———.]—*Pltf.*, a widow with children, being possessed of property left by her first husband, married, & marriage arts. were prepared upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life. The bill was filed by the wife to rectify the settlement against the husband & the solr. who prepared the settlement:—*Held*: upon the evidence the limitations were contrary to the intention of *pltf.* & the husband having undertaken as agent for the wife to have a settlement prepared was bound to have such a contract prepared as the ct. would sanction & such contract would give the wife the first life estate in her own property. A decree was therefore made to rectify the settlement.—*CLARK v. GIRDWOOD* (1877), 7 Ch. D. 9; 47 L. J. Ch. 116; 37 L. T. 614; 28 W. R. 90, C. A.

Annotation:—*Folld.* *Lovesy v. Smith* (1880), 15 Ch. D. 655.

840. ———. *Onus of proof on husband.*—Rectification of a marriage settlement decreed at the instance of the wife after the death of the husband upon her uncorroborated parol testimony. Upon the marriage of a widow with a retired solr., who had formerly acted as her solr., the whole of her property, amounting to more than £20,000, was vested in trustees upon trust to pay the income, to the wife for her life, & after her death to the husband for his life; & as to the capital, upon trust, after the death of the wife, to pay one moiety thereof to the husband, his exors., administrators, or assigns, & to hold the other moiety upon such trusts as the wife should by deed or will appoint. By another deed, executed contemporaneously, the husband, in exercise of a power given to him by the will of his father, charged some estates of which he was tenant for life, with remainder to his issue in tail male, with the payment of an annuity of £100 to the wife for her life. The settlement was prepared by the husband himself the night before the marriage, & was brought by him to the wife for execution on the morning of the marriage day. She had no independent professional advice. After the husband's death she brought an action for the rectification of the settlement by omitting the trust of a moiety of the capital for the husband. The trustees & one of the next of kin of the husband were made *defts.* *Pltf.* deposed that her husband had told her that he wished every farthing of her property to be settled upon her, & that she said she was willing to allow him a life interest; that he said he would employ counsel; that the settlement did not carry out her intentions, & that she did not know what its provisions were until after the husband's death:—*Held*: (1) it was the duty of the husband to have explained to the wife in the most unmistakable terms, & with due opportunity for deliberation, the provision in his favour, & as the settlement on the face of it was not such as the ct. would have sanctioned in the absence of agreement, the burden of proof was on

the representatives of the husband, & *pltf.* was entitled to the rectification which she claimed; (2) the fact that *pltf.* claimed to retain the benefit of the settlement made on her by the husband was no bar to the rectification; (3) it was not necessary that the other next of kin should be made parties to the action, but the drawing up of the judgment must be suspended for fourteen days, & notice of the judgment must be served on those of the next of kin who were not parties.—*LOVESY v. SMITH* (1880), 15 Ch. D. 655; 49 L. J. Ch. 809; 43 L. T. 240; 28 W. R. 979.

841. *Duty to advise settlor.*—*TUCKER v. BENNETT*, No. 819, *ante*.

842. ———.]—*LOVESY v. SMITH*, No. 840, *ante*.

SUB-SECT. 4.—MISTAKE.

See, generally, *MISTAKE*, Vol. XXXV., pp. 127–136, Nos. 279, 282–347.

843. *When rectification granted—Portions term subsequent to limitations in tail.*—In a marriage settlement, a term for years for securing younger children's portions is by mistake, made subsequent to the estate-tail limited to the sons; this helped in equity.—*VEDALE v. HALFPENNY* (1723), 2 P. Wms. 151; 2 Eq. Cas. Abr. 718; 24 E. R. 677; *sub nom.* *HALFPENNY v. UDAL*, 9 Mod. Rep. 56.

Annotations:—*Distd.* *Worsley v. Granville* (1751), 2 Ves. Sen. 331. *Refd.* *Heneage v. Hinloke* (1742), 2 Atk. 456; *Brown v. Jones* (1744), 1 Atk. 188; *Mansell v. Mansell* (1757), *Wilm.* 36; *Rogers v. Earl* (1757), 1 Dick. 295.

844. ———. *Settlement of stock—Real state of stock overlooked by party interested.*—Settlement of stock rectified, on the ground that the real state of the title to the stock, as it appeared from a prior deed of settlement, had been overlooked by the party interested.—*ASHURST v. MILL, MILL v. ASHURST* (1848), 7 Hare, 502; 18 L. J. Ch. 129; 11 L. T. O. S. 512; 12 Jur. 693; 68 E. R. 208; *affd.*, 18 L. J. Ch. 133; 12 Jur. 1035, L. C.

845. ———. *Proviso against anticipation.*—On clear evidence of mistake, a marriage settlement of a lady's fortune, reformed by striking out a proviso against anticipation of her separate estate, she having executed it on a representation that the most unlimited control, over both principal & interest, was secured to her, it having been agreed before the marriage that she should continue to possess the same power of disposition which she then had.—*TORRE v. TORRE* (1853), 1 Sm. & G. 518; 1 Eq. Rep. 364; 21 L. T. O. S. 239; 1 W. R. 490; 65 E. R. 227.

846. ———. *Erroneous belief of husband & wife—That particular property is already settled.*—The erroneous belief of both the husband & wife, on their marriage, that a particular property already stood settled, is no ground for rectifying a settlement so as to make it include it.—*BARROW v. BARROW* (1854), 18 Beav. 529; 3 Eq. Rep. 149; 52 E. R. 208; *on appeal*, 5 De G. M. & G. 782, L. J.

Annotations:—*Refd.* *Re Ford* (1863), 2 New Rep. 349; *Spiro v. Willows* (1864), 3 De G. J. & Sm. 293; *Re Cooke's Trusts* (1887), 56 L. T. 737.

PART VI. SECT. 1, SUB-SECT. 4.

d. *When rectification granted—Mistake made in preparation of conveyance.*—*CHRISTIE v. PUBLIC TRUSTEE* (1921), 22 S. R. N. S. W. 148; 38 N. S. W. W. N. 259.—*AUS.*

e. *Estate in fee granted instead of life estate.*—*CALVERT v. LINLEY* (1874), 21 Gr. 470.—*CAN.*

f. *Absolute restraint on power of alienation wrongly inserted.*—A marriage settlement by which freehold property was settled to the

separate use of a married woman, but which contained by mistake an absolute restraint on her power of alienation, was ordered to be rectified, the words inserted being struck out.—*GARDEN v. DAVIES*, 3 J. R. N. S. S. C. 50.—*N.Z.*

g. *Intention to give wife life interest only.*—*SMITH v. SMITH* (1887), 6 N. Z. L. R. 15.—*N.Z.*

h. *Mutual mistake as to effect of words—"After the decease of A."*—*HARDY v. WESTRUP* (1888), 6 N. Z. L. R. 618.—*N.Z.*

k. *No power of revocation inserted in settlement.*—*HAROLD v. TAYLOR* (1911), 31 N. Z. L. R. 361.—*N.Z.*

l. *Omission of words included in draft submitted to settlor.*—*A. G. v. WILLIAMS* (1914), 33 N. Z. L. R. 913.—*N.Z.*

m. *Property wrongly included.*—A marriage settlement rectified an agreement to convey a certain estate, save & except the lands of B. & its subdivisions, but the operative part of the deed purported to convey by name, as a separate

Sect. 1.—Rectification: Sub-sects. 4 & 5.]

847. Clause inserted by mistake—Rectification not granted—Settlement enforced as though clause not inserted.]—By a mistake in pencil directions given to a clerk or stationer, a clause of a sentence was inserted in a marriage settlement which on the face of the deed was repugnant to the sense, & which led to a highly improbable result. The fact of the mistake was not admitted by all parties. The ct., on petition under Trustee Relief Act, did not order the settlement to be rectified; but, prefacing the order with a declaration that it appeared that the words in question were inserted by mistake, made an order for distribution of the fund as if the clause had not been inserted.—*RE DE LA TOUCHE'S SETTLEMENT* (1870), L. R. 10 Eq. 599; 40 L. J. Ch. 85.

Annotation:—Reid. Re Bird's Trusts (1876), 3 Ch. D. 214.

848. Disentailment by deed of resettlement—Jurisdiction of court to rectify—Effect of Fines & Recoveries Act, 1833 (c. 74).]—The ct. is not prohibited by above Act, s. 47, from exercising its ordinary jurisdiction to rectify on the ground of mistake, a deed of resettlement which has been enrolled as a disentailing assurance under the Act.—*HALL-DARE v. HALL-DARE* (1885), 31 Ch. D. 251; 55 L. J. Ch. 154; 54 L. T. 120; 34 W. R. 82; 2 T. L. R. 100, C. A.

Annotations:—Apud. Meeking v. Meeking, [1917] 1 Ch. 77. *Reid. Re Hambrough's Estate*, *Hambrough v. Hambrough*, [1909] 2 Ch. 620. *Mentid. Evans v. Chapman* (1902), 86 L. T. 381.

849. ———.]—Sect. 47 of the above Act, which in some respects excludes the jurisdiction of cts. of equity in dealing with disentailing deeds, does not preclude the ct. from exercising its jurisdiction to rectify any slip or clerical error in a disentailing deed which prevents the deed as executed from being the deed of the parties.—*MEEKING v. MEEKING*, [1917] 1 Ch. 77; 86 L. J. Ch. 97; 115 L. T. 623.

Effect of lapse of time.]—See MISTAKE, Vol. XXXV., pp. 142, 143, Nos. 409–413.

SUB-SECT. 5.—OMISSION OF USUAL PROVISIONS.

850. Power of appointment—Omission discovered by wife after husband's death.]—By a settlement made previously to the marriage of a lady, certain hereditaments to which she was entitled in fee were conveyed to trustees, their heirs & assigns, upon trust to sell & to stand possessed of the moneys arising from such sale, upon trust to invest same, & pay the dividends, interest & annual produce to the intended husband for his life, & after his death to the separate use of the intended wife for life, & after the decease of the survivor the trust funds were to be in trust for all, & such one or more exclusively of the others or other of the children of the intended marriage as the intended wife should appoint; & in default of appointment to & in trust for all or any of the children or child of the then intended marriage, who, being a son or sons, should attain twenty-one, or being a daughter or daughters, should attain that age or marry under that age; & if more than one in equal shares. The marriage

took place, & the husband died, leaving one child only, an infant son. The widow, contemplating a second marriage, for the first time discovered that, contrary to her intentions as established by the evidence, she had no power under the settlement of appointing among the children of a second or any subsequent marriage. Upon her filing a bill for the rectification of the settlement, the ct. made a declaration & ordered the deed to be altered by inserting words which should include in the power of appointment the children of the lady by her then intended or any subsequent marriage.—*NAYLOR v. WRIGHT* (1857), 30 L. T. O. S. 126; 3 Jur. N. S. 1090; 5 W. R. 221, 770.

851. ———.]—By a marriage settlement made in 1850, the property of the intended wife was settled in trust, as to £600, as the wife should by deed appoint & subject thereto, as to the whole property, in trust for the wife for life, & after her decease as she should by will appoint, & in default of appointment in trust for her children by any marriage, & if there should be no children of the then intended marriage & the husband should predecease the wife, then in trust as to two-thirds for such persons as, under the Statutes of Distribution, would have become entitled thereto at the death of the wife if she had died possessed thereof intestate & without having been married. There were no children of the marriage, & in 1879, after the death of the husband, the wife, not having married again, brought an action claiming the rectification of the settlement. The only evidence was an affidavit of the wife that it had not been her intention to limit & she had not for some time discovered that she had by the settlement limited her disposing power in the event of her surviving her husband:—*Held*: the settlement ought to be rectified by inserting a power of appointment by deed as well as by will.—*EDWARDS v. BINGHAM* (1879), 28 W. R. 89.

Annotation:—Reid. Paul v. Paul (1880), 43 L. T. 239.

852. ———.]—*SMITHERS v. GREEN* (1877), cited in 2 Seton's Judgments & Orders, 7th ed. at p. 907.

Annotation:—Reid. Re Gowan, Gowan v. Gowan (1880), 17 Ch. D. 778.

853. ———.]—By a post-nuptial settlement a husband covenanted to settle property, to which his wife was contingently entitled, upon trusts for the wife for life to her sole & separate use, with remainder to the children equally, with remainders over. No power of appointment among children was covenanted to be reserved either to the wife, or the husband, or to both jointly. In an action brought by the wife to establish her equity to a settlement, & asking the ct. to declare that a settlement in pursuance of the covenant was a proper settlement for that purpose:—*Held*: the settlement should be amended by giving an exclusive power of appointment by deed or will among the children to the wife.—*OLIVER v. OLIVER* (1878), 10 Ch. D. 765; 48 L. J. Ch. 630; 39 L. T. 563; 27 W. R. 657.

Annotations:—Distd. Re Parrott, Walter v. Parrott (1886), 33 Ch. D. 274. *Reid. Re Gowan, Gowan v. Gowan* (1880), 17 Ch. D. 778.

854. ———.]—In a marriage settlement the property of the wife was assigned on trust to pay the income to the wife for life for her separate use, & after her decease to pay an annuity of £200 a year

denomination, the lands of K. which, it was proved, were reputed a sub-denomination of B.—*Held*: there was not sufficient evidence of mistake to justify the ct. in striking K. out of the settlement.—*ALEXANDER v. CROSBIE* (1835), L. & G. temp. Sugd. 145.—*IR.*

n. ——— Acts of settlor consistent with instructions but not with settlement.]—*BUNBURY v. LLOYD* (1844), 1 Jo. & Lat. 638.—*IR.*

o. ——— Intention of parties should be considered.]—*RICHARDS v. FITZGERALD* (1846), 9 I. Eq. R. 486.—*IR.*

p. ———.]—*HAMIL v. WHITE* (1846), 3 Jo. & Lat. 695.—*IR.*

q. ——— To exclude fund from operation of deed.]—*MACCORMACK v. MACCORMACK* (1876), 11 I. R. Eq. 130.—*IR.*

to the husband, remainder to the issue of the marriage, & in default of issue the trustees were directed to invest the trust money in land, to be held on similar trusts as were subsisting in respect of the family estate of the wife's family under the family settlement. There was no issue of the marriage, & the wife now claimed to have the settlement rectified, on the ground that her attention had not been called to the fact that under the settlement she had no power of disposing of the property in the event of there being no issue of the marriage:—*Held*: the settlement must be rectified by inserting a general testamentary power of appointment by the wife during coverture, & a general power of appointment by deed or will on discovery, in priority to the ultimate trusts.—*CORDEAUX v. FULLERTON* (1879), 41 L. T. 651; 28 W. R. 320.

855. —[—]—Rectification was claimed of a settlement, whereby *pltf.*, shortly after he attained twenty-one, settled certain reversionary property belonging to him on trusts for himself for life, then for his wife & issue, & in default of issue for his paternal next of kin. It was proved that *pltf.* was at the time of the execution of the deed of extravagant habits; that he expressed a desire to preserve his property in the family; & that the settlement was, before execution, read over & its provisions carefully explained to him, & that he fully understood & assented to them. The trustees of the settlement were made *defts.* to the action for rectification:—*Held*: (1) there was no fraud or undue influence exercised upon *pltf.*; but, inasmuch as there was an omission to explain to him that the settlement did not contain a usual power, *viz.*, to appoint as he wished in case of failure of issue, it must be rectified by the insertion of such a power before the limitation to the next of kin; (2) as the trustees of the settlement had in all respects acted properly, & were bound to come before the *ct.* to uphold the settlement, they were entitled to a charge on the funds settled for their costs.—*JAMES v. COUCHMAN* (1885), 29 Ch. D. 212; 54 L. J. Ch. 838; 52 L. T. 344; 33 W. R. 452; 1 T. L. R. 305.

Annotation:—As to (1) *Consd. Rake v. Hooper* (1900), 83 L. T. 669.

856. **Absolute interest to wife**—On death of husband—No issue of marriage.—Previously to a ward of *ct.* attaining her majority proposals of marriage were made, & the draft of settlement was submitted to the master for his sanction. The master objected to the terms proposed, & the parties consequently postponed the marriage till the ward attained twenty-one, when a settlement was executed, & the marriage took place. This was in the year 1811. After the marriage a petition was presented to the *ct.* for its sanction to the settlement, & an order was made accordingly, but it was taken by consent, & the wife was not separately examined. A bill was now filed, praying that the settlement might be reformed, on the ground that an absolute interest in the property ought to have been given to the wife in the events which had happened:—*Held*: the power of the *ct.* over the property of the ward did not cease upon her attaining twenty-one; & the settlement, under the circumstances of this case, ought to be altered so as to give an absolute interest to the wife, who had survived her husband without having children.—*MONEY v. MONEY* (1855), 3 Drew. 256; 3 Eq. Rep. 996; 24 L. J. Ch. 684; 25 L. T. O. S. 294; 3 W. R. 425; 61 E. R. 901.

857. —[—]—A marriage settlement, dated in 1823, reformed in 1857, & after the death of the husband, upon proof of the written instruc-

tions, so as to give the property to the wife absolutely in the event of her surviving her husband & there being no issue, which events had happened.—*WOLTERBEEK v. BARROW* (1857), 23 Beav. 423; 29 L. T. O. S. 119; 3 Jur. N. S. 804; 53 E. R. 167.

Annotations:—*Apld. Smith v. Iliffe* (1875), L. R. 20 Eq. 666. *Distd. Tucker v. Bennett* (1887), 38 Ch. D. 1.

858. —[—]—By a marriage settlement executed in pursuance of arts. made under the order of the *ct.* on the marriage of a lady, an infant & a ward of *ct.*, personality of the wife was limited on death of the husband & in default of children, both of which events happened, to the wife, as she should by will appoint, & in default to her next of kin. Upon her uncontradicted evidence that this was not in accordance with her intention:—*Held*: she was entitled to have the settlement rectified by limiting the property, in the events which had happened, to herself, her exors., & administrators absolutely; & declaration to that effect ordered to be indorsed on the settlement.—*SMITH v. ILIFFE* (1875), L. R. 20 Eq. 666; 44 L. J. Ch. 755; 33 L. T. 200; 23 W. R. 851.

Annotations:—*Consd. Cogan v. Duffield* (1876), 31 L. T. 593; *Hanley v. Pearson* (1879), 41 L. T. 673. *Distd. Tucker v. Bennett* (1887), 38 Ch. D. 1. *Refd. Welman v. Welman* (1880), 15 Ch. D. 570.

859. —[—]—By a marriage settlement personality of the wife was settled on trust for herself for life, for her separate use, without power of anticipation, & after her death, as she should by will or codicil notwithstanding coverture appoint, & in default of appointment on trust for the statutory next of kin then living. The husband died in the wife's lifetime. On her uncontradicted evidence that the settlement was not in accordance with the intentions of the parties:—*Held*: she was entitled to have it rectified, so that in the events which had happened the trust funds might be held in trust for herself absolutely.—*COOK v. FEARN* (1878), 48 L. J. Ch. 63; 39 L. T. 348; 27 W. R. 212.

860. —[—]—By a post-nuptial settlement, real estate belonging to the wife was conveyed unto A. & his heirs "to the use of" A., his exors. & administrators, during the life of the wife, "upon trust" to pay the rents & profits to her for her separate use: & from & after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs & assigns" of the wife for ever; but in case of the wife predeceasing the husband, then to the use of the husband, his heirs, & assigns for ever. The wife having survived her husband, she brought an action against A.'s legal personal representative to have the settlement rectified, on the ground that by a technical mistake in the form of the settlement her equitable life estate & the legal estate in remainder did not coalesce within the rule in *Shelley's Case* (1581), 1 Co. Rep. 93, so as to give her, as was intended in the events that had happened, an absolute estate in fee. *Pltf.*'s case was supported by an affidavit by herself alone:—*Held*: the settlement be rectified so as to vest the legal estate in fee simple to *pltf.*—*HANLEY v. PEARSON* (1879), 13 Ch. D. 545; 41 L. T. 673.

Annotations:—*Refd. Welman v. Welman* (1880), 15 Ch. D. 570. *Mentd. Craddock v. Hunt*, [1923] 2 Ch. 136.

861. —[—]—*COGAN v. DUFFIELD*, No. 321, *ante*.

862. **Portions term.**—Lands stood limited subject to certain powers vested in *pltf.* & certain charges for *pltf.*'s own benefit & for the jointure of *pltf.*'s wife, & for portions of his younger children, to the use of *pltf.* for life, with remainder to his

Sect. 1.—Rectification: Sub-sects. 5 & 6. Sect. 2: Sub-sects. 1 & 2.]

sons successively in tail male, with remainder to trustees for one thousand five hundred years, in trust in the event of failure of male issue of pltf., to raise a sum of £100,000 for additional portions for the pltf.'s daughters.

In contemplation of the marriage of a son of pltf.'s only son, pltf. & his son entered into an agreement for resettlement, whereby it was agreed that pltf.'s son should disentail the reversion & limit the estates after pltf.'s decease, & subject to his life interest & powers, & to the exercise thereof, & all "subsisting" charges to such uses as pltf. & his son should appoint, & that pltf. & his son should then appoint the lands, in remainder & subject as aforesaid, to the use of pltf.'s son for life, with remainder to pltf.'s first & other sons successively in tail male, with remainder to a nephew of pltf. & certain other nephews successively for their lives, with remainders to their first & other sons successively in tail, with remainders over. A deed of resettlement was made in pursuance of this agreement, & thereby the lands were appointed, after pltf.'s death & subject to his life estate, & to the powers thereto annexed, & of the jointure & any other charges upon the estates to which pltf. might be entitled, to the use of pltf.'s son for life, with remainder to his first & other sons successively in tail male, with remainder to pltf.'s nephews successively, & remainder over. Pltf. & his solr. deposed that neither of them intended by the agreement or settlement to displace the term of one thousand five hundred years or the portions of £100,000 thereby secured, except so far as was necessary for the benefit of pltf.'s son & his issue, but it did not appear that any discussion took place on the subject, or that it was mentioned:—*Held*: not a case for reforming the resettlement.—*ELWES v. ELWES* (1861), 3 De G. F. & J. 667; 4 L. T. 593; 7 Jur. N. S. 747; 9 W. R. 820; 45 E. R. 1036, L. J.J.

Annotation:—*Refd.* *Welman v. Welman* (1880), 15 Ch. D. 370.

863. Restraint on anticipation.]—*SYMONDS v. WILKES*, No. 325, *ante*.

864. Life interest to husband—No instruction given by husband for insertion of provision.]—A husband, who was about to enter into partnership as a stockbroker, by a voluntary settlement settled certain property upon his wife for life, with remainder to his children. No life interest was reserved to the settlor. On the death of his wife many years afterwards the husband alleged that he first discovered the omission to give a life interest to himself, & he brought an action to have the settlement rectified to this extent, as being contrary to his intention. He did not allege that he had given express instructions to the solr. who drew the settlement to have such a provision inserted:—*Held*: the husband had not made out a case for rectification.—*RAKE v. HOOPER* (1900), 83 L. T. 669; 17 T. L. R. 118; 45 Sol. Jo. 117.

SUB-SECT. 6.—PROCEDURE.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 56 (1), (b).

865. Suit for declaration of rights to appointed fund—Whether court will order rectification.]—A. B., being desirous of voluntarily settling pro-

perty on the female descendants then in existence of C. D., by deed reciting this desire & that certain persons therein named were the only descendants then in life of C. D., settled a part of the property on the persons so named, & reserved to himself a power of appointing the remaining part of the property amongst such several persons before named, which, in default of appointment, was given to those several persons named; he afterwards discovered that there were other descendants in existence of C. D., who had been omitted, & to remedy the omission, he appointed a part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered, of the amount when received:—*Held*: the appointment was void, & the ct. would not, in a suit to have the rights of the parties to the appointed fund declared, determine whether the case was such as to entitle the parties to have the settlement reformed according to the intention of the settlor.—*LEE v. FERNIE* (1839), 1 Beav. 483; 48 E. R. 1027.

866. Irrelevant allegation in statement of claim.]—In an action by a wife against her husband for a rectification of the marriage settlement, an allegation in the statement of claim that pltf. had refused to live with deft. because of his having committed a criminal assault upon a young girl was ordered to be struck out as being scandalous & irrelevant, & the costs of the application to strike out were ordered to be paid by the wife's next friend in the action.—*COYLE v. CUMING* (1879), 40 L. T. 455; 27 W. R. 529.

867. Notice of judgment—To interested persons not parties.]—*LOVESY v. SMITH*, No. 840, *ante*.

868. Costs charged on settled funds—Costs of trustees acting properly.]—*JAMES v. COUCHMAN*, No. 855, *ante*.

869. On whom onus of proof lies—Person seeking to alter instrument.]—*TUCKER v. BENNETT*, No. 819, *ante*.

870. Action by person claiming under settlement—Though not named in settlement.]—*WEIR v. VAN TROMP* (1900), 16 T. L. R. 531.

Costs.]—*See, generally*, *MISTAKE*, Vol. XXXV., pp. 145, 146, Nos. 444, 449-453.

Evidence.]—*See, generally*, *MISTAKE*, Vol. XXXV., pp. 137-139, 140, 141, 142, Nos. 355-367, 371, 376, 387-395, 399-403.

Practice.]—*See, generally*, *MISTAKE*, Vol. XXXV., pp. 144, 145, Nos. 423-437.

SECT. 2.—VARIATION.

SUB-SECT. 1.—VARIATION OF SETTLEMENTS.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.

871. Children obtaining contingent advantage under settlement—Variation prejudicing issue of marriage.]—Where children under a marriage settlement have obtained a contingent advantage, the ct. will not vary it to the prejudice of the issue after marriage.—*O'KEEFFE v. CALTHORPE* (1739), 1 Atk. 17; 26 E. R. 12, L. C.

Annotations:—*Consd.* *Sperling v. Rochfort* (1803), 8 Ves. 164. *Refd.* *Richards v. Chambers*, *Seaman v. Duill* (1805), 10 Ves. 580.

872. Agreement to vary limitations—Between father & child—Whether avoided on ground of undue influence.]—An agreement between a child & a father to alter the limitations under a settlement, will not be set aside, on pretence of being

PART VI. SECT. 2, SUB-SECT. 1.
r. Jurisdiction to vary—Court having made different orders under unexecuted

settlement.—*Re WALKER* (1835), L. & G. temp. Sugd. 299.—*IR.*
t. When exercisable—On marriage of

settlor's granddaughter.—*Re RIDDOCH, BAKER v. WHITE*, [1925] S. A. S. R. 72.—*AUS.*

drawn in by the father's power & authority.—*TENDRIL v. SMITH* (1740), 2 Atk. 85; 26 E. R. 452, L. C.

Annotations :—*Consd.* *Hoghton v. Hoghton* (1852), 15 Beav. 278. *Refd.* *Judd v. Pratt* (1806), 13 Ves. 168; *White v. Vitty* (1826), 2 Russ. 434.

873. Variation by subsequent settlement—Extent of revocation of former settlement.]—Leaseholds were settled by A. on his son B. absolutely, & a rentcharge & stock for his life, with remainder to his children, A. having reserved to himself power to make a deed poll, made one, revoking the trusts, etc., of the settlement, so far as they affected B., & declared, that all the estates, etc., & benefit given by the settlement to B. should remain to the use of trustees, their heirs, etc., in trust during the joint lives of B. & his wife C., to pay the income to C. for her sole & separate use, & the support of her children by B.; & if B. should die in the lifetime of C., in trust to pay the same to her during her widowhood, for the support of herself & children, with a limitation over in favour of such children, in case of her death or second marriage. C. & several children of the marriage survived B.:—*Held*: the trusts of the second deed were a substitution of those in the first in favour of B., & C. took an estate for life, or during widowhood, in the leaseholds, rentcharge, & stock, the deed poll not being considered merely as a revocation of the life estate of A.—*ANGELL v. DAWSON* (1839), 3 Y. & C. Ex. 308; 8 L. J. Ex. Eq. 50.

874. Jurisdiction to vary—Dissolution of marriage—No issue of marriage—Effect of enactment of Matrimonial Causes Act, 1878 (c. 19).]—An ante-nuptial settlement having been executed a decree *nisi* was afterwards obtained for dissolution of the marriage of the parties, & before the decree was made absolute the above Act was passed, allowing the ct., notwithstanding that there are no children of the marriage, to exercise the powers vested in it by Matrimonial Causes Act, 1859 (c. 61), s. 5:—*Held*: the ct. had jurisdiction to vary the settlement though there was no issue of the marriage.—*ANSDELL v. ANSDELL* (1880), 5 P. D. 138; 49 L. J. P. 57; 28 W. R. 832.

875. — Decree of nullity pronounced in foreign court.]—The power to vary settlements conferred upon the ct. by Matrimonial Causes Act, 1857 (c. 85), s. 45, & 1859 (c. 61), s. 5, can only be exercised where the decree upon which the application to vary the marriage settlement is founded has been pronounced by the ct. Therefore, where a decree of nullity had been pronounced by a colonial ct., & the parties afterwards returned to this country & applied for leave to file a petition here for the variation of their marriage settlement:—*Held*: the ct. had no jurisdiction to entertain such application.—*MOORE v. BULL*, [1891] P. 279; *sub nom.* *MOORE v. MOORE*, 60 L. J. P. 76; *sub nom.* *BULL v. BULL*, 7 T. L. R. 486.

Variation of settlements after decree generally.]—See HUSBAND & WIFE, Vol. XXVII., pp. 517–533, Nos. 5576–5778.

Variation of separation deed.]—See HUSBAND & WIFE, Vol. XXVII., pp. 246, 247, Nos. 2174–2180.

Conflict of laws.]—See CONFLICT OF LAWS, Vol. XI., pp. 440, 441, Nos. 1009–1012.

SUB-SECT. 2.—VARIATION OF ARTICLES.

876. Variation before marriage—Whether new agreement presumed—Ante-nuptial settlement.]—

(1) Where arts. are entered into before marriage, & settlement made after marriage different from those arts., as if by arts. the estate was to be in strict settlement, & by the settlement the husband is made tenant in tail, whereby he hath it in his power to bar the issue, this ct. will set up the arts. against the settlement. (2) But where both arts. & settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the arts. will be taken as a new agreement between them, & shall control the arts.—*LEGG v. GOLDWIRE* (1736), *Cas. temp.* Talb. 20; 25 E. R. 637, L. C.

Annotation :—*Generally, Consd.* *Bold v. Hutchinson* (1855), 5 De G. & M. & G. 558.

877. — — — — —.]—*Re GUNDRY, MILLS v. MILLS*, No. 429, *ante*.

878. — Contract approved by court.]—*Semble*: it was not incompetent to the parties before the marriage to vary *bonâ fide* the terms of the contract, notwithstanding it had been approved by the ct.—*COOK v. FRYER* (1842), 1 Harc. 498; 11 L. J. Ch. 284; 6 Jur. 479; 66 E. R. 1128.

Annotation :—*Refd.* *Hobson v. Ferraby* (1846), 2 Coll. 412.

879. — In absence of husband's legal adviser.]—An arrangement for a marriage settlement having been effected, with the assistance of the solrs. of both parties, an alteration was made on the eve of the marriage, in the absence of the husband's solr.; the ct., under the circumstances, considered the original arrangement binding, & directed that it should be carried into effect accordingly.—*CATON v. RIDEOUT* (1816), 8 L. T. O. S. 68; 10 Jur. 896.

880. Variation after marriage—Variation refused—Though reasonable.]—*ANON.* (1678), *Freem. Ch.* 38; 22 E. R. 1044, L. C.

881. — Conformance with proved intention of parties.]—*BEDFORD (DUKE) v. ABERCORN (MARQUESS)*, No. 319, *ante*.

882. — Separation of husband & wife—Due to cruelty of husband—Life interest to wife during separation.]—By arts. before marriage £6,000, part of the portion, is agreed to be invested in land, & settled to the husband for life, then to his wife for life, remainder as a provision for younger children, remainder to the husband in fee. The husband having by his cruelty forced his wife to separate from him; the ct. decreed the interest of the £6,000 to be paid her for her separate maintenance till cohabitation.—*OXENDEN v. OXENDEN* (1705), 2 Vern. 493; 1 Eq. Cas. Abr. 67; *Gilb. Ch.* 1; 23 E. R. 916; *sub nom.* *ROCKINGHAM (LORD) v. OXENDON*, *Proc. Ch.* 239.

Annotations :—*Refd.* *Nicholls v. Danvers* (1711), 2 Vern. 671; *Duncan v. Duncan* (1815), 19 Ves. 391. *Mentd.* *Jones v. Waite* (1839), 5 Bing. N. C. 311.

883. Power to vary reserved—What variations authorised—Not provisions for wife & issue of second marriage.]—*BEDFORD (DUKE) v. ABERCORN (MARQUESS)*, No. 319, *ante*.

Part VII.—Revocation and Avoidance of Settlements.

SECT. 1.—REVOCATION.

SUB-SECT. 1.—VOLUNTARY SETTLEMENTS.

884. Whether revocable.]—A single woman, not immediately contemplating marriage, transfers a sum of stock, to which she was absolutely entitled, to trustees, upon trust to pay the dividends to her until she should marry; & after her marriage, upon trust to pay the dividends to her separate use for her life; & after her decease to pay the same to her husband for his life, or until his bkpcy., & after his decease or bkpcy., in trust for the children of the settlor; & if no child, for such person or persons as she should by deed or will appoint: & in default of appointment, upon trust for her next of kin. The settlement is irrevocable. In a bill filed by the settlor for the purpose of setting aside the settlement, the mtgee. of her interest under the settlement joined as a co-pltf. He can obtain no relief in such a suit.—*BILL v. CURETON* (1835), 2 My. & K. 503; 4 L. J. Ch. 98; 39 E. R. 1036.

*Annotations:—***Refd.** *Meek v. Kettlewell* (1842), 1 Hare, 464; *Henriques v. Bensusan*, Bank of England's Claim (1872), 20 W. R. 350; *Essey v. Coward* (1884), 26 Ch. D. 191. **Mentd.** *Davies v. Quarterman* (1841), 4 Y. & C. Ex. 257; *Hughes v. Stubbs* (1842), 1 Hare, 476; *Anderson v. Wallis* (1843), 7 Jur. 119; *Malcolm v. Scott* (1843), 3 Hare, 39; *Wilding v. Richards* (1845), 1 Coll. 655; *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299.

885. — By subsequent will.]—Voluntary settlement without power of revocation shall bind the party & shall not be defeated by a subsequent will.—*VILLERS v. BEAUMONT* (1682), 1 Vern. 100; 1 Eq. Cas. Abr. 23; 23 E. R. 342, L. C.

*Annotation:—***Consd.** *Bill v. Cureton* (1835), 2 My. & K. 503.

886. — — — — —.]—After a voluntary settlement a man cannot devise the same estate, though for payment of his debts. A settlement, though voluntary, is not revocable.—*BALE v. NEWTON* (1687), 1 Vern. 464; 1 Eq. Cas. Abr. 23; 23 E. R. 589.

887. — — — — — Though retained by settlor.]—A voluntary deed kept by a person & never cancelled will not be set aside by a subsequent will.—*BOUGHTON v. BOUGHTON* (1739), 1 Atk. 625; 9 Mod. Rep. 212; 26 E. R. 393, L. C.

*Annotations:—***Apld.** *Roberts v. Williams* (1841), 11 L. J. Ch. 65. **Refd.** *Worrall v. Jacobs* (1817), 3 Mer. 256; *Cecil v. Butcher* (1821), 2 Jac. & W. 565; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671; *Patch v. Shore* (1862), 2 Drew. & Sm. 589; *Re Way's Trust* (1864), 5 New Rep. 67.

888. — — — — — & subsequently destroyed.]—A voluntary deed in favour of younger children though retained in the possession of the grantor & afterwards destroyed by him established against legatees.—*SEAR v. ASHWELL* (1739), 3 Swan. 411, n.; 36 E. R. 928, L. C.

*Annotation:—***Apld.** *Roberts v. Williams* (1841), 11 L. J. Ch. 65.

889. — — — — —.]—A voluntary deed executed in favour of children, without a power of revocation, is not revoked by a subsequent will.—*BOLTON v. BOLTON* (1739), 3 Swan. 414, n.; 36 E. R. 930, L. C.

890. — — — — —.]—S. B., a solr., made three settlements. Two of them contained a power of revocation, & the third was a declaration of trust by S. B. of certain leaseholds belonging

to him in right of his wife, & of which he had renewed the lease in his own name. S. B. destroyed each of the settlements containing a power of revocation, & although there was no evidence to show that the declaration of trust had been destroyed, it could not be found at the death of S. B. It was kept in a box with other papers at S. B.'s bankers; but search for it was made by the exors. of S. B. & others without finding it. Among the papers belonging to S. B. was found his private ledger, which contained entries referring to the declaration of trust. The entries stated in effect that S. B. had settled the leaseholds in question on his wife & himself during their joint lives, with remainder to the survivor for life, & after the death of the survivor, as the wife should appoint, among the children, & in default of appointment among the children, & also that the wife had died without appointing, & consequently all the children would take the property in equal shares. There were five children, two sons & three daughters.

By his will S. B. gave legacies of £8,000 to each of his daughters, payable five years after his death, & interest in the meantime to be paid on each legacy at the rate of 3 per cent. half-yearly; & after giving & devising all his real & leasehold estates to his elder son, & bequeathing the residue of his personal estate between his two sons as therein mentioned, testator revoked, set aside, & avoided all other wills, settlements, & agreements for settlements which he had at any time theretofore made & executed.

The questions were, whether the declaration of trust contained a power of revocation, & if so, whether testator had by his will exercised that power so as to revoke the declaration of trust; & if the ct. should be of opinion that the declaration of trust did not contain a power of revocation, then whether the will did not show an intention on testator's part to revoke the declaration of trust, & thereby cause a case of election to be raised against the younger children; & also, what rate of interest was payable on the daughters' legacies:—**Held:** the declaration of trust as to the leaseholds was not destroyed by testator, but it had been lost & did not contain a power of revocation.—*Re BOOKER, BOOKER v. BOOKER* (1886), 54 L. T. 239; 34 W. R. 346.

891. — — — — — Intention to reserve power of revocation.]—A. made an irrevocable voluntary settlement of his estate in favour, amongst others, of a relative who acted as his solr. The ct. considered that A. intended to reserve a power of revocation, but that the deed was in other respects unobjectionable. A. made his will, prepared by the same solr., making a general devise, but not revoking the settlement. The ct. then held that it was the duty of the solr., when he prepared the will, specifically to have asked testator whether he intended to revoke the deed, & not having done so, & it appearing to have been the intention of testator that the estate should pass to his devisees, the ct. decided, that although the deed would have been operative if A. had died intestate, yet that in the events which had happened, & as against all persons claiming under the settlement, the estate was subject to the trusts of the general

PART VII. SECT. 1, SUB-SECT. 1.

a. *Whether revocable—By subsequent will.]*—*CAMPBELL'S TRUSTEES v. CAMPBELL* (1862), 24 Dunl. (Ct. of Sess.) 1321; 34 Sc. Jur. 676.—**SCOT.**

NN 2

Sect. 1.—Revocation: Sub-sects. 2 & 3, A. (a), (b)

with his approbation; a few days after B. by a stratagem induced her to marry him the day after she first thought of it; B. had no notice of the settlement. The settlement was established; & a deed of revocation, obtained by duress, set aside.—*STRATHMORE (COUNTESS) v. BOWES* (1789), 1 Ves. 22; 2 Bro. C. C. 345; 2 Cox, Eq. Cas. 28; 30 E. R. 211, L. C.; *affd. sub nom. BOWES v. BOWES* (1797), 6 Bro. Parl. Cas. 427, H. L.

Annotations.—*Consd. Goddard v. Snow* (1826), 1 Russ. 485; *England v. Downs* (1840), 2 Beav. 522; *Downes v. Jennings* (1863), 32 Beav. 290. *Refd. Ball v. Montgomery* (1793), 2 Ves. 191; *St. George v. Wake* (1833), *Coop. temp. Brough*, 129; *Tullett v. Armstrong* (1839), 4 My. & Cr. 390; *Doe d. Richards v. Lewis, Richards v. Lewis* (1852), 11 C. B. 1035; *McKeogh v. McKeogh* (1870), 18 W. R. 861. *Mentd. Peel v. —* (1809), 16 Ves. 157.

899. Settlement by wife in anticipation of marriage—Ante-nuptial revocation deed by husband & wife.—Upon a marriage contemplated between A. & B., the lady's fortune vested in C. her former guardian, was, on Mar. 14, after treaty & agreement with C., vested in trustees for the lady, "her exors. & administrators & assigns" until the marriage, & afterwards for her, her husband & children. On Mar. 27, & before the marriage, the husband & wife, without the intervention of C., revoked the settlement, & married the next day. A bill by the husband, claiming the fund unaffected by the trusts of the settlement, was dismissed with costs, the ct. holding that a revocation, under such circumstances, could not be maintained.—*PAGE v. HORNE* (1848), 11 Beav. 227; 17 L. J. Ch. 200; 11 L. T. O. S. 121; 12 Jur. 340;

50 E. R. 804; *previous proceedings* (1846), 9 Beav. 570.

Annotations.—*Consd. Bond v. Walford* (1886), 32 Ch. D. 238. *Refd. Re Gundry, Mills v. Mills* (1898), 79 L. T. 438.

900. — Marriage not celebrated.—A *feme sole*, in contemplation of a marriage with T., vested personal property in trustees, upon trust for the sole benefit of herself, her exors., etc., until her marriage, if any, with subsequent trusts for her issue. She never married T., but before her marriage with M. the trustees handed over to her a part of the fund:—*Held*: the settlement was irrevocable; she had no power of absolute disposition until marriage; the trusts were to arise on any marriage; & the trustees had committed a breach of trust for which they were answerable.—*M'DONNELL v. HESILRIGE* (1852), 16 Beav. 346; 22 L. J. Ch. 342; 20 L. T. O. S. 164; 16 Jur. 1148; 1 W. R. 71; 51 E. R. 812.

Marriage void through mistake—Settlement revoked by further settlement on remarriage.—See *MISTAKE*, Vol. XXXV., p. 102, No. 91.

SUB-SECT. 3.—WHERE POWER TO REVOKE RESERVED.

A. Exercise of Power.

(a) Conditions of Exercise of Power Prescribed.

901. Conditions must be strictly observed.—*SCROPE'S CASE*, No. 913, *post*.

902. — Power to revoke by grant of fee simple or fee tail—Grant of estate for life.—*ROBSART v. TURTON* (1638), 1 Rep. Ch. 112; 21 E. R. 523.

the situation of the wife was made worse than it was under an ante-nuptial contract, while certain beneficial provisions were introduced for the children of the marriage:—*Held*: on the death of the husband, to be revocable by the wife as a *donatio inter virum et uxorem*.—*THOMSON v. THOMSON* (1838), 16 Sh. (Ct. of Sess.) 641; 641; 13 Fac. Coll. 521.—*SCOT*.

n. — — — — ——*Held*: a mutual settlement executed by a husband & wife was ineffectual in so far as it derogated from the wife's rights under an ante-nuptial contract of marriage & *quoad ultra* was revocable by the wife after her husband's death as a *donatio inter virum et uxorem* the wife not having received any benefit therefrom.—*RAE v. NIELSON* (1875), 2 L. (Ct. of Sess.) 676; 12 Sc. L. R. 477.—*SCOT*.

o. — — — — ——*GIBSON'S TRUSTEES v. GIBSON* (1877), 4 R. (Ct. of Sess.) 867.—*SCOT*.

p. — — — — ——*Post-nuptial contract.*—*GENTLES v. AITKEN* (1826), 4 Sh. (Ct. of Sess.) 749.—*SCOT*.

q. — — — — ——*Trust declared to be irrevocable.*—A trust, declared to be irrevocable, having been constituted by a lady in her ante-nuptial contract of marriage for behoof of herself, her husband, & the heirs of her body:—*Held*: apart from the interest of the heirs of her body, the trust was not revocable during the marriage by her & her husband.—*PRINGLE v. ANDERSON* (1868), 8 Macph. (Ct. of Sess.) 982; 40 Sc. Jur. 563.—*SCOT*.

r. — — — — ——*Necessity for consent of spouses.*—*FERGUSON'S CURATOR BONIS v. FERGUSON'S TRUSTEES* (1893), 20 R. (Ct. of Sess. 835; 30 Sc. L. R. 739; 1 S. L. T. 88.—*SCOT*.

t. — — — — ——*ELLIOT'S TRUSTEES v. ELLIOT* (1894), 21 R. (Ct. of Sess.) 975; 31 Sc. L. R. 850; 2 S. L. T. 164.—*SCOT*.

a. — — — — ——*Action by spouses against*

trustees to have wife's deed declared revocable.—*LYON v. LYON'S TRUSTEES* (1901), 3 F. (Ct. of Sess.) 653; 38 Sc. L. R. 568; 8 S. L. T. 489.—*SCOT*.

b. — — — — ——*Brothers not within consideration of marriage settlement.*—*BARCLAY'S TRUSTEES v. WATSON* (1903), 5 F. (Ct. of Sess.) 926; 40 Sc. L. R. 693; 11 S. L. T. 169.—*SCOT*.

c. — — — — ——*Mutual settlement—Powers to be exercised by granters collectively.*—*CRAIG'S TRUSTEES v. MACKIE* (1870), 8 Macph. (Ct. of Sess.) 898; 42 Sc. Jur. 597.—*SCOT*.

d. — — — — ——By mutual disposition & settlement a husband & wife gave & disposed to their children their whole estate presently belonging or which should belong to them or either of them at the time of their death, but, "always with & under the burden of our lawful debts & deeds, payment of our funeral expenses, & of such gift or legacies as we, or either of us, may think proper to leave by any deed to be executed by us or either of us at any time of our lives." Power was reserved to the spouses, with mutual advice & consent to revoke or alter the mutual disposition & settlement:—*Held*: upon a consideration of the terms of the deed, & especially having regard to the clause above quoted, the settlement was revocable by the survivor of the spouses so far as his own estate was concerned.—*MAIN v. LAMB* (1880), 7 R. (Ct. of Sess.) 688.—*SCOT*.

e. — — — — ——By mutual settlement each of two sisters conveyed her estates, heritable & movable to the other in herent in case she should survive & to a nephew in fee reserving "full power to us at any time during our joint lives to alter, innovate or revoke these presents in whole or in part as we may see proper"—*Held*: the mutual deed was simply testamentary & could be altered by the

surviving sister in so far as regarded her own estate.—*TRAQUAIR v. MARTIN* (1872), 11 Macph. (Ct. of Sess.) 22; 45 Sc. Jur. 28.—*SCOT*.

f. — — — — ——*KAY'S TRUSTEE v. STALKER* (1892), 19 R. (Ct. of Sess.) 1071.—*SCOT*.

g. — — — — ——*ROBERTSON'S TRUSTEES v. BOND'S TRUSTEES* (1900), 2 F. (Ct. of Sess.) 1097; 37 Sc. L. R. 833; 8 S. L. T. 129.—*SCOT*.

h. — — — — ——*Power of husband to revoke destination of settled property.*—*CORRANCE'S TRUSTEES v. GLEN* (1903), 5 F. (Ct. of Sess.) 777; 40 Sc. L. R. 526; 10 S. L. T. 744.—*SCOT*.

k. — — — — ——*Power of survivor to revoke mutual settlement by spouses containing separate dispositions to same trustees.*—*CRAIG'S TRUSTEES v. CRAIG'S TRUSTEES*, (1927) S. C. 367.—*SCOT*.

l. — — — — ——*Jus quæsitum conferred on children when coming into existence.*—In a special case presented by the trustees, by the widow, & by the children of the marriage:—*Held*: a *jus quæsitum* had been conferred on the children of the marriage when they came into existence, & that the deed was irrevocable.—*MIDDLETON'S TRUSTEES v. MIDDLETON*, (1909) S. C. 67; 46 Sc. L. R. 48; 16 S. L. T. 531.—*SCOT*.

PART VII. SECT. 1, SUB-SECT. 3.—A. (a).

m. Conditions must be strictly observed—Husband's right to revoke depending on improvident circumstances.—*COLTART v. CORIE* (1853), 15 Dunl. (Ct. of Sess.) 606; 25 Sc. Jur. 325; 2 Stuart, 318.—*SCOT*.

na. — — — — ——*Each beneficiary having right to revoke her own gift & not gift of others.*—*LANG'S TRUSTEES v. LANG* (1885), 12 R. (Ct. of Sess.) 1265; 22 Sc. L. R. 866.—*SCOT*.

903. — Revocable in presence of specified number of witnesses—Will executed before specified number—One witness not subscribing.]—SALE v. FREELAND (1680), 2 Rep. Ch. 212; 21 E. R. 660.

904. — Death of settlor after instructions to revoke—But before execution.]—PIGGOT v. PENRICE (1717), Gilb. Ch. 136; 1 Com. 250; Prec. Ch. 471; 25 E. R. 96, L. C.

Annotations:—Mentd. Thomas v. Phelps (1828), 6 L. J. O. S. Ch. 110; Doe d. Hickman v. Haslewood (1837), 6 Ad. & El. 167; Hamilton v. Hodson (1847), 6 Moo. P. C. C. 76; Sayer v. Sayer, Innes v. Sayer (1849), 7 Hare, 377.

905. — & with consent in writing of trustees—Consent of one trustee given by general power of attorney.]—Where in a marriage settlement made by tenant in tail, he settled the same to himself for life & to the children of the marriage in strict settlement; with a proviso that it should be lawful for him by deed or instrument in writing attested by three witnesses & to be enrolled with the consent of writing of certain trustees, to revoke the old & declare new uses:—Held: a deed of revocation executed by him & all the trustees in person except one, & the consent of that one being given by means of a general power of attorney before made by him to the settlor to consent to any such deed he might think proper to make, by virtue of which the settlor executed the deed for & in the name of such trustee, was bad, though properly attested & enrolled, & another deed of revocation properly executed & assented to, but not enrolled till after the settlor's death, was also void; for everything required to be done in the execution of such a power must be strictly complied with, & must be completed in the lifetime of the person by whom it is to be executed; & the defect of the one deed could not be supplied by the other.—HAWKINS v. KEMP (1803), 3 East, 410; 102 E. R. 655.

Annotations:—Refd. Wright v. Wakeford (1812), 4 Taunt. 213. *Mentd.* R. v. Austrey (1817), 6 M. & S. 319; Halliwell v. Morrell (1840), 1 Scott, N. R. 309; Laird v. Pym (1840), H. & W. 11; Cooke v. Crawford (1812), 13 Sim. 91.

906. — Power to revoke by settlement of lands of equal or greater value—Settlement of lands of less value.]—In 1714, B. conveys lands at C. to himself for life, remainder to S. for life, remainder to his first & other sons, subject to a power of revocation by B. if he settled lands in Yorkshire of as great or greater value to the same uses: by his will he devises the lands at C. to pltf. for her life; & by subsequent deeds, for the purpose of revoking the uses as to the lands at C., conveys lands in Yorkshire, but which are of less value than the lands at C., to the uses of the deed of 1714. R., who was the eldest son of S., having refused to take the estate in Yorkshire, being of less value than the estate at C.:—Held: the power of revocation was not well executed by B. & S. was entitled to the estate at C., but he was a trustee of the estate in Yorkshire not for pltf., the devisee of the C. estate, who was a volunteer, but for the heir-at-law of B.—BURGOYNE v. BENSON (1738), West temp. Hard. 340; 25 E. R. 970, L. C.

Annotation:—Mentd. Coventry v. Coventry (1742), 2 Atk. 366.

907. — Enrolment of deed of revocation—Death of settlor before enrolment.]—HAWKINS v. KEMP, No. 905, ante.

908. Power to revoke by deed or will with consent of trustees—Whether consent necessary to will.]—Under a voluntary settlement made in 1881, a fund was settled upon trust for testatrix for life with remainder in the events which happened, in trust for other persons therein named. The settlement reserved a power for testatrix with

the consent of the trustees of the settlement by deed or will expressly referring to the power to revoke the trusts of the settlement, & to declare other trusts thereof for her own benefit. By deeds in 1906 & 1909 testatrix, with the consent of the trustees exercised her power of revoking the trusts as to two sums, parts of the settled fund, & appointed those sums in her own favour. She died in 1918, having made a will in 1914 without the consent of the trustees by which she gave, devised, bequeathed, & appointed all her residuary estate, both real & personal, to trustees upon trust for sale & conversion & declared trusts of the proceeds thereof. She had no other power of appointment:—Held: on the true construction of the settlement the consent of the trustees was not required for the exercise of an appointment by will; the words of the will were sufficient to effectuate the double process of revocation & new appointment; they contained a sufficient express reference to the power within the language of the settlement & the remaining balance of the settled fund therefore passed under the appointment contained in the will.—*Re BARKER'S SETTLEMENT, KNOCKER v. VERNON JONES*, [1920] 1 Ch. 527; 80 L. J. Ch. 209; 123 L. T. 41.

(b) By Will.

909. Validity of—Power to be exercised at any time in settlor's life time.]—KIBBET v. LEE (1619), Hob. 312; 80 E. R. 455.

Annotations:—Consd. Leicester's Case (1675), 1 Vent. 278; Bath & Mountague's Case (1693), 3 Cas. in Ch. 55; Thomlinson v. Dighton (1712), 10 Mod. Rep. 71. *Refd.* Orby v. Mohun (1766), Freem. Ch. 291; Bagot v. Oughton (1726), Fortes. Rep. 332; Fitzgerald v. Fauconberge (1729), Fitz-G. 207; Marlborough v. Godolphin (1750), 2 Ves. Sen. 61; Rigden v. Vallier (1751), 3 Atk. 731; Darlington v. Pulteney (1775), 1 Cowp. 260; Whelan v. Palmer (1888), 39 Ch. D. 648.

910. — J.—Qu.: whether on a power given to L. E. to revoke uses "from time to time during his natural life," such revocation & re-appointment "to be signed, sealed & delivered in the presence of & attested by two or more credible witnesses," can be executed by will.—EDWARDS v. EDWARDS (1818), 3 Madd. 197; 56 E. R. 482.

MARLBOROUGH (DUCHESS)

MARLBOROUGH (DUKE) (1740), Barn. Ch. 69; 27 E. R. 558, L. C.

912. — J.—ROSCOMMON (COUNTESS) v. FOWKE, No. 914, post.

(c) Implied Revocation.

913. Subsequent settlement without reference to power.]—(1) S., in a covenant to stand seised, reserved to himself a power of revocation by writing indented under his hand & seal, subscribed in the presence of three witnesses, & of appointing new uses, etc., by the same or any other writing signed, etc., as above; afterwards by indenture subscribed in the presence of three witnesses, he covenanted to stand seised of the same lands to other uses. Resolved, although there is no express declaration of any intention to revoke the former uses, the conveyance shall enure first as a revocation of the former uses, & secondly as a declaration of new uses.

(2) All circumstances prescribed by the proviso must be observed in the second indenture.—SCROPE'S CASE (1612), 10 Co. Rep. 143 b; 77 E. R. 1143.

Annotations:—As to (1) Consd. Denn d. Nowell v. Roake (1825), 10 Moore, C. P. 113. *Refd.* Wigston v. Garrett (1675), Freem. K. B. 407; Albermarle v. Bath (1693), Freem. Ch. 193; Fitzgerald v. Fauconberge (1729), Fitz-G. 207; Trevel v. Angus (1737), 2 Com. 588. *As to (2) Refd.* Bagot v. Oughton (1726), Fortes. Rep. 332.

**Sect. 1.—Revocation: Sub-sect. 3, A. (c) & (d),
B. Sect. 2: Sub-sect. 1.]**

Generally, Rehd. Orby v. Mohun (1706), *Freem. Ch.* 291; *Cunningham v. Anstruther* (1872), *L. R. 2 Sc. & Div.* 223.

914. —.]—A power of revocation is reserved to A. by any writing under his hand & seal, & of appointing new uses, by the same or any other deed. A. by his will, without taking any notice of the power, devises the estate to B.:—*Held*: this was a good execution of the power.—*ROSCOMMON (COUNTS) v. FOWKE* (1745), 6 Bro. Parl. Cas. 158; 2 E. R. 998, H. L.

Annotations:—Consd. Darlington v. Pulteney (1775), 1 Comp. 260; *Edwards v. Edwards* (1818), 3 Madd. 197. *Rehd. Moss v. Harter* (1854), 24 L. T. O. S. 19.

915. —.]—Property was settled by A. with power for him to revoke the settlement by deed; A. by a deed which did not profess to execute the power, conveyed the property to his nephews beneficially:—*Held*: the deed operated as a revocation.—*COWLISHAW v. HARDY* (1857), 25 Beav. 169; 53 E. R. 601.

916. By mortgage—Revocation pro tanto.]—A mtge. after a voluntary settlement with power of revocation, & a will in confirmation of it, is a revocation *pro tanto* only.—*PERKINS v. WALKER* (1682), 1 Vern. 97; 23 E. R. 339, L. C.

Annotation:—Distd. Fitzgerald v. Fauconberge (1729), *Fitz-G.* 207.

917. —.]—Mtge. in fee is a revocation *pro tanto* only of a settlement with power of revocation.—*THORNE v. THORNE* (1683), 1 Vern. 141, 182; 23 E. R. 373, 402.

Annotations:—Distd. Fitzgerald v. Fauconberge (1731), *Fitz-G.* 207. *Rehd. Lincoln's Case* (1695), *Freem. Ch.* 202; *Banks v. Sutton* (1732), 2 P. Wms. 700; *Doe d. Lewis v. Davies* (1837), 2 M. & W. 503.

918. By conveyance to trustees—To inconsistent uses.]—Conveyance to trustees to inconsistent uses & that the trustees shall reconvey the residue after such uses satisfied is a revocation of all the old uses & not *pro tanto* only.—*FITZGERALD v. FAUCONBERGE (LORD)* (1730), *Fitz-G.* 207; 94 E. R. 722; *sub nom. FAUCONBERGE (LORD) v. FITZGERALD*, 6 Bro. Parl. Cas. 295, H. L.

Annotations:—Consd. Heather v. O'Neill (1858), 2 De G. & J. 399. *Rehd. Warrick v. Warrick* (1745), 3 Atk. 291; *Hart v. Middlehurst* (1746), 3 Atk. 371; *Moody v. Matthews* (1802), 7 Ves. 174; *Barnett v. Wilson* (1843), 2 Y. & C. Ch. Cas. 407. *Mentd. Dresser v. Norwood* (1863), 14 C. B. N. S. 574.

(d) Other Cases.

919. Revocation & new appointment by same deed.]—Where there is a power of revocation by any deed or writing, & of appointing new uses by any such deed or writing; the revocation & appointing new uses may be by the same deed.—*FITZWILLIAM'S CASE* (1604), 6 Co. Rep. 32 a; *Moore, K. B.* 681; 77 E. R. 300.

Annotations:—Rehd. Kibbet v. Lee (1619), *Hob.* 312; *Dixon v. Harrison* (1689), *Vaugh.* 36; *Evelyn v. Evelyn* (1731), 2 P. Wms. 659. *Mentd. Shecomb v. Hawkins* (1613), *Ch. Jac.* 318; *Mun v. Bayliss* (1673), *Freem. K. B.* 340; *Re Hawkins, Ex p. Official Receiver*, [1892] 1 Q. B. 890.

920. Defective execution of new settlement—Aided in equity.]—*THIN v. THIN* (1650), 1 Rep. Ch. 162; 21 E. R. 538.

921. —.]—A. tenant for life, remainder to his first & other sons, etc. Remainder to B. & the heirs male of his body, with power to A. to revoke the uses to B. A. by deed omitting the words "of his body" revokes the uses to B. & appoints the like uses to him, also omitting the

words "of his body," subject to a charge, etc. This is a good revocation.—*GILMORE v. HARRIS* (1693), 3 Lev. 213; *Carth.* 292; *Skin.* 324; 83 E. R. 656.

922. —.]—A settlement was made, with power of revocation by deed sealed in the presence of two witnesses, & tender of a guinea to deft.; the proof was, that the party who had this power being in a passion with deft., high words passed between them, & she told him she would undo the settlement, & in her anger threw a guinea upon the ground.

This shall not amount to a revocation in equity, but if it had been proved that a guinea had been deliberately tendered, & the party had at the same time declared, that she did it with an intent to revoke the settlement, although the deed had never been sealed; or if the deed had been sealed to revoke it, & no guinea tendered; this ct. would have supplied the defect of one particular circumstance, where it appeared that the party did deliberately & advisedly intend the thing; but what was said in a passion the ct. will not regard (*per CUR.*).—*ARUNDEL v. PHILPOTT* (1688), *Freem. Ch.* 102; 2 Vern. 69; cited in 3 Cas. in Ch. p. 70; 22 E. R. 1085.

Annotations:—Consd. Bath & Mountague's Case (1693), 3 Cas. in Ch. 55. *Rehd. Jones v. Dale* (1728), 1 Barn. K. B. 131.

923. Power reserved to heir—Executed by married infant.]—Power to revoke the uses of a settlement reserved to the settlor "or any of the heirs of his body," well executed by the heir of his body, being a *feme covert* & an infant; because it is for her benefit, & consistent with the intention of the settlement.—*GRANGE v. TIVING* (1665), O. Bridg. 107; 124 E. R. 494.

Annotations:—Rehd. Evans v. Evans (1853), 1 Drew. 654; *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch. D. 228. *Mentd. King v. Bellord* (1863), 32 L. J. Ch. 646.

924. Power reserved to wife—In absence of issue—Exercised on death of issue.]—Proviso in a settlement, if the wife survive her husband, they not having issue between them, then she may revoke the settlement. Husband dies leaving a son, who dies in the life of his mother. She may revoke the settlement.—*HOLT v. BURLEY* (1710), 2 Vern. 651; *Prec. Ch.* 293; 23 E. R. 1024, L. C.

Annotations:—Distd. Doe v. Denny (1756), 1 Keny. 280. *Rehd. Roo d. Buxton v. Dunt* (1767), 2 Wils. 336; *Hanbury v. Bateman*, [1920] 1 Ch. 313.

925. Power reserved to tenant for life—Exercise in own favour to exclusion of others entitled under settlement.]—A voluntary settlement in favour of several persons contained a power authorising the tenant for life, a volunteer, to revoke the trusts of the property & again resettle the same upon such trusts as to her should seem meet:—*Held*: this general power could not be controlled, & an appointment of the property to herself absolutely, to the exclusion of the other persons entitled under the settlement, was a good execution of the power.—*MEADE KING v. WARREN* (1863), 32 Beav. 111; 55 E. R. 44.

926. Power only to revoke—Whether power to resettle implied.]—*ANON.* (1674), 1 Cas. in Ch. 241; 22 E. R. 781.

927. —.]—Where the power is only to revoke no new uses can be declared.—*ANON.* (1724), 1 Stra. 584; 93 E. R. 715.

928. Settlement of term to raise portions—Power reserved to revoke trusts, powers & pro-

**PART VII. SECT. 1, SUB-SECT. 3.—
A. (d).**

o. Whether revocable—Where infant beneficiary.]—*GOLAM YASSIN v. BENGAL*

OFFICIAL TRUSTEE (1882), 1 L. R. 8 *Calc.* 887.—*IND.*

p. — No power in settlement—

Creditors not party to settlement.]—*BROWNE v. CAVENDISH* (1844), 7 L. Eq. R. 369; 1 Jo. & Lat. 606.—*IR.*

visions—Not extended to revocation of term.]—*VYVYAN v. VYVYAN*, No. 1352, *post*.

929. Power to revoke & limit new uses—New limitations defeating prior vested interests.]—Where copyholder in fee surrendered to the uses of a prior settlement, which contained a power to revoke the uses therein declared, & limit new ones:—*Held*: uses limited in execution of this power were good, although they had the effect of defeating prior vested estates.—*BODDINGTON v. ABERNETHY* (1826), 5 B. & C. 776; 8 Dow. & Ry. K. B. 626; 4 L. J. O. S. K. B. 181; 108 E. R. 289.

Annotations:—*Reid*. *It. v. Oundle* (1834), 3 L. J. K. B. 117; *Glass v. Richardson* (1852), 9 Hare, 698.

B. Extinguishment of Power.

930. By conveyance of settlor's interest.]—*BIRD v. CHRISTOPHER* (1653), Sty. 389; 82 E. R. 802.

Annotation:—*Reid*. *West v. Berney* (1819), 1 Russ. & M. 431.

931. —.]—*CLERK v. PYWELL & PHILIPS* (1669), 2 Keb. 555; 1 Saund. 319; 84 E. R. 348; *sub nom.* *CLERKE v. ROWELL*, 1 Mod. Rep. 10; *sub nom.* *CLARKE v. PHILIPS*, 1 Vent. 42.

Annotations:—*Reid*. *Doe d. Jones v. Williams* (1833), 2 Nev. & M. K. B. 602; *Doe d. Blight v. Pett* (1840), 11 Ad. & El. 842.

932. —.]—*HERRING v. BROWN* (1688), Carth. 22; Comb. 11; 90 E. R. 618, Ex. Ch.

Annotation:—*Fold*. *Tyrrell v. Marsh* (1825), 3 Bing. 31.

933. —.]—An estate being conveyed by a marriage settlement to trustees, to the use of the settlor for life, with remainders over, & with a power to the settlor, with the consent of the trustees, to revoke all the uses in the settlement, & the settlor having granted an estate for his own life, in the settled estate, a revocation subsequent thereto, of all the uses, by him, with the consent of the trustees, shall not affect the estate granted for his life.—*GOODRIGHT d. HARE v. CATOR* (1780), 2 Doug. K. B. 477; 99 E. R. 304.

Annotations:—*Distd.* *Bringloe v. Goodson* (1838), 1 Arn. 322. *Mentd.* *Doe d. Harris v. Masters* (1824), 2 B. & C. 490; *Doe d. Phillips v. Rollings* (1817), 4 C. B. 188.

934. —.]—Under the P. settlement the P. estates stood limited to B. for life, remainder to his first & other sons successively in tail male, remainder to P. for life, remainder to his first & other sons successively in tail male, with remainders over. During the life of B., P. executed a marriage settlement which provided that in case P. should become entitled to the actual possession or the actual receipt of the rents & profits of the P. estates under the limitations of the P. settlement it should be lawful for him to revoke certain trusts declared by his marriage settlement. P. subsequently assigned his life interest in the P. estates to B. On the death of B. without issue his exors. & trustees went into possession of the P. estates as assignees of the life estate of P. After the death of B., P. by a deed poll purported to exercise his power of revoking the trusts of his marriage settlement:—*Held*: notwithstanding the assignment by P., of his life estate to B., P. on the death of B. became entitled to "the actual possession" of the P. estates "under the limitations of" the P. settlement, & his power of revocation had conse-

quently arisen & was effectually exercised.—*Re PETRE'S SETTLEMENT TRUSTS*, *LEIGH v. PETRE*, [1910] 1 Ch. 290; 79 L. J. Ch. 145; 101 L. T. 847; 54 Sol. Jo. 199.

Annotation:—*Reid*. *Re Trevanion*, *Trevanion v. Lennox*, [1910] 2 Ch. 538.

935. —.]—*Lease for years.]—**YELLAND v. FICLIS* (1604), Moore, K. B. 788; 72 E. R. 906.

936. —.]—*CLERK v. PYWELL & PHILIPS* (1669), 2 Keb. 555; 1 Saund. 319; 84 E. R. 348; *sub nom.* *CLERKE v. ROWELL*, 1 Mod. Rep. 10; *sub nom.* *CLARKE v. PHILIPS*, 1 Vent. 42.

Annotations:—*Reid*. *Doe d. Jones v. Williams* (1833), 2 Nev. & M. K. B. 602; *Doe d. Blight v. Pett* (1840), 11 Ad. & El. 842.

SECT. 2.—AVOIDANCE.

SUB-SECT. 1.—IN GENERAL.

937. Grounds for avoidance—By person claiming under subsequent settlement—Unreasonableness of settlement.]—If a person upon his marriage make an extravagant or unreasonable settlement, yet if no fraud or incapacity appear, it shall not be avoided by persons claiming under a subsequent marriage settlement.—*HOBSON v. STANEER* (1723), 9 Mod. Rep. 80; 88 E. R. 328.

938. —.]—*Fraud.]—**Ex p. MAYOR* (1816), 1 Sm. & G. 246, n.; Mont. 292; 65 E. R. 106.

939. —.]—Pltf. alleged in his bill that his father married A. in 1797. Three weeks before the marriage his mother A. had borne a son B., but the fact of his having been born before wedlock was carefully concealed, & he was brought up as a legitimate son & heir apparent to his father's title & estates, to which he eventually succeeded. B. married C. in 1823, before his father's death, & he died in 1842, leaving D. his eldest son & heir. In 1866 pltf., who was the eldest son born after the marriage of his father to A., discovered the fact of B.'s illegitimacy, & also that that fact was known to B., & also to the father of C. upon the negotiation for the marriage of B. & C. He prayed a declaration of his title, & an account of rents & profits against D.:—*Held*: the bill sufficiently alleged a concealed fraud, which pltf. could not with reasonable diligence have known sooner; C. must be taken to have had notice of B.'s illegitimacy through the communication thereof to her father upon the negotiation for a settlement on her marriage with B.; & her son D., claiming through the same marriage settlement, was equally affected with the same notice.—*VANE v. VANE* (1873), 8 Ch. App. 383; 42 L. J. Ch. 299; 28 L. T. 320; 21 W. R. 252, L. J.J.

Annotations:—*Reid*. *Lawrance v. Norreys* (1888), 39 Ch. D. 213; *Willis v. Howe*, [1893] 2 Ch. 545; *Re McCallum*, *McCallum v. McCallum*, [1901] 1 Ch. 143.

—.]—*See, also*, MISREPRESENTATION & FRAUD, Vol. XXXV., p. 72, Nos. 693, 604.

—.]—*Failure of consideration.]—**See* Part V., Sect. 2, sub-sect. 3, *ante*.

940. —.]—*Bankruptcy—Avoidance as to part.]—*Property was settled on J. by his father, until he should take the benefit of Insolvent Debtors' Act, & then the trustees were, during his life, to apply it in such manner & to such persons, for the

PART VII. SECT. 2, SUB-SECT. 1.

a. Grounds for avoidance—Absence of power of revocation in deed.]—The settlor may wish to protect himself from his own improvidence or against importunities of relatives & in such a case the absence of a power of revocation in the deed is not a ground for setting it aside.—*FONSECA v. JONES* (1911), 21 Man. L. R. 168.—*CAN*.

r. —.]—*Divorce of wife.]—**WOOD v.*

WOOD (1875), 14 B. L. R. App. 6.—*IND*.

t. —.]—*New & extended term obtained by settlor to certain uses—Settlor with limited interest.]—*If a man has a limited interest in a term & settles it to a certain use, & then gets a new & extended term substituted for it, he cannot, by so doing, avoid the previous settlement.—*MILL v. HILL* (1852), 3 H. L. Cas. 828.—*IR*.

a. —.]—*Incapacity for business & inexperience of settlor—Effect of settlement not understood.]—*Where at the time of the execution of a voluntary settlement the settlor is not in a fit state of health to transact business, & is inexperienced in legal business, the solr. who prepared the deed is a complete stranger, & the deed contains unusual clauses going beyond what is necessary for giving effect to the wishes expressed by the settlor,

Sect. 2.—Avoidance: Sub-sects. 1 & 2, A., B. & C. (a).]

board, lodging & subsistence of J. & his family, as the trustees should think proper; & after his decease, upon trust for such persons as J. should appoint, & in default of appointment, in trust for his children. J. took the benefit of Insolvent Debtors Act. He had three children, but his wife was dead:—*Held*: his children, who were all infants, became entitled to three-fourths & the assignees to one-fourth of the life interest of J.—*RIPPON v. NORTON* (1839), 2 Beav. 63; 48 E. R. 1102.

Annotations:—Refd. Duncan v. Campbell (1842), 12 Sim. 616; *Wallace v. Anderson* (1853), 16 Beav. 533. *Mentd. Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 443.

—*See BANKRUPTCY, Vol. V., pp. 650–673, 837–852, Nos. 5813–5956, 7078–7163.*

941. — Resettlement—No intention to vary existing limitations.]—A., a tenant in tail, subject to an existing life estate, borrowed money on mtge., & the tenant for life joined in order to bar the entail, & he covenanted to pay the interest during his life. By the same deed, the equity of redemption was resettled on A. for life, with remainder to his issue in tail, with limitations over. The ct., ten years afterwards, set aside the resettlement of the equity of redemption, on the ground that there was no proof of any contract to vary the existing limitations.—*MEADOWS v. MEADOWS* (1853), 16 Beav. 401; 51 E. R. 833.

942. Condition for settlement of wife's property in particular manner—Different settlements on foot of former covenant.]—Estates are settled on A. & B. on their marriage, in strict settlement, provided that if the wife should, when requested by her husband, refuse to settle her estates in a particular manner, the settlement of the other estate should be void. The husband & wife join in a different settlement of her estate, proceeding, however, on the foot of the former covenant as if it had been performed; this is no avoidance of the settlement.—*MATHEWS v. JONES & HOWELL* (1794), 2 Anst. 506; 145 E. R. 949.

Annotations:—Consd. Spackman v. Timbrell (1837), 6 L. J. Ch. 147. *Refd. Richardson v. Horton* (1843), 7 Beav. 112.

943. Who should be parties—Remainderman expectant on estate tail.]—ANON. (1709), 2 Eq. Cas. Abr. 166; 22 E. R. 141.

Avoidance of fraudulent & voidable conveyances.]—See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 207 *et seq.*

944. Necessity for reconveyance.]—Where a settlement is made void by non-performance of a condition, yet a reconveyance held necessary.—*HUNT v. HUNT* (1714), Prec. Ch. 387; Gilb. Ch. 43; 24 E. R. 174.

SUB-SECT. 2.—VOLUNTARY SETTLEMENTS.

A. In General.

*See Law of Property Act, 1925 (c. 20), ss. 172, 173, & generally, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 149 *et seq.**

945. Power of court to order reconveyance.]—Where a suit is instituted to set aside a voluntary settlement of real & personal estate, & the right

to the relief asked is not contested, the ct. will order a reconveyance of the property the subject of the settlement, & direct payment of the costs out of the property so settled.—*THOMPSON v. MILLIGAN* (1868), 18 L. T. 809.

946. Costs—Power of court to order payment out of property settled.]—*THOMPSON v. MILLIGAN*, No. 945, *ante*.

947. — Right of trustee—Right of appeal.]—*DUTTON v. THOMPSON*, No. 970, *post*.

B. Who may Avoid.

948. Second husband—Settlement by woman in favour of issue of first marriage.]—C. having two sons by her first husband, made a settlement previous to her second marriage, & without the privity of the intended husband, whereby she limited the estate to herself for life; remainder as to one moiety to C., her youngest son, in tail; & for want of issue of his body, to R., her eldest son, in tail; & as to the remainder of the other moiety to R., in tail; & for want of issue of his body, to C. in tail, with remainder as to both moieties, to her own right heirs. The second marriage took effect, & the estate, lying in Ireland, the husband made claims, & sued out decrees from the comrs. under the acts of settlement & explanation, for some parts of this estate, to himself & his wife, & her heirs, & for other parts of it, to himself & his wife & his heirs. The lands so limited to his heirs, the second husband, having survived his wife, devised & otherwise disposed of:—*Held*: R. & C., the two sons of the first marriage, were entitled under their mother's settlement to all the lands; & the parties claiming under the second husband, were accountable for the rents & profits from his death.—*CALTHORPE v. MAX* (1707), 7 Bro. Parl. Cas. 413; 3 E. R. 269.

949. — —.]—If a parent makes a voluntary conveyance in trust for his children, & keeps it in his own power, or in the hands of his agent, & it is got from him, this ought not to bind him; but where a *feme* having issue by her first husband makes a suitable provision for them before a treaty for her second marriage; this is good, & not liable to be avoided by a second husband.—*KING v. COTTON* (1732), 2 P. Wms. 674; 24 E. R. 912.

Annotations:—Refd. Strathmore v. Bowes (1788), 2 Bro. C. C. 345; *St. George v. Wake* (1833), 1 My. & K. 610.

Settlor.]—See Sub-sect. 5, B., *post*.

950. Creditors—Settlement remaining in control of settlor.]—Husband after marriage purchases a term to himself & wife, & the survivor & the exors., administrators & assigns of such survivor; husband assigns the term in mtge., proviso to be void on payment of the money by him or wife, or the exors. of him or wife. Proviso that the husband, his exors. or administrators shall till default of payment quietly enjoy. Husband, seven years after, contracts debts & dies. Decreed that this settlement of the term being after marriage, in the power of the husband, & the equity of redemption being reserved to him as well as to his wife, & being also in the case of creditors, was assets to pay debts.—*WATTS v. THOMAS* (1726), 2 P. Wms. 364; 24 E. R. 767.

the clearest evidence is required that the settlor at the time of signing the deed fully understood it, & for such evidence the ct. looks to the solr. who prepared the deed, & if such evidence is not forthcoming the deed cannot be upheld. The mere formal reading over of the deed is not enough.—*ANDERSON v. ANDERSON* (1903), 23

N. Z. L. R. 101.—N.Z.

PART VII. SECT. 2, SUB-SECT. 2.—A.

945 I. Power of court to order reconveyance.]—*FARRELL v. CAMERON* (1881), 29 Gr. 313.—CAN.

PART VII. SECT. 2, SUB-SECT. 2.—B.

b. Personal representatives of dead

settlor.]—The personal representatives of a deceased settlor are necessary parties to an action by his widow to set aside a deed of settlement executed by the settlor & his wife conveying property to trustees.—*FONSECA v. JONES* (1911), 21 Man. L. R. 168.—CAN.

951. — Claim under prior agreement to charge.—On June 14, 1858, *deft. L.*, being indebted to *pltf.*, signed a memorandum of agreement whereby “in consideration of the forbearance of *pltf.* in not requiring immediate repayment of the moneys he had advanced to or for him,” he, *L.*, agreed to give & execute to *pltf.* a charge on the interest to which he was entitled by right of marriage in the property settled on his wife, or to which she was entitled in respect of her former marriage as a security “for the repayment of the moneys *pltf.* had advanced to or for him, *L.*”; & *deft. L.*, further pledged himself not to incumber his interests in such property or any part thereof. On June 18, four days afterwards, *deft. L.*, with the knowledge, but without the consent of *pltf.*, executed a post-nuptial settlement, whereby he conveyed all his interest in right of his wife in the property settled on her on her first marriage to trustees, on trusts for her for life, then for himself for life, & after the decease of the survivor for the children. About a month afterwards, on July 13, *deft. L.*, executed a deed purporting to be in pursuance of the agreement of June 14 whereby he charged all the dividends, interest & annual proceeds of the trust funds which were settled at the time of his wife’s first marriage, & also his share in the trust funds themselves, with the payment to *pltf.* of £800, & interest from June 14. He also, by the same deed, assigned his said share in the trust funds to *pltf.* by way of mtge., with a proviso for redemption to *L.* on repayment by him of the sum of £800 & interest:—*Held*: the post-nuptial settlement could not prevail against the rights of *pltf.* under the memorandum of June 14.—*CAREW v. ARUNDEL* (1861), 5 L. T. 498; 8 Jur. N. S. 71.

—*See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 149 *et seq.*

Subsequent purchasers.—*See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 225 *et seq.*

Trustee in bankruptcy of settlor.—*See BANKRUPTCY*, Vol. V., pp. 837–852.

C. Grounds for Avoidance.

(a) In General.

952. General rule.—Where it is sought to set aside a voluntary settlement, the absence of a power of revocation is an important circumstance to be taken into account, but there is not, & there ought not to be, any rule that the omission of such a power, or that the settlor was never advised that such a power should be inserted, can alone invalidate such a settlement. The ct. has to determine whether the settlement is the free determined act of the party executing it.

A maiden lady, advanced in life, settled real estate upon herself for life, & after her decease to the use of her nephew in fee. It was shown that the instructions were given by herself to the family solr., who at the time of its execution spent four hours in explaining it to her, though she was not shown to have been previously furnished with any copy or draft; but it was sufficiently understood by her, & was in accord with her intentions at the time. It contained no power of revocation, nor did the solr. appear ever to have consulted her upon that point. Some years afterwards she filed a bill to set it aside, alleging undue influence, intimidation, incapacity & ignorance; but upon the evidence their lordships dismissed the bill.

—*TOKER v. TOKER* (1863), 3 De G. J. & Sm. 487; 32 L. J. Ch. 322; 8 L. T. 777; 46 E. R. 724, L. JJ.

Annotations:—*Distd. Coutts v. Acworth* (1869), L. R. 8 Eq. 558. *Apld. Hall v. Hall* (1873), 8 Ch. App. 430. *Reid. Townsend v. Toker* (1866), 35 L. J. Ch. 610, n.

953. Fraud.—*E.*, by his marriage contract, covenanted that his whole property at the time of his death should belong to the issue of the marriage. His wife died in his lifetime, leaving a daughter, an only child, who, when about twenty-one years of age, married a young man of about the same age, & in a year after a son was born of the marriage. The husband then proposed to go abroad to improve his fortune, & *E.*, who was then a prosperous trader, persuaded him & his wife to execute a deed, in the nature of a post-nuptial contract, by which, in consideration of a sum of £315, they discharged him from all claims whatever on his property. They were at this time ignorant of the daughter’s claims under her father & mother’s marriage contract, & *E.*, attended by his man of business, brought them the deed to sign on the night of the husband’s departure, & it was then executed. It was stated in the deed that *E.* had paid a moiety of the £315 at the time of the execution of the contract, & that the other moiety was to be paid after his death. But in point of fact he paid down nothing at the time of the execution, but only renounced a debt of £61 due to him from the husband for goods, & gave a promissory note for the other £90. *E.* lived for a considerable time after; & two days before his death, by a trust deed of settlement, conveyed the bulk of his property, amounting to £14,000, to trustees to build an hospital.

The daughter’s post-nuptial contract reduced on the ground of fraud & circumvention.—*EWEN v. BANNERMAN* (1830), 2 Dow. & Cl. 74; 6 E. R. 657, 11 L.

954. Absence of independent advice.—An ignorant woman, possessed of money, lent part to a man having her confidence, & afterwards executed a deed, prepared by the borrower’s solr., by which the borrower covenanted to pay interest to her for her life, & to pay part of the capital to two of his daughters, & the remainder to two of her relations. The woman soon afterwards married, & she & her husband filed a bill against the borrower to set aside the deed, on the allegation that she executed it believing it to be a mtge. on the borrower’s estate, & on the ground that the deed was a fraud on the marital right of the husband. The ct. on the ground that the two cases made by the bill were not sustained, gave *pltf.* leave to try an issue whether the deed was obtained by fraud; & secondly, whether, when she executed the deed, she was contracted to be married; & thirdly, whether *pltf.*, the husband, when he married, knew of the settlement, & as the woman had not the protection of the borrower or his solr., to which she was entitled, not having the advice of her own solr., the bill was dismissed, without costs, if *pltf.* did not try the issue.—*GRIGGS v. STAPLEE* (1848), 2 De G. & Sm. 572; 12 L. T. O. S. 307; 13 Jur. 29; 64 E. R. 255.

Annotation:—*Reid. Chadwick v. Chadwick* (1854), 23 L. T. O. S. 108.

955. ——*PHILLIPS v. MULLINGS*, No. 958, *post.*

956. ——*Pltf.*, who was in financial difficulties, was desirous of making a voluntary settlement upon himself & his family, & was also

PART VII. SECT. 2, SUB-SECT. 2.—C. (a).

c. Absence of power of revocation.—The absence of a power of revocation in a voluntary settlement is not a ground for setting it aside.—*HILLOCK v. BUTTON* (1881), 29 Gr. 490.—*CAN.*

Sect. 2.—Avoidance: Sub-sect. 2, C. (a) & (b).]

desirous of conferring some benefit on C., who had acted as his confidential solr., but had so far received nothing for his services. Accordingly he executed two deeds, respectively dated May 15, 1900. By the first of these deeds some real estate & other property were settled upon trust for pltf. for life, & after his death as to part in trust for his son & daughter, & as to the remaining part in trust for C.

By the second deed certain furniture & chattels were vested in trustees for sale, & out of the proceeds thereof C. was to receive £500. The deeds were prepared in the office of C., but were at his suggestion submitted by pltf. to A., an independent solr.

Continuing to be pressed by his financial difficulties, pltf., on Mar. 14, 1901, executed a further deed supplemental to the first deed of May 15, 1900, whereby the trusts of the former deed were in effect revoked, & pltf. assigned the whole of his property of every description, present & future, to his son & C. upon trust for his son & daughter & C. in equal shares in consideration of a covenant by them to pay pltf. an annuity of £500 a year to be increased to £800 in certain events. This deed was at C.'s suggestion prepared by T., an independent solr.

At the time the several deeds were executed C. was continuing to act as pltf.'s solr. in all other matters relating to his affairs. Pltf. brought an action against C., the son & daughter, & A. & T. claiming to have the several deeds set aside with consequential relief, on the ground that he was induced to execute the same by the influence of C.:—*Held*: (1) no competent & independent advice was given to pltf. by the solr. A., who, although he apparently intended to do his duty, had not before him the materials to enable him to do it; therefore the *onus* thrown upon C. had not been discharged; & as regarded him the deeds of May 15, 1900, could not be allowed to stand, & must be set aside, although as regarded pltf.'s children the gifts thereunder must be treated as if they had been made by an independent deed & were valid; (2) as to the deed of Mar. 14, 1901, the solr., T., had not before him sufficient materials to enable him to advise pltf.; the bargain carried out by that deed was entered into at a time when C. was continuing to act as pltf.'s solr., & he was acting in concert with pltf.'s daughter; it was executed by pltf. under the influence of C. & without fully understanding what was being done, & without competent & independent advice; & consequently that deed must be set aside *in toto* & as against all parties.—*WRIGHT v. CARTER*, [1903] 1 Ch. 27; 72 L. J. Ch. 138; 87 L. T. 624; 51 W. R. 196; 19 T. L. R. 29, C. A.

Annotations:—As to (2) Reid. Re Coomber, Coomber v. Coomber (1911), 80 L. J. Ch. 399. *Generally, Reid. Allison v. Clayhills* (1907), 97 L. T. 709.

957. —.]—A lady, two months after she came of age, executed a voluntary settlement, being told as a matter of prudence she ought not to omit making it. The deed contained no power of revocation, & was executed by the lady without independent legal advice. Ten years afterwards she filed a bill to set aside the settlement on the grounds that it was a hasty & improvident act, & contrary to her intention:—*Held*: under the circumstances the deed must be set aside.—*EVERITT v. EVERITT* (1870), L. R. 10 Eq. 405; 39 L. J. Ch. 777; 23 L. T. 136; 18 W. R. 1020.

Annotations:—Reid. Phillips v. Mullings (1871), 7 Ch. 244; *Hall v. Hall* (1873), 28 L. T. 383; *James v. C man* (1885), 29 Ch. D. 212.

958. —.]—In order to support a voluntary

settlement, it must be shown that all the provisions are proper & usual; or if there are any unusual provisions, that they were brought to the notice of & understood by the settlor. No general rule can be laid down as to the proper & usual provisions in such a settlement, but a power of revocation is not essential.

A young man of improvident habits, being entitled to a sum of money, was induced by the trustee of the money, & by a solr., to execute a settlement by which he assigned a part of the money to trustees on trust to invest & to pay him during his life the income on such part thereof as they should think fit, & after his death on trust to hold the same for his wife & children, if any, & subject thereto on trust for certain cousins of his. He had no power of appointment in default of issue, & no power of revocation, & no power to appoint new trustees. The deed was explained to him, & the particular clauses were brought to his notice:—*Held*: the deed could not be set aside by the settlor.—*PHILLIPS v. MULLINGS* (1871), 7 Ch. App. 244; 41 L. J. Ch. 211; 20 W. R. 129, L. C.

Annotations:—Reid. Hall v. Hall, Hall v. Hall (1872), L. R. 14 Eq. 365; *Welman v. Welman* (1880), 15 Ch. D. 570.

959. —.]—An old man of eighty-six years of age executed a conveyance of certain freeholds in consideration of natural love & affection, to his son, to the use of himself for life, with remainder to his son in fee. The deed did not contain any power of revocation, & the propriety of inserting such a power had not been suggested to the grantor. Subsequently the grantor conveyed all his property to his daughter, who by the deed of conveyance covenanted to indemnify him against a mtge. debt to which part of the property was subject.

On a bill by the daughter to set aside the prior voluntary conveyance:—*Held*: the deed must be set aside, as it contained no power of revocation, & as it was clear that the propriety of reserving such a power had not been suggested to the grantor; but without costs, as there was no evidence that the execution of the deed had been obtained by fraud.—*MOUNTFORD v. KEENE* (1871), 24 L. T. 925; 19 W. R. 708.

Annotation:—Expld. Hall v. Hall (1873), 8 Ch. App. 430.

960. —.]—A lady in her sixty-ninth year executed, at the instance of her relatives & without independent advice, a voluntary settlement containing no power of revocation, & under the impression that the deed had the effect of a will:—*Held*: the deed must be set aside.—*HENSHALL v. FEREDAY* (1873), 29 L. T. 46; 21 W. R. 570, L. JJ.

961. —.]—The absence of a power of revocation, & the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid, they are merely circumstances to be considered in deciding on the validity of a voluntary settlement. A widow instructed a solr. to prepare a deed settling certain houses & buildings on herself for her life, & after her death for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to & executed by her. There was no suggestion made to her that the deed ought to contain a power of revocation. Some years afterwards she burnt it, expressed satisfaction at having got rid of it. She executed a mtge. of part of the settled property, after asking the consent of a son who was both beneficially interested & a trustee of the settlement, & made a will purporting to dispose of the whole property:—*Held*: under the

circumstances, the deed of settlement was valid, & not affected by the want of a power of revocation or by the divergence from the instructions.—*HALL v. HALL* (1873), 8 Ch. App. 430; 42 L. J. Ch. 444; 28 L. T. 383; 21 W. R. 373, L. C. & L. JJ.

Annotations:—*Distd. Henshall v. Fereday* (1873), 29 L. T. 45. *Refd. Henry v. Armstrong* (1881), 30 W. R. 472.

962. — Onus of proof.—The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable, & where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solr. to insist upon the insertion of such power, & the want of it will in general be fatal to the deed.—*COUTTS v. ACWORTH* (1869), L. R. 8 Eq. 558; 38 L. J. Ch. 694; 21 L. T. 224; 17 W. R. 1121.

Annotations:—*Refd. Phillips v. Mullings* (1871), 7 Ch. App. 244; *Baker v. Loader* (1872), L. R. 16 Eq. 49; *Welman v. Welman* (1880), 15 Ch. D. 570.

963. — — — — ——*WOLLASTON v. TRIBE*, No. 823, *post*.

964. Deed not fully explained to settlor.—*PHILLIPS v. MULLINGS*, No. 958, *ante*.

965. — Effect of confirmation of settlement—By subsequent deed.—Where a settlor filed a bill to obtain the declaration of the ct. that a settlement executed by him eleven years previously was not binding upon him by reason of its being an unreasonable one, & of his having executed it in ignorance of its effect:—*Held*: a subsequent deed executed by pltf. reciting part of the former deed, & purporting to be in exercise of one of the powers therein contained, was an absolute confirmation of the whole, & was a bar to pltf.'s suit, though the deed was one which, apart from lapse of time & subsequent confirmation, the ct. could not have upheld.—*JARRATT v. ALDAM* (1870), L. R. 9 Eq. 463; 22 L. T. 192; 18 W. R. 511; *sub nom. JARRATT v. OLDHAM*, 39 L. J. Ch. 349.

Annotation:—*Consd. Hoblyn v. Hoblyn* (1889), 60 L. T. 499.

Self-protective settlement.—*See* Sub-sect. 5, C. (b), *post*.

966. Settlement executed in anticipation of immediate death.—A settlement on his family by a person in *extremis* & not containing a power of revocation set aside, the ct. being of opinion that it was executed in expectation of his immediate death but not with the intention that it should be operative in case of his recovery.—*FORSYTH v. WELSBY* (1860), 30 Beav. 243; 30 L. J. Ch. 331; 4 L. T. 170; 7 Jur. N. S. 299; 9 W. R. 225; 54 E. R. 882.

Annotations:—*Consd. Hall v. Hall* (1873), 8 Ch. App. 430. *Refd. Coutts v. Acworth* (1869), L. R. 8 Eq. 558.

967. Settlement not carrying out intentions of settlor.—*OGILVIE v. ALLEN* (1899), 15 T. L. R. 294, H. L.; *affg. S. C. sub nom. OGILVIE v. LITTLEBOY* (1897), 13 T. L. R. 399, C. A.

Divorce or separation.—*See* HUSBAND & WIFE, Vol. XXVII., pp. 96–98, Nos. 749–755.

(b) Self-Protective Settlements.

968. Lack of understanding of settlor—Burden of proof.—A deed prepared by an attorney, & executed by his client, a young man who had

applied to him to procure a loan of money, settling the property of the client so as to restrict his power of dealing with it, & appointing the attorney the trustee, recited that the trusts of the deed were created at the desire of the client, & for the purpose of placing the property under the management of the attorney. The client, by his bill to set aside the deed, denied the truth of the recitals, & insisted that the settlement was made without his knowledge or authority. The attorney, by his answer, alleged that the recitals were true, & that the deed was made & executed with the knowledge and authority of the client, & in order to prevent him from dissipating his property, but gave no evidence of such knowledge or authority:—*Held*: the burden of proof was upon the attorney, & the ct. set aside the deed.—*MOORE v. PRANCE* (1851), 9 Hare, 299; 20 L. J. Ch. 468; 18 L. T. O. S. 51; 15 Jur. 1188; 68 E. R. 517.

969. — Settlement containing unusual clauses.—*PHILLIPS v. MULLINGS*, No. 958, *ante*.

970. — Whether propriety of clauses considered.—(1) Where an action is brought by the settlor against the trustees to set aside a voluntary settlement, the ct. will not consider the propriety or impropriety of the clauses, except as evidence that the settlor did not understand what he was doing: the only question being whether the settlor understood what he was doing, & its effect on his position with regard to the property. (2) Where a settlement is set aside the trustee has no claim to his costs as a matter of right, there being no contract in existence; & therefore, if costs are given against him he has no right of appeal.—*DUTTON v. THOMPSON* (1883), 23 Ch. D. 278; 52 L. J. Ch. 661; 49 L. T. 109; 31 W. R. 596, C. A.

Annotations:—*As to* (1) *Refd. Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200. *As to* (2) *Consd. Morry v. Pownall*, [1898] 1 Ch. 306. *Refd. Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157.

971. — As to details of settlement—Reliance on professional adviser.—Pltf. was entitled to a settled estate as tenant in tail male in remainder, subject to two preceding life interests of his aunt, the protector of the settlement, & his mother. Pltf. attained twenty-one on Dec. 10, 1878, & shortly after that date it was thought by his mother very desirable & important that some resettlement of the estate should be made. Accordingly he executed two deeds, both dated Jan. 2, 1879, to which the protector of the settlement was a party, one being the usual disentailing deed & the other a resettlement. The estate was thereby relimited to the use of pltf. for life, with remainder to uses in favour of the issue of pltf., & in default of issue, then in favour of his cousins, children of the protector of the settlement, as tenants in common, with ultimate remainder to pltf. in fee. An action was brought by pltf. claiming to have the resettlement cancelled & set aside or modified in effect. The question was whether pltf. had been made sufficiently aware of the nature & effect of the deed, & had had the proper amount of independent advice which is necessary, in order that such a resettlement, executed by a person who has just attained his majority, should be upheld. Pltf. admitted in his evidence he understood that by the deed he was giving his property to his cousins in the event of his death without issue; but he stated that he

Sect. 2.—Avoidance: Sub-sect. 2, C. (b) & (c). Part VIII. Sects. 1 & 2: Sub-sect. 1.]

did not understand, & it was not explained to him that the deed was an irrevocable instrument, & he believed that it was something in the nature of a will, which he supposed it was his duty to execute upon attaining twenty-one. He had a short time previously executed a disentailing deed, & made a will in favour of his cousins in reference to another estate belonging to him. On the other hand, the evidence of defts. went to show that pltf. understood generally what he was executing, but that he declined an offer made by his legal adviser to have the deed read over to him, on the ground that he should not understand if it was read. It did not appear that pltf.'s attention had been specifically called in detail to the nature & effect of the several clauses of the deed:—*Held*: as plaintiff, had an accurate general knowledge of what he was doing, & only refused to receive a detailed explanation of the provisions of the deed because he trusted his solr. to look into those details on his behalf, he was as much bound as if he were himself a lawyer, & had drawn the deed with his own hand.—*LOVELL v. WALLIS* (No. 2) (1884), 50 L. T. 681.

Annotation:—*Refd.* Bonhote v. Henderson, [1895] 1 Ch. 742.

972. Absence of professional advice.]—A settlement made by a woman in contemplation of marriage, without the knowledge of her intended husband, & without proper legal advice, set aside.—*PRIDEAUX v. LONSDALE* (1863), 1 De G. J. & Sm. 433; 2 New Rep. 144; 8 L. T. 554; 9 Jur. N. S. 507; 11 W. R. 705; 46 E. R. 172, L. J.

Annotations:—*Apld.* Everitt v. Everitt (1870), L. R. 10 Eq. 405. *Distd.* Phillips v. Mullings (1871), 7 Ch. App. 214. *Refd.* Baker v. Loader (1872), L. R. 16 Eq. 49; Welman v. Welman (1880), 15 Ch. D. 570.

973. —Improvidence of settlement—Settlement by young woman shortly after majority.]—*EVERITT v. EVERITT*, No. 957, *ante*.

Absence of power of revocation.]—See Sub-sect. 5, C. (a), *ante*.

(c) Settlement in Favour of Objects of Settlor's Bounty.

974. Undue influence—Benefit to father—Settlement by son tenant in tail.]—Son tenant in tail of an estate, upon the death of the mother, who was tenant for life, makes a settlement of it for the benefit of the family, in consequence of an agreement so to do in the mother's life; although the father derives some benefit under the settlement, it shall not be set aside, as entered into under undue influence.—*KINCHANT v. KINCHANT* (1784), 1 Bro. C. C. 369; 28 E. R. 1183.

Annotations:—*Refd.* Brown v. Carter (1801), 5 Ves. 862; Hoghton v. Hoghton (1852), 15 Beav. 278. *Mentd.* Pickett v. Logan (1807), 14 Ves. 215.

975. —Settlement by daughter tenant in tail.]—V., having an infant daughter, who was tenant in tail in possession of certain estates, & tenant in fee in remainder in another, in which he had himself a prior life interest & having held possession of such estates as guardian in socage during her minority, procured her, on her coming of age, in 1843, to bar the entail & by the disentailing deed to give to him an immediate estate for life in two-thirds of the land of which she was tenant in tail. V. had not maintained his daughter during her minority out of his own moneys though of capacity to have done so. He never accounted to his daughter for the receipt of rents during her minority. On the other hand he had defrayed about £700 costs of litigation on her behalf. The infant came of age in Feb. 1843;

the disentailing deed giving V. a life estate was engrossed in May, 1843, & executed in June, 1843. It was wholly prepared by the confidential solr. of the father, V. In 1844 the whole circumstances were for the first time known to the daughter. Shortly after, she married pltf., to whom the circumstances were also known & proceedings to set aside the life estate so obtained by V. seem to have been then contemplated as possible. In 1845 pltf. wrote to V. upbraiding him with having so obtained the life estate & insisting that V. should pay a sum of £200 in respect of the marriage outfit of the daughter. In the same year by post-nuptial settlement, the lands in question were conveyed to trustees "subject to the life estate of V." Pltf.'s wife, V.'s daughter, died in 1850. In 1853 pltf. brought this bill to have the life estate of V. set aside:—*Held*: although the transaction was apparently one which could have been set aside in 1843, or even in 1844 if proceedings had been taken immediately after the marriage, yet pltf. was now precluded from relief, on the ground of laches; & the same reason applied to prevent relief in respect of the rents received by V. during his late daughter's minority.—*WRIGHT v. VANDERPLANK* (1855), 2 K. & J. 1; 25 L. T. O. S. 303; 1 Jur. N. S. 932; 3 W. R. 637; 69 E. R. 669; *affd.* (1856), 8 De G. M. & G. 133, L. J.

Annotations:—*Consd.* Turner v. Collins (1871) 7 Ch. App. 329; Mitchell v. Homfrey (1881), 50 L. J. Q. B. 460. *Apld.* Allcard v. Skinner (1887), 36 Ch. D. 145; De Witte v. Addison (1899), 80 L. T. 207; Powell v. Powell, [1900] 1 Ch. 243. *Refd.* Kempson v. Ashbee (1874), 39 J. P. 164; Tyars v. Allsop (1889), 61 L. T. 8; London & Westminster Loan & Discount Co. v. Hilton (1911), 27 T. L. R. 184. *Mentd.* *Re* Maddever, Three Towns Banking Co. v. Maddever (1883), 31 W. R. 720.

976. —Benefit to clergyman—Settlement by widow.]—Voluntary settlement by a widow upon a clergyman & his family set aside; as obtained by undue influence & abused confidence in deff., as an agent undertaking the management of her affairs; upon the principles of public policy & utility, applicable to the relation of guardian & ward, etc.—*HUGUENIN v. BASELEY* (1807), 14 Ves. 273; 33 E. R. 526.

Annotations:—*Consd.* Hunter v. Atkins (1834), Coop. temp. Brough, 464; Middleton v. Sherburne (1841), 4 V. & C. Ex. 358; Tokor v. Tokor (1863), 3 De G. J. & Sm. 487. *Apld.* Coutts v. Acworth (1869), L. R. 8 Eq. 558; Baker v. Loader (1872), L. R. 16 Eq. 49; Allcard v. Skinner (1887), 36 Ch. D. 145; Berry v. Glazebrook (1891), 7 T. L. R. 574; Morley v. Loughman, [1895] 1 Ch. 736. *Distd.* Wright v. Carter, [1903] 1 Ch. 27. *Refd.* Pratt v. Barker, Pratt v. Barker (1825), 1 Sim. 1; MacCabe v. Hussey (1831), 5 Bl. N. S. 715; Harris v. Wiltshire (1834), 4 L. J. Ch. 30; Dent v. Bennett (1839), 4 My. & Cr. 269; Cockell v. Taylor, Collett v. Preston, Preston v. Collett (1852), 15 Beav. 103; Hoghton v. Hoghton (1852), 15 Beav. 278; Reynell v. Sprye (1852), 1 De G. M. & G. 600; Russell v. Jackson (1852), 10 Hare, 204; Scholefield v. Templer (1859), John. 155; Forshaw v. Welsby (1860), 30 Beav. 243; Nottidge v. Prince (1860), 2 Giff. 246; Brown v. Kennedy (1863), 33 Beav. 133; Rhodes v. Bato (1865), 4 Giff. 670; Lyon v. Home (1868), L. R. 6, Eq. 655; Topham v. Portland (1869), 5 Ch. App. 40; Turner v. Collins (1871), 7 Ch. App. 334, n.; Hall v. Hall (1873), 8 Ch. App. 430; Moxon v. Payne (1873), 8 Ch. App. 881; Coxon v. Schofield (1893), 9 T. L. R. 290; Re Stead, Whitham v. Andre (1899), 69 L. J. Ch. 49; Barron v. Willis, [1900] 2 Ch. 121; Powell v. Powell, [1900] 1 Ch. 243; *Re* McCallum, McCallum v. McCallum, [1901] 1 Ch. 143; Wilton v. Osborn, [1901] 2 K. B. 110; Blischoff's Trustees v. Frank (1903), 89 L. T. 188; Cavendish v. Strutt (1903), 19 T. L. R. 483; Howes v. Bishop, [1909] 2 K. B. 390; Manks v. Whiteley, [1911] 2 Ch. 448; Lloyd v. Coote & Ball, [1915] 1 K. B. 242. *Mentd.* Harris v. Trompenheere (1808), 15 Ves. 34; Lloyd v. Passingham (1815), Coop. G. 152; Nicol v. Vaughan (1834), 7 Bl. N. S. 395; Wallgrave v. Tebbis (1855), 2 K. & J. 313; Tee v. Ferris (1856), 2 K. & J. 357; Talbot v. Hope Scott (1858), 4 K. & J. 96; *Re* Royal British Bank (1859), 3 De G. J. & J. 387; Natal Land & Colonization Co. v. Good (1868), L. R. 2 P. C. 121; Galway Borough Petn. (1872), 2 O'M. & H. 46; Vane v. Vane (1873), 8 Ch. App. 383; Burstall v. Beyfus (1884), 32 W. R. 418; Moody v. Cox & Hatt, [1917] 2 Ch. 71; John v. Dodwell, [1918] A.C. 563; Shears v. Jones (1922), 128 L. T. 218.

977. — Benefit to solicitor relative — Improvident settlement.]—NANNEY *v.* WILLIAMS, No. 891, *ante*.

978. — Benefit to brother — Settlement by spinster—Without professional assistance.]—(1) A voluntary deed made by an unmarried lady in favour of her brother, with whom she was residing at the time, & executed by her without professional assistance, set aside at the instance of the lady & her husband.

(2) The sale of a reversionary interest by a sister to her brother set aside upon the ground of undervalue, after a lapse of ten years, the sister having continued under the influence of her brother up to a period of within two years of the bill being

filed.—*SHARP v. LEACH* (1862), 31 Beav. 491; 7 L. T. 146; 8 Jur. N. S. 1026; 10 W. R. 878; 54 E. R. 1229.

—*See, generally*, FAMILY ARRANGEMENTS, Vol. XXIV., pp. 955, 956, Nos. 87-99; FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 257-266, Nos. 832-902.

979. Misrepresentation — That object of settlement illegitimate son of settlor.]—COXON *v.* SCHOFIELD (1893), 9 T. L. R. 290.

Infirmity or incapacity of grantor.] — See, generally, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 253-257, Nos. 802-831.

Absence of power of revocation.]—See Sub-sect. 5, C. (a), *ante*.

Part VIII.—Beneficial Interests in Personality.

SECT. 1.—IN GENERAL.

980. Direction that shares of daughters be settled—Daughters dying without issue—Effect of.]—Where either in a settlement or a will there is an absolute gift to children followed by a direction that the daughters' shares shall be settled on themselves for life, with remainder to their children, the daughters' interests are only cut down for the sake of the children, & any daughter who dies without issue takes her share absolutely.—*RE SIDWAY HALL ESTATE* (1877), 37 L. T. 457.

SECT. 2.—LIFE INTERESTS.

SUB-SECT. 1.—IN GENERAL.

981. Wife's life interest—Restraint on anticipation.]—Under a marriage settlement certain money & stock in the funds were vested in trustees upon trust, during the joint lives of the husband & wife, to pay the interest & dividends to such persons & for such purposes as the wife, notwithstanding the coverture, should, by any writing under her hand, except in any mode of anticipation, direct or appoint; or, in default of such direction or appointment, into her own hands for her own sole & separate use, independently of her husband; & so that her receipts, notwithstanding the coverture or the receipts of the appointee, might be good discharges.—*Held*: the effect of this instrument was to restrain the wife from anticipation, whether by an appointment under the power, or by an assignment independent of the power.—*MOORE v. MOORE* (1844), 1 Coll. 54; 13 L. J. Ch. 124; 63 E. R. 318; *sub nom.* *MOORE v. MOORE, Ex p. ASPREY*, 8 Jur. 139. *Annotations:—Reid*, *Modley v. Horton* (1844), 8 Jur. 853. *Mentd.* *Morrell v. Cowan* (1877), 6 Ch. D. 166; *Re Glanville*, *Ellis v. Johnson* (1886), 31 Ch. D. 532.

982. — —.]—On the marriage of D. & X. in 1871 a fund was settled upon trust to pay the income to X. during her life, but during their joint lives for the separate use of X., with a restraint on anticipation. In 1878 X. was divorced from D., & afterwards married S.:—*Held*: the separate use & restraint on anticipation attached upon the second marriage.—*ABERGAVENNY (MARQUIS) v. SUGDEN* (1886), 2 T. L. R. 754.

—*See, also*, HUSBAND & WIFE, Vol. XXVII., pp. 101-132, Nos. 793-1082.

983. Settlement during joint & natural lives—Effect of.]—The words "during their joint & natural lives" in a settlement, held to mean "during their joint lives & the life of each of

them."—*SMITH v. OAKES* (1844), 14 Sim. 122; 3 L. T. O. S. 318; 60 E. R. 304.

984. Power of tenant for life to surrender life interest—& contingency in absolute fund—To son entitled in default of appointment.]—By a settlement made upon the intended marriage of C. G. & J. W. certain stock was transferred into the joint names of the two trustees, upon trust to pay the dividends thereof to J. W. the intended wife, during her life, for her sole & separate use, & after her decease, in trust for the said C. G. during his life, if he should survive her, & after the decease of the survivor of them, in trust to pay the principal sum of money among the child & children of the marriage in such a manner as J. W. should direct or appoint; & in default thereof, then upon trust for all & every the children of the marriage, if more than one, who should be living at the decease of the said C. G. & J. W. & the lawful issue then also living of such of the said children as should be then dead. If there should be but one child of the said intended marriage living at the decease of them, the said C. G. & J. W. & no lawful issue of any other child, then to transfer the whole of the Bank Annuities to such only child; & if there should be no children of the said intended marriage living at the decease of the survivor of them, the said C. G. & J. W. but only lawful issue of some one of the said children, then to transfer the whole to such issue at twenty-one. There was afterwards a proviso that if the said C. G. should survive the said J. W. & without leaving any child or issue of any child or children, that the whole fund should be transferred to the said C. G. absolutely. The marriage took place, & J. W., the wife, died without making any appointment, leaving C. G. & one son, the only issue of the marriage, who attained his age of twenty-one years, her surviving. C. G. being willing to give up his life interest, together with his contingency in the absolute fund, over to his son, at once, for the son's benefit, in order that the son might have the whole absolute fund in himself, application was made to the ct. for that purpose:—*Held*: the trusts were not exhausted, nor had C. G. & C. J. G. together power to deal with the corpus of the fund, they not having in themselves the whole title thereto, but there was a contingent interest in favour of such issue; & therefore, C. G. the tenant for life, being still living, the trustee must continue to retain the stock in his own name & pay the dividends to C. G. until his decease.—*GARDNER v. SMITH* (1844), 3 L. T. O. S. 238.

Sect. 2.—Life interests: Sub-sects. 1 & 2, A.]

985. Executor taking life estate—Right to payment of fund.]—Payment to exor. taking limited beneficial interest. A sole exor., who is tenant for life of a fund, is not entitled to have the fund paid to him.—*MARSTON v. GUILLET* (1864), 10 L. T. 292.

986. Administration of fund by court—As against tenant for life—Fund in danger.]—The rule that if personal property consisting of money or stock is limited to A. for life & after his death to B., absolutely, it will be ordered into ct. for administration in an action by B., for the purpose is not absolute & will only be enforced as against A., where there is reasonable ground, such as danger to the fund, for the application.—*Re BRAITHWAITE, BRAITHWAITE v. WALLIS* (1882), 21 Ch. D. 121; 52 L. J. Ch. 15; 48 L. T. 857; 31 W. R. 180.

Annotations:—Reid. De Quetteville v. De Quetteville (1902), 19 T. L. R. 109; *Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

SUB-SECT. 2.—DETERMINABLE IN CERTAIN EVENTS.

A. Acts Involving Forfeiture.

987. Bankruptcy.]—A legacy for life, with a proviso against alienation, held to be forfeited, by the legatee taking the benefit of the Insolvent Act of New South Wales, upon his own petition, & surrendering his estate accordingly, although the legacy was not mentioned in the schedule to his petition.—*TOWNSEND v. EARLY* (No. 2) (1864), 34 Beav. 23; 4 New Rep. 489; 10 L. T. 897; 10 Jur. N. S. 860; 12 W. R. 1132; 55 E. R. 540.

988. —.]—By a settlement made on the second marriage of a widow of her property, a life estate for her separate use was given to the wife, followed by an estate to the husband for his life or until his bkpcy. Provisions were then made for the children of the marriage & a son of the wife's former marriage, & it was declared that, if the son of the former marriage should die under twenty-one, & if there should be no child of the marriage who should attain twenty-one or marry under that age, then, subject & without prejudice to the trusts before declared, & after the death of the husband, & of the son of the former marriage under twenty-one, & the default or failure of children of the marriage, "which shall last happen," the trustees should hold the property, if the wife should survive the husband, in trust for her absolutely, but, if the husband should have survived the wife, in trust for such persons as the wife should by will appoint, & subject thereto, in trust for her next of kin as if she had died intestate & "without having been married." The wife died first, without having exercised the power of appointment. There were no issue of the marriage. The son of the former marriage survived his mother, but died under twenty-one. Before the wife's death the husband had filed a liquidation petition:—*Held*: (1) the infant son was entitled, as sole next of kin of his mother, to the trust fund; (2) the trust for the next of kin did not arise until after the death of the husband, & consequently he was entitled to the income of the trust fund for his life, & this interest had vested in the trustee under his liquidation.—

UPTON v. BROWN (1879), 12 Ch. D. 872; 48 L. J. Ch. 756; 41 L. T. 340; 28 W. R. 38; *subsequent proceedings* (1884), 26 Ch. D. 588.

Annotations:—As to (1) N.F. Emmins v. Bradford, Johnson v. Emmins (1880), 13 Ch. D. 493. *Distd. Re Watson's Trusts* (1886), 55 L. T. 316. *Consd. Re Arden's Settlement*, [1890] W. N. 204. *Apld. Stoddart v. Saville*, [1894] 1 Ch. 480. *Follid. Re Forbes, Errington v. Sempell*, [1899] W. N. 6. *N.F. Re Brydone's Settlement*, *Cobb v. Blackburne* (1903), 88 L. T. 614; *Re Smith's Settlement*, *Wilkins v. Smith*, [1903] 1 Ch. 373. *Reid. Boyce v. Washbrough*, [1922] 1 A. C. 425.

See Nos. 1170, 1171, post.

989. —.]—By a settlement made in 1893 the settlor assigned property to trustees on trust to pay to him the annual income until he was declared bkpt.; thereafter his rights were to cease, & the trustees were to have power to apply at their discretion the income or any part thereof for his personal maintenance & support, & were to apply the residue for the benefit of his children, if any, or to accumulate it & add it to the corpus, which was ultimately to go to his relatives. In 1900 the settlor was adjudicated bkpt., & the trustee in bkpcy. applied to set aside the settlement, & it was set aside so far as was necessary to pay the bkpt.'s debts provable in the bkpcy. The trustees of the settlement by consent raised a sufficient sum to pay bkpt.'s debts in full & the costs, but the bkpcy. was not annulled. In 1902 the settlor was adjudicated bkpt. for the second time, & the trustee in that bkpcy. applied again to set aside the settlement, but was refused on the ground that at the time of making the settlement bkpt. was in a position to pay his debts without the aid of the settled property. The trustee in bkpcy. then applied for a declaration that bkpt.'s life estate under the settlement vested in the trustee in bkpcy. Throughout these transactions bkpt. was unmarried:—*Held*: the first bkpcy. had operated under the settlement as a forfeiture of the settlor's life estate, & it did not, therefore, vest in the trustee of the second bkpcy.—*Re JOHNSON JOHNSON, Ex p. MATTHEWS & WILKINSON*, [1904] 1 K. B. 134; 73 L. J. K. B. 220; 90 L. T. 61; 52 W. R. 304; 11 Mans. 14, D. C.

Annotation:—Consd. Re Burroughs-Fowler, Burroughs-Fowler's Trustee v. Burroughs-Fowler, [1916] 2 Ch. 251.

—.]—*See, also, BANKRUPTCY*, Vol. V., pp. 600, 661, 663, 664, 665, 668, Nos. 5878, 5880, 5896, 5899, 5903, 5904, 5906, 5924, 5927, 5930.

990. Assignment or Incumbrance.]—By a marriage settlement an annuity for the life of the wife's mother was assigned to trustees, for the wife for life, remainder for the husband for life, remainder for the issue of the marriage. Provided that if the husband should, during the life of the wife or of her mother, become bkpt., compound with, or assign his effects for the benefit of his creditors, or should do any act with a view to charge the annuity, his interest should be for the benefit of the issue. The husband, after his wife's death, sold an annuity to one of the trustees of the settlement, & signed an unstamped agreement to deposit the settlement with him, & authorising him to retain the annuity so sold out of the settled annuity:—*Held*: the husband had forfeited his interest in the settled annuity.—*STEPHENS v. JAMES* (1831), 4 Sim. 499; 58 E. R. 186.

991. — Charging order.]—Under a settlement the dividends of the trust fund were payable to B. for his life, or until he should assign or incumber the same, or until he should do or suffer

any act whereby the dividends should become payable to another person. A judgment creditor of B. obtained a charging order against the trust fund:—*Held*: under the words "shall suffer any act," a forfeiture had accrued of B.'s life interest.—*ROFFEY v. BENT* (1867), L. R. 3 Eq. 759.

Annotations:—*Apld.* *Re Throckmorton, Ex p. Eyston* (1877), 7 Ch. D. 145. *Consd.* *Sutton, Carden v. Goodrich* (1899), 80 L. T. 765.

992. — [By a marriage settlement the annual income of the trust fund was given to the husband "& his assigns" for his life or until he should make, or attempt to make, any assignment of the income, or any part thereof, or to charge or incur or attempt to charge or incur, the same, or until he should be found or declared a bkpt., or should take the benefit of any Act of Parliament for the benefit of insolvent debtors, or until he should make any assignment of his effects for the benefit of his creditors. The settlement contained limitations over, & a direction that upon the husband's death, or sooner determination of his estate, payment should be made to those entitled in remainder. The husband mortgaged his life interest & judgments had been signed against him for costs incurred in certain litigation & charging orders made against his life interest in certain consolidated stock comprised in the trusts of the settlement. It was contended that the effect of the addition of the word "assigns" was that the husband's life interest was absolute, & the forfeiture clause void:—*Held*: the result of giving so wide a meaning to the word "assigns" would be to render nugatory the rest of the proviso, which was aimed against alienation; the charging orders were not within the clause; & it was possible to give effect to the clause against alienation & at the same time to give effect to the word "assigns," therefore the charging orders would be valid against the income up to the date of the mtge., but the mtge. operated so as to work a forfeiture of the life interest.—*Re KELLY'S SETTLEMENT, WEST v. TURNER* (1888), 59 L. T. 494.

993. — *Contingent charge in favour of creditors.*—Under a proviso against assigning or charging or attempting to assign or charge a life interest, so as not to be entitled to the personal receipt & enjoyment of the property, an agreement to charge a debt on the estate in the event of the deficiency of another estate, a power of attorney authorising the receipt of the rents & payment in discharge of debts, & an authority to a creditor to receive future rents, for which anticipated receipts were given, were each declared sufficient to determine the life interest.—*WILKINSON v. WILKINSON* (1819), 3 Swan. 515; 2 Wils. Ch. 47; 36 E. R. 958.

Annotations:—*Consd.* *Oldham v. Oldham* (1867), L. R. 3 Eq. 404. *Apld.* *Re Spearman, Spearman v. Lowndes* (1900), 82 L. T. 302. *Reid.* *Lear v. Leggett* (1830), 1 Russ. & M. 690; *Rochford v. Hackman* (1852), 9 Hare, 475; *Avison v. Holmes* (1861), 30 L. J. Ch. 564; *Re Catt's Trusts* (1864), 10 Jur. N. S. 636; *Re Sheward, Sheward v. Brown*, (1893) 3 Ch. 502.

994. — *Separation deed.*—By a settlement, dated in 1859, & made upon the marriage of A. & B. certain property of the husband was vested in trustees upon trust to invest the same, & to pay the interest, dividends, & annual produce thereof unto or permit the same to be received by the husband until he should be outlawed, or be found or declared a bkpt., or become an insolvent debtor within the meaning of some Act of Parlia-

ment for the relief or relating to insolvent debtors, or should do or commit any other act, or any other event should occur whereby the income or any part thereof would or might if thereby settled absolutely upon or in trust for him become alienated by law or vested in any other person or persons; & from & after the decease of the husband, or the sooner determination of the trust thereinbefore declared for his benefit, upon trust to pay the whole of such interest, dividends, & annual produce unto, or permit the same to be received by the wife & her appointees or assigns during her life for her separate use; & subject thereto upon trust for the children of the marriage as therein mentioned. A receiving order was made against the husband in 1885, but was rescinded in Feb. 1886. By a separation deed dated in Sept. 1886, & made between the husband & the wife, the husband covenanted that he would, during their joint lives, if they should so long live separate from each other, allow the wife to receive for her own benefit the interest, dividends, & annual income of the property therein mentioned, being the property brought into the marriage settlement by the husband:—*Held*: the covenant in the separation deed operated as an equitable assignment of the husband's life interest, & consequently a forfeiture had occurred.—*Re SPEARMAN, SPEARMAN v. LOWNDES* (1900), 82 L. T. 302; 44 Sol. Jo. 377, C. A.

995. — *Judgment.*—By a marriage settlement property was settled on the wife, for her separate use, for life, & after her decease on the husband for life, & it was provided that if the husband, either during his wife's life or afterwards, should do or permit any act whereby the income of the property might become payable to any person other than himself, then his life interest should be forfeit-d. During the marriage judgment was recovered against the husband by a creditor, & a writ of execution was issued, but no further proceedings were taken until after the wife's death, when the husband having filed a bill against the trustees of the settlement to enforce his life interest, the creditor sued out a writ of *elegit*, & obtained a garnishee order, which, however, the ct. of law refused to make absolute pending the proceedings in equity:—*Held*: there had been a forfeiture of the husband's interest, & his bill must be dismissed.—*STOCKWELL v. YEATES* (1868), 19 L. T. 328; 17 W. R. 22.

996. — [A marriage settlement of the settlor's own property was made on trust to pay the income to himself "during his life or till he shall become bkpt. or shall assign, charge or incur the income or shall do or suffer something whereby the same or some part thereof would through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons," & from & after the determination of the trust in favour of the settlor upon trust to pay the income to his wife during her life:—*Held*: the limitation over to the wife was valid in the event of an involuntary alienation by process of law of the income in favour of a judgment creditor of the husband.—*Re DETMOLD, DETMOLD v. DETMOLD* (1889), 40 Ch. D. 585; 58 L. J. Ch. 495; 61 L. T. 21; 37 W. R. 442.

Annotations:—*Apld.* *Re Tetley, Ex p. Jeffry* (1896), 66 L. J. Q. B. 111. *Distd.* *Re Spearman, Spearman v. Lowndes* (1900), 82 L. T. 302. (*See* 82 L. T., p. 305.) *Apld.* *Re Johnson Johnson, Ex p. Matthews & Wilkinson*, [1904]

995 I. *Assignment or incumbrance—Judgment.*—*Re RYAN* (1887), 19 L. R. Ir. 24.—*IR.*

995 II. — [—*DOUGLAS'S TRUSTEES v. COCHRANE* (1902), 5 F. (Ct. of Sess.) 69; 40 Sc. L. R. 103; 10 S. L. T. 328.—*SCOT.*

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1 K. B. 134; *Re Perkin's Settlement*, Leicester, Warren v. Perkins (1912), 56 Sol. Jo. 412. *Reid*, Mackintosh v. Pogoso, [1895] 1 Ch. 505; *Re Holland*, Gregg v. Holland, [1902] 2 Ch. 360.

997. — *Mortgage.*—*Re KELLY'S SETTLEMENT*, WEST V. TURNER, No. 992, *ante*.

998. — *—*—*—*—A settlor made a settlement of his property by which certain income was to be paid to himself for life or until he should attempt to alienate it. Subsequently he executed a mortgage upon the income payable to him under the settlement:—*Held*: the settlor's life interest in the fund was forfeited by operation of the charge.—*Re PERKINS' SETTLEMENT TRUSTS*, LEICESTER; WARREN v. PERKINS (1912), 56 Sol. Jo. 412.

999. — *By convict in anticipation of conviction.*—*B.*, by a voluntary settlement, limited real & personal property to trustees upon certain trusts therein mentioned, & subject thereto, to pay an annuity of £150 to his wife for her life, & another annuity of £200 to his daughter for life, for her separate use, & subject to these trusts, to apply all or any part of the income towards the maintenance & education of his daughter's six children, & accumulate the surplus income until the death of the survivor of his wife & daughter, & until the youngest child should attain twenty-one, & when the youngest child attained twenty-one, if his wife & daughter should be then dead, or if living, then immediately after the death of the survivor, to convey the property to the six children, or such of them as should be then living, as joint tenants, if more than one, & not as tenants in common. He also declared that if any of the children should alienate his or her share it should be forfeited & belong to the others. Four of the children lived to attain twenty-one, & one of the sons having committed felony, assigned his share of the trust premises to his two brothers & his sister. He was afterwards convicted, & transported for life, but on the expiration of some years received a conditional pardon. B.'s daughter being dead, her children agreed, with the consent of the widow, to divide the annuity of £200, reserving a fourth part for their brother, the convict; they at the same time executed deeds severing the joint tenancy, & settling their respective shares. The widow having died, a suit was instituted to administer the trusts of the voluntary settlement:—*Held*: the assignment by the convict was a forfeiture to his brothers & sister, & even if this alienation had not taken place the Crown could not have claimed his interest, as it was not vested until after the conditional pardon had been granted him.—*BARNETT v. BLAKE* (1862), 2 Drew. & Sm. 117; 62 E. R. 566; *sub nom.* *BLAKE v. BARNETT*, 31 L. J. Ch. 898; 6 L. T. 886; 26 J. P. 692; 8 Jur. N. S. 812; 10 W. R. 767.

Annotations:—*Consd.* Talbot v. Jevors (1917), 117 L. T. 430. *Reid*. Hurst v. Hurst (1882), 21 Ch. D. 278.

1000. — *Direction to trustees to pay to third person.*—Under a settlement, O. was entitled to a life interest in an annuity, with a clause of forfeiture if he should enter into a composition with his creditors, or charge, assign, or in any manner by way of anticipation dispose of the annuity, or until anything should happen whereby it should vest or become liable to be vested in another person. O., being indebted to his bankers to a large amount, in pursuance of an agreement with them, gave the trustees a written authority to pay the annuity, as it should become due, to his bankers, who were to apply it partly in payment of interest & in reduction of the debt. It was

alleged that there was an agreement with the bankers that the authority should be revocable:—*Held*: this occasioned a forfeiture of the life interest.—*OLDHAM v. OLDHAM* (1867), L. R. 3 Eq. 404; 36 L. J. Ch. 205; 15 W. R. 300.

Annotation:—*Distd.* *Re Swannell*, Morice v. Swannell (1909), 101 L. T. 76.

1001. — *Authority to attorney to receive moneys.*—S. was entitled for life to the income bequeathed by a will which provided that if he should commit or suffer any act or default or process whatsoever which but for that proviso would have the effect of resting the right to receive the interest in any person whomsoever the life interest of S. should cease & be void & the income be paid as on his death. S. being about to go to South Africa executed a general power of attorney to his solr. W., who was a trustee of testator's will, & on W.'s going abroad & retiring from the trusteeship in 1906 executed a power of attorney appointing his then solr. K. in his name & on his behalf to recover & receive all sums of money in respect of the interest under the will:—*Held*: the power of attorney being a mere authority to receive the income of S.'s interest under the will & apply it for his benefit & not a colourable transaction giving his creditors an equitable charge it did not constitute a forfeiture within the meaning of the will.—*Re SWANNELL*, MORICE v. SWANNELL (1909), 101 L. T. 76.

1002. — *Divorce Court order.*—In 1887, F., on his marriage settled the proceeds of property as to the income upon himself for life determinable on his bkpcy. or until he suffered any act or thing or any event happened whereby, if payable to him absolutely, he would be deprived of the right to receive the income or any part thereof. By an order in 1895 after the dissolution of F.'s marriage, the President of the Probate Div. ordered that the trustees should set apart the whole of the income of the settled funds which was then payable by him, & apply it for the children of the marriage until majority. F. became bkpt. in 1904, & his youngest child attained twenty-one in 1910:—*Held*: the order of the Probate Div. was an act or event antecedent to his bkpcy. by which F.'s interest in the whole income was determined for a substantial period, & therefore a forfeiture took place at the time the order was made & nothing passed to the trustee in his bkpcy.—*Re CAREW'S TRUSTS*, GELLIBRAND v. CAREW (1910), 103 L. T. 658; 55 Sol. Jo. 140.

1003. — *Post-nuptial settlement by beneficiary & husband—Settlement inoperative against beneficiary.*—Testator by his will gave the residue of his estate to trustees, on trust to pay an annuity of £50 to his widow in case she should marry again, which she did, during her life, & subject thereto to pay the income to his two sisters, in equal shares, during their lives, & to pay the whole to the survivor during the remainder of her life, & after her death to divide the fund equally between testator's nephews & nieces, to be paid to them at twenty-one, the share or shares of any of them dying under that age leaving issue to go to such issue, & the share or shares of any of them dying under that age without leaving issue, or leaving issue in case such issue should all die under twenty-one, to go to testator's surviving nephews & nieces, & to the issue, if any, of such of them as should be then dead, such issue to represent their respective parents, & to take equally amongst them, if more than one, & if but one, such one only, the same share as his, her, or their deceased parent would have taken if he or she had then

been living & had been a surviving nephew or niece; & testator declared that if any of his nephews or nieces should, during the lives of his two sisters or the survivor of them, assign his or her expectant share, or any portion thereof, or should attempt so to do, then he or she so assigning his or her expectant share, or any portion thereof, or attempting so to do, should forfeit all benefit under testator's will; & the assignment, so far as it should purport to affect any part of the trust moneys, should be null & void, & the share of the person so assigning, or attempting so to do, should go, as if he or she had never been born, to the other nephews or nieces. The survivor of testator's two sisters died in 1890. In 1876 one of testator's nieces, who had attained twenty-one, married in Australia a domiciled Australian. No settlement was made on her marriage; but in 1879 she & her husband executed a post-nuptial settlement, which purported to assign (*inter alia*), her reversionary interest under the will of testator to trustees upon certain trusts. By the law of Australia this assignment was inoperative except to the extent of the husband's interest, if any, in the wife's reversionary share:—*Held*: (1) the forfeiture clause was valid notwithstanding that the reversionary interest were originally vested but liable to be divested; (2) although the settlement was inoperative as regarded the wife, it was, within the meaning of the clause, an attempt to assign her reversionary share, & the forfeiture had taken effect.—*Re PORTER, COULSON v. CAPPER*, [1892] 3 Ch. 481; 61 L. J. Ch. 688; 67 L. T. 823; 41 W. R. 38; 36 Sol. Jo. 626; 3 R. 19.

Annotations:—*As to* (1) *Distd.* *Re Smith, Smith v. Smith*, [1916] 1 Ch. 369. *As to* (2) *Distd.* *Re Tancred's Settlement, Somerville v. Tancred, Re Selby, Church v. Tancred*, [1903] 1 Ch. 715; *Re Adamson, Public Trustee v. Billing* (1913), 109 L. T. 25. *Refd.* *Re Sheward, Sheward v. Brown*, [1893] 3 Ch. 502.

Beneficiary becoming enemy alien.—*See* ALIENS, Supp. III., p. 93, No. 215c.

B. Acts Not Involving Forfeiture.

Proviso against assignment or incumbrance.—Bankruptcy—Funds not belonging to settlor.—*See* BANKRUPTCY, Vol. V., pp. 653–656, Nos. 5839–5853.

1004. — Settlement by beneficiary on marriage.—L. was entitled under a voluntary settlement to a life interest in one-fourth part of certain funds, with remainder to his children who should attain twenty-one, or die under that age leaving issue with remainder over. The settlement contained a proviso for the determination of his life interest, & the acceleration of the subsequent remainders, if he should alien, dispose of, mortgage charge, or in anywise incumber his life interest, or if by reason of his bkpcy., insolvency, or otherwise the income of the funds could be no longer personally enjoyed by him, but would, but for that proviso, become vested in, or payable to any person or persons other than him.

By a subsequent settlement made on his marriage, L., amongst other property, assigned to trustees the share to which he was entitled under the former settlement, upon trust to continue the trust funds in their then present investments, or upon the written request of L., & after his death upon such request, or at such discretion as therein mentioned, to sell the same, & pay the income of the proceeds to L. during his life, & after his death, to his wife during her life, with remainder for the issue of the marriage as L. & his wife jointly, or the survivor should appoint, & in default

for all the children of the marriage in equal shares, sons at twenty-one, daughters at twenty-one or marriage, & in default of such issue for L. absolutely.

The question arose whether the marriage settlement produced a forfeiture of L.'s life interest under the voluntary settlement:—*Held*: no such forfeiture was produced, for the assignment contemplated by the forfeiture clause was one by reason of which the income of L.'s share would become payable to some person other than him, whereas by the marriage settlement the life interest was assigned to trustees for his benefit.—*LOCKWOOD v. SIKES* (1884), 51 L. T. 562.

1005. ——A person entitled to a life interest, determinable if he should dispose or attempt to dispose of it, assigned it to the trustees of his marriage settlement upon trusts under which he was to receive the income for life. By the settlement he appointed the trustees his attorneys to receive the income, & gave them power to pay the expenses of managing the trusts:—*Held*: this was not a disposition or attempted disposition of his life interest so as to cause it to be forfeited.—*Re TANCRED'S SETTLEMENT, SOMERVILLE v. TANCRED, Re SELBY, CHURCH v. TANCRED*, [1903] 1 Ch. 715; 72 L. J. Ch. 324; 88 L. T. 164; 51 W. R. 510; 47 Sol. Jo. 319.

Annotation:—*Refd.* *Re Eardley's Will, Simson v. Freemantle*, [1920] 1 Ch. 397.

1006. — Existing incumbrance.—A settlement contained a trust for payment of the income of the trust fund to A. for life "or until he shall assign, charge or incumber, or affect to assign, charge or incumber" the same:—*Held*: under the circumstances this trust had not a retrospective operation so as to include past acts.—*WEST v. WILLIAMS*, [1899] 1 Ch. 132; 68 L. J. Ch. 127; 79 L. T. 575; 47 W. R. 308, C. A.

Annotation:—*Refd.* *Deeley v. Lloyds Bank*, [1912] A. C. 756.

1007. — Inoperative assignment.—A life interest was liable to forfeiture if "some event shall have happened or shall happen whereby if the same income belonged absolutely to" the life tenant "she would be deprived of the personal enjoyment thereof or of any part thereof." The life tenant made an equitable assignment of part of her life interest, but this subsequently became inoperative before any money came to her trustees as part of her life interest:—*Held*: no forfeiture had been incurred of the life interest.—*Re MAIR, WILLIAMSON v. FRENCH*, [1909] 2 Ch. 280; 78 L. J. Ch. 711; 101 L. T. 70.

1008. — Release of interest to effect advancement.—By a marriage settlement made in 1865 the income of the wife's fortune was settled upon trust, as to part thereof for the wife for life, & as to the other part thereof for the husband for life or until bkpcy. or alienation or his doing some act whereby the same or some part thereof would become vested in or payable to some other person. Subject to the trusts aforesaid the husband's & wife's fortunes were settled upon trust, in the events which happened, for their children in such shares " & with such provisions for their respective maintenance, education, & advancement " as the husband & wife should by deed jointly appoint, & in default of such appointment for the children equally at twenty-one or marriage. Then followed the usual advancement clause.

In 1896 the husband & wife by deed appointed one equal ninth share of the trust funds to a son on his marriage & the appointed share was settled, & in 1897 they by deed appointed another equal ninth share to another son on his marriage, & the appointed share was settled. Neither of these

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appointments contained an advancement clause. Subsequently the trustees of the 1865 settlement in exercise of their power of advancement raised £4000 out of their trust funds in respect of each appointed share & paid the same to each of the son's marriage settlement trustees, & the husband & wife released their respective life interests in each of the sums so advanced:—*Held* (1) the appointments must be read into the original settlement & the advancement clause applied to appointed as well as to unappointed shares; (2) the husband by releasing his life interest in the sums advanced did not thereby forfeit his life interest under the settlement.—*Re HODGSON, WESTON v. HODGSON*, [1913] 1 Ch. 34; 82 L. J. Ch. 31; 107 L. T. 607; 57 Sol. Jo. 112.

Annotation:—*As to* (1) *Consd. Re Winch's Settmt.*, Winch v. Winch, [1917] 1 Ch. 633.

1009. Proviso against attempt to prevent wife from appointing to objects of power—Joint appointment by husband & wife nominally to child—Actually for benefit of husband.—Construction of a clause of forfeiture of the interest of a husband, on his doing, or attempting to do any act whereby the wife should be prevented executing a power or the property be prevented devolving on her heirs.

By a settlement, the husband & wife had a joint power of appointment over part of the property in favour of the children; the wife had, in one event, a general power to appoint by deed or will, & in another event, by will only, over the other part.

The ultimate remainder, in default of issue, etc., was to the wife's heir & next of kin. The deed contained a proviso of forfeiture of the husband's interest, in case he should do or "attempt" to do any act which would prevent or hinder the wife executing her powers, or prevent the property devolving on her heir, etc. The husband & wife appointed a part of the fund nominally to a child, but really for the husband's benefit, which was set aside:—*Held*: the husband's interest had not been thereby forfeited, & the proviso pointed to the separate power of the wife & not to the joint power of husband & wife.—*WADE v. HOPKINSON* (1855), 19 Beav. 613; 52 E. R. 488.

SUB-SECT. 3.—BY IMPLICATION.

1010. Settlement in trust for wife during coverture—Life interest in wife.—By a marriage settlement a portion to which the wife was entitled was assigned in trust, for her separate use during the coverture, & in case she should die in her husband's lifetime, then in trust for him during his life, & after the death of the survivor, in trust for the issue of the marriage living at the death of the survivor, as the wife should appoint, & in default of such issue, in trust for such persons as the wife should by deed or will appoint; the wife survived the husband:—*Held*: she was entitled to the interest of the portion for her life.—*TUNSTALL v. TRAPPES* (1830), 3 Sim. 286; 57 E. R. 1005.

Annotations:—*Refd.* *Allin v. Crawshay* (1851), 9 Hare, 382; *Acraman v. Corbett* (1861), 30 L. J. Ch. 642; *Mara v. Browne*, [1895] 2 Ch. 69; *Re Thursby's Settmt.*, *Grant v. Littledale*, [1910] 2 Ch. 181; *Re Stanley's Settmt.*, *Maddocks v. Andrews*, [1916] 2 Ch. 50. *Mentd.* *Hart v. Craddock* (1837), 1 Jur. 735; *Noate v. Marlborough* (1838), 3 My. & Cr. 407; *Barnes v. Rastor* (1842), 1 Y. & C. Ch. Cas. 401; *Benham v. Keane* (1861), 3 De G. F. & J. 318; *Doswell v. Reece* (1865), 13 L. T. 156.

1011. ———.—*]*—A marriage settlement declared the trusts of a sum of stock to be that, during the joint lives of the husband & wife, the dividends should be paid to the wife for her separate use; & if she should die in the husband's lifetime, the principal sum should be transferred to him absolutely; & if the husband should die in the wife's lifetime, then the same should be held in trust for such person as the wife should by will appoint. The wife survived the husband:—*Held*: the wife took, by implication, a life interest in the trust fund.—*ALLIN v. CRAWSHAY* (1851), 9 Hare, 382; 21 L. J. Ch. 873; 68 E. R. 555.

Annotations:—*Refd.* *Re Thursby's Settmt.*, *Grant v. Littledale*, [1910] 2 Ch. 181; *Re Stanley's Settmt.*, *Maddocks v. Andrews*, [1916] 2 Ch. 50.

1012. Gift to parent & children—Life interest in parent.—A. devises several leasehold estates to two trustees, in trust; if his granddaughter married without their consent, to convey the premises to two other trustees, in trust for her separate use during her life, & after her death for the use & benefit of her issue. Though she had no children by the first husband, she has only a right for her life, for the issue by any husband are provided for by this settlement.—*CHAMPION v. PICKAX* (1737), 1 Atk. 472; 26 E. R. 301, L. C.

1013. ———.—*]*—Settlement of a sum of money upon trust, to be transferred to the surviving parent, for the benefit of him or her, & any child or children of the marriage:—*Held*: upon construction of the whole instrument, that the surviving parent took for life, with remainder to the children.—*CHAMBERS v. ATKINS* (1823), 1 Sim. & St. 382; 1 L. J. O. S. Ch. 208; 57 E. R. 153.

Annotations:—*Refd.* *Crockett v. Crockett* (1842), 1 Hare, 451; *Ralkes v. Ward* (1842), 1 Hare, 445.

1014. ———.—*]*—A., having been indebted to the estate of B. in a sum of money, but from which he had been discharged under a commission of bkpt., voluntarily executed to C., the widow of B., a bond for the payment of part of such debt., for the use of herself & children, but at her disposal. Two years afterwards, A. executed to C. another bond for the payment of the remainder of such debt, for the use & benefit of herself & children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—*Held*: the widow took a life interest in the money secured by the bonds, & the principal, after her decease, became payable among the children, in such manner, & in such proportions, as she should direct.—*FOWLER v. HUNTER* (1829), 3 Y. & J. 506; 148 E. R. 1279.

1015. ———.—*]*—A letter, in the nature of a declaration of trust of a sum of £2,000, was as follows:—"The interest to be retained by me during my life, & after my decease, to be applied to the maintenance of H. & her daughter. After my decease I wish the interest of the above sum to be applied to their maintenance during their joint lives; & at the decease of her mother, if the child survives & lives until she has attained the age of twenty-one years, then the principal sum I bequeath to her; but in the event of both their deaths before the child shall have obtained the age of twenty-one years, then the principal sum to be paid to my brothers & sisters. The daughter lived to attain twenty-one, but died in the lifetime of the mother:—*Held*: the mother was entitled to the interest of £2,000 during her life, & the daughter upon attaining the age of twenty-one, acquired an absolute vested interest in the principal sum.—*MOOR v. ABBOTT* (1857),

26 L. J. Ch. 787; 30 L. T. O. S. 70; 3 Jur. N. S. 551.

1016. ———.]—In 1860 S. by deed settled leasehold property of his own in trust for his daughters M. & R. "for & during the terms of their natural lives as tenants in common & not as joint tenants" & "from & immediately after the decease of the survivor of them . . . then to the use of their respective child or children of the said M. & R. share & share alike as tenants in common & not as joint tenants." M. died in 1867 leaving children. R. died in 1914 without having had a child:—*Held*: on the death of M., R. took a life estate by implication in the moiety of M., & on the death of R. the children of M. took the whole of the settled property.—*Re STANLEY'S SETTLEMENT, MADDOCKS v. ANDREWS*, [1916] 2 Ch. 50; 85 L. J. Ch. 809; 114 L. T. 933; 60 Sol. Jo. 478.

1017. Failure of purpose of trust.]—By a settlement a fund was directed to be held upon trust to pay the income to an officer in the army until an opportunity should occur of applying it for or towards his promotion in the army, & then to sell out the same & apply the proceeds for or towards such promotion; but if the officer should happen to die before such promotion, leaving his wife him surviving then to hold the fund in trust for her, but if she should be then dead, then in trust for her father. The wife having died, & promotion by purchase having been abolished:—*Held*: the officer was not entitled to the fund, except for his life.—*CATOR v. DREW* (1874), 22 W. R. 248.

SUB-SECT. 4.—ENLARGEMENT TO ABSOLUTE INTERESTS.

1018. Power of appointment in survivor of husband & wife—Joint appointment in favour of husband.]—On marriage a sum of £9,000 was vested in trustees upon trust to pay the interest to the husband for life, & after his death, to the wife for life & after the death of the survivor, to pay the principal to such persons as the survivor should direct. The husband having occasion for money, the wife joined him in executing a deed poll, whereby they appointed the money immediately to the husband; but the trustees declining to act without the directions of the ct., this bill was filed; & upon personal examination of the wife, the ct. directed the trustees to pay the money to the husband & to deliver up the settlement to be cancelled.—*MACARMICK v. BULLER* (1787), 1 Cox, Eq. Cas. 357; 29 E. R. 1202.

Annotations:—*Apld.* Chesslyn v. Smith (1803), 8 Ves. 183. *Obtd.* Sperling v. Rochford (1803), 8 Ves. 164; Richards v. Chambers (1805), 10 Ves. 580.

1019. Power of appointment in donee of life interest.]—Money in ct. stood limited to a widow for life & afterwards as she should by deed or will appoint. The ct. directed payment to her without requiring an appointment.—*CAMBRIDGE v. ROUS* (No. 2) (1858), 25 Beav. 574; 53 E. R. 756.

1020. ———.]—A bequest to a *feme sole* "to be by her possessed & enjoyed absolutely during the term of her natural life & to be disposed of as she shall think fit at her death":—*Held*: to entitle the legatee on her petition to payment of the whole fund.—*Re DAVID'S TRUSTS* (1859), John. 495; 29 L. J. Ch. 116; 1 L. T. 130; 6 Jur. N. S. 94; 8 W. R. 39; 70 E. R. 517.

Annotations:—*Distd.* Mattingley's Trusts (1862), 2 John. & H. 426. *Refd.* Freeland v. Pearson (1867), L. R. 3 Eq. 658; Humble v. Bowman (1877), 47 L. J. Ch. 62.

1021. ——— **Limitation in default of appointment**

—**To executors & administrators.]**—Bequests to females, some of whom were married & some single, for their separate use for their respective lives, & after their decease to such persons as they should respectively appoint; & in default of appointment, to their respective exors., administrators, & assigns:—*Held*: each of the legatees, whether married or unmarried women, were entitled upon petition, without executing any formal appointment, to an immediate transfer or payment to themselves of the corpus of their shares of the fund.—*HOLLOWAY v. CLARKSON* (1843), 2 Hare, 521; 67 E. R. 215.

Annotations:—*Apld.* Long v. Watkinson (1852), 17 Beav. 471. *Follid.* Cambridge v. Rous (No. 2) (1858), 25 Beav. 574. *Consd.* Taylor v. Millington (1858), 4 Jur. N. S. 204. *Apld.* *Re Davids' Trusts* (1859), John. 495; *Re Seymour's Trusts* (1859), John. 472. *Refd.* Smith v. Palmer (1849), 7 Hare, 225; Mackenzie v. Mackenzie (1851), 3 Mac. & G. 559; Hughes v. Wells (1852), 9 Hare, 749; Page v. Soper (1853), 11 Hare, 321; Humble v. Bowman (1877), 47 L. J. Ch. 62; *Re* Clay, Clay v. Clay (1885), 54 L. J. Ch. 648; *Re* Onslow, Plowden v. Gayford (1888), 39 Ch. D. 622.

1022. ———.]—Bequest of personalty, in trust for the legatee for life, with remainder to her appointees by will, with remainder, in default of appointment, to her exors. & administrators:—*Held*: the legatee took the capital absolutely.—*DEVAL v. DICKENS* (1845), 9 Jur. 550.

Annotations:—*Follid.* Page v. Soper (1853), 11 Hare, 321. *Refd.* *Re* Onslow, Plowden v. Gayford (1888), 39 Ch. D. 622.

1023. ———.]—The trusts of some stock were, by a settlement, declared to be for A., B., C., & D., equally; with a proviso, that the shares of females should not be paid to them, but should be invested, & the income paid to them for their lives & that, after the death of each such female, the trustees should stand possessed of her share for such persons as she should by will appoint, & in default of appointment, for the exors. or administrators, or other the personal representatives or representative of such female:—*Held*: each female had an absolute interest in her share, & had a right to a transfer.—*ST. JOHN v. GIBSON* (1847), 17 L. J. Ch. 45; 10 L. T. O. S. 480; 12 Jur. 373.

1024. ———.]—Where trust funds were settled to the separate use of a married woman for her life, & after her decease upon trust for such persons as she should by will appoint, & in default of appointment, for her exors. & administrators, she, having become a widow, applied for a transfer of the funds to herself & her assignees, offering to release her power of appointment, & it was held that she was absolutely entitled to the trust funds, & the order was made accordingly.—*PAGE v. SOPER* (1853), 11 Hare, 321; 1 Eq. Rep. 540; 22 L. J. Ch. 1044; 17 Jur. 851; 1 W. R. 518; 68 E. R. 1298.

Annotation:—*Refd.* *Re* Onslow, Plowden v. Gayford (1888), 39 Ch. D. 622.

1025. ——— **To next of kin.]**—*ANDERSON v. DAWSON*, No. 1123, *post*.

.]—*See* POWERS, Vol. XXXVII., pp. 396 *et seq.*; WILLS.

1026. Interest of married woman—Power to consent to transfer to husband.]—Settlement of stock to the separate use of a married woman for life & after her death for her husband absolutely. Decree upon the bill of the husband & wife for a transfer to him upon his personal security.—*CHESSLYN v. SMITH* (1803), 8 Ves. 183; 32 E. R. 323.

Annotation:—*Refd.* Wake v. Parker (1838), 2 Keen, 59.

1027. ———.]—*Qu.*: whether a jurisdiction in equity, to permit a married woman to give up her interest for life in a trust fund not settled to her separate use, nor subjected to her appointment

SECT. 2.—Life interests: Sub-sect. 4. Sects. 3 & 4: Sub-sect. 1.]

analogous to a fine can be maintained.—**SPELTING v. ROCHFORD** (1803), 8 Ves. 164; 32 E. R. 316, L. C.

Annotations:—*Refd.* **Richards v. Chambers** (1805), 10 Ves. 580; **Woodlands v. Crowcher** (1806), 12 Ves. 174.

1028. ———.]—No jurisdiction in equity by the consent of a married woman upon examination to transfer to her husband personal property settled in trust for her surviving her husband absolutely.—**RICHARDS v. CHAMBERS, SEAMAN v. DUILL** (1805), 10 Ves. 580; 32 E. R. 970.

Annotations:—*Apld.* **Lee v. Muggeridge** (1812), 1 Ves. & B. 118. *Consd.* **Purdew v. Jackson** (1824), 1 Russ. 1; **Logan v. Wienholt** (1833), 7 Bl. N. S. 1; **Duberley v. Day** (1852), 16 Beav. 33. *Refd.* **Woodlands v. Crowcher** (1806), 12 Ves. 174; **Dalbiac v. Dalbiac** (1809), 16 Ves. 116; **Whittle v. Henning** (1848), 2 Ph. 731; **Roberts v. Cooper**, [1891] 2 Ch. 335.

1029. ———.]—Where a married woman stipulates that in the event of her surviving the property shall be hers reserving no power of disposition over it during coverture there are no means by which she can dispose of it while covert.—**LEE v. MUGGERIDGE** (1812), 1 Ves. & B. 118; 35 E. R. 46; *subsequent proceedings* (1813), 5 Taunt. 36.

Annotation:—*Mentd.* **Coward v. Hughes** (1855), 1 K. & J. 443.

1030. Separate use for life—Without limitations over.]—It is declared by a marriage settlement, that a trustee is to lay out a sum of money, which the husband had agreed to settle, in the purchase of any public stocks, or funds, or annuities for the life of the intended wife, in his own name in trust for her, & that he is, during her life, to pay to her the dividends & other produce of the stock or annuity so to be purchased, to her separate use during her life:—*Held*: the wife was entitled absolutely to a sum of 3 per cent. stock purchased with the money, & not merely to a life interest in it.—**SMITH v. KING** (1826), 1 Russ. 363; 38 E. R. 141.

SECT. 3.—POWERS OF APPOINTMENT.

See, generally, POWERS, Vol. XXXVII., pp. 384 et seq.

SECT. 4.—HOTCHPOT CLAUSE.

SUB-SECT. 1.—IN GENERAL.

As to satisfaction & ademption generally, *see* **EQUITY, Vol. XX., pp. 449 et seq.**

1031. Effect of omission of clause—All appointees share in unappointed portion.]—£4,000 settled on marriage in trust after the decease of the husband & wife to pay among all & every the child & children other than an eldest or only son at such times & in such proportions as he, or she, or the survivor, should appoint by deed or will; for want of appointment, among such child & children, other than, etc., equally to be divided; if but one, to that one; payable at twenty-one or marriage, or as soon after, as the life interests should drop; the shares of any dying before payable in the £4,000, or so much, as should not be appointed, to go to the survivors at the same time: There were four younger children: the marriage settlement of one recited, that she

was entitled to £1,000 part of this fund; one-fourth of it was appointed to another on his marriage; & to a third £1,000 as her share of that portion; the fourth died above twenty-one before his father, who survived his wife, & died without any farther appointment:—*Held*: £3,000 was well appointed; & the remainder vested in all equally according to the direction for want of appointment.—**WILSON v. PIGGOTT** (1794), 2 Ves. 351; 30 E. R. 668.

Annotations:—*Consd.* **Foster v. Cautley** (1855), 6 De G. M. & G. 55. *Refd.* **Kemp v. Kemp** (1801), 5 Ves. 849; **Doe d. Simpson v. Simpson** (1838), 5 Scott. 770; **Brodrick v. Brown** (1855), 1 K. & J. 328; **Minchin v. Minchin** (1871), 19 W. R. 993. *Mentd.* **Bulteel v. Plummer** (1870), 6 Ch. App. 160.

1032. ———.]—By a marriage settlement, a sum of £4,000 was to go, after the decease of the husband & the wife & the husband's father & subject to the father's power of appointment, to the children of the marriage equally; & the real estates of the wife were charged with a sum of £8,000, which was to be divided among the children, in such shares & manner as she should appoint. The wife, by her will, appointed £100 to the eldest son of the marriage, & the remaining £7,900 to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, & in daughters on their attaining that age or marriage with their father's consent; she, likewise, created a further charge, in order that each younger child's share of the £8,000 might be augmented to £5,000; & by the same instrument she, in exercise of a power of appointment, which she had under the will of C., appointed C.'s residuary property to the first & other sons of the marriage successively, who should attain twenty-one; & if there were no such sons, to the daughters of the marriage who should attain twenty-one. Afterwards, by a codicil, she directed that the same fortune should be given to any child or children of whom she might be delivered, as was given by her will to each of her daughters, & that if no son of the marriage should live to attain twenty-one or be married, each of her daughters should be entitled to have for her fortune £10,000, to be paid in the manner and at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving a son & three daughters her surviving; & in the events which happened, two daughters, the only surviving children of the marriage, became entitled under the settlement to the £4,000, & under their mother's appointment, to the residuary property of C.:—*Held*: they were entitled to receive £10,000, exclusive of, & in addition to, their shares of the £4,000, & of the residuary property of C.—**WHYTE v. KEARNEY** (1827), 3 Russ. 208; 6 L. J. O. S. Ch. 22; 38 E. R. 555, L. C.

1033. ———.]—An appointment to one of a class of a part of a fund as "her part, share, & proportion," does not prevent her participating in the unappointed fund, limited to the class equally in default of appointment. A mother had a power of appointing a reversionary fund to her daughters. A daughter, who was under age, being about to marry, the mother appointed that a moiety of the fund should, on the marriage, become the portion of the daughter, & be vested in her or her intended husband in her right, & to be paid to the husband, his exors., administrators, or assigns, on the death of the tenant for life:—*Held*: (1) although the husband was not an object of

1031.1. *Effect of omission of clause—All appointees share in unappointed portion.]*—**CLOSE v. COOTE** (1880), 7 L. R. Ir. 24.

the power & the fund was reversionary & the daughter an infant, there was a valid appointment; (2) the daughter took her share of the unappointed portion of the fund, in default of appointment.—*WOMBWELL v. HANROTT* (1851), 14 Beav. 143; 20 L. J. Ch. 581; 18 L. T. O. S. 60; 51 E. R. 241.

Annotations:—As to (2) *Consd.* *Foster v. Cautley* (1855), 6 De G. M. & G. 55. *Generally, Refd.* *Re Gosset's Settlement* (1854), 19 Beav. 529.

1034. ———.]—A term of years was limited by will to trustees upon trust, if there should be two or more younger children of T., to raise for their portions such sum or sums, not exceeding £8,000 as T. should appoint, & in default of appointment, the sum of £8,000 to be paid to such of the children & in such shares as T. should appoint, & in default of appointment, to all the children equally. T., by his marriage settlement, directed that £6,000 should be raised for the younger children of that marriage if two or more, & that if he should survive his intended wife & die without being married again, or if so married, should not have any issue of any future marriage who should take an interest in the sum provided by the will for younger children, then the further sum of £2,000 should be raised for the younger children of the first marriage, if there should be two or more. Neither the will nor the settlement contained a hotchpot clause. Afterwards T. appointed to one of his daughters "the sum of £2,000 part of the sum of £8,000 made raisable by the will in the event which has happened, of there being two or more younger children." T. died in the lifetime of his wife:—*Held*: the appointee of £2,000 was entitled to participate in the unappointed £6,000.—*WALMSLEY v. VAUGHAN* (1857), 1 De G. & J. 114; 26 L. J. Ch. 503; 29 L. T. O. S. 204; 3 Jur. N. S. 497; 5 W. R. 549; 44 E. R. 666, L. C.

1035. ———.]—By a settlement, made in 1842, certain lands were conveyed to trustees on trust to raise, after the death of M., or during his life with his consent, £12,000 for the benefit of E. & L., daughters of M., in such shares as M. should appoint, & in default of appointment for E. & L. equally on attaining twenty-one or marriage, to be paid to them at that age or time after the death of M. or by his consent in writing during his life. M., by a deed poll in 1844, appointed £5,000 to be raised & paid to E. at once, & £1,000 to be paid to her after his death, to the intent that the payment of her portion, under the deed of 1842, might be accelerated. M. died without making any further appointment:—*Held*: E. was entitled to share equally with L. in the unappointed portion of the £12,000.—*Re ALFRETTON'S TRUST ESTATES* (1883), 52 L. J. Ch. 745; 31 W. R. 702.

1036. ——— *Contrary Intention appearing from appointment.*]—Power of appointment among three persons executed by a transfer of one-third to one under an order on petition; stating, that the person having the power was desirous, that the fund might be equally divided. That person dying, without any further execution, the ct. gave the two remaining thirds respectively to another of the objects & to the administratrix of the third; who was dead; but had survived the person having the power.—*FORTESCUE v. GREGOR* (1800), 5 Ves. 553; 31 E. R. 734, L. C.

Annotations:—*Consd.* *Wombwell v. Hanrott* (1851), 14 Beav. 143; *Foster v. Cautley* (1855), 6 De G. M. & G. 55; *Lee v. Head* (1855), 1 K. & J. 620.

1037. ———.]—Under a marriage settlement, the husband & wife had a power of appointing a fund among their children, & in default of appointment, or so far as it did not

extend the fund was to go to the children equally. There were three children of the marriage. An appointment of one-third of the fund was made in favour of one of the children, yet so as not to affect the same power further than to the extent specified, & also, in case of no complete exercise or execution of the same power or authority as to the share of the fund not affected by the appointment, so as not to prejudice or affect the right or contingent interests of the appointee under the proviso for accruer, in case of the death of any or either of the other children, in such manner as specified in the settlement & notwithstanding that in case of no complete appointment the then "appointment was intended to be made in lieu of all claims & demands" of the appointee to or for any original or principal share of the fund:—*Held*: the appointors must be taken by necessary implication to have appointed the other two-thirds to their two other children, & the appointee was not entitled to share in such two-thirds.—*FOSTER v. CAUTLEY* (1855), 6 De G. M. & G. 55; 26 L. T. O. S. 249; 2 Jur. N. S. 25; 43 E. R. 1150, L. C.

Annotation:—*Consd.* *Walmsley v. Vaughan* (1857), 3 Jur. N. S. 497.

1038. ———.]—A lady, under a special power for the purpose in her father's will, appointed by will £10,000 equally among her three children. Subsequently by deeds poll she appointed sums equal to one-third to one daughter:—*Held*: on the facts the appointments by deeds poll were intended to be in satisfaction of the daughter's share in the £10,000, & she was not entitled to share in the unappointed residue equally with the other children.—*Re ASHTON, INGRAM v. PAPILLON*, [1898] 1 Ch. 142; 67 L. J. Ch. 84; 77 L. T. 582; 46 W. R. 231, C. A.

Annotations:—*Consd.* *Eardley's Will*, *Simeon v. Freemantle*, [1920] 1 Ch. 397. *Refd.* *Re Tancered's Settlement*, *Somerville v. Tancered*, *Re Selby, Church v. Tancered*, [1903] 1 Ch. 715; *Re Peel's Settlement*, *Biddulph v. Peel*, [1911] 2 Ch. 165; *Re Ware, Re Rouse, Ware v. Rouse* (1926), 70 Sol. Jo. 691.

1039. ——— *Portion of appointed fund paid to trustees—Subsequent deficiency of fund.*]—Trust funds comprised in a marriage settlement which contained no hotchpot clause were, in pursuance of a power in the settlement, appointed to the children of the marriage. Portions differing in amount of the sums so appointed having been paid over to the various appointees, the remaining trust funds afterwards, in consequence of an unforeseen loss, became insufficient to satisfy the appointments:—*Held*: the payments actually made must be treated as final & not as to be brought into account, & the sums still due to the appointees must bear the loss rateably.—*Re BACON'S SETTLEMENT TRUSTS, HUTTON v. ANDERSON* (1889), 42 Ch. D. 559; 58 L. J. Ch. 823; 61 L. T. 458.

1040. *To what persons clause extends—Remoter issue than children.*]—R., under his marriage settlement, appointed to W., his son, more of the settled property than he would have been entitled to in default of appointment. R., by his will, gave to his son W. the proceeds of all the policies of assurance on his life, & also all other property which he might have at the time of his death, & proceeded as follows:—"He will have to bring into hotchpot that portion of the fund settled on the marriage of his dear mother, which has already been received by him, & then, as I make no further appointment under the power for that purpose, the whole settled fund will be divided equally between him & my little grandson":—*Held*: this was no appointment to the grandson.—*LANGSLOW v. LANGSLOW* (1856), 21

Sect. 4.—Hotspot clause: Sub-sects. 1 & 2.]

Beav. 552; 25 L. J. Ch. 610; 2 Jur. N. S. 1057; 52 E. R. 973.

Annotation:—Refd. Box v. Barrett (1866), L. R. 3 Eq. 244.

1041. Valuation—As at time of distribution.]—By the marriage settlement of Mr. & Mrs. K. stocks were assigned to trustees upon trust for Mrs. K. for life, & after her death, in the events which happened of her surviving her husband & no joint appointment by them having been made, then upon trust for such of the issue of the marriage as the survivor of them should by deed or will appoint, & in default of such appointment in trust for the children of the marriage in equal shares. The settlement contained a hotspot clause in common form. Mrs. K. on the occasion of the marriage of one of her daughters appointed that certain sums of stock forming part of the settlement trust fund should immediately after the marriage be held in trust for the daughter for her absolute benefit, & Mrs. K. assigned & surrendered her life interest in the appointed stocks to the daughter. The stocks were accordingly transferred to the trustees of the daughter's settlement immediately after their marriage. Mrs. K. died & the trust funds became divisible:—*Held*: the daughter must bring into hotspot the share appointed to her at its value at the date of the death of Mrs. K.—*Re KELLY'S SETTLEMENT TRUSTS, GUSTARD v. BERKELEY*, [1910] 1 Ch. 78; 79 L. J. Ch. 60; 101 L. T. 555; 54 Sol. Jo. 12.

Annotation:—Refd. Re West, Denton v. West, [1921] 1 Ch. 533.

SUB-SECT. 2.—APPLICATION OF CLAUSE.

1042. To what funds applicable—Reversionary & life interests—Necessity for valuation.]—The donees of a power, authorising the appointment of personal estate amongst the children of the donees, or the issue of such children born during the lives of the donees or the life of the survivor, appointed it "upon the trusts following; that is to say," trusts for the benefit of some of the children, & to pay the interest to them for life; & after the decease of each child, to dispose of her share amongst her children. The settlement giving the power contained the usual hotspot clause:—*Held*: the life interest given by the appointment, as above stated, must be valued, & brought into hotspot.—*RUCKER v. SCHOLEFIELD* (1862), 1 Hem. & M. 36; 32 L. J. Ch. 46; 9 Jur. N. S. 17; 11 W. R. 137; 71 E. R. 16.

Annotations:—Consd. Re Oliphant's Trusts, Re Dixon's Will, Phillips v. Phelps (1917), 86 L. J. Ch. 452; *Re West, Denton v. West*, [1921] 1 Ch. 533. *Refd. McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482; *Re Harrison, Hunter v. Bush* (1918), 87 L. J. Ch. 433; *Re Payne, Taylor v. Payne*, [1927] 2 Ch. 1.

1043. ———.]—*Re HEATHCOTE, TRENCH v. HEATHCOTE*, [1891] W. N. 10.

Annotations:—Consd. Re West, Denton v. West, [1921] 1 Ch. 533. *Refd. Re Orlerton's Settlement, Sweetman v. Batty* (1912), 106 L. T. 588.

1044. ———.]—On inquiry in chambers where disagreement.]—Life & reversionary interests must be brought into hotspot under the usual hotspot clause.

Life interests & reversionary interests must be brought into hotspot. The value of them must be ascertained in the best way you can: & if you

cannot agree, there must be an inquiry at chambers on the subject (*JESSEL, M.R.*).—*EALLES v. DRAKE* (1875), 1 Ch. D. 217; 45 L. J. Ch. 51; 24 W. R. 184.

Annotations:—Consd. Re West, Denton v. West, [1921] 1 Ch. 533. *Refd. Wilson v. Kenrick* (1885), 31 Ch. D. 658.

1045. ———.]—The donee of a limited power died in 1886 having by her will appointed the entire fund, producing about £270 a year, in trust for T. for life, & after her death on the usual trusts for her issue & children & in default of such issue or children, in trust as to one moiety for G. for life with further trusts that failed. Under the deed creating the power T. & G. each took £1,000 in default of appointment, subject to the usual hotspot clause. G. died in 1915 without issue. T. died in 1920 without issue, & the fund became distributable:—*Held*: (1) T.'s estate must bring her life interest in the entirety into hotspot; (2) G.'s estate was not liable to bring anything into hotspot for two reasons:

(a) because G. being only given a defeasible reversionary life interest, did not at any time "take" any appointed part or share within the meaning of the hotspot clause.

(b) even if she theoretically did so at the appointor's death in 1886, it would be unfair & inequitable now to assess a retrospective actuarial value thereon without regard to the actual fact that her defeasible reversionary life interest had never fructified.—*Re WEST, DENTON v. WEST*, [1921] 1 Ch. 533; 90 L. J. Ch. 342; 125 L. T. 117; 37 T. L. R. 433; 65 Sol. Jo. 379.

As to time for valuation.]—*See No. 1041, ante.*

1046. ———.]—Two funds settled for same purpose by separate instrument.]—On a marriage, two separate sums were provided by two separate deeds, for the portions of younger children, & each deed contained a hotspot clause:—*Held*: these clauses were separate & distinct, & operated only on the fund contained in each settlement respectively.—*MONTAGUE v. MONTAGUE* (1852), 15 Beav. 565; 51 E. R. 657.

Annotations:—Distd. Re Perkins, Perkins v. Bagot (1892), 67 L. T. 743. *Refd. Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574; *Re Bristol, Grey v. Grey*, [1897] 1 Ch. 946; *Re Peel's Settlement, Biddulph v. Peel*, [1911] 2 Ch. 165.

1047. ———.]—On the marriage of M. & his wife two deeds were executed, one conveying English estates the other Irish; in the former a term was created to raise £40,000 portions; in the latter a term to raise £25,000 in each, after powers of appointment was a hotspot clause, declaring that "in default of any appointment to the contrary," no child should take any unappointed part without bringing his appointed share into hotspot, & the Irish deed referred to the English. Two appointments were made of parts of the £40,000 & there was a direction in the deeds of appointment, that the appointment should not prejudice the appointees' rights in the unappointed part:—*Held*: he was not obliged to bring anything into hotspot, but was entitled to his share in the £25,000 & in the residue of the £40,000 as if he had taken nothing by appointment.—*WELLESLEY v. MORNINGTON (EARL)* (1855), 2 K. & J. 143; 1 Jur. N. S. 1202; 69 E. R. 728.

Annotations:—Refd. Re Marsden's Trust (1859), 4 Drew. 594; *Topham v. Portland* (1862), 31 Beav. 525; *Roach v. Trood* (1876), 3 Ch. D. 429; *Henty v. Wrey* (1882), 21 Ch. D. 332. *Mentd. Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 48 L. J. Ch. 1.

1048. ———.]—By a marriage settlement, certain funds were settled upon certain usual trusts

for the benefit of the husband & wife & their children, & it contained a hotchpot clause. By the will of the wife's mother, made subsequently, a portion of her personal estate was bequeathed to the trustees to pay & transfer the same to the trustees of the settlement, to be held by them upon & for the same trusts & purposes as were therein expressed concerning the property thereby settled. On a summons taken out by the trustees of the settlement to ascertain the effect of this bequest, it was contended by parties to whom but small appointments under the settlement had been made that the bequest was to be treated as an accretion to the settlement, so as to make the hotchpot clause applicable by bringing into account the funds already appointed under the settlement:—*Held*: inasmuch as there was no context in the will importing that the use of the words "same trusts" implied an accretion of the settlement trust fund, the bequest must be deemed to be of an independent fund, to which the hotchpot clause in the settlement was not applicable.—*Re NORTH, MEATES v. BISHOP* (1897), 76 L. T. 186.

Annotations:—*Expld. Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 224. *Refrd. Re Walpole's Marriage Settlement, Thomson v. Walpole*, [1903] 1 Ch. 928.

1049. — Two funds settled by same instrument.—Whether considered distinct for purposes of clause.—Testator devised real estate on trust for sale & conversion, & directed a third of the proceeds of the sale to be held on trust for each of his daughters for her life, & after her death in trust for such of her children or their issue born in her lifetime as she should by will or deed appoint, & failing any such appointment, in trust for all her children in equal shares. A general hotchpot clause followed. Testator then directed two other funds to be held by his trustees on the same trusts. One of testator's daughters by will appointed part of the trust moneys to her two sons on condition that they should resign a benefit accruing to them under their father's will, whereby the residuary estate of testatrix, which was given to a stranger, would be enlarged, & failing their compliance with this condition, testatrix appointed the fund to one of her daughters:—*Held*: testator's intention was not to create three funds, but one fund, & therefore there was one general hotchpot clause applying to the whole share of the issue of testator's daughter in the moneys accruing to them under his will.—*Re PERKINS, PERKINS v. BAGOT*, [1893] 1 Ch. 283; 62 L. J. Ch. 531; 67 L. T. 743; 41 W. R. 170; 37 Sol. Jo. 26; 3 R. 40.

Annotations:—*Consd. Re North, Meates v. Bishop* (1897), 76 L. T. 186. *Distd. Re Bristol, Grey v. Grey*, [1897] 1 Ch. 946; *Re Cavendish, Grosvenor v. Butler*, [1912] 1 Ch. 794. *Consd. Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 224; *Re Wood, Wodehouse v. Wood*, [1913] 1 Ch. 303. *Distd. Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595. *Refrd. Vatcher v. Paull*, [1915] A. C. 372.

1050. — — — — —.]—A marriage settlement dealt with two funds: £13,000 Consols belonging to the wife, & a policy for £5,000 on the life of the husband. The capital of the wife's fund was to go to such children of the marriage as the husband & wife by deed, or the survivor by deed or will, should appoint, & in default of appointment to the children equally, subject to a hotchpot clause in the form usually adopted in the case of one fund: the £5,000 policy moneys were to go to such children of the marriage as the wife should by deed or will appoint, & in default of appointment "upon the same or the like trusts," & subject to "the same or the like" powers & provisoes as were expressed in the said settlement concerning the wife's fund after the death of the husband & wife & in default of appointment. The whole of the £13,000 had been appointed unequally among

the three children of the marriage, the £5,000 was unappointed & the question now raised was whether the two sums were to be aggregated for the purposes of hotchpot, or whether the £5,000 was divisible into three equal shares:—*Held*: the two funds were distinct, & the three children were entitled to the £5,000 in equal shares, without having to account for or bring into hotchpot any sums appointed to them out of the £13,000.—*Re BRISTOL (MARQUIS), GREY (EARL) v. GREY*, [1897] 1 Ch. 946; 66 L. J. Ch. 446; 76 L. T. 757; 45 W. R. 552; 41 Sol. Jo. 451.

Annotations:—*Follid. Re Cavendish, Grosvenor v. Butler*, [1912] 1 Ch. 794. *Consd. Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 224. *Appld. Re Wood, Wodehouse v. Wood*, [1913] 1 Ch. 303.

1051. — — — — —.]—By a marriage settlement made in 1877, after reciting that by virtue of a prior settlement & deed poll the wife was entitled to a reversionary sum of £15,000, but subject to a provision in the deed poll for the reduction thereof, in case the wife should make default in bringing the same into account in the division of certain trust funds in the deed poll mentioned, the sum of £15,000 was settled, subject to the life interests of the husband & wife, in trust for children of the marriage as the husband & wife should jointly appoint, & in default, as the survivor should appoint, & in default, in trust for children of the marriage in equal shares, the sons to take vested interests at twenty-one & the daughters at twenty-one or marriage. Then followed a usual hotchpot clause relating to "the trust premises," & usual powers of maintenance & advancement with the usual ultimate trusts in default of children in favour of the wife. The settlement contained an agreement to settle the wife's other or after-acquired property upon trusts for sale & conversion, the proceeds to be held "upon the trusts & with & subject to the powers, provisoes, agreements & declarations herein declared concerning the sum of £15,000 hereinbefore expressed to be hereby assigned," & further provided that, notwithstanding the agreement, if the wife became entitled to any interest which ought to be settled pursuant to the said agreement but under the provisions of the deed poll would go in satisfaction of the £15,000, it should be lawful for the trustees to release any such interest with the intent of keeping the £15,000 intact & unreduced. The husband & wife appointed the £15,000 in favour of one daughter & died without having made any further appointment:—*Held*: for the purposes of the hotchpot clause the £15,000 & the other or after-acquired property were distinct funds, & the daughter was entitled to share in the other or after-acquired property without bringing the £15,000 appointed to her into hotchpot.—*Re CAVENDISH'S SETTLEMENT, GROSVENOR v. BUTLER*, [1912] 1 Ch. 794; 81 L. J. Ch. 400; 106 L. T. 510; 56 Sol. Jo. 399.

Annotations:—*Consd. Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 224; *Re Wood, Wodehouse v. Wood*, [1913] 2 Ch. 574; *Re Campbell's Trusts, Public Trustee v. Campbell*, [1922] 1 Ch. 551.

1052. — — — — —.]—Testator gave three separate funds to trustees upon trusts, fully set out in each case, for his three children respectively for life, with remainder to their issue as they should respectively appoint, & in default of appointment to their respective children in equal shares with a hotchpot clause. In each case testator gave the fund over, on failure of the express trusts, upon trusts in favour of his other children, & their issue successively, by reference to the trusts expressly declared in favour of such children & their issue concerning the fund given in trust for them in the

marriage.]—*CHAMBERLAIN v. NAPIER* (1880), 15 Ch. D. 614; 49 L. J. Ch. 628; 29 W. R. 194.

Annotations :—*Refd.* *Re* Barnard, *Barnard v. White* (1887), 56 L. T. 9; *Re* Bankers, *Reynolds v. Ellis*, [1902] 2 Ch. 333; *Re* Fitzgerald, *Surman v. Fitzgerald*, [1904] 1 Ch. 573; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *Re* Mackenzie, *Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578.

1057. Ill appointment as to part—Part goes as in default.]—Personal estate settled on marriage for the husband for life, then for the wife for life, then to & among all & every the children & grandchildren, or issue, in such shares, under such restrictions, at such times, & in such manner, as they or the survivor should appoint by deed or deeds or by will; for want of appointment to all & every the children & grandchildren, or issue, living at the decease of the survivor, equally, payable at twenty-one or marriage; if but one, to that one; provided that in case of no appointment the issue of any children dead should not have a greater share than their parents would have had: issue only are within the power; but in any degree: but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power; otherwise it is void, even as to such as come *in esse* within those limits: but on marriage of a daughter interests may be given to her children, generally, & to the husband. What is ill appointed goes as in default of appointment: but children of a living parent cannot take under the proviso.—*ROUTLEDGE v. DORRIL* (1794), 2 Ves. 357; 30 E. R. 671.

Annotations :—*Consd.* *Leake v. Robinson* (1817), 2 Mer. 363; *Harvey v. Stracey* (1852), 1 Drew. 73; *Fitzroy v. Richmond* (1859), 27 Beav. 190. *Refd.* *Crompton v. Barrow* (1799), 4 Ves. 681; *Legard v. Haworth* (1800), 1 East, 120; *White v. St. Barbe* (1813), 1 Ves. & B. 399; *Tucker v. Sanger* (1824), M'Cle. 424; *Cutten v. Sanger* (1828), 2 Y. & J. 459; *Hughes v. Wells* (1852), 9 Bore. 749; *James v. Wynford* (1852), 1 Sm. & G. 40; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Fry v. Capper* (1853), Kay, 163; *Re Gosset's Settlement*, (1854), 19 Beav. 529; *Birley v. Birley* (1858), 25 Beav. 299; *Re Veale's Trusts* (1876), 4 Ch. D. 61; *Williamson v. Farwell* (1887), 35 Ch. D. 128; *Whitby v. Mitchell* (1890), 44 Ch. D. 85; *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 51; *Re Whitaker, Ainley v. Ainley* (1897), 41 Sol. Jo. 209; *Re Bowles, Amedroz v. Bowles*, [1902] 2 Ch. 650; *Re Hewett's Settlement*, *Hewett v. Eldridge*, [1915] 1 Ch. 810.

1058. Meaning of gift to daughter on "marriage."—**Marriage under twenty-one.**]—By a voluntary settlement personal property was assigned to trustees upon trust to pay the interest to T. during his life, & on his decease to pay the principal to his lawful issue, if then of age or married, share & share alike, if more than one, & if only one, the whole to be paid to such only child; or in case such child or children should be an infant or infants on the death of the said T., then the principal was to be paid to him, her or them as aforesaid, on their attaining twenty-one if sons, or, if daughters, on their marriage, respectively. By his will the settlor bequeathed certain other funds to the same trustees upon similar trusts. T. died, leaving an infant daughter his sole surviving child:—*Held*: the daughter would become absolutely entitled to the funds in question, either on attaining twenty-one, or on her marriage under that age.—*LANG v. PUGH* (1842), 1 Y. & C. Ch. Cas. 718; 6 Jur. 939; 62 E. R. 1086.

1059. Ascertainment of class to take—First member becoming absolutely entitled.]—A fund was settled by a voluntary deed upon such trusts as the settlor should appoint, & in default of appointment for such of the younger children of a third person as should attain twenty-one, or being daughters marry:—*Held*: when one younger child attained a vested interest in possession the class was closed, & such child was entitled to be

then paid a share.—*Re KNAPP'S SETTLEMENT*, *KNAPP v. VASSALL*, [1895] 1 Ch. 91; 64 L. J. Ch. 112; 71 L. T. 625; 43 W. R. 279; 13 R. 147.

Annotation :—*Refd.* *Re* Stephens, *Kilby v. Betts*, [1904] 1 Ch. 322.

—[*See, generally*, **WILLS**.
Effect of restraint on anticipation.]—*See* **PERPETUITIES**, Vol. XXXVII., p. 120, No. 527.

Meaning of particular words & phrases.]—*See* Part II., Sect. 3, sub-sect. 3, E., *ante*.

B. Vesting.

See Sect. 7, *post*.

SUB-SECT. 2.—TRUSTS FOR CHILDREN AT LATER AGE THAN TWENTY-ONE.

1060. Void for remoteness.]—A trust fund was limited, after the death of husband & wife, & in default of appointment, to their children equally, to be a vested interest in, & to be paid, transferred or assigned to, sons at twenty-five & to daughters at twenty-five or marriage, with benefit of survivorship in case of death under twenty-five, & as to daughters, in case of being unmarried:—*Held*: the limitation was void for remoteness.—*Re MORSE'S SETTLEMENT* (1855), 21 Beav. 174; 25 L. J. Ch. 192; 26 L. T. O. S. 163; 2 Jur. N. S. 6; 4 W. R. 148; 52 E. R. 825.

Annotation :—*Mentd.* *Re* Malet (1862), 30 Beav. 407.

1061. —[A marriage settlement, to which the wife's father was a party, after reciting that he had agreed to give £3,000 as a marriage portion or fortune with his daughter, & that it had been agreed that £500 should be forthwith paid to the husband for his own use, & that the residue thereof should be invested on the trusts therein mentioned, & that the wife's father had accordingly paid £500 to the husband, & had invested £2,500 in the names of the trustees, declared trusts of that fund for the settlor until the marriage, & then, after giving to the husband & wife life interests, & a power of appointment among the children, which was not exercised, for the children attaining twenty-five, & in default of such children, for the wife's representatives or next of kin in the usual manner. The trusts for the children, & subsequent thereto, being considered bad for remoteness:—*Held*: there was a resulting trust for the settlor.—*Re NASH'S SETTLEMENT* (1882), 51 L. J. Ch. 511; 46 L. T. 97; 30 W. R. 406.

Annotation :—*Refd.* *Re* Connell's Settlement, *Re* Bennett's Trusts, *Fair v. Connell*, [1915] 1 Ch. 867.

1062. —[*Re* **WARDEN**, *Re* **GILBART'S SETTLEMENT**, *BROWETT v. WARDEN*, [1887] W. N. 24.

See, now, Law of Property Act, 1925 (c. 20), s. 163.

SECT. 6.—INTERESTS DEPENDENT ON MARRIAGE WITH OR WITHOUT CONSENT.

1063. Where consent dispensed with—Consent capriciously refused.]—Settlement to two daughters. Proviso, if either marry without the consent of their mother, it should be to her separate use, etc. The mother proposed & encouraged the marriage of one of her daughters with S. & afterwards refused her consent out of pique & resentment; the marriage was had without her consent, & held no forfeiture.—*STRANGE (LORD) v. SMITH* (1755), Amb. 263; 27 E. R. 175, L. C.

Annotations :—*Consd.* *Dashwood v. Bulkeley* (1804), 10 Ves. 230; *Clarke v. Parker* (1812), 19 Ves. 1. *Refd.*

Sect. 6.—Interests dependent on marriage with or without consent. Sect. 7.]

Merry v. Ryves (1757), 1 Eden, 1; Walker v. Inge (1767), Rom. 95; D'Aguliar v. Drinkwater (1813), 2 Ves. & B. 225; Re Brown, Ingall v. Brown, [1904] 1 Ch. 120.

1064. What may constitute consent—Subsequent approbation of marriage contracted without consent.]—G. conveyed real estates upon trust for the benefit of his daughter; but he declared that if she married under age, & without his consent, the trustees should hold the estates in trust for him & his heirs. The daughter married under twenty-one, & without consent; but G. was afterwards reconciled to her, & treated both her & her husband with great kindness:—*Held*: this conduct of the father did not divest the equitable fee which had vested in him on the marriage.—*DUFFIELD v. ELWES* (1823), as reported in 1 Sim. & St. 239; 57 E. R. 96; *on appeal* (1827), 1 Bli. N. S. 497, H. L.

Annotations:—Mentd. Staniland v. Willott (1852), 3 Mac. & G. 664; Veal v. Veal (1859), 27 Beav. 303; Re Patterson, Mitchell v. Smith (1864), 4 New Rep. 131; Re Mead, Austin v. Mead (1880), 43 L. T. 117; Re Richardson, Shillito v. Hobson (1885), 53 L. T. 746; Re Dillon, Duffin v. Duffin (1890), 44 Ch. D. 76; Re Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. 889; Re Wasserberg, Union of London & Smiths Bank v. Wasserberg, [1915] 1 Ch. 195; Re Lee, Treasury Solicitor v. Parrott (1918), 87 L. J. Ch. 594.

1065. Failure to exercise power on marriage with consent—Discretionary power of trustees.]—A settlement was made of a trust fund, in moieties, for the grand-daughters of the settlor for life, subject to a prior interest in their mother, with remainder to their children as they should appoint, or, in default, equally. A power was interposed that in the event of either of the grand-daughters marrying with consent, the trustees might transfer to her part of the trust funds. One of the grand-daughters married with consent, but the power was not executed. The trust fund was paid into ct.:—*Held*: the execution of the power was discretionary with the trustees, & they not having exercised it, the grand-daughter was not entitled to payment to her of any part of the capital of the trust funds.—*Re STRICKLAND'S TRUST* (1862), 1 New Rep. 164.

1066. Whether condition enforceable—Necessity for gift over on marriage without consent.]—A condition subsequent in partial restraint of marriage, e.g., a condition providing for the forfeiture of interests, given by a settlement to a daughter of the settlor & her children, upon the marriage of the daughter at any time without the consent of named persons, is valid & enforceable if it be accompanied by a gift over of the fund on marriage without the required consent.—*Re WHITING'S SETTLEMENT*, *WHITING v. DE RUTZEN*, [1905] 1 Ch. 96; 74 L. J. Ch. 207; 91 L. T. 821; 53 W. R. 293; 21 T. L. R. 83; 49 Sol. Jo. 83, C. A.

Annotation:—Reid. Re Hewett, Eldridge v. Iles, [1918] 1 Ch. 458.

1067. Consent of trustees required—Whether consent of majority sufficient.]—The trust of a term under a settlement was, that if there should be two or more daughters of the marriage, then the trustees were to raise & pay to each the sum of £2,000, if she marry with the consent of her mother, if living, & a widow; if not, then with the consent of the trustees or the survivor of them, his exors., administrators, or assigns; & in case any of the daughters die before the portion was paid, that it should not go to the exor., but the

estate should be exonerated thereof, or, if raised, should go to him on whom the reversion of the premises is limited to descend.

The father afterwards by his will gives the further sum of £2,000 to each of his daughters, as an augmentation of their portions, subject to the same conditions, etc., as the original portions; & if any of the daughters die before the original portions become payable, then he wills that this £2,000 should not be paid to her exor., but that his lady & extrix. should have the residuum of this money, & makes her residuary legatee.

Pltf., H., married one of the daughters without consent, & C. another, also without consent. They are not entitled to the portions under the settlement or will.

Where a condition has been performed to a reasonable intent, the ct. will dispense with the want of circumstances, as where the major part of the trustees consent, or where they give an implied, not an express, consent.—*HARVEY v. ASTON (LADY)* (1737), 1 Atk. 361; 2 Com. 726; 5 Vin. Abr. 89, pl. 10; 26 E. R. 230; *sub nom.* *HERVEY v. ASTON*, West temp. Hard. 350; Willes, 83, L. C.

Annotations:—Dntd. Clarke v. Parker (1812), 19 Ves. 1. It was contended . . . upon the dictum of Lord Chief Baron Comyns, assisting Lord Hardwicke in the case of *Harvey v. Aston*, that the consent of the major part of the trustees is sufficient & two had consented. As to that passage, cited from Atkyn's Report, I have seen a manuscript note, in which the Chief Baron says no such thing. He has published his judgment in his own report, where no such passage appears (LORD ELDON, C.). *Reid.* Parsons v. Parsons (1744), 9 Mod. Rep. 464; Reynish v. Martin (1746), 3 Atk. 330; Wheeler v. Bingham (1746), 3 Atk. 364; Berkeley v. Ryder (1752), 2 Ves. Sen. 533; Burleton v. Humfrey (1755), Amb. 256; Low v. Peers (1770), Wilm. 364; Scott v. Tyler (1788), 2 Bro. C. C. 431; Lloyd v. Branton (1817), 3 Mer. 108; Newton v. Marsden (1862), 2 John. & H. 356; Re Moore, Trafford v. Maconochie (1888), 39 Ch. D. 116; Re Nourse, Hampton v. Nourse (1898), 79 L. T. 376. *Mentd.* Pearce v. Loman (1796), 3 Ves. 135.

1068. ———.]—No instance that consent of three trustees to marriage being required that of two not consulting the third would be sufficient.—*CLARKE v. PARKER* (1812), 19 Ves. 1; 34 E. R. 419, L. C.

Annotations:—Apld. Worthington v. Evans (1823), 1 Sim. & St. 165. *Reid.* Re Birch (1853), 17 Beav. 358; Re Brown's Trusts (1881), 44 L. T. 340; Re Smith, Keeling v. Smith (1890), 44 Ch. D. 654.

See, further, WILLS.

SECT. 7.—VESTING.

1069. Covenant to pay annuity to wife—To survivor for life—Afterwards to children.]—A. possessed of an exchequer annuity for ninety-six years by marriage arts. covenants to pay it to the wife for her separate use, & then to the survivor of husband & wife for life, & after to the children of the marriage, & if no child, then to be for the benefit of A. Husband & wife die leaving a child, who soon after dies. A. shall keep the annuity, & it shall not go to the administrator of the child.—*BASSE v. GRAY* (1715), 2 Vern. 692; Gilb. Ch. 97; 1 Eq. Cas. Abr. 363, pl. 16; 23 E. R. 1049, L. C.

1070. Limitation to children attaining twenty-one—Payable at twenty-three.]—COMBE v. COMBE (1741), 2 Atk. 185; 26 E. R. 516, L. C.

1071. Child not surviving parents—Where intention as to vesting clear in settlement—Intention followed.]—Where a settlement makes the right

PART VIII. SECT. 7.

1071 I. Child not surviving parents—Where intention as to vesting clear in settlement—Intention followed.]—BEALE v. CONNOLLY (1874), 8 L. R. Eq. 412.—*IR.*

of a child to a provision clearly depend upon its surviving both parents, the intention must prevail; but where the expressions are ambiguous, the presumption is in favour of the child.—*PERFECT v. CURZON* (LORD) (1820), 5 Madd. 442; 58 E. R. 964.

Annotations.—*Apld.* *Ballie v. Jackson* (1853), 1 Sm. & G. 175; *Swallow v. Binns* (1855), 1 K. & J. 417. *Consd.* *Currie v. Larkins* (1863), 9 L. T. 638; *Jeyes v. Savage* (1875), 10 Ch. App. 558, n. *Apld.* *Re Knowles*, *Nottage v. Buxton* (1882), 21 Ch. D. 806. *Refd.* *Tucker v. Harris* (1832), 5 Sim. 538; *Dalton v. Hill* (1862), 10 W. R. 396; *Jackson v. Dover* (1864), 10 L. T. 489; *Wakefield v. Maffet* (1885), 10 App. Cas. 422.

1072. — — — — —.]—A., by his marriage settlement, covenanted that he would, by his will or otherwise, settle all the real & personal estates which he should die seised or possessed of, so that the same might be enjoyed by his wife, for life, in case she should survive him; &, after the death of the survivor, by all the children of the marriage equally: some of the children of the marriage died in the lifetime of A. & his wife:—*Held*: under this covenant, all the children became entitled to vested interests, on their coming into existence.—*NAYLER v. WETHERELL* (1831), 4 Sim. 114; 9 L. J. O. S. Ch. 125; 58 E. R. 44.

Annotation.—*Refd.* *Faulkner v. Wynford* (1845), 15 L. J. Ch. 8.

1073. — — — — —.]—A married woman, by a testamentary instrument made in execution of a power contained in her marriage settlement, gave £2,000 subject to the life interest of her husband, to trustees upon trust for the benefit of her child or children, to be equally divided between them share & share alike; but in case the £2,000 should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust to invest & apply the interest to their maintenance & education, & when they should attain twenty-one or day of marriage, to pay to them their respective shares of the principal; & in case any of the children should happen to die before their portions should become payable, then the same should go & belong to the survivors or survivor of them.

Testatrix left a son & two daughters, all of whom had attained twenty-one at her decease. The son, & afterwards a daughter, died in the lifetime of their father:—*Held*: on the death of the father, the surviving daughter was entitled to the £2,000 by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which belonged to the representative of deceased daughter.—*BRIGHT v. ROWE* (1834), 3 My. & K. 316; 40 E. R. 121.

Annotations.—*Refd.* *Swallow v. Binns* (1855), 1 K. & J. 417; *Leader v. Duffey* (1888), 13 App. Cas. 294.

1074. — — — — —.]—By the marriage settlement of A. & B., a sum of £3,300 was assigned to trustees upon trust for the husband & wife for their respective lives; & after the decease of the survivor of them, in case there should be any child or children of their bodies then living, to pay the sum unto such child or children which should be then living, in such shares, etc., as the husband & wife should jointly appoint; & for want of such appointment, the same was to go & be equally divided among such children, if more than one, as should not be inheritable to the real estate of the husband, share & share alike, & to be paid to him, her, or them, at his, her, or their respective age or ages of twenty-one years or days of marriage, which should first happen; & in case there should be no such child or children living at the time of the death of the survivor of A. & B., or,

if such, & they should all happen to die before their respective ages of twenty-one years or days of marriage as aforesaid, then the sum was to go to such person or persons as B. by deed or will should appoint. A. & B. died without executing the joint power of appointment, having had several children, some of whom survived them:—*Held*: a son of the marriage who attained twenty-one, but died, without having been married, in the lifetime of one of his parents, acquired a vested interest in the fund, but two children who died infants & without having been married, in their parent's lifetime, were excluded from the fund.

The ct. must read settlements of this description with an inclination to believe that there was an intention to provide for children at a time when a provision would be required, namely at twenty-one or marriage. If the expressions are doubtful that inclination will prevail, but if there be a clearly expressed intention that intention so clearly expressed must be abided by (*KNIGHT BRUCE, V.-C.*).—*MOSTYN v. MOSTYN* (1841), 1 Coll. 161; 8 Jur. 456, 820; 63 E. R. 366.

Annotation.—*Consd.* *Jackson v. Dover* (1861), 2 Hem. & M. 209.

1075. — — — — —.]—A sum was vested in trustees, upon trust, declared by deed. The deed recited an intention to make some provision for A. & her children, & declared that the trustees should hold the fund for A. for life, & upon her death or doing any act to incur her interest, the trustees were to stand possessed, "if there should be one child of A. then living, the stock to be an interest vested in such child at twenty-one, & to be paid accordingly, if such age should happen after the death of A., & if not, immediately on her death or making any charge"; & if there should be two or more such children, then the stock to be transferred amongst such children, in equal shares, at the age of twenty-one, if A. should be dead; but if not, then immediately after her decease or having made such incumbrance. The deed contained clauses of survivorship in case of any child dying under twenty-one, as to "the share intended to be thereby provided for such child dying," & also clauses for maintenance, advancement, & accruer. There were several children; one attained twenty-one, & died in the life of A.:—*Held*: her representatives did not participate in the fund.—*SKIPPER v. KING* (1848), 12 Beav. 29; 12 Jur. 570; 50 E. R. 970, L. C.

Annotation.—*Distd.* *Swallow v. Binns* (1855), 1 K. & J. 417.

1076. — — — — —.]—By a marriage settlement, dated in 1787, £1,000, the wife's property, was vested in trustees, in trust for the wife & her husband for their lives, successively, & after their several deceases & the death of the survivor of them, in case there should be any child or children of the body of the husband or the body of the wife lawfully begotten which should be then living, in trust to pay the £1,000 unto such children equally, &, if there should be but one such child living, then in trust for such only child, & to be paid to such child or children at their respective ages of twenty-one, &, in the meantime, the interest of each child's share to be applied for its maintenance; &, in case there should be no such child living at the death of the survivor of the husband & wife, or in case of there being such & all of them should die before they should attain twenty-one, then the £1,000 to be in trust for the wife's father. By a deed, dated in 1793, the wife's father made a voluntary settlement of leaseholds & £500 stock, in trust for the wife for life, remainder

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in trust for all her children then born or thereafter to be born who should be living at her decease, equally, & to be assigned & paid to them at their respective ages of twenty-one, & in the meantime, the income to be applied for their maintenance; & if any of them should die before their shares should become payable or assignable, their shares to go to the survivors; & in case all the children should die under twenty-one, the property to be in trust for the settlor. The husband & wife had three children. The wife survived the husband. Two of the children died in her lifetime; one of them having attained twenty-one. The third attained twenty-one & survived the wife:—*Held*: that child was entitled to the whole of the property comprised in the deeds.—*JEFFERY v. JEFFERY* (1849), 17 Sim. 26; 13 Jur. 482; 60 E. R. 1036.

1077. ————.]—An appointment, under a power in a settlement, was made, directing the trustees after the death of the tenant for life to stand possessed of £6,000, to pay the dividends to S. for life, & after his decease to permit T. to receive the dividends for his life, & after the decease of the survivor for all & every the child & children of T. & S. equally to be divided between them, share & share alike, the shares of sons to be paid, assigned or transferred at the age of twenty-one, & the shares of daughters at twenty-one or marriage, which should respectively first happen, with benefit of survivorship among the children surviving, in case any of them should die before he, she, or they should, by virtue of the trusts, become entitled to payment, assignment or transfer of his, her or their respective parts. At the time of executing the deed T. & S. had seven children, the eldest of whom was forty-three, & the youngest twenty-six years of age. One of the children died in the lifetime of the tenants for life:—*Held*: the personal representative of deceased child was entitled to her share, & not the surviving brothers & sisters.—*Re WILLIAMS* (1849), 12 Beav. 317; 19 L. J. Ch. 46; 14 L. T. O. S. 393; 13 Jur. 1110; 50 E. R. 1083.

Annotation:—*Reid. Re Thomson's Trusts* (1852), 22 L. J. Ch. 273.

1078. ————.]—In determining the rights of children under a marriage settlement, the ct., unless prevented by clear & distinct words, will hold that children who attained twenty-one, & died, living their parents, took vested interests under the settlement.

The ct. will lay hold of minute circumstances in favour of such construction.—*BAILIE v. JACKSON* (1853), 1 Sm. & G. 175; 1 W. R. 196; 65 E. R. 76.

1079. ————.]—By a marriage settlement, after the death of the husband & wife, the trustees were to pay, assign & transfer, the capital to the children of the wife equally, the shares to be paid at twenty-one. There was a subsequent proviso that if there should be no such child living at the decease of the survivor of the parents, then the fund was to go over to C. There was only one child of the marriage:—*Held*: though she had attained twenty-one, her interest was defeasible by her death before the survivor of her parents.—*LLOYD v. COCKER* (1854), 19 Beav. 140; 24 L. J. Ch. 84; 24 L. T. O. S. 105; 1 Jur. N. S. 174; 52 E. R. 302.

1080. ————.]—S., under a power in a settlement, directed that after the death of the

survivor of W., A. & M. the trust premises "shall go & be paid, assigned, transferred, & conveyed in equal parts & proportions unto all & every child or children of J. born, or to be born, who shall be living at the decease of W., A. & M., in case they should survive B. or at the decease of B. in case they, the said W., A. & M., should all die in his lifetime, & to the children of those who may then be dead, such children to stand in the place of their parents respectively, & to take such share as their parents, if living, would have been entitled to." W., A. & M. died in the lifetime of B. B. died in 1851; J. died in 1837; J. had five children, one of whom married G. & died in 1842. There was issue of that marriage six children, four of whom died before B. G. obtained letters of administration to the estate of one of his children, who survived her mother; the other three deceased children of J. were not represented:—*Held*: the fund was divisible in equal shares among the surviving children of J. & the representatives of her deceased children.—*HARCOURT v. HARCOURT* (1857), 26 L. J. Ch. 536; 29 L. T. O. S. 174; 5 W. R. 478.

Annotations:—*Reid. Crauso v. Cooper* (1859), 1 John. & H. 207; *Lauphler v. Buck* (1865), 2 Drew. & Sm. 484.

1081. ————.]—*MOOR v. ABBOTT*, No. 1015, *ante*.

1082. ————.]—A fund was settled upon marriage upon trust, in case the husband should die in the lifetime of the wife & there should be issue of the marriage living at the death of the husband, for all & every the child & children of the marriage, & the issue of such child or children in case any of them should happen to be dead, leaving issue, in equal shares; the issue to be entitled only to the shares which their parents would have been entitled to if living:—*Held*: having regard to the context, the words "all & every the child & children" must be restricted to children who survived their father.—*Re THORNE'S TRUST* (1862), 10 W. R. 338.

1083. ————.]—Property was settled upon trust after death of settlor to apply the whole or part of income towards the maintenance & education of the six children of S. by name, & to accumulate the residue of the income until the death of the survivor of O. & S., or until such time as the youngest of the six children, or the youngest of such of them as should be living attained twenty one; & then if O. & S. should then have died, or if not, immediately after the death of the survivor, to convey & assign the same to the children, or such of them as should be then living. There was no other gift to the children. The settlement contained a clause that the share of any of the six children who "alienated" his share should be forfeited, & go over to the other children:—*Held*: none of the children took a vested interest till after the happening of the last of the three events, namely, the attainment of twenty-one by the youngest, & the death of O. & S.; & therefore none of the children who died before the last of such events happened took a vested interest.—*BARNETT v. BLAKE* (1862), 2 Drew. & Sm. 117; 62 E. R. 566; *sub nom. BLAKE v. BARNETT*, 31 L. J. Ch. 898; 6 L. T. 886; 26 J. P. 692; 8 Jur. N. S. 812; 10 W. R. 767.

Annotations:—*Mentd. Hurst v. Hurst* (1882), 21 Ch. D. 278; *Talbot v. Jevors* (1917), 117 L. T. 430.

1084. ————.]—**Ambiguous expressions in settlement as to vesting—Presumption in favour of child.**—*PERFECT v. CURZON* (LORD), No. 1071, *ante*.

10841. ————.]—*Ambiguous expressions in settlement as to vesting—Presumption in favour of child.*—*DARLEY v. PERCEVAL*, [1900] 1 L. R. 129.—*IR.*

1085. — — — —.]—By a marriage settlement stock was vested in trustees, upon trust, to pay the dividends to the husband during coverture & to the wife during her life, in case she survived him; & from & after her decease, in case there should be any children of the marriage then living, then upon trust for such of the children as should attain twenty-one or be married, with a direction in case all or any of such children should then be under twenty-one & unmarried, to apply the dividends for their maintenance; & in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one & unmarried, upon trust, if the husband should survive the wife & all such children, to pay the dividends to him during his life, & from & after the death of the survivor of the husband & wife, & from & after the death of the children, in case there should be any, & all of them should die under age & unmarried, in trust for certain other persons: the wife survived the husband, & at her death there was no child of the marriage living; but a son, who died in her lifetime, had attained twenty-one & married:—*Held*: the stock vested in that son absolutely.

Where clauses are conflicting the rational presumption is that a child attaining twenty-one takes a vested interest (*LEACH, M.R.*).—*TORRES v. FRANCO* (1830), 1 Russ. & M. 649; 39 E. R. 249.

Annotations:—*Fold*. Swallow v. Binns (1855), 1 K. & J. 417. *Apld.* Dixon v. Barkshire (1865), 34 Beav. 537; *Re Knowles, Nottage v. Buxton* (1882), 21 Ch. D. 806. *Consd.* *Re Hamlet*, Stephen v. Cunningham (1888), 38 Ch. D. 183. *Reid.* Woodhouse v. Woodhouse (1841), 5 Jur. 404.

1086. — — — —.]—*MOSTYN v. MOSTYN*, No. 1074, *ante*.

1087. — — — —.]—*BAILIE v. JACKSON*, No. 1078, *ante*.

1088. — — — —.]—By a settlement trustees were directed to hold trust funds upon trust to pay the income to E. for life, & after her death, "leaving a child or children," to transfer, pay, & make over the fund unto "all & every the child or children of E. & the issue of such of the children as might be then dead," such issue to take the parent's share, equally between them if more than one, the shares of sons to be transferred & paid at the age of twenty-one, & the shares of daughters at that age or marriage. Five of the children of E. survived her, & attained twenty-one or married, & one of her sons attained twenty-one & died without issue in her lifetime:—*Held*: although the trust only took effect in case some one child survived E., the contingency upon which the trust took effect was not to be imported into the constitution of the class who were to take under the trust, & the son who attained twenty-one & died in the lifetime of the tenant for life without issue took, nevertheless, a vested interest in the fund.—*Re ORLEBAR'S SETTLEMENT TRUSTS* (1875), L. R. 20 Eq. 711; 44 L. J. Ch. 661.

Annotations:—*Consd.* Selby v. Whittaker (1877), 6 Ch. D. 239. *Reid.* *Re Walker*, Dunkerly v. Hewerdine, [1917] 1 Ch. 38.

1089. — — — —.]—*Right of children of deceased child.*—By a settlement reciting a royal warrant directing a sum of £1,000 to be paid to trustees for the benefit of A. & J. & children of A., it was declared

that the trustees should stand possessed of the £1,000 upon trusts for investment & payment, & application of the income to or for the benefit of A. & J. during their respective lives, & from & after the deceases of A. & J. upon trust to pay, divide, or transfer the £1,000, & all dividends or interest which might be due thereon, unto & amongst all & every the child & children of A., & the issue of such child & children, if more than one, in equal shares & proportions, & if but one, then the whole to such one, & to be paid & transferred to such children or child as should be sons or a son at the age of twenty-one years, & to such children or child as should be daughters or a daughter at the age of twenty-one years, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable to be entitled to the share or shares which his, her, or their parent or parents would have been entitled to if living. A son of A. attained twenty-one, & died in the lifetime of A. leaving a child:—*Held*: the child of the son so dying was entitled to the parent's share of the trust fund.—*DAY v. RADCLIFFE* (1876), 3 Ch. D. 654; 24 W. R. 961.

1090. *Covenant to pay on death of parent—Child under age at death—Control of covenant by subsequent clause—Prevention of vesting.*—*FITZGERALD v. FIELD*, No. 1672, *post*.

1091. *Limitation to children "then living"—Meaning of—Time of determination of prior life interest.*—Limitation over after a life interest to husband for life or until bkpcy. remainder to the wife for life, remainder in the case of the wife dying in the husband's lifetime, then after the husband's death or sooner, in case of his becoming bkpt., to the children "then living":—*Held*: these words referred to the period of the wife's death, & not of the bkpcy.—*Re EDGINGTON'S TRUSTS* (1855), 3 Drew. 202; 61 E. R. 880.

1092. *Direction to divide among class—Following life interest.*—Under a trust for A. for life, " & after her decease, to be divided equally between her younger children":—*Held*: (1) the children took vested interests at their births; (2) the character of "younger child" was to be determined at the period of vesting, & not that of distribution.—*ADAMS v. ROBERTS* (1858), 25 Beav. 658; 53 E. R. 788.

Annotation:—*As to* (2) *Reid.* Domville v. Winnington (1884), 26 Ch. D. 382.

1093. *Substitutional gift to children—Whether affected by death of parent before settlement.*—By a voluntary deed a settlor gave property to A., B., C., & D. in equal shares. He provided that if any of the four should die in his lifetime, leaving specified issue, the share of him or her so dying should be in trust for the children of him & her so dying; & if any of the four should die in his lifetime, without leaving such issue, the share of him or her so dying should go over & accrue & be added to the other shares. A. & B. were dead at the date of the settlement, the former leaving issue, the latter without issue:—*Held*: the gifts over of the shares of A. & B. did not fail by reason of their being dead at the date of the settlement.—*BARNES v. JENNINGS* (1866), L. R. 2 Eq. 448; 35 L. J. Ch. 675; 14 W. R. 831.

R. (Ct. of Sess.) 698; 33 Sc. L. R. 505; 3 S. L. T. 331.—*SCOT*.

1089 v. — — — —.]—*STIRLING'S TRUSTEES v. STIRLING* (1898), 1 F. (Ct. of Sess.) 215; 36 Sc. L. R. 194; 6 S. L. T. 223.—*SCOT*.

1089 i. — — — —.]—*Right of children of deceased child.*—*REILLY v. FITZGERALD* (1843), 6 I. Eq. R. 335; *Drury temp. Sug.* 122.—*IR*.

1089 ii. — — — —.]—*CUNNINGHAM v. CUNNINGHAM* (1889), 17 R. (Ct. of Sess.) 218; 27 Sc. L. R. 106.—*SCOT*.

1089 iii. — — — —.]—*BOGLE'S TRUSTEES v. COCHRANE* (1892), 20 R. (Ct. of Sess.) 108; 30 Sc. L. R. 128.—*SCOT*.

1089 iv. — — — —.]—*BLACKBURN'S TRUSTEES v. BLACKBURN* (1896), 23

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1094. Limitation to issue on death of husband & wife—Effect of divorce.]—By ante-nuptial contract of marriage the intended wife conveyed a sum of about £19,000 to trustees, directing them to pay the annual income to her during her life & after her death, in the event of her being survived by her husband to pay the same to him during all the days of his life & survivance & on the death of the spouses to pay or deliver the fee or capital of the means & estate to the child or children of the marriage.

The marriage was dissolved by decree of divorce obtained by the wife against the husband on the ground of desertion. Thereafter the wife died survived by her husband & a daughter. The daughter & her marriage contract trustees claimed that in consequence of the wife's death & the husband being divorced she, the daughter & her trustees became entitled to the funds in the hands of her mother's trustees:—*Held*: (1) the divorce of the father was not equivalent to his death in a question as to the vesting of the daughter's provision; (2) during her father's life nothing fell to the daughter; (3) the income which but for the divorce would have been paid to the father fell into the executory estate of the wife.—*DAWSON v. SMART*, [1903] A. C. 457; 89 L. T. 343; 19 T. L. R. 633, H. L.

Annotation:—*Apld.* *Montgomery v. Zarifi* (1918), 88 L. J. P. C. 20.

1095. ———.]—By a settlement in English form made upon the marriage of a husband whose domicile was in Scotland with a wife whose domicile was in England the income of certain settled property was to be paid to the wife during her life for her separate use without power of anticipation, & after her death to the husband during his life, & subject to these life interests the property was to be held in trust for the issue of the marriage, with remainders over in default of issue, & the settlement expressly provided "that these presents shall be construed & that the rights of all persons claiming hereunder shall be regulated according to the law of England."

After the marriage the spouses resided in Scotland, & the husband obtained in the Ct. of Session a decree of divorce against the wife on the ground of her adultery:—*Held*: the effect of the provision in the settlement was to exclude the Scottish law of forfeiture under the statute of 1573 (c. 55), in case of divorce for adultery, & the husband was not entitled to the income of the settled funds for his life as if the wife were dead.—*MONTGOMERY v. ZARIFI* (1918), 88 L. J. P. C. 20; 119 L. T. 380, H. L.

See, further, WILLS.

SECT. 8.—ILLEGITIMATE CHILDREN.

1096. When entitled—Gift to children—Prima facie includes only legitimate issue.]—A married woman, having several legitimate children, & one illegitimate child, & being separated from her husband, & enceinte with a second illegitimate child, appointed a fund to her illegitimate child

then born, reserving a power of revocation, as to a moiety, in favour of any after-born children she might have born of her body.

After the birth of the second illegitimate child, she revoked the appointment of the moiety, & appointed the entire fund equally between the two illegitimate children:—*Held*: the after-born children, for whose benefit the revocation might be made, must be taken, in the primary & legal sense, as applying to legitimate children only, therefore the second illegitimate child was not an object of the reserved power, & could not take under the latter appointment.—*DOVER v. ALEXANDER* (1843), 2 Hare, 275; 12 L. J. Ch. 175; 7 Jur. 124; 67 E. R. 114.

Annotations:—*Refd.* *Bell v. Alexander* (1847), 6 Hare, 543; *Re Saville's Trusts* (1866), 14 W. R. 603.

1097. ———.]—*Re HUMAN, BERKELEY v. ROMANO* (1905), 49 Sol. Jo. 551.

1098. ——— Illegitimate children in esse—Necessity for sufficient description.]—The ultimate limitation in a settlement was to all the children, as well those already born as hereafter to be born of A. & B., his wife. B. was the settlor's sister, who had been married to A. five years before the date of the settlement. They never had any legitimate children; but, before their marriage, B. had several children still living, who were reputed to be her children by A.:—*Held*: these children were entitled to the property under the limitation.

Semble, the construction of these words in a will would exclude illegitimate children born at the date of the will, because of the possibility that legitimate children might have been born before testator's death.—*GABB v. PRENDERGAST* (1855), 1 K. & J. 439; 3 Eq. Rep. 648; 24 L. J. Ch. 431; 26 L. T. O. S. 47; 1 Jur. N. S. 900; 3 W. R. 395; 69 E. R. 531.

Annotation:—*Refd.* *Crook v. Whitley* (1856), 25 L. J. Ch. 657.

1099. ———.]—A. & B., his aunt by the half blood, went through the ceremony of marriage; a settlement was afterwards made providing for the children of B. by A.; a month afterwards a child was born of B. by A.:—*Held*: the child took no benefit under the settlement.—*Re SHAW, ROBINSON v. SHAW*, [1894] 2 Ch. 573; 63 L. J. Ch. 770; 71 L. T. 79; 43 W. R. 43; 38 Sol. Jo. 513; 8 R. 421.

Annotation:—*Overd.* *Ebborn v. Fowler*, [1909] 1 Ch. 578.

1100. ———.]—By a post-nuptial settlement a fund belonging to the wife was settled as to one third upon trust to pay the income to her daughter E., therein described as the wife of J. K., for life, for her separate use, independently of J. K. or any future husband, & after her death in trust for the children of E. who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares.

A year before the settlement E. went through the ceremony of marriage with J. K., who had been her deceased sister's husband, & at the date of the settlement she was enceinte with a child, who was born a month afterwards & attained twenty-one, & she died without ever having been lawfully married:—*Held*: the child was entitled to participate under the settlement.—*EBBERN v. FOWLER*, [1909] 1 Ch. 578; 78 L. J. Ch. 497; 100 L. T. 717; 53 Sol. Jo. 356, C. A.

1094 i. Limitation to issue on death of husband & wife—Effect of divorce.]—*BOYD'S TRUSTEES v. BOYD* (1905), 7 F. (Ct. of Sess.) 578; 42 Sc. L. R. 435; 12 S. L. T. 798.—SCOT.

g. Whether time of vesting post-

poned—Where trustees have power to postpone payment.]—*M'ELMAIL v. LUNDIE'S TRUSTEES* (1888), 16 R. (Ct. of Sess.) 47; 26 Sc. L. R. 28.—SCOT.

h. New settlement with proviso safe-

guarding rights of children under original settlement—Vesting of children's shares on acceptance of new settlement.]—*WHYTE v. ROBERTSON* (1890), 17 R. (Ct. of Sess.) 708; 27 Sc. L. R. 559.—SCOT.

1101. — Gift to future illegitimate children.]—Personal estate settled in trust for after-born illegitimate children. Upon the bill of the settlor the fund was transferred to him as against such children.—*WILKINSON v. WILKINSON* (1842), 1 Y. & C. Ch. Cas. 657; 6 Jur. 921; 62 E. R. 1059.

1102. — — — — —.]—*DOVER v. ALEXANDER*, No. 1096, ante.

1103. — — — — — Gift to future children of invalid marriage—Deceased wife's sister.]—A marriage settlement executed in 1809 provided that after the death of the husband & wife the income should be held in trust for the children of the husband by the said wife & by any future wife. The first wife died in 1874, & in 1884 the husband married his deceased wife's sister. Such a marriage was at that time invalid. There were three children of each marriage, & the three children of the second marriage were born before the passing of Deceased Wife's Sister's Marriage Act, 1907 (c. 47):—*Held*: as the three children of the first marriage had, at the passing of the Act, a vested interest in remainder, the case fell within sect. 2 of the Act & the children of the second marriage were not entitled to any share in the settled fund.—*Re SPRINGFIELD, DAVIES v. SPRINGFIELD* (1922), 38 T. L. R. 263; 66 Sol. Jo. 268.

See, now, Deceased Wife's Sister's Marriage Act 1907 (c. 47), s. 2.

SECT. 9.—TRUSTS IN DEFAULT OF ISSUE.

SUB-SECT. 1.—IN GENERAL.

1104. No reference to death without issue—Whether implied by court—Intention of parties.]—Arts. construed against the words for the sake of the intent. As where the wife's portion was to be laid out in land, to be settled on husband & wife, & the heirs of their bodies; & if not laid out in land during their joint lives, & the wife should die first, that the money should go to the wife's brother & sister: wife dies first, leaving issue, & the money is not laid out in a purchase, yet the issue, & not the wife's brother & sister, shall have it; equity supplying the words, "if the wife dies without issue."—*KENTISH v. NEWMAN* (1715), 1 P. Wms. 234; 24 E. R. 368, L. C.

Annotations:—Apld. Targus v. Puget (1751), 2 Ves. Sen. 194. *Consd. Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 69. *Refd. Lloyd v. Lloyd* (1837), 2 My. & Cr. 192.

1105. Ultimate trust for surviving spouse—Child dying in lifetime of parent—Leaving issue—Whether grand-children entitled.]—*HEURTLEY v. MASON* (1764), Amb. 621; 27 E. R. 403, L. C.

1106. — — — — —.]—A settlement directed the trustees, immediately after the decease of the survivor of the husband & wife, to transfer a fund unto & amongst all & every the son & sons, daughter & daughters of the husband & wife, & the children of such son & sons, daughter & daughters, in case any of them should be dead leaving issue, share & share alike; but the child or children of such of the said sons & daughters as should be then dead were to be entitled only to a parent's share; & in case there should be no child or children of the husband & wife living at the death of the survivor of them, then in trust to

transfer the fund to the survivor, his or her exors., etc. There were three children of the marriage, but they all died before either of their parents; two of them left children, some of whom survived both their grandfather & their grandmother:—*Held*: the surviving grandchildren were entitled to the fund.—*GREEN v. BAILEY* (1845), 14 Sim. 635; 9 Jur. 636; 60 E. R. 504; *sub nom. GREEN v. BARCLAY*, 5 L. T. O. S. 473.

1107. When trusts arise—No issue of marriage—Gift over on death of issue under age.]—By a marriage settlement real & personal estate was conveyed in trust, after the death of the parents, for the children at twenty-one or marriage, but if no child attained that age, or, being a daughter, did not marry under that age, then the trustees were directed to convey & assign the property to certain persons. There were never any children of the marriage:—*Held*: the instrument was executory & the gift over took effect.—*OSBORN v. BELLMAN* (1860), 2 Giff. 593; 3 L. T. 265; 6 Jur. N. S. 1325; 9 W. R. 11; 66 E. R. 249.

1108. — — — — —.]—*CARDIGAN v. CURZON-HOWE*, No. 1117, post.

1109. — — — — — Dissolution of marriage.]—

(1) A marriage settlement vested funds in trustees, upon trusts for the children of the marriage, & in default as the wife should appoint. The wife was divorced *à vinculo*, & there being no children, appointed to herself:—*Held*: a good appointment.

(2) Children of a second marriage of the wife & divorced husband would not be children of "the marriage" contemplated by the settlement.—*BOND v. TAYLOR* (1861), 2 John. & H. 473; 31 L. J. Ch. 784; 5 L. T. 445; 8 Jur. N. S. 1090; 10 W. R. 169; 70 E. R. 1144.

1110. Time for ascertainment of default—Extinction of possibility of issue.]—Leaseholds were, by deed, conveyed to trustees, in trust for the settlor for life, & after her decease in trust to assign them to T., his exors., etc., "absolutely." But if T. should die without leaving any child living at the time of his decease, then in trust to assign to P., etc.:—*Held*: on the context, the death referred to was not confined to a death in the life of the tenant for life, & T. did not, upon the death of the settlor, become absolutely entitled to the leaseholds.—*MILNER v. MILNER* (1865), 34 Beav. 276; 55 E. R. 641.

Annotation:—Refd. Re Heathcote's Trusts (1873), 9 Ch. App. 47, n.

1111. Presumption of impossibility of issue.]—Property comprised in a marriage settlement was limited on trust for the wife for life for her separate use, without power of anticipation, remainder to her husband for life, remainder to the children of the marriage, with an ultimate remainder to the husband. The wife was now fifty years old & the husband fifty-three, they had been married twenty-eight years, & there was no issue of the marriage, & there was evidence that it was almost, if not entirely, impossible that there could be any. Both husband & wife were in a delicate state of health, & the income of the property was so small that they could not afford the comforts which in consequence of the wife's health it was important she should have. They now applied to the ct., under Conveyancing Act, 1881 (c. 41), s. 39, to remove the restraint on anticipation, & to make

PART VIII. SECT. 8.

11011. When entitled—Gift to future illegitimate children.]—*THOMPSON v. THOMAS* (1891), 27 L. R. Ir. 457.—*IR.*

PART VIII. SECT. 9, SUB-SECT. 1.

k. Meaning of "issue"—Children

or descendants.]—Re DIXON'S TRUSTS (1869), 4 I. R. Eq. 1.—*IR.*

*l. — — — — —.]—*The word "issue" occurring in a marriage settlement *primâ facie* includes all descendants, & in the absence of some controlling or explanatory context is not to be restricted to children only.—*HOBBS v.*

TOTHILL, [1895] 1 I. R. 115.—*IR.*

m. — — — — — Includes child en ventre sa mère.]—DONOGHUE v. BROOKE (1875), 9 I. R. Eq. 489.—*IR.*

n. Power to wife to devise remainder to her nearest-of-kin—No power of appointment to self conferred.]—TAYLOR

Sect. 9.—Trusts in default of issue: Sub-sects. 1, 2 & 3. Sect. 10.]

such an order binding the interest of the wife as would enable the capital of the trust fund to be applied for the benefit of the husband & wife:—*Held*: the application must be refused as the ct. could not assume that the wife was past child-bearing.—*Re WARREN'S SETTLEMENT* (1883), 52 L. J. Ch. 928; 49 L. T. 696, C. A.

—.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 173–175, Nos. 1505–1525.

1112. Trust for “child or children or grandchild” of stranger—Living at death of survivor—Whether grandchildren entitled.]—A trust in a marriage settlement of certain stocks & securities for the benefit of the husband & wife & the children of the marriage, & in default of children, which event happened, then, upon the death of the survivor of the husband & wife, “for all & every the child & children or grandchild of A.” living at the death of the survivor of the husband & wife.

The husband survived the wife, & died in Jan. 1900. A. had thirteen children, of whom eight survived the husband & five died in his lifetime, four unmarried, & one leaving an only child:—*Held*: “or” was not to be read “and,” & there being children of A. living at the period of distribution, no grandchild took a share.—*Re COLEY, GIBSON v. GIBSON*, [1901] 1 Ch. 40; 70 L. J. Ch. 153; 83 L. T. 671; 49 W. R. 165; 45 Sol. Jo. 164.

Annotation:—*Reid. Re Coulnden, Coulnden v. Coulnden*, [1908] 1 Ch. 320.

SUB-SECT. 2.—LIMITATIONS OF HUSBAND'S FUND.

1113. Ultimate trust for right heirs of husband—Effect of intervening void limitations.]—*HUNT v. JONES* (1670), 2 Rep. Ch. 56; 21 E. R. 615.

1114. Ultimate trust for next of kin—Of settlor—Intervening remainder void for remoteness.]—C. declares his term of one thousand years, in trust for his son T. for so many years of the term as he should live; & after his death in trust for the issue male of T. lawfully begotten, for so many years, etc., as such issue male should live; & when the issue male of T. should happen to be extinct, then in trust for his second son, W. for life, remainder in trust for the issue male of W. for so many years as they should happen to live; the eldest to be preferred before the youngest; & after the death of W. & from the time his issue male should happen to be extinct, then the premises to descend & continue in the issue male of the name & family of the C.'s, which should be next of kin, for all the residue of the term; & made his son T. sole exor. & residuary legatee. Testator died, & T. died without issue male. The residue of the term shall go to the representative of T. contrary to the will, in which there is a plain affectation of a perpetuity.—*CLARE v. CLARE* (1734), Cas. temp. Talb. 21; 25 E. R. 638, L. C.

Annotations:—*Consd. Phipps v. Mulgrave* (1798), 3 Ves. 613; *Greenwood v. Verdon* (1854), 3 Eq. Rep. 181. *Reid. Hodsell v. Russell* (1739), 9 Mod. Rep. 236; *Gower v. Grosvenor* (1740), Barn. Ch. 54; *Hodgeson v. Busssey* (1740), 2 Atk. 89; *Theobridge v. Kilburne* (1751), 2 Ves. Sen. 233; *Knight v. Ellis* (1789), 2 Bro. C. C. 570; *Lyon v. Mitchell* (1816), 1 Madd. 467; *Ex p. Wynch* (1854), 5 De G. M. & G. 188; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013.

1115. ——— Intention to exclude persons other than statutory next of kin.]—*WEIR v. VAN TROMP* (1900), 16 T. L. R. 531.

—.]—*See, also*, Sect. 10, *post*.

1116. Ultimate trust for husband's executors—“Of his own family”—Whether trust for next of kin.]—In a marriage settlement, the ultimate trust of the wife's chattels was for the exors. or administrators of the wife of her own family, & the ultimate trust of the husband's chattels was for his exors. or administrators of his own family:—*Held*: though the same words were used, *mutatis mutandis*, in both limitations, yet the ct. was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, & with respect to the husband's chattels, his exors. or administrators simply.—*SMITH v. DUDLEY* (1738), 9 Sim. 125; 2 Jur. 322; 59 E. R. 306.

Annotations:—*Reid. A.-G. v. Malkin* (1845), 2 Ph. 61; *Re Morgan's Trusts* (1854), 2 W. R. 439.

—.]—*See, also*, Sect. 11, *post*.

1117. Ultimate trust for settlor.]—By a settlement made in 1811, the C. family plate was settled upon trust for R. for life & after his decease for J., the son & heir-apparent of R., for his life, & after his decease in trust for the first son of the body of J. his exors. & assigns; but if such first son should die under twenty-one without leaving issue male living at his death, then for the second son, his exors., administrators, & assigns, with like executory trusts in favour of the other sons of J.; & if he should not have any son or sons, or having such all of them should die under twenty-one, & some of them should leave issue male living at his death, then in trust for the second son of R., his exors., administrators, & assigns; but if such second son should die under twenty-one without leaving issue male living at his death, then in trust for the third & other sons of R.; & if there should be any son of the said R., or the said J., who should live to attain the age of twenty-one years or should die under that age leaving issue male living at his death, then in trust for the settlor. R. had only one son J., who attained twenty-one, & died without issue:—*Held*: upon his death, the ultimate trust in favour of the settlor took effect, the words “any son” in the gift over being read “any such son as is hereinbefore mentioned.”—*CARDIGAN v. CURZON-HOWE* (1870), L. R. 9 Eq. 358; 22 L. T. 640; 18 W. R. 878.

1118. Provision for survivorship & accrual.]—On the marriage of J. & S. a sum of stock was settled by deed, upon trust after the death of J. & S., & failure of issue of the marriage, to transfer the same unto, amongst & between F., R., W. & E. equally; provided that if either of them, the said F., R., W. & E., should depart this life without having acquired a vested interest, leaving issue, the share of such person so dying should go to such issue, but in case either of them should die without having lawful issue, then the share of him, her or them so dying should belong to the survivors or survivor of them. There was no issue of the marriage. F. & R. died in the lifetime of J. & S., leaving issue. W. survived F., & died in the lifetime of R. without issue. E. survived both J. & S.:—*Held*: she was entitled by survivorship to W.'s share in the fund.—*Re ACOTT'S SETTLEMENT* (1859), 28 L. J. Ch. 383.

SUB-SECT. 3.—LIMITATIONS OF WIFE'S FUND.

1119. Absolute interest for wife—In event of wife surviving husband—Whether possibility of future marriage & issue thereby considered.]—By a mar-

riage settlement, certain stocks, the property of the lady, are assigned to trustees, upon certain trusts, for the benefit of the intended wife & husband, during their joint lives; & if the wife should survive the husband, having children by him, upon trust for her during her life, & after the death both of her & her husband, upon trust for all her children by her then intended or any future husband, as she should appoint; & in default of appointment, upon trust for the children of the then intended marriage; & it was provided, that, if the lady should survive her intended husband, & there should be no children of that marriage who should acquire a vested interest in the property, the stocks should be upon trust for her, & assigned to her: the lady having outlived her husband, & there being no child of that marriage who had acquired a vested interest:—*Held*: the lady was entitled to the stocks absolutely, without regard to the possibility of there being children of a future marriage.—*HANSON v. COOKE & HANSON* (1825), 4 L. J. O. S. Ch. 45.

1120. ———.]—By a settlement made on the marriage of R. D. & L. B. it was provided that if the income given to the wife for life after coverture or to the husband should become vested in any other person, then the trustees should apply it for the benefit of "L. B. or R. D. and her husband or his wife & her or his issue." The husband being dead without issue the widow applied to the trustees to re-assign to her the trust fund on the ground that the settlement had come to an end:—*Held*: the discretionary trust extended to a future husband & the issue of such future marriage, & therefore the trustees could not re-assign the fund.—*Re DAW, BINNEY v. DAW* (1918), 87 L. J. Ch. 441; 118 L. T. 151.

1121. ——— *Whether limitation coalesces with limitation to executors.—To prevent operation of restraint on anticipation.*—By a marriage settlement, certain real & personal property of the intended wife was settled in trust for her during her life, for her separate use exclusive of her then intended husband or any other husband with whom she might intermarry, without power of anticipation, & after her death upon certain trusts for the benefit of the children of that marriage & in the event of there not being any such children, who should acquire a vested interest in the fund, then the fund was to be held in trust for the intended wife, her exors., administrators & assigns, in case she survived her first husband. There was no issue of this marriage, & the wife having survived her first husband contracted a second marriage:—*Held*: the trust for her separate use thereupon came into operation & this limitation, & the limitation to her exors., administrators & assigns did not coalesce, & consequently, her second husband was not entitled to the trust fund by his marital right.—*DIXON v. DIXON* (1838), 1 Beav. 40; 8 L. J. Ch. 25; 2 Jur. 960; 48 E. R. 853.

— *Failure to give absolute interest.—Ground for rectification.*—*See Nos. 856–860, ante.*

1122. Trust for husband.—Declaration of trust, on the part of the wife, of £2,000, already paid, & other £2,000, to be paid by the exors. of the covenantor, of the interest to husband for life, then to the wife for life, then to their heirs, as they shall direct; proviso, that if the wife dies before the husband, sans issue, or the issue die before covenantor, then his exors. shall pay to the husband, if living, only £1,000. Husband dies, leaving his wife his extrix., & without issue:—*Held*: the husband, in consideration of his settlement, was a purchaser of the whole portion; the

receipt of the first £2,000 was acknowledged by him, & the security of the other; the argument on deff.'s part, that the uses being at an end, the interest results, is confuted by the tenor of the marriage contract: & decreed, that the contingency, on which the proviso was to take effect, not having happened, the second £2,000 belonged to the husband's representatives.

Where there is a marriage, & a contract for a portion for the wife, & the husband, in consideration thereof, makes a settlement on the wife & her issue, notwithstanding the restrictions put upon the wife's fortune, though it be vested in trustees for particular uses, yet, if it is stipulated as the marriage portion, & in consideration of the settlement, the general property, subject to these limitations, is considered here as belonging to the husband, unless the parties have provided otherwise, for he is looked upon as a purchaser (*LORD HARDWICKE, C.*).—*WHARTON v. WHARTON* (1751). *Keny, Ch. 99; 96 E. R. 1322, L. C.*

Disposition by will during husband's life.—Necessity for republication of will after husband's death.—*See Married Women's Property Act, 1893 (c. 63), s. 3.*

See, also, Sects. 10–12, post.

SECT. 10.—TRUST FOR WIFE'S NEXT OF KIN OR EXECUTORS SUBJECT TO HER LIFE INTEREST.

1123. Ultimate trust for wife's next of kin.—Whether revocable.—Settlement by a *feme sole*, in contemplation of marriage, of part of her fortune in trust to pay the dividends to herself for her separate use for life, & after her death for her intended husband; & after the death of the survivor to transfer the capital according to her appointment by will; & in case she should die without appointment, & he should be then dead, in trust for her next of kin, their exors., etc., according to Statute of Distributions. An interest for life only in the widow, with a power of disposition by will.

There was a case before Lord Alvanley upon a settlement in favour of next of kin, whether they could take a vested interest. It turns upon that, whether they were intended: so that plff. could disappoint them only by a will (*GRANT, M.R.*).—*ANDERSON v. DAWSON* (1808), 15 Ves. 532; 33 E. R. 856.

Annotations:—*Distd. Godsal v. Webb* (1838), 2 Keen, 99. *Mentd. Holloway v. Clarkson* (1843), 2 Hare, 521.

1124. ———.]—By a marriage settlement of the wife's property, consisting of money in the funds, a general power of appointment by will was given to the wife in the event of her dying before her husband without children, & in default of appointment there was a trust for the next of kin of the wife excluding the husband. But if the wife survived, then in default of children, in trust for the wife absolutely. The father of the wife joined in the settlement, & covenanted to pay an annuity to his daughter. During the life of the husband & wife debts were contracted by the wife. There were no children, & the impossibility of there being any was not questioned:—*Held*: upon the application of the wife & with the approbation of the husband the next of kin being mere volunteers, & not within the marriage consideration, the corpus of the trust funds might be applied in payment of debts.—*PAUL v.*

Sect. 10.—Trust for wife's next of kin or executors subject to her life interest. Sects. 11 & 12: Sub-sect. 1, A.]

PAUL (1880), 15 Ch. D. 580; 50 L. J. Ch. 14; 43 L. T. 239; 29 W. R. 281.

Annotations:—Overd. Paul v. Paul (1882), 20 Ch. D. 742. *Refd. Re Coghlan, Broughton v. Broughton* (1894), 8 R. 384.

1125. ———. ———.]—By a marriage settlement the wife's property was settled, after life estates in the husband & wife & in default of children, in the event of the wife surviving, on her, & in the event of the husband surviving, as the wife should by will appoint, & in default, on her next of kin, excluding the husband:—*Held*: the trust in favour of the next of kin could not be revoked, & although there was no possibility of issue, the husband & wife together were not entitled to the corpus of the settled fund.—PAUL v. PAUL (1882), 20 Ch. D. 742; 51 L. J. Ch. 839; 47 L. T. 210; 30 W. R. 801, C. A.

Annotation:—Refd. Meredyth v. Meredyth, [1895] P. 92.

1126. ———. On bankruptcy of husband.]—A trader, on his marriage, received a fortune of £5,000 with his wife; & settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife & children, in the event of his becoming bankrupt or insolvent. It was provided that, if he should survive his wife, & the issue of the marriage should fail, & he should then be or should have been bkpt., fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the £5,000 was settled; but the whole of the settled fund was the husband's property, & it did not appear, from any of the expressions in the settlement, what was the consideration for the provision as to fifteen sixty-sixths of the stock:—*Held*: the limitations over in the event of the bkpcy. of the husband, were good as to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder.—LESTER v. GARLAND (1832), 5 Sim. 205; Mont. 471; 1 L. J. Ch. 185; 58 E. R. 314.

Annotations:—Refd. Fraser v. Thompson (1859), 1 Giff. 49; Mackintosh v. Pogose, [1895] 1 Ch. 505. *Mentd. Whitmore v. Mason* (1861), 2 John. & H. 204.

1127. ———. Claim against husband's estate.]—Upon a marriage in 1818, a sum of £400 was handed over by the wife to the husband, & the husband executed a bond for repayment with interest at the expiration of six months, if required by the trustees of the marriage settlement. The trusts of the settlement were to pay the interest to the husband for life, then to the wife for life, & then for the benefit of the children, but if no children to transfer the trust funds to the next of kin of the wife. The husband died in 1853, leaving his wife his sole legatee & extrix, & his wife died in 1864. There were no children, & there had been no repayment & no demand:—*Held*: the trustees were entitled to claim the £400 on behalf of the wife's next of kin against the husband's estate.—MILLS v. BORTHWICK (1865), 35 L. J. Ch. 31; 12 L. T. 600; 11 Jur. N. S. 558; 13 W. R. 707.

Annotation:—Consd. Re Dixon, Heynes v. Dixon, [1899] 83 L. T. 129.

1128. Ultimate trust for executors of wife's mother—After death of husband & wife—Death of husband & wife during mother's life—Whether gift falls.]—HORSEMAN v. ABBEY (1819), 1 Jac. & W. 381; 37 E. R. 420.

Annotations:—Consd. Morris v. Howes (1846), 16 L. J. Ch. 121. *Refd. Holloway v. Clarkson* (1843), 2 Hare, 521.

1129. ———. In default of appointment by wife—No appointment during first coverture—Whether

subsequent appointment avoids ultimate trust.]—By a marriage settlement, a sum of £1,000 was charged upon real estates of the husband, for such persons as the wife should, by deed or will, during his coverture, appoint; & in default of appointment, for the exors., administrators & assigns of the wife's mother, who was then living:—*Held*: the power of appointment could only be exercised during the continuance of the coverture, & an appointment of £1,000 after the death of the husband was void, & the £1,000 formed part of the personal estate of the wife's mother, by virtue of the limitation to her exors., administrators & assigns.—MORRIS v. HOWES (1846), 16 L. J. Ch. 121; 8 L. T. O. S. 229; 10 Jur. 955, L. C.

1130. Ultimate trust for wife's executors—Wife predeceasing husband—Whether trust for wife's next of kin.]—Trust in a marriage settlement, to raise a sum of money charged on the settled estate, at the end of twelve months from the decease of the survivor of the husband & wife, & to pay same to the exors. or administrators of the wife:—*Held*: upon the whole scope & context of the instrument a trust for the next of kin of the wife, although she died in the husband's lifetime.—BULMER v. JAY (1834), 3 My. & K. 197; 40 E. R. 75, L. C.

Annotations:—Distd. Wallis v. Taylor (1836), Donnelly, 162. *Apld. Smith v. Dudley* (1838), 2 Jur. 322. *Distd. Daniel v. Dudley* (1841), 1 Ph. 1; Mackenzie v. Mackenzie (1851), 3 Mac. & G. 559. *Consd. Page v. Soper* (1853), 11 Hare, 321. *Refd. Allen v. Thorp* (1843), 13 L. J. Ch. 5; Holloway v. Clarkson (1843), 2 Hare, 521; Morris v. Howes (1845), 4 Hare, 599; A.-G. v. Malkin (1846), 2 Ph. 64.

1131. ———. ———.]—By a marriage settlement a sum of money, the property of the wife, was vested in trustees in trust for the separate use of the wife during her life, & after her decease in trust for the husband during his life, & after the death of the survivor, upon certain trusts for the children, & in default of children, who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, in trust for such person or persons as the wife should, notwithstanding her coverture, by deed or will appoint, & in default of appointment, in trust to pay & transfer same to the exors. or administrators of the wife:—*Held*: under the ultimate limitation to the exors. or administrators of the wife the fund did not belong to the next of kin of the wife, in exclusion of the husband, but passed to the administratrix of the wife as part of her general personal estate.—DANIEL v. DUDLEY (1841), 1 Ph. 1; 41 E. R. 531, L. C.

Annotations:—Consd. Holloway v. Clarkson (1842), 6 Jur. 923. *Apld. Allen v. Thorp* (1843), 7 Beav. 72; Mackenzie v. Mackenzie (1851), 3 Mac. & G. 559. *Refd. Morris v. Howes* (1845), 4 Hare, 599; A.-G. v. Malkin (1846), 2 Ph. 64; Page v. Soper (1853), 11 Hare, 321; Dixon v. Dixon (1857), 24 Beav. 129. *Mentd. Johnson v. Johnson* (1843), 3 Hare, 157; Long v. Watkinson (1852), 17 Beav. 471; Re Morgan's Trusts (1854), 2 W. R. 439; Re Seymour's Trusts (1859), 28 L. J. Ch. 765; Re Clay, Clay v. Clay (1885), 54 L. J. Ch. 648.

1132. ———. ———.]—The ultimate trust in a marriage settlement of a fund belonging to the wife, was to her exors. or administrators:—*Held*: (1) the surviving husband, who was her administrator, & not her next of kin, was entitled; (2) if by those words her next of kin were intended, then that the next of kin at the death of the wife, & not of the husband, who was tenant for life, were entitled.

(3) By a marriage settlement, a fund belonging to the wife was settled on the husband & wife for their respective lives, with remainder to the children of the marriage, to be vested at twenty-one or marriage; & in case no children should attain vested interests, which happened, then as

the wife should appoint; & in default unto the exors. or administrators of the wife. The wife predeceased the husband, & made no appointment. There was one child only of the marriage, who survived her mother, but died without attaining a vested interest:—*Held*: the ultimate limitation was in favour of the wife's administrator, & not of her next of kin.—*ALLEN v. THORP* (1843), 7 Beav. 72; 13 L. J. Ch. 5; 49 E. R. 990.

Annotations:—*Generally*, *Mentd.* *Long v. Watkinson* (1852), 17 Beav. 471; *Re Seymour's Trusts* (1859), 28 L. J. Ch. 765; *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648.

1133. ————.]—A sum of money was bequeathed in trust for several tenants for life in succession, with remainder to such persons as one of them, who was a married woman, should by will appoint, & in default of such appointment, "to & for the benefit of her exors. or administrators." The lady died without making any appointment:—*Held*: her personal representative took the reversionary interest in the fund, not beneficially nor in trust for her next of kin, but as part of her estate.—*A.-G. v. MALKIN* (1846), 2 Ph. 64; 1 Coop. temp. Cott. 237; 16 L. J. Ch. 99; 9 L. T. O. S. 69; 10 Jur. 955; 41 E. R. 866, L. C.

Annotations:—*Apld.* *MacKenzie v. MacKenzie* (1851), 3 Mac. & G. 559. *Reid.* *Morris v. Howes* (1846), 16 L. J. Ch. 121; *Re Crawford's Trusts* (1854), 2 Drew. 230; *A.-G. v. Maxwell* (1860), 2 L. T. 334; *Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 269. *Mentd.* *Mozley v. Alston* (1847), 4 Ry. & Can. Cas. 636; *Long v. Watkinson* (1852), 17 Beav. 471; *Re Morgan's Trusts* (1854), 2 W. R. 439; *Re Seymour's Trusts* (1859), 28 L. J. Ch. 765; *A.-G. v. Partington* (1864), 3 H. & C. 193; *A.-G. v. Cleave* (1873), 31 L. T. 86; *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648.

1134. ————]—Trust for executors & administrators of wife's own family.—*SMITH v. DUDLEY*, No. 1116, *ante*.

1135. ————]—Property passes to administrator—*Husband*.—By a marriage settlement, a reversion in real estate was conveyed to trustees, in trust, at the request of the husband & wife, or of the survivor, to sell, & the proceeds were settled on the husband & wife for life, with remainder to the children, & in default thereof, to such person as the wife should appoint, & in case of no appointment, to the use of the heirs, exors., & administrators of the wife, according to the nature & property of the premises. The wife died without issue, & without having exercised the power; the husband took out administration to his wife, & required the trustees to sell the reversion:—*Held*: he was entitled to have it sold, & to have the proceeds as administrator of his wife.—*WARBURTON v. HADFIELD* (1837), 6 L. J. Ch. 203; 1 Jur. 164.

1136. ————.]—*ALLEN v. THORP*, No. 1132, *ante*.

1137. ————.]—*DANIEL v. DUDLEY*, No. 1131, *ante*.

1138. ————]—In default of appointment by will—Whether wife entitled to absolute interest—*Settlement in contemplation of future marriage*.—By a marriage settlement, the wife's property was vested in trustees, in trust for her separate use for life, independently of her then or any future husband, without anticipation, with remainder, in the events which happened, as she should, notwithstanding her coverture, appoint by will, & in default of appointment, in trust for her exors. & administrators:—*Held*: the lady & an after-taken

husband were entitled to a transfer of the settled fund.—*MALCOLM v. O'CALLAGHAN* (1835), 5 L. J. Ch. 137.

Annotations:—*Consd.* *Tullett v. Armstrong* (1840), 4 My. & Cr. 390. *Reid.* *Bradley v. Hughes* (1836), Donnelly, 116; *Davies v. Thornycroft* (1836), 5 L. J. Ch. 140; *Re Gaffee's Settlement* (1850), 1 H. & Tw. 635.

1139. ————.]—*PAGE v. SOPER*, No. 1021, *ante*.

SECT. 11.—TRUSTS FOR HEIRS.

1140. Limitation to "right heirs"—Whether husband entitled as administrator.—By a marriage settlement certain personal property of the intended wife was assigned to trustees, in trust for the wife for life, & after the death of the survivor, & in default of issue of the marriage, to the right heir or heirs of the wife. The wife died without issue, in the lifetime of her husband, who took out letters of administration to her effects:—*Held*: the husband did not acquire as the administrator of his wife, an absolute interest in the settled property.—*NEWENHAM v. PITTAR* (1838), 7 L. J. Ch. 300.

1141. ————]—Whether next of kin entitled.—Personal estate was settled on a husband & wife successively for life, with remainder to their children, & on failure of children, "then to the right heirs" of the survivor of the husband & wife:—*Held*: under the last limitation, the heir-at-law of the survivor, & not the next of kin, was entitled.—*HAMILTON v. MILLS* (1861), 29 Beav. 193; 3 L. T. 766; 54 E. R. 601.

Annotations:—*Distd.* *Re Philips' Will* (1869), L. R. 7 Eq. 151. *Reid.* *Re Preston's Trusts* (1863), 1 New Rep. 470.

SECT. 12.—TRUSTS FOR NEXT OF KIN.

SUB-SECT. 1.—APART FROM STATUTE.

A. In General.

1142. Who are next of kin—Nearest blood relations.—(1) A. assigned a fund to trustees, upon trust to pay the interest to B. for his life, & after his decease to pay, transfer, & assign the same among B.'s children, & if no child of B., from & immediately after the decease of B. upon trust to pay, transfer, & assign the same as A. should appoint, & in default of appointment, to pay, transfer, & assign the same to such person or persons as should at the time of the decease of A. be A.'s next of kin. A. died in the lifetime of B. without having made any appointment; & B. died without issue. B. is not excluded from the benefit of the limitation to A.'s next of kin.

(2) B. was the only surviving brother of A., & there were children of a deceased brother of A.:—*Held*: the words "next of kin," used *simpliciter*, are to be taken to mean "nearest of kin," & consequently B.'s personal representatives were entitled to the whole fund.—*ELMSLEY v. YOUNG* (1835), 2 My. & K. 780; 4 L. J. Ch. 200; 39 E. R. 1142; *affg.* (1833), 2 My. & K. 82.

Annotations:—*As to* (1) *Consd.* *Urquhart v. Urquhart* (1844), 13 Sim. 613. *Reid.* *Jennings v. Newman* (1839), 3 Jur. 748. *As to* (2) *Apld.* *Cooper v. Denison* (1843), 13 Sim. 290. *Follid.* *Withy v. Mangles* (1843), 10 Cl. & Fin. 215. *Distd.* *Booth v. Vicars* (1844), 1 Coll. 6; *Doody v. Higgins*

PART VIII. SECT. 11.

p. Time for ascertaining heirs — Where hypothesis is death without issue — At death of person to whom hypothesis refers. — *ANDERSON'S TRUSTEES v. FORREST*, [1917] S. C. 321; [1917] 1 S. L. T. 142. — *SCOT*.

PART VIII. SECT. 12, SUB-SECT. 1.

a. Who are next-of-kin — Daughter of deceased brother. — A sum of money was settled upon A. on her marriage, & upon her death without leaving issue, "in trust for the persons legally entitled thereto, as next-of-kin of A."

A. died without issue, leaving a brother & sister & a niece surviving her, the daughter of a deceased brother:—*Held*: under the settlement, the niece of A. was entitled, with the brother & sister of A., to a distributive share of the sum settled. — *KIDD v. FRAZER* (1851), 18 L. T. O. S. 13. — *IR*.

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(1856), 2 K. & J. 729. *Apld.* Rook v. A.-G. (1862), 31 Beav. 313; Harris v. Newton (1877), 46 L. J. Ch. 268. *Refd.* Butler v. Bushnell (1834), 3 My. & K. 232; Soott v. Moore (1844), 13 L. J. Ch. 283; Smith v. Palmer (1849), 7 Hare, 225; Horn v. Coleman (1853), 1 Sm. & G. 169; *Re* Saunders' Trust (1857), 3 K. & J. 152; Avison v. Simpson (1859), John. 43; *In the Goods of* McVicar (1869), L. R. 1 P. & D. 671.

1143. ———. ———.]—*WITHEY v. MANGLES*, No. 1148, *post*.

1144. ———. ———.] — *HALTON v. FOSTER*, No. 1159, *post*.

1145. ———. ———. *Sisters.*]—Limitation by settlement of personal property "to next of kin in equal degree," passes the property to a surviving sister, in exclusion of children by a deceased brother.—*v.* ——— (1815), 1 Madd. 36; 56 E. R. 14; *sub nom.* *WORTHINGTON v. STOTHER*, cited in 10 Cl. & Fin. at p. 251; *sub nom.* *WORTHINGTON v. STATHAM*, cited in 3 Swan. at p. 314.

Annotations:—Refd. Brandon v. Brandon (1819), 3 Swan. 312; *Withy v. Mangles* (1843), 10 Cl. & Fin. 215.

1146. ———. ———.]—*LUCAS v. BRANDRETH* (No. 2), No. 1158, *post*.

1147. ———. ———. *Children of deceased brother.*]—*v.* ———, No. 1145, *ante*.

1148. ———. ———. *Parents.*]—(1) By the settlement made on the marriage of E., the ultimate limitation of a sum of £10,000, which her father thereby covenanted to pay, was "to such person or persons as at the time of her death should be her next of kin." E. died, leaving her husband & a child of the marriage, & her own father & mother, surviving:—*Held*: the father, mother, & child of E. were equally her next of kin, & were entitled, under the limitation, to the £10,000 in joint tenancy.

(2) By a marriage settlement, the wife's portion was limited to her for life, remainder to her husband for life, remainder to the children of the marriage to be vested at twenty-one or marriage, & in case none should attain that age or marry, then in trust for the brothers & sisters of the wife or their issue, as she should appoint; & in default of appointment, in trust for her next of kin:—*Held*: the child of the marriage was not excluded from taking under the ultimate limitation.

(3) Under the ultimate limitation of a trust fund in a marriage settlement "for such person or persons as, at the time of the death of E. should be her next of kin":—*Held*: those who at the death of E. were nearest to her in proximity of blood, & not those who would be entitled to E.'s personal estate in case of intestacy, under Statute of Distributions were intended.—*WITHEY v. MANGLES* (1843), 10 Cl. & Fin. 215; 8 Jur. 69; 8 E. R. 724, H. L.

Annotations:—As to (3) *Consd.* Kidd v. Frazer (1851), 18 L. T. O. S. 13; Horn v. Coleman (1853), 1 Sm. & G. 169. *Erid.* Avison v. Simpson (1859), John. 43. *Apld.* Halton v. Foster (1868), 3 Ch. App. 505. *Distd.* *Re* Gray's Settlement, *Akers v. Sears*, [1896] 2 Ch. 802. *Refd.* Doody v. Higgins (1856), 2 K. & J. 729; White v. Springett (1869), 4 Ch. App. 300; Harris v. Newton (1877), 46 L. J. Ch. 268; Keay v. Boulton (1883), 25 Ch. D. 212; Hutchinson v. National Refuges for Homeless & Destitute Children, [1920] A. C. 795.

1149. ———. ———. *Child of marriage.*]—*WITHEY v. MANGLES*, No. 1148, *ante*.

1150. ———. ———. *Brothers.*]—Trust under a deed for such person or persons as, at the time of the death of A., shall be the next of kin of B., his wife, & would be entitled to her personal estate, as if she had died sole & unmarried. B. died in the lifetime of A., having five brothers; four died in the life of A.:—*Held*: the surviving brother alone was entitled.—*Re* WEBBER'S SETTLEMENT

(1850), 17 Sim. 221; 19 L. J. Ch. 445; 60 E. R. 1114.

Annotation:—Expld. Nichols v. Haviland (1855), 1 K. & J. 504.

1151. ———. ———. *Person taking interest under settlement.*]—*ELMSLEY v. YOUNG*, No. 1142, *ante*.

1152. *Effect of illegitimacy of wife—Right of husband to take—As administrator.*]—By a marriage settlement a fund, the property of the wife, was settled on her & her husband & their issue, & in default of issue, on the wife's next of kin. The wife, who was illegitimate, died without issue, & her husband administered to her:—*Held*: the Crown was not entitled to the fund; but it belonged to the husband as administrator to his wife.—*HAWKINS v. HAWKINS* (1834), 7 Sim. 173; 4 L. J. Ch. 9; 58 E. R. 803.

Annotation:—Refd. *Re* Bacon's Will, Camp v. Coe (1886), 31 Ch. D. 460.

1153. ———. ———.]—*ANON.* (1858), 1 Giff. 392; 65 E. R. 970.

Annotation:—Consd. Wollaston v. Berkeley (1876), 2 Ch. D. 213.

1154. *Trusts of settlement exhausted—Rights of personal representative of settlor.*]—By a settlement made on the marriage of L. & G., L. agreed that he would, after the marriage, transfer to the trustees a sum of Consols, & G. assigned unto the same trustees some Portuguese bonds. The trustees were to pay the income of the Consols to L. for life, & after his death to pay it to G. for life, & after the death of the survivor, in trust for the children of the marriage, & if none, in trust for the survivor of L. & G., his or her exors. & administrators. The trustees were to pay the income of the bonds to L. during his & G.'s joint lives, & in case he should survive, then, after G.'s decease, to transfer the bonds to whom she might appoint by will, & in default of appointment, to her next of kin; but if she should survive L., then in trust to transfer the bonds to her, her exors. or administrators. After the marriage, the Consols were transferred to the trustees. L., by will, gave to his wife the whole of his property absolutely, & G. bequeathed the whole of her property to her husband for life, & after his death, to her sisters. Both husband & wife, who left Liverpool, in Apr. 1874, in the *Liberia*, were, with all hands on board, drowned at sea:—*Held*: the funds settled belonged to the legal personal representatives of each settlor.—*WOLLASTON v. BERKELEY* (1876), 2 Ch. D. 213; 45 L. J. Ch. 772; 34 L. T. 171; 24 W. R. 360.

B. Nature of Estate Taken.

1155. *Whether joint tenancy.*]—*WITHEY v. MANGLES*, No. 1148, *ante*.

1156. ———. ———. *Joint tenancy for life.*]—*LUCAS v. BRANDRETH* (No. 2), No. 1158, *post*.

SUB-SECT. 2.—STATUTORY NEXT OF KIN.

A. What Constitutes Reference to Statute.

See, now, Administration of Estates Act, 1925 (c. 23), s. 50.

1157. *Implied reference—Reference to death unmarried.*]—On a limitation by settlement "to the next of kin of A. of her own blood & family, as if she had died sole & unmarried," the next of kin take as under Statute of Distributions.—*COTTON v. SCARANCKE* (1815), 1 Madd. 45; 56 E. R. 18.

Annotations:—Refd. Halton v. Foster (1868), 3 Ch. App. 505. *Mentd.* *Grieves v. Rawley* (1852), 10 Hare, 63.

1158. ———. ———.]—(1) The ultimate limitation in a marriage settlement was "for the next of kin of the wife as if she had not been married, not

including the husbands of both or either of her sisters":—*Held*: the sisters, who were her next of kin took as joint tenants.

It is no doubt settled, that if, in a case of this description there is a direct or implied reference to Statute of Distributions, the next of kin take as tenants in common; if therefore this settlement had stated that the next of kin were to take according to the statute in the same manner as if B. had died intestate I should have held that the daughters took as tenants in common. . . . It would be too strong an alteration of the deed to draw from the words "as if she had not been married" a reference to Statute of Distributions. . . . Finding then in this deed, no words of reference to Statute of Distributions or to an intestacy & finding no words of severance, I think the sisters as next of kin take as joint tenants (ROMILLY, M.R.).

(2) By a marriage settlement, real estates were conveyed to trustees & "their heirs" upon trusts for the parents for life & afterwards for the children, & in default as the wife should appoint & in default for her next of kin. The gift to the next of kin contained no words of inheritance:—*Held*: they took for life only.—*LUCAS v. BRANDRETH* (No. 2) (1860), 28 Beav. 274; 2 L. T. 785; 6 Jur. N. S. 945; 54 E. R. 371.

Annotations:—As to (2) *Consd. Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752; *Re Tringham's Trusts, Tringham v. Greenhill*, [1904] 2 Ch. 487; *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469. *Re Tatham v. Vernon* (1861), 29 Beav. 604; *Re Whiston's Settlement, Lovatt v. Williamson*, [1891] 1 Ch. 661; *Re Hudson, Kuhne v. Hudson* (1895), 72 L. T. 892.

1159. ———.]—Testator gave a legacy to his daughter for life, & in default of issue, in trust, "for her next of kin in blood as if she had died unmarried." The daughter died without issue:—*Held*: the only surviving sister of the daughter was entitled to the legacy in exclusion of children of deceased brothers & sisters, for that the words "as if she had died unmarried" did not point to the mode of distribution in cases of intestacy, & "next of kin," therefore, must be taken as meaning nearest relations, & not persons entitled as next of kin according to the statute.—*HALTON v. FOSTER* (1868), 3 Ch. App. 505; 37 L. J. Ch. 547; 18 L. T. 623; 16 W. R. 683, L. J.

Annotations:—*Consd. Re Gray's Settlement, Akers v. Sears*, [1896] 2 Ch. 802. *Reid. Day v. Day* (1870), 18 W. R. 417; *Harris v. Newton* (1877), 25 W. R. 228; *Brigg v. Brigg* (1885), 54 L. J. Ch. 464.

1160. ———.]—In a gift to next of kin a reference to the death of the propositus intestate imports division among blood relations according to Statute of Distributions.

Consols were settled on trust after the death of M. for "the next of kin in blood to M. . . . in case she had so died intestate & unmarried":—*Held*: children of deceased brothers & sisters of M. were entitled as well as living brothers & sisters to share in the fund.—*Re GRAY'S SETTLEMENT, AKERS v. SEARS*, [1896] 2 Ch. 802; 65 L. J. Ch. 858; 75 L. T. 407; 40 Sol. Jo. 702.

1161. ———.]—Reference to intestacy.—*LUCAS v. BRANDRETH* (No. 2), No. 1158, *ante*.

1162. ———.]—*Re GRAY'S SETTLEMENT, AKERS v. SEARS*, No. 1160, *ante*.

B. Surviving Spouse.

See, now, Administration of Estates Act, 1925 (c. 23), s. 50.

1163. Whether next of kin—Wife.]—A widow, as such, cannot take under a limitation to the next of kin of her husband according to Statute of Distribution, 1670 (c. 10).

In a marriage settlement, the ultimate limita-

tion of a fund was to such persons "as would, at the decease of the husband, be entitled to his personal estate, as his next of kin, according to the statute for the distribution of personal estate of persons dying intestate, if the husband had died intestate without having been married to A.," his wife. The wife died, & the husband married again & died:—*Held*: his widow took nothing under this limitation.—*CHOLMONDELEY v. ASHBURTON* (LORD) (1843), 6 Beav. 86; 12 L. J. Ch. 337; 49 E. R. 757.

1164. ———.]—In a marriage settlement, the ultimate limitation of a fund provided by the husband was, "for his next of kin or personal representative in a due course of administration according to Statute of Distribution, 1670 (c. 10)." There was a similar limitation *mutatis mutandis* of the fund provided by the wife. The ct., rejecting the claims of the husband's exors. & of his residuary legatee, & excluding his widow:—*Held*: the next of kin were entitled to the fund provided by the husband.—*KILNER v. LEECH* (1847), 10 Beav. 362; 16 L. J. Ch. 503; 10 L. T. O. S. 202; 11 Jur. 859; 50 E. R. 621.

Annotation:—*Reid. Horn v. Coleman* (1853), 22 L. J. Ch. 779.

1165. ———.]—In a post-nuptial settlement the ultimate limitation of a fund settled by the husband was for his "next of kin in blood according to Statutes for the Distribution of Intestates' Effects, & in the manner in which the same would have been distributed if he had died possessed thereof intestate." The husband died in the lifetime of his wife:—*Held*: his widow was not entitled to share in the fund with his next of kin.—*Re FITZGERALD* (1889), 58 L. J. Ch. 662; 61 L. T. 221; 37 W. R. 552.

1166. ———.]—Husband.]—Trust under marriage settlement for the next of kin of the wife, subject to her appointment by will with two witnesses: appointment in favour of the husband by an unattested will being void, the children are entitled, not the husband; who is not of kin to his wife; & whose claim to her personal property is not in that character under the statute, but *jure mariti*; & in this case according to the plan of the settlement he was not intended.—*WATT v. WATT* (1796), 3 Ves. 244; 30 E. R. 992, L. C.

Annotations:—*Reid. Anderson v. Dawson* (1808), 15 Ves. 532; *Bailey v. Wright* (1811), 18 Ves. 49. *Mentl. Dyke v. Walford* (1848), 5 Moo. P. C. C. 434.

1167. ———.]—Under a limitation in a marriage settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband not entitled.

—*BAILEY v. WRIGHT* (1811), 18 Ves. 49; 34 E. R. 236; *affd.* (1818), 1 Swan. 39; 1 Wils. Ch. 15, L. C.

Annotations:—*Consd. Bulmer v. Jay* (1834), 3 M. & K. 197; *Re Best's Settlement, Trusts* (1874), L. R. 18 Eq. 686.

1168. ———.]—*GRAFFTEY v. HUMPAGE*, No. 495, *ante*.

1169. ———.]—Under a limitation in a settlement in the event of the wife dying without leaving children in the lifetime of the husband, in trust for such persons as at the decease of the wife would have become entitled thereto under Statute of Distribution, 1670 (c. 10):—*Held*: the husband did not take.—*NOON v. LYON* (1875), 33 L. T. 199.

C. As if Wife had died "without having been Married."

1170. Words to have ordinary meaning—Unless circumstances or context show contrary intention.]

—By a settlement made on the marriage of a widow which contained a recital showing that she

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had children living by her first husband, but which made no provision for such children, her property was assigned to trustees upon trust, if there should be no issue of the intended marriage, which happened, after the deaths of her intended husband & herself, for those persons who, under Statutes for the Distribution of Intestate Estates, would have been entitled thereto in case she had died absolutely possessed thereof "without ever having been married":—*Held*: there being no context, the words "without ever having been married" ought to have their ordinary meaning, & therefore the persons entitled under the ultimate trust were the persons who would be the next of kin of the lady if she had died a spinster.—*EMMINS v. BRADFORD, JOHNSON v. EMMINS* (1880), 13 Ch. D. 493; 49 L. J. Ch. 222; 42 L. T. 45; 28 W. R. 531.

Annotations:—*Consd.* *Re Watson's Trusts* (1886), 55 L. T. 316. *N.F.* *Stoddart v. Saville*, [1894] 1 Ch. 480. *Distd.* *Re Mare, Mare v. Howey*, [1902] 2 Ch. 112. *Foldd.* *Re Brydone's Settltmt.*, *Cobb v. Blackburne*, [1903] 2 Ch. 84; *Re Smith's Settltmt.*, *Wilkins v. Smith*, [1903] 1 Ch. 373; *Boyce v. Wasbrough*, [1922] 1 A. C. 425. *Reid.* *Re Sergeant, Mertens v. Walley* (1884), 26 Ch. D. 575.

1171. ———.]—The words in question ought *primâ facie* to be construed according to their natural meaning, which would exclude issue of the wife, unless there be something in the context or in the circumstances of the case which shows that the words were not intended to bear that meaning.

By a settlement made on the marriage of a spinster a fund belonging to her was vested in trustees, upon trust to pay the income to her during the joint lives of herself & her husband, & after the death of either of them to pay the income to the survivor during his or her life, & after the death of the survivor to hold the fund in trust for the child or children of the marriage as the husband & wife should by deed jointly appoint, & in default of appointment as the survivor should by deed or will appoint, & in default of appointment in trust for the children, of the marriage equally who being sons should attain twenty-one, or being daughters should attain twenty-one or marry. If there should be no child, who being a son should attain twenty-one "or being a daughter should attain that age or marry, then, without prejudice to the prior trusts, if the wife should die before the husband, the trustees were, after his death & such default or failure of children, to hold the fund upon such trusts as the wife should by will appoint, & in default of appointment upon trust for the persons who would have been entitled thereto as her statutory next of kin at her death "if she had died possessed thereof intestate & without having been married." The marriage took place in 1870. The wife died in 1871, intestate, leaving twin infant children, who both died a few months after their mother. In 1901 the husband died. No appointment had been made under the powers contained in the settlement:—*Held*: the sole statutory next of kin of the wife at the time of her death, excluding the infant children, was entitled to the fund.—*Re BRYDONE'S SETTLEMENT*, (*COBB v. BLACKBURNE*, [1903] 2 Ch. 84; 72 L. J. Ch. 528; 88 L. T. 614; 51 W. R. 497; 47 Sol. Jo. 490, C. A.)

Annotation:—*Foldd.* *Boyce v. Wasbrough*, [1922] 1 A. C. 425.

1172. ———.]—*BOYCE v. WASBROUGH*, No. 151, ante.

1173. Whether issue excluded.—*CLARKE v. COLLS*, No. 1188, post.

1174. ———.]—By a marriage settlement, personalty belonging to the intended wife was settled in trust for her separate use for her life, & subject thereto as she should by deed or will appoint; & in default of appointment, in case she should predecease her husband, in trust for such persons as under Statutes of Distribution would have become entitled thereto at her death if she had died intestate & without having been married. It was declared that A., her illegitimate daughter, should, for the purposes of that trust be deemed to be her lawful child. The wife made no appointment, & died without lawful issue, leaving her husband & A. surviving:—*Held*: A. was entitled, under the settlement, to the trust fund.—*WILSON v. ATKINSON* (1864), 4 De G. J. & Sm. 455; 4 New Rep. 451; 33 L. J. Ch. 576; 11 L. T. 220; 46 E. R. 995, L. J.J.

Annotations:—*Foldd.* *Re Ball's Trust* (1879), 11 Ch. D. 270; *Upton v. Brown* (1879), 12 Ch. D. 872. *Expld.* *Emmins v. Bradford, Johnson v. Emmins* (1880), 13 Ch. D. 493. *Apld.* *Re Arden's Settltmts.*, (1890) W. N. 204. *Consd.* *Stoddart v. Saville*, [1894] 1 Ch. 480. *Foldd.* *Re Mare, Mare v. Howey*, [1902] 2 Ch. 112. *Consd.* *Re Brydone's Settltmt.*, *Cobb v. Blackburne*, [1903] 2 Ch. 84; *Re Smith's Settltmt.*, *Wilkins v. Smith*, [1903] 1 Ch. 373; *Boyce v. Wasbrough*, [1922] 1 A. C. 425. *Reid.* *Re Watson's Trusts* (1886), 55 L. T. 316.

1175. ———.]—Where a settlement made on the marriage of a spinster contains trusts for her children attaining twenty-one or marrying, an ultimate trust, in default of such children, & in the event of the wife predeceasing the husband, for her statutory next of kin as if she had died intestate & "without ever having been married" *primâ facie* excludes children.—*Re SMITH'S SETTLEMENT, WILKINS v. SMITH*, [1903] 1 Ch. 373; 72 L. J. Ch. 184; 87 L. T. 740; 51 W. R. 217.

Annotations:—*Consd.* *Boyce v. Wasbrough*, [1922] 1 A. C. 425. *Reid.* *Re Brydone's Settltmt.*, *Cobb v. Blackburne*, [1903] 2 Ch. 84.

1176. ———.]—Issue of intended marriage.]—By a marriage settlement the trust funds were, in the event of the husband surviving, to go as if the wife had died without having been married. She died, leaving her husband & one child surviving:—*Held*: the trust funds went to the child.—*Re BALL'S TRUST* (1879), 11 Ch. D. 270; 48 L. J. Ch. 279; 40 L. T. 880; 27 W. R. 409.

Annotations:—*Consd.* *Emmins v. Bradford, Johnson v. Emmins* (1880), 13 Ch. D. 493. *Foldd.* *Re Forbes, Errington v. Sempell*, [1899] W. N. 6. *Consd.* *Re Brydone's Settltmt.*, *Cobb v. Blackburne* (1903), 88 L. T. 614; *Re Smith's Settltmt.*, *Wilkins v. Smith*, [1903] 1 Ch. 373; *Boyce v. Wasbrough*, [1922] 1 A. C. 425. *Reid.* *Re Sergeant, Mertens v. Walley* (1884), 26 Ch. D. 575; *Re Watson's Trusts* (1886), 55 L. T. 316; *Stoddart v. Saville*, [1894] 1 Ch. 480.

1177. ———.]—By a marriage settlement, the trust fund was assigned to trustees upon trust to dispose of the same as the wife should in writing direct, & in default, to pay the income to her for life, for her separate use, & after her death for such persons as she should by deed or will appoint, & in default, in trust for the persons, who under the statutes for the distribution of intestates' estates, would, on her death, have been entitled thereto, if she had died possessed thereof intestate " & without having been married." The wife died, without having appointed, leaving one child of the marriage:—*Held*: the trust funds went to the child.—*STODDART v. SAVILLE*, [1894]

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332.—IR. *Whether issue excluded—Issue of intended marriage.*—*Re DEANE'S TRUSTS, DUDLEY v. DEANE*, [1900] 1 I. R.

r. "Unmarried" means "discovert."—*Re WOODHOUSE'S TRUSTS*, [1903] 1 I. R. 126.—IR.

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consequently the fund went to the child, as the wife's next of kin, & on its death passed to its father.

What is the meaning of the word unmarried? It may . . . mean either "without ever having been married" or "not having a husband living at her death." If the former construction be adopted, then if the wife should survive her husband & afterwards marry & have children her collateral relations would take the fund to the exclusion of her issue (LORD CRANWORTH).—CLARKE v. COLLS (1861), 9 H. L. Cas. 601; 11 E. R. 864, H. L.; *affg.* S. C. *sub nom.* MITCHELL v. COLLS (1860), John. 674.

Annotations:—*Apld.* *Re Sanders' Trusts* (1866), L. R. 1 Eq. 675; *Emmins v. Bradford, Johnson v. Emmins* (1880), 13 Ch. D. 493. **Distd.** *Blundell v. De Falbe* (1888), 57 L. J. Ch. 576. **Folld.** *Re Smith's Settlement*, Wilkins v. Smith, [1903] 1 Ch. 373. **Consd.** *Re Brydone's Settlement*, Cobb v. Blackburne, [1903] 2 Ch. 84; *Re Collyer, Collyer v. Back* (1907), 24 T. L. R. 117. **Distd.** *Boyce v. Wasbrough*, [1922] 1 A. C. 425. **Refd.** *Thomas v. Jones* (1862), 7 L. T. 154; *Re Chant, Chant v. Lemon*, [1900] 2 Ch. 345.

1189. —. —. —.]—Although the word "unmarried" is one of flexible meaning, & may mean either "never having been married," or "not having a husband" at the time when a gift is to take effect, the former is the primary or natural meaning, & in the absence of any context showing a different intention, the word will be so construed.—*Re SERGEANT, MERTENS v. WALLEY* (1884), 26 Ch. D. 575; 54 L. J. Ch. 159; 32 W. R. 987.

Annotations:—*Consd.* *Blundell v. De Falbe* (1888), 57 L. J. Ch. 576; *Re Collyer, Collyer v. Back* (1907), 24 T. L. R. 117. **Refd.** *Re Jones, Last v. Dobson*, [1915] 1 Ch. 246.

1190. —. —. —.]—"No husband living at her death."—MAUGHAM v. VINCENT, No. 1185, *ante*.

1191. —. —. —.]—(1) By a marriage settlement, a moiety of the settled fund was assured in trust after the death of the wife, if she died in the lifetime of the husband, to such uses as she should appoint, & in default of appointment, to such person or persons as at her decease would have been entitled to the clear residue of her personal estate under the Statute of Distributions, in case she had died intestate & without being married. On the death of the wife, in the lifetime of the husband, without having exercised the power:—**Held:** the children of the marriage were entitled.

(2) Without being married means without having a husband at the time of her death, not without ever having had a husband. Still the rules of grammar must give way to the rules of good sense, & where a reasonable interpretation of the whole instrument requires that grammar should be departed from it must be & constantly is departed from (KNIGHT BRUCE, L.J.).—*Re NORMAN'S TRUST* (1853), 3 De G. M. & G. 965; 1 Eq. Rep. 53; 22 L. J. Ch. 720; 21 L. T. O. S. 97; 17 Jur. 444; 1 W. R. 220; 43 E. R. 378, L. JJ.

Annotations:—*As to* (1) *Apld.* *Pratt v. Mathew* (1856), 22 Beav. 328. *As to* (2) **Consd.** *Re Saunderson's Trust* (1857), 3 K. & J. 152; *Clarke v. Colls* (1861), 9 H. L. Cas. 601. **Refd.** *Hall v. Robertson* (1853), 2 Eq. Rep. 15; *Day v. Barnard* (1860), 1 Drew. & Sm. 351.

1192. —. —. —.]—PRATT v. MATHEW, No. 1198, *post*.

1193. —. —. —.]—In a settlement the expression "in case she (the wife) had died intestate & unmarried" held equivalent to "in case she had died intestate & a widow."

Accordingly, under a limitation, at the wife's death, to the persons who, in the event above

mentioned, would have been entitled to her personal estate:—**Held:** her first husband having died without issue, her children by a second husband, who survived her, were the persons designated.—*Re SAUNDERS' TRUST* (1857), 3 K. & J. 152; 69 E. R. 1060.

Annotations:—*Refd.* *Re Gratton's Trusts* (1857), 5 W. R. 795; *Clarke v. Colls* (1861), 9 H. L. Cas. 602.

1194. —. —. —.]—CLARKE v. COLLS, No. 1188, *ante*.

1195. —. —. —.]—*Re SERGEANT, MERTENS v. WALLEY*, No. 1189, *ante*.

1196. —. —. —.]—"Never having been married."—MAUGHAM v. VINCENT, No. 1185, *ante*.

1197. —. —. —.]—*Re NORMAN'S TRUST*, No. 1191,

1198. —. —. —.]—The word "unmarried" in one part of a settlement held to mean not having a husband, although in another it was clearly used in the sense of "without having been married."

A fund was settled in contemplation of marriage, upon trust for the wife for life, then for the husband for life, then for the children of the marriage equally, subject to a power of appointment among them, to be paid at twenty-one, or in the case of daughters on their attaining that age or marrying; & in the event of any of them, being a son or sons, dying under twenty-one, or being a daughter or daughters dying under that age & "unmarried," the share of such child was to accrue among the others; with an ultimate trust, in the event of no child attaining a vested interest & of the wife dying in the husband's life, for such person or persons as would have been entitled to her personal estate under Statute of Distributions if she had died "unmarried" & intestate:—**Held:** the word "unmarried" in the ultimate trust was to be construed "not having a husband at the time."—PRATT v. MATHEW (1856), 8 De G. M. & G. 522; 25 L. J. Ch. 686; 27 L. T. O. S. 267; 2 Jur. N. S. 1055; 4 W. R. 772; 44 E. R. 491, L. JJ.

Annotations:—*Refd.* *Clarke v. Colls* (1861), 9 H. L. Cas. 602. **Mentd.** *Medworth v. Pope* (1859), 27 Beav. 71. *Howarth v. Mills* (1866), L. R. 2 Eq. 389; *Holt v. Sindrey* (1868), L. R. 7 Eq. 170; *Lepine v. Bean* (1870), 39 L. J. Ch. 847; *Oceleston v. Fullalove* (1873), 9 Ch. App. 147.

1199. —. —. —.]—Where there is a gift over in the event of a person, who is not married at the time, dying "unmarried," it means without ever having been married.

In a limitation in a marriage settlement, giving the whole fund, after the death of the parents, to an only child, if all but one should have died "unmarried & without issue," the word "unmarried" was construed "without having been married," & one having married it was held that the clause became inoperative.—HEYWOOD v. HEYWOOD (1860), 29 Beav. 9; 30 L. J. Ch. 155; 3 L. T. 429; 7 Jur. N. S. 228; 9 W. R. 62; 54 E. R. 527.

Annotation:—*Consd.* *Re Jones, Last v. Dobson*, [1915] 1 Ch. 246.

1200. —. —. —.]—CLARKE v. COLLS, No. 1188, *ante*.

1201. —. —. —.]—**Natural meaning.—In absence of context showing different intention.**—*Re SERGEANT, MERTENS v. WALLEY*, No. 1189, *ante*.

1202. —. —. —.]—The primary & usual meaning of the word "unmarried," in the absence of any context showing a different meaning, is "without ever having been married."

By a marriage settlement, property belonging to the wife was settled in the events which happened, subject to the life interests of the husband & wife, in trust "for such person or persons as, under or by virtue of the statute for the distribution of intestate's effects, would at the time of the decease of the wife have been entitled to her personal

estate as her next of kin in case she had died intestate & unmarried":—*Held*: in the absence of anything in the settlement showing a contrary intention, the word "unmarried" must be construed to mean "without ever having been married."—*BLUNDELL v. DE PALBE* (1888), 57 L. J. Ch. 576; 58 L. T. 621.

Annotation:—*Consd. Re Collyer, Collyer v. Back* (1907), 24 T. L. R. 117.

E. Nature of Estate Taken.

See, generally, Administration of Estates Act, 1925 (c. 23), ss. 45–52, & DESCENT & DISTRIBUTION, Vol. XVIII., pp. 17–28, Nos. 161–283.

1203. Tenancy in common.—*LUCAS v. BRANDRETH* (No. 2), No. 1158, *ante*.

1204. —.]—By a marriage settlement personal property of the intended wife was settled, the ultimate trust being for such person or persons as at the time of the decease of the wife should be her next of kin "under & according to Statute of Distributions":—*Held*: the next of kin of the wife took as tenants in common & not as joint tenants.—*Re RANKING'S SETTLEMENT TRUSTS* (1868), L. R. 6 Eq. 601.

SUB-SECT. 3. PERIOD FOR ASCERTAINING CLASS.

1205. Where hypothesis is death intestate.—At death of person to whom hypothesis refers.—By a marriage settlement, a fund was settled on the wife, in case she should survive her husband, for her life, remainder to their children who, being sons, should attain twenty-one, or being daughters, should attain that age or marry; & the trustees were directed to apply a portion of the income of the children's expectant shares for their maintenance, & to accumulate the surplus for the benefit of such person or persons as should be entitled thereto, by virtue of the settlement; provided that, if no son should attain twenty-one, nor any daughter should attain that age or marry, then the fund should be in trust for such person or persons as the husband should by deed or will appoint; & in default of appointment, in trust for his next of kin according to Statute of Distributions & as if he had died intestate. There was issue of the marriage one son only. The husband died first, without having exercised the power reserved to him: then the son died under twenty-one, & lastly, the wife died:—*Held*: the fund vested in the son as his father's next of kin at the father's death, & not in the persons who were the father's next of kin at the son's death.—*SMITH v. SMITH* (1811), 12 Sim. 317; 59 E. R. 1153.

Annotations:—*Consd. Re Saunders' Trust* (1857), 3 K. & J. 152. *Reid. Re Gratton's Trusts* (1851), 29 L. T. O. S. 399.

1206. —.]—Trust funds were settled upon a husband for life, & if the wife should die in the lifetime of the husband, then, after his decease & failure of issue, "for such persons, other than the husband, as should then be the next of kin of the wife, & would have been entitled thereto under Statutes of Distribution, in case she had died sole, unmarried & intestate":—*Held*: that her next of kin, at her own death, & not those at the death of her husband, were entitled.—*WHEELER v. ADDAMS* (1853), 17 Beav. 417; 1 W. R. 473; 51 E. R. 1095.

Annotations:—*Consd. Bullock v. Downes* (1860), 3 L. T. 194; *Day v. Day* (1870), 18 W. R. 417; *Mortimer v. Slater* (1877), 7 Ch. D. 322. *Reid. Wharton v. Barker*

(1858), 4 K. & J. 483; *Mitchell v. Bridges* (1864), 11 L. T. 727; *Travis v. Taylor* (1866), 12 Jur. N. S. 791; *Hutchinson v. National Refuges for Homeless & Destitute Children*, [1920] A. C. 795.

1207. Where hypothesis is that wife has survived husband & died intestate.—At death of husband.—

By a marriage settlement personal estate of the wife was settled in trust for the husband & wife for their respective lives, & afterwards for the children of the marriage, & in default for the wife if she survived her husband, but if she predeceased him, then, subject to his life interest, for such person as, at the decease of the wife, would, under Statute of Distributions, have been entitled to her personal estate, as her next of kin, in case she had survived her husband & had afterwards died intestate. The husband survived the wife:—*Held*: her next of kin ascertained at the husband's death were entitled.—*CHALMERS v. NORTH* (1860), 28 Beav. 175; 3 L. T. 140; 6 Jur. N. S. 490; 8 W. R. 426; 54 E. R. 333.

Annotations:—*Distd. & Dtd. Drutt v. Seaward, Re Almsworth, Almsworth v. Seaward* (1885), 31 Ch. D. 234. *Dtd. Re Bradley, Brown v. Cottrell* (1888), 58 L. T. 631. *Apld. Clarke v. Hayne* (1889), 42 Ch. D. 529. *Consd. Re King's Settlement, Gibson v. Wright* (1889), 60 L. T. 745.

1208. —.]—In the event of there being no issue of a marriage, the settled fund was given to the wife, if she should survive her husband, for her absolute use; but if she should die in his lifetime, then to such persons as she should appoint, & in default of appointment to the persons who would then be entitled to the personal estate of the wife, in case she had survived her husband & had died possessed of same intestate:—*Held*: the next of kin of the wife at the death of the husband were entitled to the fund.

If by the instrument testator chooses to say, that the next of kin of a person are to be ascertained not at his death, but at a later or subsequent time, how can the ct. avoid so to construe the gift (*ROMILLY, M.R.*).—*PINDER v. PINDER* (1860), 28 Beav. 44; 29 L. J. Ch. 527; 2 L. T. 202; 6 Jur. N. S. 489; 54 E. R. 282.

Annotations:—*Distd. & Expld. Re Bradley, Brown v. Cottrell* (1888), 58 L. T. 631. *Apld. Clarke v. Hayne* (1889), 42 Ch. D. 529. *Fold. Re King's Settlement, Gibson v. Wright* (1889), 60 L. T. 745; *Re Peirson's Settlement, Cayley v. De Wend* (1903), 88 L. T. 794. *Reid. Chalmers v. North* (1860), 28 Beav. 175; *Travis v. Taylor* (1866), 12 Jur. N. S. 791.

1209. —.]—By a marriage settlement, dated in 1814, trust funds to which the wife was entitled were settled upon trusts for the benefit of the wife & husband during their respective lives & for the benefit of the child or children of the marriage. The settlement then provided that, if there should be no child, the trust funds should remain upon the trusts following: if the husband should die in the lifetime of the wife, then, after his decease & such failure of issue as aforesaid, in trust for the wife absolutely; but if the husband should survive the wife, then after, the decease of the husband so surviving the wife, & such failure of issue as aforesaid, "in trust for the person or persons, who, under the statutes made for the distribution of the estates of intestates, would then be entitled to the personal estate of" the wife in case the wife, "having survived" the husband, "had died possessed of same intestate, & to be divided between or amongst the same persons respectively, if more than one, in the shares & proportions in which same respectively would, under or by virtue of the statutes, be divisible among the persons respectively." There was

PART VIII. SECT. 12, SUB-SECT. 3.

t. Where hypothesis is death intestate.—At death of person to whom hypothesis refers.—*DAY v. DAY* (1870), 18 W. R. 417.—*IR.*

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Sect. 13.]

never any issue of the marriage. The wife died in 1886, & the husband died in 1888. The question was, when the class of next of kin of the wife entitled to the trust funds was ascertainable—whether at the death of the wife or of the husband:—**Held**: the wife's next of kin entitled to take were to be ascertained, not at the time of her own death, but at the time of the death of her husband.—**Re** KING'S SETTLEMENT, GIBSON v. WRIGHT (1889), 60 L. T. 745.

Annotation:—**Consd.** *Re* Peirson's Settlmt., Cayley v. De Wend (1903), 88 L. T. 794.

1210. ———.]—Under the ultimate trusts in a marriage settlement trustees were directed to hold certain funds “in trust for the person or persons who, under the statutes made for the distribution of intestates’ personal estates, would then be entitled to the personal estate of A. in case she having survived” her husband “had died possessed of the trust moneys, stocks, funds, & securities, & to be paid & divided accordingly.” The husband survived the wife:—**Held**: the period at which the wife's next of kin were to be ascertained was the death of the husband.—**Re** PEIRSON'S SETTLEMENT, CAYLEY v. DE WEND (1903), 88 L. T. 794; 51 W. R. 519; 47 Sol. Jo. 547.

1211. ———. **At death of wife.**]—Testator by his will directed that the shares of his daughters in his residuary estate should be settled, the ultimate limitation, in case a daughter should not leave any child or children who should be living at the decease of the survivor of herself & her husband, being in trust for the person or persons who under Statutes of Distribution “would on her decease have been entitled thereto in case she having survived her husband & had then died possessed thereof & intestate.” A daughter having died without issue, leaving her husband surviving:—**Held**: her next of kin to take under the ultimate limitation were to be ascertained at the time of her own death, & not at the time of the death of her husband.—**DRUITT v. SEAWARD, Re AINSWORTH, AINSWORTH v. SEAWARD** (1885), 31 Ch. D. 234; 55 L. J. Ch. 239; 53 L. T. 954; 34 W. R. 180.

Annotations:—**Fold.** *Re* Bradley, Brown v. Cottrell (1888), 58 L. T. 631. **N.F.** Clarke v. Hayne (1889), 42 Ch. D. 529. **Consd.** *Re* King's Settlmt., Gibson v. Wright (1889), 60 L. T. 745. **Refd.** *Re* Peirson's Settlmt., Cayley v. De Wend (1903), 88 L. T. 791.

1212. ———.]—In a marriage settlement, which gave successive life interests to the wife & husband, the ultimate limitation of personal property, in the event of the husband surviving the wife, was in trust for the person or persons who, under the statutes for the distribution of the estates of intestates would, on the decease of the wife, have been entitled thereto in case she had survived the husband, & had then died possessed thereof & intestate. The wife predeceased the husband:—**Held**: the class of persons to take under the limitation ought to be ascertained as at the date of the death of the wife, & not as at the date of the death of the husband.—**Re** BRADLEY, BROWN v. COTTRELL (1888), 58 L. T. 631.

Annotations:—**N.F.** Clarke v. Hayne (1889), 42 Ch. D. 529. **Refd.** *Re* Peirson's Settlmt., Cayley v. De Wend (1903), 88 L. T. 794.

1213. ———. **Immediately after death of husband.**]—By a marriage settlement, dated in 1839, certain property of the wife was vested in trustees upon trust for the appointees of the wife, &, in default, for her for life for her separate use, & after her death for the husband for life, &, after the decease of the husband & wife, in trust for the

person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto in case the wife having survived the husband were to die possessed thereof respectively & intestate, & to be divided between or among such persons, if more than one, in the shares & proportions in which the same would be divisible under the same statutes. The wife died in the lifetime of the husband. Her next of kin under the statute at her death & those persons who would have been her next of kin if she had survived her husband & died immediately after his death were not altogether the same, & the question was which of those two classes was to take:—**Held**: the persons to take were those who would have been entitled to the wife's personal estate if she had survived her husband & died intestate immediately after him.—**CLARKE v. HAYNE** (1889), 42 Ch. D. 529; 61 L. T. 161; 37 W. R. 667; *sub nom.* *Re* BEACH, **CLARKE v. HAYNE**, 59 L. J. Ch. 195.

Annotation:—**Consd.** *Re* Peirson's Settlmt., Cayley v. De Wend (1903), 88 L. T. 794.

1214. **Period fixed by settlor—Whether effect given to settlor's intention.**]—**PINDER v. PINDER**, No. 1208, *ante*.

1215. **Trust for wife's next of kin—On death or marriage of husband—Ascertainment at death of wife—Cesser of prior interests on remarriage after divorce.**]—A fund was settled on marriage in trust, after a life interest to the wife & other limitations, for the wife if she should survive her husband, but if she should die in his lifetime, in trust for the husband for life, or until he should marry again, & upon his decease or marriage as aforesaid, in trust for such persons as at the time of his death or marriage should be the next of kin of the wife. The marriage was dissolved by decree; both husband & wife married again, & the wife died:—**Held**: (1) the next of kin of the wife at her death were entitled to the fund, the words “his death or marriage” being read as meaning the determination of the prior interests; (2) the husband's interest was destroyed by his second marriage in the lifetime of the wife.—**Re** MATHEW'S TRUSTS (1876), 24 W. R. 960.

SUB-SECT. 4.—TRUST FOR WIFE'S NEXT OF KIN
SUBJECT TO HER LIFE INTEREST.

See Sect. 10, *ante*.

SECT. 13.—LIMITATION TO REPRESENTATIVES.

1216. **“Personal representatives” — Husband taking partial interest—Whether husband is entitled.**]—**BAILEY v. WRIGHT**, No. 139, *ante*.

1217. ———. **Construed as “next of kin.”**]—A, by a settlement, declared that trustees should be possessed of £4,000, as to a moiety for M. & her children; & as to the other moiety, for N. & her children; & that if both M. & N. should die without leaving issue living at the time or respective times of their decease, then that the trustees should divide the trust moneys among the personal representatives of A. in a legal course of administration. M. & N. both died without having been married. A. did not leave a widow:—**Held**: the persons intended to be benefited were the next of kin of A. living at his death.—**WILSON v. PILKINGTON** (1847), 16 L. J. Ch. 169; 9 L. T. O. S. 145; 11 Jur. 537.

Annotation:—**Consd.** *King v. Cleaveland* (1859), 4 De G. & J. 477.

1218. ———.]—J. settled certain policies of insurance on his own life, on his wife & children & provided that in default of children, & after the death of the wife, the fund should be in trust for such persons as should be his next of kin at his wife's death, & who would be then his personal representatives in case he died intestate & unmarried, & be distributable accordingly under the statutes for the distribution of intestates' effects; but in case his wife should die in his lifetime, whether leaving children or not, then the whole fund to be in trust for J., his exors., administrators, & assigns absolutely. J. became bkpt. & died, leaving his wife, but no children surviving. On the question whether the words "personal representatives," referred to the exors. & administrators of J. in their representative character:—*Held*: the next of kin of J. at the death of the wife were entitled.—*RHODES v. KIPPS* (1859), 7 W. R. 511.

1219. ———.]—In a settlement the words "to pay to legal representatives in a due course of administration":—*Held*: to amount to a direction to pay to next of kin, & not to exors. or administrators.—*BRIGGS v. UPTON* (1872), 7 Ch. App. 376; 41 L. J. Ch. 519; 26 L. T. 485; 21 W. R. 30, L. C.

Annotations:—*Distd. Re Best's Settlement*, Trusts (1874), L. R. 18 Eq. 686. *Reid*. Wing v. Wing (1876), 24 W. R. 878.

1220. ———.]—A fund was settled on A. for life, then on any husband she might leave for life, then on her children, & in default of children on the person or persons who should happen to be her legal personal representative or representatives at the time of her death:—*Held*: legal personal representatives meant next of kin according to Statutes of Distribution.—*ROBINSON v. EVANS* (1873), 43 L. J. Ch. 82; 29 L. T. 715; 22 W. R. 199.

Annotations:—*Consd. Re Best's Settlement*, Trusts (1874), L. R. 18 Eq. 686. *Reid*. Wing v. Wing (1876), 31 L. T. 941.

1221. ———.]—**Statutory next of kin.**—Personal estate brought into settlement by B., stood on trust for the person or persons, exclusive of A. & his representatives, who under Statute of Distributions would have become entitled, if B. had died possessed thereof, a *feme sole* & intestate. A. was B.'s brother. At B.'s death her statutory next of kin included three daughters of A.:—*Held*: the term representatives meant those who represented A. as statutory next of kin of B.; & A.'s daughters were therefore excluded from taking under the settlement.—*LANDSAY v. ELLICOTT* (1876), 46 L. J. Ch. 878.

1222. ———.]—**Construed as "executors & administrators."**—By a marriage settlement, the wife's real & personal estate was assigned to trustees on trust to pay the annual income to husband for life, remainder to wife for life, remainder as she should by deed or will appoint; & in default for her personal representatives. The wife predeceased her husband, intestate & without issue. After the husband's death, his exors. took out administration of the wife's estates:—*Held*: they were entitled to the fund.—*Re BEST'S SETTLEMENT TRUSTS* (1874), L. R. 18 Eq. 686; 43 L. J. Ch. 545; 22 W. R. 599.

Annotation:—*Reid*. Smith v. Iliffe (1875), L. R. 20 Eq. 666.

1223. ———.]—**"Executors & administrators."**—Whether they take beneficially.]—By a marriage settlement the ultimate trust declared of a copyhold estate, the property of the husband, was for his exors. or administrators, & a similar trust was declared with respect to the exors. or administrators of the wife as to a copyhold estate which was her property. The wife survived & took out administration to her husband:—*Held*: she was

not entitled to hold the former estate for her own exclusive benefit but for the benefit of herself & her husband's next of kin.—*WELLMAN v. BOWRING* (1830), 3 Sim. 328; 57 E. R. 1021.

1224. ———.]—By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, & after her death, for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should by deed or will appoint; & in default of appointment, for his exors. & administrators; the husband died in the wife's lifetime, having appointed an extrix., but without exercising his power:—*Held*: the extrix. was not entitled to the stock beneficially, but it was to be administered by her as part of his general personal estate.—*COLLIER v. SQUIRE* (1827), 3 Russ. 467; 5 L. J. O. S. Ch. 186; 38 E. R. 650.

Annotations:—*Reid*. Devey v. Devey (1851), 9 Haro, 230, n.; Mackenzie v. Mackenzie (1851), 3 Mac. & G. 559; Gibson v. Lawrence (1860), 3 L. T. 367.

1225. ———.]—**Addition of "for their own use & benefit."**—By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest & dividends to the husband for life, & in case he should survive the wife, upon trust to transfer the stock to the husband, "his exors., administrators, or assigns, to & for his or their own use & benefit"; but in case the wife should survive the husband, upon trust during her life to pay the interest & dividends as she should appoint, & after her decease, upon trust to transfer the stock "unto the exors. or administrators of M., the husband, to & for their own use & benefit." The wife survived the husband & took out administration of his effects, & claimed an absolute interest in the whole corpus of the stock:—*Held*: she was not entitled.

Semble: a limitation in a settlement "to the exors. & administrators of A., for their own use & benefit," unconnected with any other limitation showing more specifically who are to take, is void for uncertainty.—*MARSHALL v. COLLETT* (1835), 1 Y. & C. Ex. 232; 160 E. R. 94.

1226. ———.]—Upon the construction of a marriage settlement:—*Held*: under a limitation "to the exors., administrators, or assigns of the settlor, to & for his & their own use & benefit," his exors. were not entitled beneficially.—*HAMES v. HAMES* (1838), 2 Keen, 616; 7 L. J. Ch. 123; 48 E. R. 777.

Annotations:—*Consd.* Johnson v. Routh (1857), 27 L. J. Ch. 305. *Reid*. Holloway v. Clarkson (1843), 2 Haro, 521; Mackenzie v. Mackenzie (1851), 3 Mac. & G. 559.

1227. ———.]—(1) Under a limitation by deed of a fund, to "the exors. or administrators of the settlor, to & for his & their own use & benefit":—*Held*: under the circumstances, the fund belonged to the next of kin, & not the administrator.

(2) A. being under an obligation to make a settlement on his wife, by deed expressed to be made in order to make such provision, conveyed property to trustees in trust to permit him & his assigns to receive the dividends, "to & for his & their own entire use & benefit during the joint lives of himself & his wife"; & in case A. survived his wife, then in trust, after her death, to assign it to him, "his exors., administrators & assigns, to & for his & their own use & benefit"; but if his wife should survive him, then to her for life, & afterwards to assign it "unto the exors. or administrators of A. to & for his & their own use & benefit." The wife survived:—*Held*: subject to her life interest, the fund belonged to the next of kin of A. & not to his administrator.—*MERYON v. COLLETT* (1845), 8 Beav. 386; 14 L. J. Ch. 369; 5 L. T. O. S. 366; 9 Jur. 459; 50 E. R. 151.

Sect. 13.—Limitation to representatives. Sect. 14. Part IX. Secls. 1 & 2: Sub-sect. 1.]

1228. — — — — —.]—By a marriage settlement, an annuity & policy of assurance were assigned by the husband to trustees, upon trust for himself & his wife during their lives, & then for the benefit of the children of the marriage, & in default of children, to such person as the husband should by deed or will appoint, & in default of appointment, "unto the exors. or administrators of the husband to & for their own use & benefit":—*Held*: the exors. took the property as part of the husband's general assets.—*JOHNSON v. ROUTH* (1857), 27 L. J. Ch. 305; 30 L. T. O. S. 111; 3 Jur. N. S. 1048; 6 W. R. 6.

Annotation:—*Distd.* Harrington v. Atherton (1864), 4 New Rep. 206. (*See* 5 New Rep. 1.)

1229. — — — — — *Whether next of kin entitled.*]—The ultimate limitation of a fund in a marriage settlement, after the death of a husband & wife, was to the husband if he survived his wife, but if the wife survived, then, after her death, to such person as the husband should appoint, & in default, "to his exors., administrators, or assigns." The wife survived, & the husband made no appointment:—*Held*: his residuary legatees, & not his next of kin, were entitled.—*HOWELL v. GAYLER* (1842), 5 Beav. 157; 11 L. J. Ch. 398; 49 E. R. 537.

1230. *Trust for person or his legal representative.*]—By an incorrectly framed settlement a sum of money was settled on trusts for A. for life, with trusts in remainder for her children, & if she should die without issue, in trust to pay a portion of the fund to B. or her legal representatives:—*Held*: the words legal representatives were either words of limitation, so as to give B. an absolute interest, or were intended to provide for her being dead at the date of the settlement, or were void for uncertainty.—*TOPPING v. HOWARD* (1851), 4 De G. & Sm. 268; 64 E. R. 827; *sub nom.* *TIPPING v. HOWARD*, 17 L. T. O. S. 231; 15 Jur. 911.

Annotation:—*Refd.* Stockdale v. Nicholson (1867), L. R. 4 Eq. 359.

1231. *Whether limitation makes property subject to disposition—By settlor's will.*]—The effect of a

settlement by deed, limiting property to the exor. or administrator of the settlor, is to make such property subject to the disposition of the settlor by will, or to be dealt with under Statute of Distributions.—*MACKENZIE v. MACKENZIE* (1851), 3 Mac. & G. 559; 21 L. J. Ch. 465; 18 L. T. O. S. 229; 15 Jur. 109; 42 E. R. 376, L. C.

Annotation:—*Mentd.* Trethewy v. Helyar (1876), 4 Ch. D. 53.

1232. — — — — — *On intestacy.*] — *MACKENZIE v. MACKENZIE*, No. 1231, *ante*.

Trust for wife's executors subject to her life interest.]—*See* Sect. 10, *ante*.

SECT. 14.—APPLICATION OF RULE AGAINST PERPETUITIES.

1233. *Unborn children of marriage—After life interests to husband & wife—Remainders in default of children.*]—*APPRICE v. FLOWER* (1660), 1 Rep. Ch. 175; Poll. 27; 21 E. R. 542, L. C.

Annotation:—*Consd.* Alford's Case (1662), O. Bridg. App. 581.

1234. *Remainder in default of issue—After gift to children.*]—*KNIGHT v. KNIGHT* (1674), *Cas. temp. Finch*, 181; 23 E. R. 99.

1235. *Remainders to daughters—After successive remainders to unborn sons.*]—If a grant be made of a term of years to A. for life, with remainder to A. & B. his wife for life; remainder to the first son of their two bodies, & so on to their other sons successively; & if they should have no sons, then with remainder over to their daughters, the remainder is void, although A. & B. never have a son, but a daughter only; for such remote contingencies tend to create a perpetuity.—*BURGIS v. BURGIS* (1674), 1 Mod. Rep. 114; *Cas. temp. Finch*, 91; 1 *Cas. in Ch.* 229; Poll. 40; 86 E. R. 773.

Annotations:—*Consd.* Howard v. Norfolk (1682), 2 Rep. Ch. 229; Stanley v. Leigh (1737), 2 P. Wms. 686, *Refd.* Gower v. Grosvenor (1739), 9 Mod. Rep. 249; Scarsdale v. Curzon (1860), 29 L. J. Ch. 249.

Rule against perpetuities generally.]—*See* PERPETUITIES, Vol. XXXVII., pp. 55–128.

Part IX.—Beneficial Interests in Realty.

SECT. 1.—PIN MONEY.

Nature of.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 166, 167, Nos. 1353–1360.

Savings out of pin money.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 95, Nos. 731–733.

Recovery of arrears.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 148, 172, Nos. 1201, 1400, 1401.

SECT. 2.—JOINTURE.

SUB-SECT. 1.—IN GENERAL.

1236. *Nature of—Benefit to wife—Taking effect before or after death of husband.*]—The popular notion of a jointure [is] something from which [the wife] derives no benefit till her husband's

death (POLLOCK, C.B.).—*JAMIESON v. TREVELYAN* (1854), 10 Exch. 269; 23 L. J. Ex. 281; 156 E. R. 445.

Annotation:—*Consd.* *Re* De Hoghton, De Hoghton v. De Hoghton, [1896] 2 Ch. 385.

1237. — — — — — *Life estate.*]—*Prima facie*, a jointure is an estate to the wife for life to take effect on the death of the husband.

It is true that the word [jointure] is not necessarily confined to a provision only to commence at the death of the husband (STIRLING, J.).—*Re* DE HOGHTON, DE HOGHTON v. DE HOGHTON, [1896] 2 Ch. 385; 65 L. J. Ch. 667; 74 L. T. 613; 44 W. R. 635; 40 Sol. Jo. 514.

1238. *What amounts to valid limitation—Life estate in remainder.*]—(1) A limitation to the husband for life, remainder to B. for life, or to the use

PART IX. SECT. 2, SUB-SECT. 1.

a. *Nature of—Benefit to wife after husband's death.*]—*LANGLEY v. LANGLEY* (1839), 2 L. J. Ch. 313.—*IR*

b. *What property liable—Jointure charged on two properties.*]—*SULLIVAN v. SULLIVAN* (1845), 8 L. J. Ch. 685; 2 Jo. & Lat. 769.—*IR*.

c. *Priority.*]—*CREED v. CAREY*

(1857), 7 L. J. Ch. R. 295; 10 Ir. Jur. 123.—*IR*.

d. — — — — —.] — A jointure does not necessarily take precedence of other estates in a settlement.—*Re ANNALY'S*

of A. for life, remainder to the wife for life is no jointure, though A. dies, living the husband.

(2) So of an estate to the wife for the life of another.

(3) An estate to husband & wife & the heirs male of their bodies, or to the wife during her widowhood, or in fee, are good jointures.

(4) On eviction of a jointure in fee, the widow shall be endowed for life only.—**VERNON'S CASE** (1572), 4 Co. Rep. 1 a; 3 Dyer, 317 a; 76 E. R. 815.

Annotations :—*As to* (1) **Refd.** *Colt & Glover v. Coventry & Lichfield* (Bp.) (1616), Hob. 140; *It. v. Hampden* (1637), 3 State Tr. 826. *As to* (3) **Refd.** *Hughes v. Clubb* (1722), 1 Com. 369; *Re Bolton Estates*, *Russell v. Meyrick*, [1903] 2 Ch. 461. *Generally*, **Refd.** *Strata Mercella's* (Abbot of) *Case* (1591), 9 Co. Rep. 24 a; *Pheasant v. Pheasant* (1670), 1 Cas. in Ch. 181; *Fry v. Porter* (1679), 1 Mod. Rep. 300; *Charles v. Andrews* (1724), 9 Mod. Rep. 151; *A.-G. v. Scott* (1735), *Cas. temp. Talb.* 138; *Godwin v. Winsmore* (1742), 2 Atk. 525; *Buckinghamshire v. Drury* (1762), *Willm.* 177; *Dyke v. Rendall* (1852), 2 De G. M. & G. 209. **Mentd.** *Peto v. Checy* (1611), 2 Brownl. 128; *Tyrer v. Littleton* (1612), 2 Brownl. 187; *James v. Tutney* (1639), Cro. Car. 532; *Fry's Case* (1672), 1 Vent. 199; *London (Bp.) v. A.-G.* (1694), *Show. Parl. Cas.* 164; *Lane v. Cotton* (1701), 12 Mod. Rep. 472; *Clifford v. Turrell* (1845), 14 L. J. Ch. 390.

1239. — **Estate pur autre vie.**—**VERNON'S CASE**, No. 1238, *ante*.

1240. — **Estate tail.**—**VERNON'S CASE**, No. 1238, *ante*.

1241. — **Estate in fee simple.**—**VERNON'S CASE**, No. 1238, *ante*.

1242. — **Estate during widowhood.**—**VERNON'S CASE**, No. 1238, *ante*.

1243. **What property liable.**—**BOSWORTH v. FORARD** (1666), O. Bridg. 153; 124 E. R. 520; *sub nom.* **BATH'S (EARL) CASE**, **BOSWORTH v. FARRAND**, Cart. 96.

Annotations :—**Refd.** *Thomason v. Mackworth* (1666), O. Bridg. 502; *Williams's Case* (1682), *Freem. K. B.* 486; *Wright v. Pearson* (1758), 1 Eden, 119; *Darlington v. Pulteney* (1775), 1 Cowp. 260; *Blake v. Luxton* (1815), *Coop. G.* 178.

1244. — **Devise of part of property to wife.**—**Settlement confirmed by will.**—**Jointure payable out of part not devised.**—By indenture of marriage settlement, lands were conveyed in trust after the death of G. the husband to the use & intent that A. the wife should receive an annuity of £1,000 clear of all taxes & deductions for her jointure, & in bar of dower, etc., with powers of distress & entry, & a term to secure the payment. By his will G. directed his debts to be paid & devised to his wife during her life, his mansion house, park, etc., at D., & directed that timber should be cut on his estates at H., etc., & sold to pay the expense of repairs, painting & glazing, which in the opinion of A. should at any time be required for any of the hereditaments devised to her for life, & for insurance of the premises, & he thereby confirmed the settlement made on his marriage. He gave to his nephew P. & his heirs all his real estates in England, including the lands devised to his wife, subject to her life interest & all his lands in Pennsylvania, without any incumbrance or restriction. He directed that the paintings in his house at D. should be enjoyed with the same by his wife for her life, & after her death to go with the house & subject to the payment of his debts. The manor, park, etc., at D. formed part of the premises settled & devised.

Upon a bill filed by A. :—**Held** : she was entitled to enjoy the manor & park, etc., free from all charges, & the annuity of £1,000 ought to be raised & paid to her out of the remainder of the lands demised without contribution from the manor, park, etc.

—**POWELL v. GRIGBY** (1835), 9 Bli. N. S. 646; 3 Cl. & Fin. 103; 5 E. R. 1429, H. L.; *affg.* S. C. *sub nom.* **GRIGBY v. POWELL** (1832), 5 Sim. 290.

Annotation :—**Consd.** *Eyre v. Green* (1846), 2 Coll. 527.

1245. — **Lands substituted under power in settlement.**—By marriage settlement, three terms were vested in three sets of trustees; one for securing a jointure; the second for raising a sum for children; the third for raising a sum for the wife; & the settlor had power, with the consent of the several trustees, to substitute other lands in place of those charged by the settlement, upon which the lands originally charged were to be exonerated, & such of the terms as became unnecessary to cease. The settlor substituted other lands by a deed, to which himself & all the trustees were parties, but which was executed only by himself, the trustees of the term for securing the jointure, & one of the trustees of the term for the children's portion :—**Held** : the substituted land was only charged with, & the original land only discharged of, the term for securing jointure.—**GREENHAM v. GIBBESON** (1831), 10 Bing. 363; 4 Moo. & S. 198; 3 L. J. C. P. 128; 131 E. R. 944.

Annotation :—**Refd.** *Gilbey v. Rush*, [1906] 1 Ch. 11.

1246. **Jointure charged on reversionary life interest.**—**Liability on becoming interest in possession.**—**As against incumbrancers without notice.**—A tenant for life, on his marriage, appointed, in pursuance of a power, a jointure & portions payable after his death. By another deed he charged an additional jointure & portions on certain estates "to which he would become entitled on the death of his father," & covenanted to convey such estates & all other hereditaments to which he might be entitled for an estate of freehold to trustees to such uses for securing the additional jointure & portions as were contained in the first settlement :—**Held** : in the absence of any fraud or misrepresentation, the wife & children were not entitled as against incumbrancers without notice to any lien or charge on the settlor's life estate.—**FORD v. TYNTE** (1865), 2 De G. J. & Sm. 557; 6 New Rep. 51; 34 L. J. Ch. 452; 12 L. T. 512; 11 Jur. N. S. 402; 46 E. R. 492; *sub nom.* **FORD v. TYNTE**, **FORD v. ADAMS**, **JONES v. TYNTE**, **ADAMS v. TYNTE**, **HODGE v. TYNTE**, 13 W. R. 643, L. J.

1247. — **Jointure charged on two properties.**—**One property perishable.**—**Apportionment.**—A jointure was charged on two several properties of different annual value. One of the properties was of a perishable nature :—**Held** : an apportionment of the jointure between the properties must be made year by year.—**LEY v. LEY** (1868), L. R. 6 Eq. 174; 37 L. J. Ch. 328; 18 L. T. 126; 16 W. R. 509.

1248. — **Bequest of property to be settled to same uses as existing settlement.**—**Provision against increase of charges or powers of charging.**—**Release of powers of charging under original settlement.**—By the will of J., personal estate of very great value was given to trustees upon trust to purchase land to be settled to such of the uses, & upon & for such of the trusts, & subject to such of the powers & provisions in & by a certain indenture of settlement limited & declared of & concerning the family estates thereby settled as at the time of testator's decease should be subsisting or capable of taking effect, but not so as to multiply any charges or powers of charging. At the time of testator's death the family estates stood limited to H. for

Sect. 2.—Jointure: Sub-sects. 1 & 2, A. & B. (a) & (b).]

life, remainder to C. for life, remainder to his first & other sons successively in tail.

Both H. & C. had powers of charging the estates with jointures for their widows & portions for their younger children. H. had charged a jointure for his widow which never took effect. C. had charged a jointure of £1,000 a year for his widow, & £10,000 for the portion of each of his younger children. H. died in 1891, & in 1892 C. & his eldest son executed a disentailing deed of (*inter alia*) the personal estate directed to be laid out in the purchase of lands to be settled, whereby the disentailed property was conveyed to such uses as they should appoint. This was a summons by C. & his eldest son, asking that the personal estate might be paid to them:—*Held*: the lands to be purchased with testator's personal estate would be subject only to the powers of charging existing & exercisable at the date of his death, not to the charges which had then been created in exercise of those powers, & therefore, upon C. & his eldest son releasing their powers of charging, which still subsisted, the personal estate might be transferred & paid to them for their own use.—*Re BERNERS, BERNERS v. CALVERT* (1892), 67 L. T. 849; 41 W. R. 188; 37 Sol. Jo. 80; 3 R. 153.

—**Order of application of assets.**—*See* EXECUTORS, Vol. XXIII., p. 487, No. 5542.

Release of jointure in separation deed—Necessity for acknowledgment.—*See* HUSBAND & WIFE, Vol. XXVII., p. 229, No. 2002.

SUB-SECT. 2.—POWERS OF JOINTURING.

A. In General.

1249. Objects of power—Wife of first or subsequent marriage—Second marriage after divorce at instance of first wife.—*MAILBOROUGH (LILY, DUCHESS) v. MAILBOROUGH (DUKE)*, No. 1260, *post*.

1250. Effect on legal estate.—*BROUGHTON v. LANGLEY* (1702), 1 Lut. 814; Holt, K. B. 708; 2 Ld. Raym. 873; 2 Salk. 679; 125 E. R. 427.

Annotations:—*Reid*. Garth v. Baldwin (1755), 2 Ves. Sen. 646; Legard v. Hodges (1792), 3 Bro. C. C. 531; Right d. Philipps v. Smith (1810), 12 East, 455.

B. Exercise of Powers.

(a) In General.

1251. What amounts to valid exercise—Covenant to stand seised.—*HASTINGS'S (DAME) CASE* (undated), cited in T. Raym. at p. 239; cited in 3 Keb. at p. 511; 83 E. R. 124.

Annotation:—*Consd.* Wigson v. Garret (1674), T. Raym. 239.

1252. — Lease for years determinable on wife's life.—Tenant for life, with power to make a jointure [for his wife, during her life] before marriage makes a lease for ninety-nine years determinable on her life, in trust for his intended wife:—*Held*: this was not a good execution of his power.—*RATTLE v. POPHAM* (1734), Cunn. 102; 2 Stra. 992; 94 E. R. 1089.

Annotations:—*Apld.* Churchman v. Harvey (1757), Amb.

335. *Consd.* Zouch d. Woolston v. Woolston (1761), 2 Burr. 1136; Roe d. Brune v. Prideaux (1808), 10 East, 158. *Reid.* Alexander v. Alexander (1755), 2 Ves. Sen. 640; Doe d. Collins v. Weller (1798), 7 Term Rep. 478; Shannon v. Bradstreet (1803), 1 Sch. & Lef. 52.

1253. ——*RATTLE v. POPHAM* (*circa* 1735), cited in 2 Burr. at p. 1147; 97 E. R. 758, L. C.

Annotations:—*Consd.* Roe d. Brune v. Prideaux (1808), 10 East, 158. *Reid.* Alexander v. Alexander (1755), 2 Ves. Sen. 640; Zouch d. Woolston v. Woolston (1761), 2 Burr. 1136; Doe d. Collins v. Weller (1798), 7 Term Rep. 478.

1254. — Power to jointure in bar of dower—Jointure not declared to be in bar of dower.—*ALEYN v. BELCHIER* (1758), 1 Eden, 132; 28 E. R. 634.

Annotations:—*Reid.* Daubeny v. Cockburn (1816), 1 Mer. 626; Rowley v. Rowley (1854), 2 Eq. Rep. 241; Topham v. Portland (1862), 31 Beav. 525; Saunders v. Shafto, [1905] 1 Ch. 126.

1255. — Execution at different times.—Power to make a life estate to one's wife may be executed at different times.—*ZOUCH v. WOOLSTON* (1761), 1 Wm. Bl. 281; 2 Burr. 1136; 96 E. R. 157.

Annotations:—*Folld.* Doe d. Milborne v. Milborne (1788), 2 Term Rep. 721. *Reid.* Roe d. Brune v. Prideaux (1808), 10 East, 158.

1256. — Grant of rentcharge—Secured by term for ninety-nine years—With proviso for cesser.—Devise, subject as to part to a devise to trustees & their heirs for debts in aid of the personal estate, & as to part to mortgages in fee, to sons & a daughter, & their respective issue male in strict settlement, etc.; with power to the sons respectively, when in possession, to convey or appoint all or any part to trustees on trust by the rents & profits to raise a rentcharge as & for a jointure for any wife or wives for each such wife's natural life only; & also to charge portions by deed & to lease for twenty-one years. Execution of the power by conveyance to trustees & their heirs on trust by the rents & profits to raise & pay a jointure during the wife's natural life only; & charging portions; with covenant for title, & for quiet enjoyment by the trustees during the natural life only of the wife. The proper mode of executing such a power is limiting a rentcharge to the wife by way of jointure, secured, if not by the ordinary power of entry & distress, by a trust term for ninety-nine years, with a proviso for cesser on payment of the jointure during her life, & all arrears at her death.—*WYKHAM v. WYKHAM* (1811), 18 Ves. 395; 34 E. R. 366, L. C.

Annotations:—*Mentd.* Warter v. Hutchinson (1823), 3 Dow. & Ry. K. B. 58; Duffield v. Duffield (1829), 3 Bl. N. S. 260; Sherratt v. Bentley (1834), 2 My. & K. 149; Key v. Key (1853), 4 De G. M. & G. 73; Lewis v. Rees (1856), 3 K. & J. 132.

1257. — Exercise by virtue of private Act—Exercise by will—Not within purview of Act.—By a private Act, real estates were limited to two persons respectively in tail, with cross-remainders between them in tail, with a proviso that no tenant in tail should alien any of the settled estates nor do anything to the disinheritation of his heirs, "but only for the jointure of wife."

By a later Act, which recited the earlier Act, including the proviso, the powers of Leases & Sales of Settled Estates Act, 1856 (c. 120), were made applicable to the estates. Certain sects. of

PART IX. SECT. 2, SUB-SECT. 2.—A.

g. Objects of power—Wife of first or subsequent marriage.—*Re SHERIDAN'S ESTATE* (1878), 1 L. R. Ir. 54.—*IR.*

h. ——*Re EVANS' ESTATE*, [1897] 1 I. R. 410.—*IR.*

PART IX. SECT. 2, SUB-SECT. 2.—B. (a).

k. What amounts to valid exercise.—*PURCELL v. PURCELL* (1842), 2 Dr. & War. 217.—*IR.*

l. ——*BARRON v. CONSTABLE* (1858), 7 I. Ch. R. 467.—*IR.*

m. ——*A.* had a power by deed or will to charge a jointure, not exceeding £100 a year for every £1,000 which he had actually & *bond fide* received with his wife. On his marriage, a life estate of his wife in a chattel interest in lands was conveyed to him for life. *A.* received before the

the later Act referred to "the powers of jointuring contained in the earlier Act, & Sect. 9 enacted that the "powers in the recited Act contained or implied of giving the lands for the jointure of a wife" should be exercisable either previously to or after a marriage.

In 1901 M. became tenant in tail in possession of the estates & in 1902, having by a codicil to his will purported, "in the exercise of all powers contained in" the two private Acts, "or either of them," to appoint & give the estates to his wife, who survived him, for life "by way of jointure." The question being raised whether M. had power to appoint the income of the estates for the jointure of a surviving wife:—*Held*: although a power to jointure by "will" was not actually mentioned in the earlier Act, & in fact could not have then been contemplated, inasmuch as, apart from custom, a will had no operation before Statute of Devises, 1540 (c. 1), yet upon the principle stated in *Vernon's Case*, No. 1238, *ante*, that "an Act of late time shall be taken within the equity of an Act made long time before," a jointure under the power conferred upon a tenant in tail by the earlier Act could, under the present law, be well created by a testamentary instrument.—*Re BOLTON ESTATES, RUSSELL v. MEYRICK*, [1903] 2 Ch. 461; 72 L. J. Ch. 605; 88 L. T. 851; 52 W. R. 87; 47 Sol. Jo. 637, C. A.

1258. Exercise with consent of specified parties.—Effect of death of parties.]—MANSELL (LADY) v. MANSELL (1757), Wilm. 36; 97 E. R. 14.

1259. Restriction on total charge by way of jointure.—Exercise of power in settlement & resettlement.]—A settlement, after limiting two estates to A. for life, remainder to his first & other sons in strict settlement, remainder to M. for life, with remainder over, required each person when in possession to assume the name & arms of the settlor; gave to the tenants for life powers of leasing & of charging the estates with a jointure of £400 a year, & a sum of £2,000 for younger children; & reserved to the settlor a power of revocation & new appointment as to one of the estates. The settlor subsequently exercised that power by revoking, as to one of the estates, the remainder to M. for life, & the limitations over; & by appointing that estate to S. for life, with remainders over; & by the deed of revocation & new appointment, he imposed upon each of them, A. & S., when entitled as tenants for life in possession, "under the limitations aforesaid," the condition of assuming his name & arms, & gave them the power of charging the estate with a jointure of £400 & with £3,000 for younger children, but directed that there never should be more than the yearly sum of £400 a year payable out of any part of the premises as a jointure at one time:—*Held*: the second deed did not give A., when tenant for life in possession, the power of appointing a second sum of £400 as a jointure to his wife.—*WIGSELL v. SMITH* (1828), 5 Russ. 299; 38 E. R. 1039, L. C.

1260. — Exercise as often as donee shall marry.—Divorce & re-marriage of donee.]—By a deed of resettlement of family estates power was given to the second tenant for life "to appoint to any woman whom he may marry" for her life a jointure rentcharge not exceeding the yearly

sum of £2,500 to be charged on the estates. It was declared that the power might be exercised as often as the donee should marry. There was a proviso that the charge on the estates by way of jointure should not at any one time exceed in the whole the annual sum of £4,000. In 1869 the donee married & by a settlement made on his marriage he, in exercise of the power, appointed to his wife during her life, in case she should survive him, a jointure rentcharge of £2,500. In 1883 the marriage was dissolved on the wife's petition. In 1888 the donee married again, & by a post-nuptial settlement he, in exercise of the power, appointed to his second wife, during her life, in case she should survive him, a jointure rentcharge of £2,500. In 1892 the donee died. Both the wives survived him:—*Held*: (1) the appointment of a jointure to the second wife was authorised by the power, though she could not receive more than £1,500 a year during the life of the first wife; (2) though the power operated to make provision for the event of a divorce of the donee from his first wife, it was not thereby rendered illegal or contrary to public policy.—*MARLBOROUGH (LILY, DUCHESS) v. MARLBOROUGH (DUKE)*, [1901] 1 Ch. 165; 70 L. J. Ch. 244; 83 L. T. 578; 49 W. R. 275; 17 T. L. R. 137; 45 Sol. Jo. 116, C. A.

Annotations:—As to (2) *Consd. Re Hope Johnstone, Hope Johnstone v. Hope Johnstone*, [1904] 1 Ch. 470. *Refd. Brodie v. Brodie*, [1917] P. 271.

(b) Defective Exercise.

1261. When aided by equity—Covenant to exercise—Donee subsequently coming into possession.]—*ALFORD v. ALFORD* (1709), cited in 2 P. Wms. at p. 230; cited in 1 Stra. at p. 604; 93 E. R. 727; *sub nom. ALLFORD v. ALFORD*, Gibb. Ch. 167.

Annotations:—*Folld. Coventry v. Coventry* (1724), 2 P. Wms. 222. *Consd. Jackson v. Jackson* (1793), 4 Bro. C. C. 462.

1262. — — — Incapacity of donee.]—Covenant by G. on his marriage, that if he came into possession, he would exercise the power of jointuring, which, by the terms of the will, could only be exercised by a tenant for life in possession. G., before coming into possession, became of unsound mind:—*Held*: the covenant was a defective execution of the power, which this ct. would enforce against the remainderman.—*AFFLECK v. AFFLECK* (1857), 3 Sm. & G. 394; 26 L. J. Ch. 358; 29 L. T. O. S. 37; 3 Jur. N. S. 326; 5 W. R. 425; 65 E. R. 709.

Annotations:—*Apld. Charlton v. Charlton*, [1906] 2 Ch. 523. *Refd. Johnson v. Touchet* (1867), 37 L. J. Ch. 25; *Re Anstis, Chetwynd v. Morgan, Morgan v. Chetwynd* (1886), 31 Ch. D. 596.

1263. — — — Approval of draft deed.]—T. by his will made in 1882 devised real estate & declared that it should be lawful for every tenant for life thereof to charge it by deed or will with a jointure not exceeding £400 a year in favour of his wife. In 1885 N., testator's son, executed a marriage settlement whereby he covenanted to charge all real & personal estate which might come to him from his father with the payment of a jointure of £400 a year to his wife. At the date of the settlement testator was still alive, & the power to charge had not come into existence.

date of the will about £2,000 out of the rents of said lands:—*Held*: the charge by his will of a jointure of £200 a year was valid if £2,000 was received, & if said sum was not received the jointure should abate proportionally.—*BREKE*

TON v. BARRY (1860), 11 I. Ch. R. 97.—*IR.*

*n. When power arises.]—*Declaration that tenants for life "shall & may at his or their marriage" have certain powers of jointuring & settling por-

tions:—*Held*: such powers arise so soon as the marriage takes place, & may be exercised at any subsequent period.—*Re CREAGH'S ESTATE, LANE, PETITIONER* (1890), 25 L. R. Ir. 128.—*IR.*

Sect. 2.—Jointure: Sub-sect. 2, B. (b) & (c), & C.; sub-sect. 3, A.]

He died in 1886, & N. became tenant for life of his real estate & donee of the power. In June, 1892, a draft deed was settled & approved on behalf of N., whereby he charged the real estate with £400 a year for his wife; but he died a few days afterwards without having executed the deed. His widow claimed a jointure of £400 a year:—**Held**: the covenant in the settlement was a defective execution of the power to which the ct. would give effect; the approval of the draft deed operated as a selection of the property to be charged; & the widow was entitled to a jointure of £400 a year charged on the real estate devised by testator.—**CHARLTON v. CHARLTON**, [1906] 2 Ch. 523; 75 L. J. (Ch. 715; 95 L. T. 714; 50 Sol. Jo. 668.

1264. — — — Donee in possession.]—CLIFFORD (LADY) v. BURLINGTON (EARL), No. 1306, *post*.

1265. — — — — — Death before exercise.]—Tenant for life with power to make a jointure, remainder over, tenant for life covenants to make a jointure to a wife in consideration of a marriage by virtue of his power, or otherwise, of £500 *per annum*, & dies before making the jointure; equity will make it good.—**COVENTRY (COUNTESS) v. COVENTRY (EARL)**, (1724), 2 P. Wms. 222; 1 Stra. 596; Gilb. Ch. 160; 9 Mod. Rep. 12; 1 Eq. Cas. Abr. 348, pl. 19; 2 Eq. Cas. Abr. 660, pl. 8; 24 E. R. 707, L. C.

Annotations:—Apld. Cotter v. Laver (1731), 2 P. Wms. 623. **Consd.** Evelyn v. Evelyn (1731), 2 P. Wms. 659; Bates v. Dandy (1741), 3 Russ. 172, n.; Jackson v. Jackson (1793), 4 Bro. C. C. 462; Story v. Johnson (1835), 5 L. J. Ex. Eq. 9. **Apld.** Charlton v. Charlton, [1906] 2 Ch. 523. **Refd.** Hervey v. Hervey (1739), 1 Atk. 561; Sanders v. Sanders (1739), West temp. Hard. 686; Sergeson v. Sealey (1742), 2 Atk. 412; Blandford v. Marlborough (1743), 2 Atk. 542; Brown v. Heathcote (1746), 1 Atk. 160; Maddison v. Andrew (1747), 1 Ves. Sen. 57; Tyrconnel v. Ancaster (1754), 2 Ves. Sen. 499; Churchman v. Harvey (1757), Amb. 824; Wilson v. Piggott (1794), 2 Ves. 351; Marnell v. Blake (1816), 4 Dow. 248. **Mentd.** Shove v. Pincke (1793), 5 Term Rep. 124.

1266. — — — — —.]—J. devises certain estates to trustees upon trust for his grandson, A., for life, with remainder to his first & other sons in tail male, with like remainders to his grandson, B., & he declared that as his grandsons should come to be in possession of the estates, they might make a jointure for his or their wives respectively, not exceeding £100 *per annum* for every £1,000 & he directed his personal estate to be applied by his exors. in purchasing lands to be settled to the same uses as his real estate. A., the grandson, enters on the estate upon the death of his grandfather, & by arts. covenants that his wife shall have as her jointure certain specified parts of the estates, amounting in the whole to £320 *per annum*, in consideration of £3,200 for marriage portion, £3,000 of which her mother covenants to pay to A., in addition to the £200 he had already received, with interest in the meantime, with a power of revocation to A. & C. A. dies, having in his lifetime received £1,700 in part payment of the portion, & having purchased certain real estate:—Held**: (1) the power of giving the jointure of £320 *per annum* was well executed by way of covenant or agreement; (2) the deficiency in value, the estates on jointure not amounting to the £320 *per annum*, was not to be made good against the remainderman; & the purchase of the real estate could not be considered as a purchase in performance of the trust, there being no proof that the purchase was made out of the personal estate of the grandfather, or in performance of**

the trust.—**SANDERS v. SANDERS** (1739), West temp. Hard. 686; 25 E. R. 1150, L. C.

1267. — — — — — Covenant to settle lands for jointure—No reference to power.]—HOLLINGSHEAD v. HOLLINGSHEAD (1708), Gilb. Ch. 167; cited in 2 P. Wms. at p. 229; 25 E. R. 117; *sub nom.* HOLLINGSHEAD v. HOLLINGSHEAD, cited in 1 Stra. at p. 604, L. C.

Annotations:—Folld. Coventry v. Coventry (1724), 2 P. Wms. 222. **Refd.** Jackson v. Jackson (1793), 4 Bro. C. C. 462.

1268. — — — — —.]—Father being tenant for life, & son tenant in tail in remainder, of an estate, a settlement was made, wherein was a power for the son, when in possession, to make a jointure. Father & son enter into a general covenant, without reciting or referring to the power, that the son, within twelve months, shall make a jointure on a then intended wife: The father dies within twelve months; the son takes possession & dies, without making any settlement: the estate is bound in the hands of the remainderman.—JACKSON v. JACKSON** (1793), 4 Bro. C. C. 462; 29 E. R. 988.**

Annotations:—Refd. Affleck v. Affleck (1857), 3 Sm. & G. 394; Charlton v. Charlton, [1906] 2 Ch. 523.

1269. — — — — — Power to jointure by deed—Execution by will.]—One has a power to make a jointure by deed under hand & seal, he executes it by will, this is a good execution in equity in favour of a wife.—TOLLET'S CASE** (1728), Mos. 46; 25 E. R. 262; *sub nom.* **TOLLET v. TOLLET**, 2 P. Wms. 489; 2 Eq. Cas. Abr. 663, pl. 10.**

Annotations:—Refd. Hervey v. Hervey (1739), 1 Atk. 561; Wilkie v. Holme (1752), 1 Dick. 166; Churchman v. Harvey (1757), Amb. 335; Darlington v. Pulteney (1775), 1 Cowp. 260; Chapman v. Gibson (1791), 3 Bro. C. C. 229; Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 315; Evans v. Evans (1853), 1 Drew. 654.

1270. — — — — — Excessive execution—Power to settle for life—Conveyance to trustees for ever.]—If a power, in which the intention of the parties is clear & evident, be executed defectively as to part, & afterwards executed defectively, as to the whole of the interest, a ct. of equity will, in favour of a purchaser for a valuable consideration, reject the first appointment & supply the defects of the second.

Equity will supply the defective execution of powers in favour of purchasers, creditors, wives & younger children.

By the power he was to settle it [the jointure] to her for her life, etc., whereas he has conveyed it to trustees for ever; which is also bad, the power not being pursued . . . in equity it is also void . . . but not so void as that the wife shall have no provision made for her (**LORD HARDWICKE, C.**).—**HARVEY v. HARVEY** (1739), 9 Mod. Rep. 253; Barn. Ch. 103; 2 Eq. Cas. Abr. 669, pl. 22; 88 E. R. 433; *sub nom.* **HERVEY v. HERVEY**, 1 Atk. 561, L. C.; *subsequent proceedings* (1740), Barn. Ch. 109, L. C.

Annotations:—Consd. Zouch d. Woolston v. Woolston (1761), 2 Burr. 1136; Thornton v. Bright (1836), 2 My. & Cr. 230. **Refd.** Wright v. Wright (1750), 1 Ves. Sen. 409; Tyrconnel v. Ancaster (1754), 2 Ves. Sen. 499; Churchman v. Harvey (1757), Amb. 335; Chapman v. Gibson (1791), 3 Bro. C. C. 229; Nottidge v. Dering, Raban v. Dering, [1910] 1 Ch. 297. **Mentd.** Rogers v. Earl (1757), 1 Dick. 295.

1271. Imperfect execution in articles—Completion by words of request in codicil.]—Imperfect execution of power to jointure, by arts., completed by words of request in a codicil.—VERNON v. VERNON** (1737), Amb. 3; 27 E. R. 1.**

Annotations:—Refd. Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 345; *Re* Digges, Gregory v. Edmondson (1888), 39 Ch. D. 254, n. **Mentd.** Ramsden v. Hylton, Hylton v. Blacoe (1751), 2 Ves. Sen. 304.

1272. — — — — — Mistake in amount in articles.]—LONDONDERRY (LADY) v. WAYNE, No. 1286, *post*.

(c) *Fraudulent Exercise.*

1273. What amounts to—Benefit to husband's creditors.]—LANE v. PAGE (1754), Amb. 233; 27 P. R. 155.

*Annotations:—*Follid. Alevn v. Belchier (1758), 1 Eden. 132. *Consd.* Daubeny v. Cockburn (1816), 1 Mer. 626; Saunders v. Shafto, [1905] 1 Ch. 126. *Refd.* Askham v. Barker (1853), 17 Beav. 37; Whelan v. Palmer (1888), 39 Ch. D. 618.

1274. ———.]—The donee of a power to jointure may exercise it in favour of his wife in accordance with a bargain by which he himself is benefited, provided this is done, not by diverting from her any part of the jointure itself, but by applying it to its proper use in consideration of his getting something which he is at liberty to take for his own benefit.

A wife may hold a jointure, the whole of which is intended to be enjoyed by herself though she has obtained it by a post-nuptial bargain with her husband & given him or his creditors as a consideration some interest in her own property. The ct. will not inquire into the quantum of the consideration.

Testator devised real estate to certain uses, & declared that it should be lawful for each tenant for life under the will, either in contemplation of marriage or after marriage, to charge the hereditaments with the payment of any annual sum not exceeding £300 to any woman whom he should marry for her life. In 1868 the tenant for life married pltf.; & in 1882, whilst they were living apart, he, in consideration of £50 paid to him by her, executed a deed whereby he charged the property with the payment to her, if she should survive him, of the yearly sum of £300 for her life. There was evidence that the jointure was not at that time worth £50. The tenant for life died in 1902:—*Held*: the transaction was not a corrupt bargain nor a fraud on the power, but the widow was entitled to receive the jointure.

While an appointment by way of jointure, as the result of a bargain between husband & wife or between intended husband & wife, that part of the jointure shall go or be for the benefit of the husband's creditors or a stranger is bad to the extent of that part, yet the rest of the bargain may stand so far as the jointure is to be enjoyed by the wife herself (ROMER, L.J.).—SAUNDERS v. SHAFTO, [1905] 1 Ch. 126; 74 L. J. Ch. 110; 91 L. T. 789; 53 W. R. 421; 49 Jol. So. 100, C. A.

1275. ——— Benefit to husband.]—If a power of jointuring be exercised on a corrupt bargain for some benefit to be given to the husband, the fraud being only upon the donor of the power, the ct. will sever the appointment, & hold it to be good so far as it is for the benefit of the jointress & bad as to the rest.—ROWLEY v. ROWLEY (1854), Kay, 242; 2 Eq. Rep. 241; 23 L. J. Ch. 275; 23 L. T. O. S. 55; 18 Jur. 306; 69 E. R. 103.

*Annotations:—*Refd. Whelan v. Palmer (1888), 39 Ch. D. 648; Saunders v. Shafto, [1905] 1 Ch. 126; *Itc* Wright, Hegan v. Bloor, [1920] 1 Ch. 108. *Mentd.* Bulter v. Plummer (1869), L. R. 8 Eq. 585.

1276. ———.]—SAUNDERS v. SHAFTO, No. 1274, *ante*.

1277. ——— Benefit to stranger.]—Under a power of appointing a jointure rentcharge not exceeding £200, the donee of the power appointed £200 a year to the jointress under a corrupt bargain with her to provide thereout for a stranger:—*Held*: the appointment was a fraud on the power & void not merely *pro tanto* but altogether, although the jointress took some benefit under the

appointment, it clearly appearing that the donee had no intention whatever of benefiting her & used the power merely as machinery to benefit the stranger; if, however, it had appeared that the donee did intend to benefit the jointress to some extent the appointment might have been upheld *pro tanto*.—WHELAN v. PALMER (1888), 39 Ch. D. 648; 57 L. J. Ch. 784; 58 L. T. 937; 36 W. R. 587; 4 T. L. R. 486.

*Annotation:—*Overd. Saunders v. Shafto, [1905] 1 Ch. 126.

1278. ———.]—SAUNDERS v. SHAFTO, No. 1271, *ante*.

1279. Appointment fraudulent as to part—Whether severable.]—ROWLEY v. ROWLEY, No. 1275, *ante*.

1280. ———.]—WHELAN v. PALMER, No. 1277, *ante*.

1281. ———.]—SAUNDERS v. SHAFTO, No. 1271, *ante*.

C. *Non-Exercise of Power.*

1282. What amounts to—Covenant to make jointure—Extent not specified.]—Tenant in tail with power to make a jointure, in consideration of marriage articles to make a jointure, without specifying the extent, & dies without issue & without making the jointure. The wife dies; & her extrix. brings a bill for an account of the profits of the lands article to be settled. Bill dismissed.—ELLIOT v. HELE (1686), 1 Vern. 406; 23 E. R. 517, L. C.; *previous proceedings, sub nom.* HELE v. HELE (1682), 2 Cas. in Ch. 87.

1283. Not aided by equity.]—ELLIOT v. HELE, No. 1282, *ante*.

SUB-SECT. 3.—AMOUNT OF JOINTURE.

A. *In General.*

1284. Yearly value—When calculated—Whether at death of husband or date of settlement.]—A man covenants that lands settled for a jointure are of such a yearly value. This relates only to the time of settlement, & not to the death of the husband.—SPEAKE (LADY) v. SPEAKE (LADY) (1683), 1 Vern. 217; 23 E. R. 425.

1285. ———.]—Power to husband to make jointure not exceeding clear yearly value of £100 for every £1,000 portion; part of the portion is limited, the interest to the husband for life, then to increase younger children's fortune; if none to survivor of husband or wife, this considered as received by him as settled fairly for the family; & for his benefit, & within intent of the power. "Clear" must be as at the time of making the jointure, & not during its continuance; which would make these powers fluctuating. "Clear" means free from charges usually allowed between buyer & seller, & by course of the country borne by tenant, but subject to land tax & those borne by landlord.—TYRCONNEL (EARL) v. ANCASTER (DUKE), ANCASTER (DUKE) v. SHERRARD (LADY) (1754), 2 Ves. Sen. 499; Amb. 237; 28 E. R. 320, L. C.

*Annotation:—*Apld. Saunders v. Shafto, [1905] 1 Ch. 126.

1286. ———.]—(1) Husband having a power to make a jointure of any part of the estate not exceeding £400 *per annum*, covenants on his marriage to settle lands of the yearly value of £400 clear of taxes & reprises: he afterwards makes a settlement of lands, with a covenant, that if they should fall short of £400 *per annum*, he would make up the deficiency:—*Held*: the settlement

PART IX. SECT. 2, SUB-SECT. 2.—B. (c).

o. What amounts to.]—JEVENS v. JEVENS (1735), 1 Bro. Parl. Cas. 272.—*IR.*
p. ———.]—BALDWIN v. ROCHE (1842) 5 I. Eq. R. 110.—*IR.*

Succession duty.]—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 105, No. 773.

1299. ——— ———.]—Lands settled on A. for life, for her jointure, are covenanted to be of a certain clear yearly value; after the death of the husband, the jointure lands turn out deficient.

The jointress is entitled to have the deficiency made good out of other lands, & to come in as a specialty creditor upon the husband's estate, for the arrears of the deficiency, with interest.—*PARKER v. HARVEY* (1726), 4 Bro. Parl. Cas. 604; 2 E. R. 411, H. L.

1300. — — — — —.]—Where in marriage arts., the lands agreed to be limited in jointure are expressed to be of the yearly value of £500 & afterwards prove deficient; this amounts to an agreement that they were of that value, & is a sufficient foundation for making up the deficiency.—*GLEGG v. GLEGG* (1728), 4 Bro. Parl. Cas. 614; 2 E. R. 418, H. L.

1301. — — — — —.]—**Lands settled as additional jointure—“In recompense of all deficiencies.”**—Where lands are settled in jointure, & covenanted to be of £500 *per annum* value, but the husband afterwards discovering a defect in the title, settles other lands as an additional jointure, & declares them to be in recompense of all deficiencies, either in title or value of the lands before settled; the jointress shall have lands of the full value of £500 *per annum* over & above the other lands, & all other provisions made for her by her husband's will.—*GROVE v. HOOKE* (1714), 4 Bro. Parl. Cas. 593; 2 E. R. 404, H. L.; *affg. S. C. sub nom. HOOK (LADY) v. GROVE* (1713), 2 Eq. Cas. Abr. 389, L. C.

1302. — — — — —.]—**To prove as specialty creditor against estate.**—*PARKER v. HARVEY*, No. 1299, *ante*.

1303. — — — — —.]—**Lien on estate of covenantors—Covenant for jointure by father & son.**—In marriage contracts when the fortune of the wife is paid to the father, or to clear incumbrances, or to the son; & the father & the son who are parties to the marriage contract, covenant jointly that the wife's jointure shall be of a certain value, in case of a deficiency the wife has a lien both upon the estate of the father & son.—*PROBERT v. CLIFFORD* (1739), *West temp. Hard.* 638; 25 E. R. 1124; *sub nom. PROBERT v. MORGAN & CLIFFORD*, 1 Atk. 440, L. C. *Annotations:—*Refd. *Andrews v. Emmott* (1788), 2 Bro. C. C. 297. *Mentd. Bishop v. Church* (1751), 2 Ves. Sen. 371; *Doe d. Nowell v. Roake* (1825), 2 Bing. 497.

1304. **Liability of remainderman—To bear deficiency rateably with jointress—Estate subject to incumbrance.**—*CARPENTER v. CARPENTER, WARBORNE v. DOWNES*, No. 702, *ante*.

1305. — — — — —.]—**MOHUN'S (LORD) CASE** (1695), *Freem. Ch.* 204; 22 E. R. 1161.

1306. — — — — —.]—**To make up deficiency.**—Tenant for life, with power to make a jointure of £1,000 *per annum* upon marriage, covenants to make a jointure on his wife of £1,000 *per annum*. Afterwards gives a particular of lands mentioned to be £1,000 *per annum* which are settled for the jointure, but prove to be but £600 *per annum*. Decees the jointure to be made up £1,000 *per annum* by the issue in tail.—*CLIFFORD (LADY) v. BURLINGTON (EARL)* (1700), 2 Vern. 379; 23 E. R. 841.

*Annotations:—**Consd. Coventry v. Coventry* (1724), 1 Stra. 596; *Evelyn v. Evelyn* (1731), 2 P. Wms. 659. *Dtd. Sanders v. Sanders* (1739), *West temp. Hard.* 686. *Fold. Tyronnell v. Ancester* (1754), 2 Ves. Sen. 499. *Consd. Marnell v. Blake* (1816), 4 Dow. 248. *Refd. Blandford v. Marlborough* (1713), 2 Atk. 542.

1307. — — — — —.]—*SANDERS v. SANDERS*, No. 1266, *ante*.

1308. **Liability of grantee from Crown—Of forfeited estate.**—A. upon his marriage with B. settles lands of £400 *per annum* for her jointure, & covenants, that if the particular lands so settled should not yield £400 *per annum* clear, B. should have so much of the rents of the residue of the

settled estate as should make up the said £400 *per annum*. A. being attainted of high treason, his estate becomes forfeited, & was granted by the Crown to J. S. The particular jointure lands did not amount to £400 *per annum*:—*Held*: the jointress is entitled, as against the grantee of the Crown, to have the deficiency made good.—*EUSTACE v. KNIGHTLEY* (1713), 4 Bro. Parl. Cas. 588; 2 E. R. 401, H. L.

SUB-SECT. 4.—RIGHTS AND LIABILITIES OF JOINTRESS.

1309. **Rights—Right to estate for life—Beneficial title in settlor—Defective legal title.**—*NEWCASTLE (EARL) v. SUFFOLK (EARL)* (1630), 1 Rep. Ch. 50; 21 E. R. 504.

1310. — — — — —.]—**To hold over on paying off mortgage.**—Where a jointress was of land mortgaged between B. & S.; decreed that the jointress paying the mtg., she should hold over till she & her exor. should be repaid with interest.—*BERTUE v. STILE* (1676), 1 Cas. in Ch. 271; 22 E. R. 796.

1311. — — — — —.]—**To lease.**—Power of jointress to make leases not expressed cannot be implied.—*ROE d. BOLTON (DUKE) v. GRANTHAM* (1761), 3 Burr. 1259; 9 E. R. 820.

*Annotation:—*Refd. *Re Bolton Estates, Russell v. Meyrick*, [1903] 2 Ch. 161.

1312. — — — — —.]—**To allowance for children—Jointure & maintenance in arrear—Appropriation of payments on account generally.**—A. is entitled to a rentcharge issuing out of a real estate, & to an allowance out of the same estate for the maintenance of her children during their minority. The tenant for life suffers both the rentcharge & the maintenance to run greatly in arrear, but from time to time pays money to A. on account generally. In this case, A. is entitled to carry the money so received to such of the two accounts as she pleases.—*MORGAN v. JONES* (1785), 1 Bro. Parl. Cas. 32; 1 E. R. 397, H. L.

1313. — — — — —.]—**Effect of prior deed of separation—Granting annuity.**—By arts. of separation, dated in June, 1834, deft. agreed that he would, on or before Feb. 1, 1835, effectually, by a charge on freehold estates, or by investment of an adequate sum of money, or by the best means which might then be in his power, secure to pltf., his wife, an annuity of £1,000. In Dec. 1834, a deed of arrangement was executed between deft. & his son, by which certain family estates were conveyed to trustees to raise money for the payment of various incumbrances, afterwards to such uses as deft. & his son should appoint, & in default of appointment to deft. for life, & then to his son absolutely, with a power for deft. to jointure his then present or any future wife to the extent of £1,000 *per annum*:—*Held*: pltf. was entitled to have her jointure raised out of the estates, as against deft. & his son.—*WELLESLEY v. WELLESLEY, MORNINGTON (COUNTESS) v. MORNINGTON (EARL)* (1849), 17 Sim. 59; 18 L. J. Ch. 442; 13 L. T. O. S. 419; 60 E. R. 1050; *affd.* (1852), 1 De G. M. & G. 501, L. J.J.; *subsequent proceedings* (1853), 4 De G. M. & G. 537, L. J.J.

*Annotations:—**Mentd. Beavan v. Mornington* (1860), 8 H. L. Cas. 525; *Carson v. Pickersgill* (1885), 54 L. J. Q. B. 484.

1314. — — — — —.]—**Right to concur in sale of estate charged.**—*Re GREATHED, Ex p. BURGESS* (1858), 31 L. T. O. S. 59; 4 Jur. N. S. 288.

PART IX. SECT. 2, SUB-SECT. 4.

q. **Rights—To release part of property subject to jointure.**—*Re HARTFORD* (1851), 3 Ir. Jur. 5.—*IR.*

q q 2

Sect. 2.—Jointure: Sub-sects. 4 & 5. Sects. 3, 4 & 5: Sub-sect. 1.]

1315. — Mortgage of settled & unsettled estates—Sale without consent of wife of unsettled estates—Right to charge mortgagee with purchase-money.]—A married woman having a charge on settled estates for her jointure joined with her husband in mortgaging them & another estate of which he was absolute owner. Afterwards the husband sold the unsettled estate, the mtgees. joining, & the purchase-money was paid partly in reduction of the mtge. debt & partly to the husband. The wife did not join in the conveyance, but consented to the transaction:—*Held*: whatever equity the wife might have against her husband or the estate which had been sold, she had no equity to charge the mtgees. with the sum paid to her husband.—*NOYES v. POLLOCK* (1886), 32 Ch. D. 53; 55 L. J. Ch. 513; 54 L. T. 473; 34 W. R. 383, C. A.

— **Rights on deficiency in jointure.]—***See* Nos. 1297–1303, *ante*.

— **Right to concur in reconversion.]—***See* *EQUITY*, Vol. XX., p. 391, No. 1311.

1316. Liabilities—Waste.]—*BASSETT v. BASSETT* (LADY) (1675), *Cas. temp. Finch*, 189; 23 E. R. 104.

Compare No. 1297, *ante*.

1317. — Production of jointure deed.]—A jointress is not obliged to bring her jointure deed into ct., unless the party requiring will confirm it.—*PETRE v. PETRE* (1717), 3 Atk. 511; 26 E. R. 1094, L. C.

SUB-SECT. 5.—ENFORCEMENT.

See Law of Property Act, 1925 (c. 20), s. 121 (7).

1318. Bond—Cancelled by settlor.]—Bond for performance of a promise to make a settlement having been cancelled by the obligor, he was ordered to settle lands agreeably to the bond.—*ARNOLD v. BARRINGTON* (1631), 1 Dick. 5; 21 E. R. 167.

1319. — Surrendered by jointress.]—Voluntary bond after marriage to make a jointure to a wife, husband accordingly makes a jointure. Wife gives up the bond, the jointure is evicted. The jointure shall be made good out of the husband's personal estate.—*BEARD v. NUTTHALL* (1686), 1 Vern. 427; 23 E. R. 564.

1320. Sale of estate—Whether court will order—Existing powers of distress & entry.]—Where a jointure, secured by powers of distress & entry, falls into arrear, the ct. will not, at the instance of the jointress, direct a sale of the estate, but, in case part of the estate has been sold, will direct payment of the arrears to be made out of the purchase-money.—*GREATHEAD v. ELLIOTT* (1851), 18 L. T. O. S. 71; 15 Jur. 986.

*Annotation:—***Consd.** *Re Manchester's Settlt.*, [1910] 1 Ch. 106.

1321. — — Discretion.]—There is equitable jurisdiction to order a sale or mtge. of land to raise arrears of a jointure rentcharge issuing out of the rents & profits of the land; though there is no express charge on the land; but the exercise of the jurisdiction is discretionary.—*HAMBRO v. HAMBRO*, [1894] 2 Ch. 564; 63 L. J. Ch. 627;

8 R. 413; *sub nom.* *Re HAMBRO, HAMBRO v. HAMBRO*, 70 L. T. 684; 43 W. R. 92.

*Annotations:—***Refd.** *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811; *Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479. **Mentd.** *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.

1322. — Part of estate sold—Payment out of purchase-money.]—*GREATHEAD v. ELLIOTT*, No. 1320, *ante*.

1323. Specific performance to execute deed—Refusal to execute—Declaration of trusteeship.]—A donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife to execute the power by a deed to be approved of by the master, whereby £1,000 *per annum* was to be appointed as plff.'s jointure. On his refusal to obey the decree:—*Held*: under Trustee Act, 1850 (c. 60), & Trustee Act, 1852 (c. 55), he might be declared a trustee of all the rights, interests, estates & property acquired by him under the settlement, & the ct. appointed a person to execute the requisite deed in his place under Trustee Act, 1850 (c. 60).—*WELLESLEY v. WELLESLEY, MORNINGTON v. MORNINGTON, Ex p. MORNINGTON* (COUNTESS) (1853), 4 De G. M. & G. 537; 1 Eq. Rep. 369; 22 L. J. Ch. 966; 43 E. R. 617, L. JJ.

1324. Mortgage of estate—Discretion of court.]—*HAMBRO v. HAMBRO*, No. 1321, *ante*.

SECT. 3.—RENTCHARGES AND ANNUITIES.

See, generally, *RENTCHARGES & ANNUITIES*, Vol. XXXIX., pp. 108 *et seq.*

SECT. 4.—ESTATES FOR LIFE.

See, generally, *REAL PROPERTY*, Vol. XXXVIII., pp. 668 *et seq.*

1325. Limitation in marriage settlement—Whether birth of issue condition precedent to estate.]—*SOUTHAMPTON (DUKE) v. CRAMBORNE* (1685), *Freem. Ch.* 186; 1 Vern. 338; 22 E. R. 1151; *reversd., sub nom.* *WOOD (alias CRANMER) v. SOUTHAMPTON (DUKE)* (1692), *Show. Parl. Cas.* 83, II. L.

*Annotations:—***Consd.** *Hervey v. Aston* (1738), *West temp. Hard.* 350. **Refd.** *City of London v. Garway* (1706), 2 Vern. 571; *Champney v. Champney* (1714), 10 Mod. Rep. 314. **Mentd.** *Jones v. Dale* (1728), 1 Barn. K. B. 131.

1326. Creation of life estate—Under power of revocation & new appointment.]—A. having a power of revocation & new appointment over an estate, of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible":—*Held*: the estate of B. & all other tenants in tail in *esse* at A.'s death, being in the line of the title, were abridged to estates for life only.—*DORCHESTER (LORD) v. EFFINGHAM (EARL)* (1813), 3 Beav. 180, n.; 10 Sim. 587, n.; 49 E. R. 71.

*Annotations:—***Consd.** *Bankes v. Le Despencer* (1840), 10 Sim. 576. **Refd.** *Sackville West v. Holmesdale* (1870), L. R. 4 H. L. 543. **Mentd.** *Rowland v. Morgan* (1848), 2 Ph. 764.

1327. — Absence of words of inheritance—Equitable limitation.]—*Re WHISTON'S SETTLEMENT, LOVATT v. WILLIAMSON*, No. 1745, *post*.

— — — *See, generally*, *DEEDS*, Vol. XVII., pp. 349 *et seq.*; *REAL PROPERTY*, Vol. XXXVIII., pp. 711 *et seq.*

a. — — — *Re DENNEHY'S ESTATE* (1865), 17 I. Ch. R. 97; 18 Ir. Jur. 21.—**IR.**

b. *By implication.]—**SWEETMAN v. BUTLER*, [1908] 1 I. R. 517.—**IR.**

PART IX. SECT. 2, SUB-SECT. 5.

r. *Distress.]—**LOCKE v. DARLEY* (1842), 2 Dr. & War. 256; 1 Con. & Law. 406.—**IR.**

PART IX. SECT. 4.

t. *Limitation in marriage settlement.]—**BARRON v. BARRON* (1836), 2 Jo. Ex. Ir. 226.—**IR.**

Operation of rule in Shelley's Case.—*generally*, REAL PROPERTY, Vol. XXXVIII., pp. 705-708.

Absence or insufficiency of words of inheritance.—*See* REAL PROPERTY, Vol. XXXVIII., pp. 668, 669, 707, 712, 714, Nos. 111-115, 521, 523, 584, 810.

Production of cestui que vie.—*See* REAL PROPERTY, Vol. XXXVIII., pp. 673-675, Nos. 167-213.

Merger of life estate.—*See* EQUITY, Vol. XX., p. 509, No. 2366; REAL PROPERTY, Vol. XXXVIII., p. 760, Nos. 926-928.

SECT. 5.—PORTIONS.

SUB-SECT. 1.—IN GENERAL.

See Settled Land Act, 1925 (c. 18), s. 16.

Presumption against double portions.—*See* EQUITY, Vol. XX., pp. 453 *et seq.*

1328. Nature & definition—An advancement.—*JENKS v. HOLFORD* (1682), 1 Vern. 61; 23 E. R. 311, L. C.

Annotation.—*Consd.* *Hume v. Edwards* (1746), 3 Atk. 450.

1329. — Chargeable on real estate.—A provision for younger children is chargeable on the real estate.—*SARTH v. BLANFREY (LADY)* (1695), Gilb. Ch. 166; 25 E. R. 117.

Annotation.—*Refd.* *Coventry v. Coventry* (1721), Gilb. Ch. 160.

1330. — Estate in land.—The word portion, with respect to younger children, includes an estate in land as well as in money, & this land, in the computation of the estate to be distributed, is to be added to, & computed with other parts of it; but with respect to the eldest son, whatever land came to him from his father by descent, or otherwise, he is to have his share, without any consideration of the value of such land (*LORD COWPER, C.*).—*LLOYD v. TWITSHAM* (1715), 2 Eq. Cas. Abr. 438; 11 Vin. Abr. 192; 22 E. R. 373, L. C.

1331. — Estate in money.—*LLOYD v. TWITSHAM*, No. 1330, *ante*.

1332. — Surplus rents not considered as portion.—Surplus cannot be considered as such [portion], for, being for all the children it takes in the elder also, & the elder, if alone surviving, would have the whole (*LORD HARDWICKE, C.*).—*VANE v. VANE* (1747), 1 Ves. Sen. 57; 27 E. R. 889, L. C.

1333. — Sum secured to children—Out of property settled upon parents.—(1) Where a gift to children is not made or secured to them out of property springing from or settled upon their parents, & there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, it is not a portion within Accumulations Act, 1800 (c. 98), s. 2, & the circumstance, that the gift is a part of the estate of which the parent is the residuary legatee, has not the effect of giving to the gift the character of a portion.

(2) There is no reason, & it is contrary to the policy of Accumulations Act, 1800 (c. 98), to put a strained or forced construction on the term "portions for children" contained in Accumulations Act, 1800 (c. 98), s. 2.—*JONES v. MAGGS* (1852), 9 Hare, 605; 22 L. J. Ch. 90; 19 L. T. O. S. 213; 16 Jur. 325; 68 E. R. 654.

Annotations.—*As to (1)* *Refd.* *Barrington v. Liddell* (1852), 2 De G. M. & G. 480; *Middleton v. Losh* (1852), 1 Sm. & G.

d. Condition precedent — Whether happening of contingency material.—*NUGENT v. CLARE* (1771), Wallis by Lyne, 105.—*IR.*

—*WALCOTT v. BLOOM-*

61; *Watt v. Wood* (1862), 31 L. J. Ch. 338; *Re Walker, Walker v. Walker* (1886), 54 L. T. 792; *Re Peel's Settlement*, *Biddulph v. Peel*, [1911] 2 Ch. 165.

1334. Discharge of land from portion—Insolvency of trustee after raising amount.—Trustee appointed for raising & paying a portion of £500 to A. Trustee enters & gives judgment to A. for paying the £500 to A. when raised; the trustee raises the £500 & more, & becomes insolvent. *Qu.*: whether the land is discharged. —*HARRISON v. CAGE* (1688), 2 Vern. 85; 23 E. R. 661.

1335. Portion charged on two estates—Contribution from both.—By a settlement, two estates, one in Norfolk, & the other in Suffolk, are subjected to the raising of a portion of £2,000 to a daughter, by a term of five hundred years, commencing after the respective decease of two several lives; one life upon the Suffolk estate, & the other upon the Norfolk estate. The life on the Suffolk estate fell, & the daughter bringing her bill for the £2,000, J. to whom that estate was come, paid the £2,000. Afterwards the life on the Norfolk estate fell, & the fee simple thereof descended to the daughter. J. that paid the £2,000 shall have contribution out of the Norfolk estate, in proportion to its value, only the Suffolk estate shall be valued as an estate in possession, & the Norfolk estate as an estate in reversion.—*HEVENINGHAM v. HEVENINGHAM* (1697), 2 Vern. 355; 23 E. R. 821, L. C.

1336. Decree for raising portions—Assignability.—*WALTER v. SAUNDERS* (1703), 1 Eq. Cas. Abr. 58; 21 E. R. 872.

Annotations.—*Consd.* *Ineson v. Moulston* (1712), 9 Mod. Rep. 373. *Refd.* *Jewson v. Moulson* (1712), 2 Atk. 417; *Sturgis v. Champneys* (1839), 5 My. & Cr. 97.

1337. Term for raising portions—Condition precedent to term—Whether happening of contingency immaterial.—*ANDREWS v. STROUD* (1706), Holt, K. B. 623; 11 Mod. Rep. 88; 90 E. R. 1245; *sub nom.* *STRODE v. ANDREWS*, 6 Bro. Parl. Cas. 46, II. L.

1338. Portion limited after estate tail—Barring of entail—Security for portion.—*FREWIN v. CHARLETON* (1712), 1 Eq. Cas. Abr. 386; 21 E. R. 1121, L. C.

Annotations.—*Consd.* *Barnard v. Large* (1781), 1 Bro. C. C. 531; *Moody v. Walters* (1809), 16 Ves. 283.

1339. Charge in nature of portion.—A. on the marriage of his son, settles his estate in the usual manner, but subject to a proviso, that if A. did not, in his lifetime, dispose of his daughters in marriage, or raise portions for them out of the profits of his estate, he might at any time, during his life, by will, deed, or other writing, charge the estate so settled, with £1,500, as portions for his daughters. At the time of making this settlement, A. had two daughters, both of whom afterwards, & in his lifetime, married; but instead of giving them any portions in hand, he executed a deed, charging the estate with £750 a piece, payable to their respective husbands.—*Held*: the husbands were entitled to recover these portions, with interest.—*ODELL v. GRAYDON* (1721), 6 Bro. Parl. Cas. 64; 2 E. R. 935, II. L.

1340. Payment—Presumption of payment—After long period.—Portions which became due in 1673, sued for in this ct. in 1717, such a length of time creates a strong presumption they are paid, & it almost amounts to proving a negative to induce the ct. to believe they are still unpaid.—*STANDISH v. RADLEY* (1741), 2 Atk. 177; Barn. Ch. 463; 26 E. R. 511, L. C.

FIELD (1843), 4 Dr. & War. 211.—*IR.*

f. — — — — — *Re BLAKE'S ESTATE* (1857), 7 I. Ch. R. 65.—*IR.*

g. — — — — — *Re SMYTH'S TRUSTS,*

PART IX. SECT. 5, SUB-SECT. 1.

c. Satisfaction of portion.—*MULLHOLLAND v. MERRIAM* (1873), 20 Gr. 153.—*CAN.*

Sect. 5.—Portions: Sub-sects. 1 & 2, A. & B.]

1341. — On settlement being made—Whether interdependent conditions.]—Agreed in marriage arts., that a portion shall be paid, & a settlement made; but that payment is to be withheld, unless the settlement be made within a limited time. After the marriage, the settlement is not proceeded with:—*Held*: the latter clause could only be intended to hasten the marriage settlement, & the right to the portion is independent of its observance.—*HENDRICK v. WINTER* (1754), 3 Keny. 96; 96 E. R. 1321, L. C.

1342. Costs of raising portion—Payable out of estate.]—*MICHELL v. MICHELL*, No. 1475, *post*.

1343. Investment of fund to satisfy portions—Payable on death of tenant for life—Right to dividends during life of tenant for life.]—£25,000, part of the produce of a sale under Incumbered Estates Act, having been set aside by the comrs. & invested in consols to satisfy portions of that amount, which were payable out of the estate upon the death of the tenant for life:—*Held*: the tenant for life was entitled as against the portioners to the dividends in the meantime.—*WELLESLEY v. MORNINGTON (EARL)* (1857), 27 L. J. Ch. 150; 6 W. R. 177; *sub nom.* *MORNINGTON v. WELLESLEY*, 4 Jur. N. S. 6.

1344. Ultimate trust for sum raised as portion—Sum devolves as personality.]—T. by a settlement covenanted with the trustees that, in the event of his dying in the lifetime of his daughter C. before she should have attained twenty-one or married, his heirs, exors., or administrators should within six months after his decease pay to the trustees £10,000 with interest thereon from the day of his decease; & it was declared that, in the event of C. having no child who should attain twenty-one or marry, then the fund, after her decease, should form part of T.'s personal estate. By the same deed T. charged all his real estate with this sum. T. afterwards, in consequence of a requisition made by persons who were advancing him money on mtge., paid the £10,000 to the trustees, who released the estate from it. The trustees subsequently lent part of this sum to T. himself, on mtge. of part of the estates originally subject to the charge, & the rest of it, to other persons. T. died leaving a will, by which he bequeathed his personal estate to plff. & his real estate to the deft. C. died an infant & unmarried within five months after his death:—*Held*: no part of the £10,000 belonged to the devisees of the real estate, but that the whole belonged to the legatee of the personality.—*TUCKER v. LOVERIDGE* (1858), 2 De G. & J. 650; 27 L. J. Ch. 731; 31 L. T. O. S. 351; 4 Jur. N. S. 939; 6 W. R. 786; 44 E. R. 1142, L. J.J.

Annotation:—Consd. Re Somerset, Thynne v. St. Maur (1886), 55 L. T. 753.

1345. Whether raisable out of life estate.]—*FORD v. TYNTE*, No. 1246, *ante*.

1346. Merger—Life tenant heir of deceased portionist—No intention to keep portion alive.]—The owner of the fee simple of certain real estate created a term to secure the raising of certain sums charged in favour of two of his younger sons if & when they should respectively attain the age of twenty-one years, to be paid on their respectively attaining that age, or on the death of their father, whichever should happen last. By the same settlement he covenanted with the trustees that the annual value of his settled estate should never fall

below a certain sum. One of the sums vested in one of the sons on his attaining twenty-one years, but he subsequently died intestate during the lifetime of his father, leaving his father his sole next-of-kin. The father did not take out administration to his son. The father subsequently died, having by his will devised the property out of which the charges were raisable, but without having made any mention of the existence of the charges:—*Held*: under the circumstances, there was no indication of any intention on the part of the father to treat the portion coming to him as sole next of kin of his son as still subsisting; it was for the benefit of the father that the portion should sink back into the fee simple; & it had so sunk back accordingly.—*Re FRENCH-BREWSTER'S SETTLEMENTS, WALTERS v. FRENCH-BREWSTER*, [1904] 1 Ch. 713; 73 L. J. Ch. 405; 90 L. T. 378; 52 W. R. 377.

Portionist becoming entitled to estate charged.]—*See* Nos. 1388–1391, *post*.

Satisfaction of portion by legacy or portion.]—*See, generally, EQUITY, Vol. XX., pp. 465 et seq.*

SUB-SECT. 2.—POWER TO CHARGE PORTIONS.

A. In General.

1347. Power overreaches all estates.]—*BEALE v. BEALE*, No. 1392, *post*.

1348. Eldest son joining with father to alter settlement—Right to raise portions provided by original settlement.]—When a son joins with his father in altering a settlement of an estate, where he may claim the benefit of charges under the former settlement, contrary to the subsequent one.—*EDMONDS v. EDMONDS* (1740), Barn. Ch. 362; 27 E. R. 679, L. C.

1349. Power given to executrix—Not extending to real estate—Of which executrix trustee only.]—A power given to an extrix. to raise a portion for a younger child does not extend to real estates, of which she was also trustee. A power to raise portions may be executed at several times, provided the first execution be not meant as a complete execution, & that the party, in the whole execution, does not transgress the limits of the power.—*DOE d. MILBORNE v. MILBORNE* (1788), 2 Term Rep. 721; 100 E. R. 388.

1350. Exercise of power—At several times.]—*DOE d. MILBORNE v. MILBORNE*, No. 1349, *ante*.

1351. — Mistake as to amount of portion.]—£10,000 provided by settlement for one daughter or younger son, £15,000 if more: there being but one daughter, the father by will under a power reserved to him appoints the time of payment & the application of the interest of the £15,000 provided for her by settlement, & gives her the further sum of £5,000, she was held entitled to £20,000. Charge upon land payable at a future day not vested till the time of payment.—*PHIPPS v. MULGRAVE (LORD)* (1798), 3 Ves. 613; 30 E. R. 1182, L. C.

Annotations:—Reid. Lyon v. Mitchell (1816), 1 Madd. 467; *Re Lowman, Devonish v. Pester* (1895), 12 R. 362.

1352. — Reservation of right to revoke—Effect of reappointment.]—A tenant in tail under a will with power to charge portions & for the purpose of raising them to demise the devised hereditaments to trustees for a term, charged the estate

Lx p. SMYTH (1861), 12 L. Ch. R. 467.—*IR.*

*h. — — — — —.]—**WANDERFORD v. CARRICK* (1871), 5 I. R. Eq. 486.—*IR.*

*k. — — — — —.]—**Re FLEMING'S TRUSTS* (1885), 15 L. R. 363.—*IR.*

*l. Direction for maintenance.]—**HAYS v. BAILEY* (1813), cited 2 Dr. & War. 576.—*IR.*

PART IX. SECT. 5, SUB-SECT. 2.—A. m. Extinguishment or release of power.]—*HATCHELL v. CREMORNE* (1834), 3 Ir. L. Rec. N. S. 279; 1 L. & G. temp. Plunk. 236.—*IR.*

with the payment of £4,000 for the benefit of his younger children as he should appoint, & subject to appointment equally, & he appointed the hereditaments to trustees for a term with a proviso for cesser, & reserved to himself a power of revoking any of the trusts of the money, & to declare any new trusts thereof. He executed a subsequent deed, not noticing the former, purporting to charge part of the hereditaments with £2,000 in favour of a younger child, & to create a term to secure it:—*Held*: the trusts of the money were well revoked & reappointed, but the reappointment of the term was void, so that the trustee of it could not give a good receipt to mtgees. for the money raised.—*VYVYAN v. VYVYAN* (1861), 4 De G. F. & J. 183; 31 L. J. Ch. 158; 5 L. T. 511; 8 Jur. N. S. 3; 10 W. R. 179; 45 E. R. 1153, L. C.

Annotation:—*Mentl. R. v. Essex JJ., Ex p. Perkins*, [1927] 2 K. B. 475.

1353. Omission of power—Ground for rectification of settlement.—*WELMAN v. WELMAN*, No. 834, *ante*.

1354. Extinguishment or release of power—Disentailing estate.—A. having a power to charge lands with portions for younger children, suffers a recovery, & after by will reciting his power, he charges the estate with £1,000 for the portion of his daughter, & devises her £1,000, the recovery having extinguished his power, the £1,000 charged on the lands was decreed to be paid out of his personal estate.—*TANKERVILLE (EARL) v. COKE* (1729), Mos. 146; 25 E. R. 319, L. C.

1355. ———. *—Semble*: where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levies a fine, the power will be extinguished.

By a marriage settlement, lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of four hundred years, to commence from the decease of the survivor of the husband & wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son & one or more younger child or children, who should live to attain his, her, or their age or ages of twenty-one years, to raise such sum, not exceeding £200 in the whole, as the husband & wife should by any deed or writing appoint, or in default thereof, as the survivor should by deed or writing, or his or her last will or testament, appoint; & in default of such appointment, or subject thereto, after the moneys so appointed should have been raised, & the costs of the trustees paid, the term was to cease or be assigned in trust to attend the inheritance. There were younger children of the marriage who attained twenty-one. The wife died without having joined in any appointment, & afterwards the husband levied a fine of the premises:—*Held*: the power was extinguished by the fine.—*BICKLEY v. GUEST* (1831), 1 Russ. & M. 440; 39 E. R. 170.

1356. ———. *By express instrument.*—A tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, & covenanted not to exercise the power:—*Held*: he could not, afterwards, charge the estate with portions, to the prejudice of his mtgees.—*HURST v. HURST* (1852), 16 Beav. 372; 22 L. J. Ch. 538; 1 W. R. 105; 51 E. R. 822.

Annotation:—*Refd. Re Beddingfelds & Herring's Contract*, [1893] 2 Ch. 332.

1357. ———. *—*—A power given to a tenant for life to charge the inheritance with portions for younger children may be released not only by an instrument expressly releasing it, but by dealings

manifestly inconsistent with its exercise. The donee of the power cannot be allowed to derogate from his own grant. Ordinary covenants for title do not suffice to release the power, if the property is in terms assured or appointed subject to the power, the presumption being strong that such covenants are only ancillary to the assurance & are not intended to enlarge its operations.

By a marriage settlement in 1822 certain real estates were settled to the use of the husband for life, with remainder, subject to a long term of years for securing portions for younger children, to the use of his first & other sons successively in tail male, & he was thereby empowered by deed or will to charge a further sum for portions for younger children. By a disentailing deed in 1854 his eldest son, with his consent as protector of the settlement, assured the settled estates in fee simple, subject to the uses, estates, & terms limited in the settlement anterior to the limitations in tail male & all powers to such precedent estates belonging or annexed, to such uses as the father & son should by deed jointly appoint. They thereupon in exercise of the joint power created three mtges. upon the estates. Each mtge. deed contained (*inter alia*) a joint & several covenant by them for quiet enjoyment "free & clear & freely & clearly . . . released . . . & indemnified of from & against all & all manner of . . . portions, & especially" certain specified charges, but the power to appoint further portions was not specially mentioned. The father survived his son & died in 1896, having by his will charged the estates with the further sum for portions for younger children:—*Held*: upon the construction of the mtges. the power to appoint further portions had not been released, & therefore, the portions charge had priority over the mtges.—*NOTTIDGE v. DERING, RABAN v. DERING*, [1910] 1 Ch. 297; 79 L. J. Ch. 439; 102 L. T. 145, C. A.

Annotation:—*Refd. Re Evered, Mollineux v. Evered* (1910), 102 L. T. 691.

1358. ———. *By dealings inconsistent with exercise.*—*NOTTIDGE v. DERING, RABAN v. DERING*, No. 1357, *ante*.

1359. ———. *By covenants for title.*—*NOTTIDGE v. DERING, RABAN v. DERING*, No. 1357, *ante*.

B. Construction.

1360. Whether general power cut down—Particular proviso.—A general power to raise portions for daughters, may be restrained & qualified by a particular proviso.—*FANE v. DEVONSHIRE (DUKE)* (1718), 6 Bro. Parl. Cas. 137; 2 E. R. 981, H. L.

1361. ———. *Question of circumstances of case.*—Where the intention of a settlement appears from the recitals, to be to secure a provision for children, it is a question of the actual circumstances in each particular case whether a power in the settlement, which is in terms general, must be cut down to a particular power in favour of children only.—*MINTON v. KIRWOOD* (1868), 3 Ch. App. 614; 37 L. J. Ch. 606; 18 L. T. 781; 10 W. R. 991, L. JJ. *Annotation*:—*Refd. Heasman v. Pearse* (1871), L. R. 11 Eq. 522.

1362. Power given by reference to another power—Free from contingencies applicable to other power.—A., tenant for life in possession, joined with B., the next heir, in the settlement of certain estates. The settlement contained, among other things, a power for B., in case of the death of his first wife & his marrying again, to charge the settled estates with portions for the younger children of his second marriage, the amounts being regulated with reference to the number of children that might be born of the first marriage.

Sect. 5.—Portions: Sub-sect. 2, B. & C.]

The deed contained a proviso that if the brothers of B. should respectively come into possession of the settled estates, "either before or after their marriage with any woman or women," they might charge all or any part of the estates with "the like sum or sums of money for the portion or portions of their child or children, other than an eldest or only son, as B. is entitled to do before or after his marriage with any woman or women after the decease of his first-taken wife by virtue of the provision hereinbefore contained:—*Held*: this was an absolute power, which, with reference to a younger brother of B. succeeding to the settled estates, was not subject to the restrictions & contingencies which applied to B. himself in making a charge for the children of his second marriage. —*HARRINGTON (EARL) v. HARRINGTON (COUNTESS DOWAGER)* (1868), L. R. 3 H. L. 295; 37 L. J. Ch. 858, H. L.

1363. Power exercisable if there should be "not more than two children"—No children born.]—A marriage settlement contained a provision authorising & directing the trustees, on the request of the survivor of the husband & wife, to raise, "if there should be not more than two children of the marriage, the sum of £5,000 & if there should be more than two children, the sum of £3,000." There were no children born of the marriage, & the husband survived his wife. It was, however, contended that the event on which the exercise of the power depended had not occurred, inasmuch as there was no express power to raise any sum in the event of there being no children:—*Held*: the power was intended to override previous limitations in the settlement; & the only proper & grammatical construction of the words was, that the expression "not more than two children" extended to the case of there being no children. Therefore, the sum of £5,000 was raisable.—*WILKINSON v. THORNHILL* (1889), 61 L. T. 362.

C. Validity of Execution of Power.

1364. Power to appoint by deed—Instructions in writing for deed—Death before execution.]—Father by a marriage settlement, had power to charge lands with £500 for portions for his daughters; he prepared notes in writing purporting his will; & declared those notes were the effect of his will, but died before it was drawn up in form, & before it was executed; this was decreed to be a good execution of his power.—*SMITH v. ASHTON* (1876), Cas. temp. Finch, 273; 1 Cas. in Ch. 263; Freem. Ch. 308; Freem. K. B. 308; 3 Keb. 551; 1 Eq. Cas. Abr. 345; 23 E. R. 150.

Annotations:—*Refd.* *Albemarle v. Bath* (1693), 2 Freem. Ch. 193; *Bath & Mountague's Case* (1693), 3 Cas. in Ch. 55; *Harvey v. Harvey* (1739), Barn. Ch. 103; *Jones v. Clough* (1751), 2 Ves. Sen. 365; *Wilkie v. Holme* (1752), Dick. 166; *Churchman v. Harvey* (1757), Amb. 824; *Hume v. Rundell* (1822), 6 Madd. 331.

1365. — Exercisable by survivor of trustees.]—*BUSHELL v. NEWBY & WAKEFIELD* (1870), Cas. temp. Finch, 260; 23 E. R. 143, L. C.

1366. Defective execution—How far equity will assist—Power of leasing as provision for children.]—*GOODING v. GOODING* (1698), 1 Eq. Cas. Abr. 342; 21 E. R. 1089; *sub nom.* *ANON.* Freem. Ch. 224.

1367. Exclusive or unequal appointment.]—The

father by marriage settlement has a power to make an appointment of a sum not exceeding a sum certain, for portions & maintenance of younger children, in such manner & under such limitations as he shall appoint. He has several younger children, & by his will, taking notice that the rest were provided for by their grandfather, he appoints the whole sum to one. This is not a good pursuance of his power.—*MENZEY v. WALKER* (1735), Cas. temp. Talb. 72; 25 E. R. 669, L. C.

Annotations:—*Refd.* *Cholmondeley v. Meyrick* (1758), 1 Eden, 77; *Pierson v. Garnet* (1786), 2 Bro. C. C. 38; *Kemp v. Kemp* (1801), 5 Ves. 849; *Bax v. Whitbread* (1809), 16 Ves. 15.

1368. —.]—By marriage settlement, £1,500 was provided for younger children in such shares as the parents should appoint, in default of appointment to all the children, after the death of the wife. The parents afterwards made an appointment excluding one child; this deed vests the portions in the children born or to be born.—MAYHEW v. MIDDLEDITCH (1782), 1 Bro. C. C. 162; 28 E. R. 1054, L. C.

1369. —.]—A power to raise such sum as A. should direct, to be divided amongst such younger children as A. should direct, authorises an exclusive appointment to one.—TANNER v. BABBAGE (1835), 4 L. J. Ch. 101.

1370. —.]—(1) A settlement was made in Ireland of estates, some of which were situate there & the rest in England, by which the estates were limited to trustees for a term of years, for raising at a future time £10,000 for portions; & interest at 5 per cent. was to be raised out of the rents for the children's maintenance in the meantime; but the settlement was silent as to the rate of interest on the portions after they had become payable:—*Held*: the £10,000 must be raised in Irish currency; but not with Irish interest, 6 per cent., but 4 per cent. according to the usual course of the ct.

(2) Under a marriage settlement the husband & wife, having power to appoint £10,000 amongst all their younger children, but in such shares as they should think fit, appointed the whole, in different sums & at different times, to four of the younger children, to the exclusion of the rest:—*Held*: the three first appointments were good, & only the last void.

(3) Under a marriage settlement, a term was vested in trustees for raising £10,000 for the younger children of the marriage, & subject thereto, the estates were limited to the first & other sons in tail male. Much more than six years after the £10,000 ought to have been raised & paid, the younger children filed a bill, to have that sum raised:—*Held*: the relation of trustee & cestui que trust existed between the parties; & therefore, Stat. Limitations, which enacts that money to be raised out of land shall not be recoverable but within twenty years next after a right to receive the same shall have accrued to some person capable of giving a receipt for the same, did not apply.—*YOUNG v. WATERPARK (LORD)* (1842), 13 Sim. 199; 11 L. J. Ch. 367; 6 Jur. 656; 60 E. R. 77; *on appeal* (1845), 15 L. J. Ch. 63, L. C.

Annotations:—*As to* (1) *Consd.* *Balfour v. Cooper* (1883), 23 Ch. D. 472. *As to* (2) *Refd.* *Bulteel v. Plummer* (1870), 6 Ch. App. 160. *Generally.* *Mentd.* *Cox v. Dolman* (1852), 2 De G. M. & G. 592; *Hughes v. Williams, Chappell v. Rees* (1852), 16 Jur. 415; *Petre v. Petre* (1853), 1 Drew. 371; *Mansfield v. Ogle* (1855), 1 Jur. N. S. 414; *Snow v. Booth* (1855), 2 K. & J. 132; *Blower v. Blower* (1858),

PART IX. SECT. 5, SUB-SECT. 2.—C.

1367 i. Exclusive or unequal appointment.]—A father, having a power of appointment among all his children, by will, purporting to appoint the

whole fund, excluded one child, & appointed a portion of the fund to grandchildren, not objects of the power:—*Held*: the appointment was valid, so far as it related to the portion of the fund appointed to the children.

—*Ex p. BERNARD* (1857), 6 I. Ch. R. 133; 9 Ir. Jur. 226.—IR.

1367 ii. —.]—Re BROMHEAD'S TRUSTS, PUBLIC TRUSTEE v. BROMHEAD, [1922] 1 I. R. 75.—IR.

5 Jur. N. S. 33; *Burrowes v. Gore* (1858), 6 H. L. Cas. 907; *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Lewis v. Duncombe* (No. 2) (1861), 29 Beav. 175; *Round v. Bell* (1861), 31 L. J. Ch. 127; *Re Jordison, Raine & Jordison*, [1922] 1 Ch. 440.

1371. —[.]—Upon the construction of an instrument creating a power of raising portions *Held*: the donee had a right to distribute the portions unequally.—*COTGREAVE v. COTGREAVE* (1846), 1 De G. & Sm. 38; 16 L. J. Ch. 145; L. T. O. S. 233; 11 Jur. 51; 63 E. R. 961.

1372. — Existing prior appointment in equal shares.—(1) By a marriage settlement of 179 certain estates at B. were charged with a sum of £10,000 for portions for the children of the marriage, in equal shares; & by the same instrument power was given to substitute for those estates other estates of equal value, as a fund for raising those portions. By a deed of 1811 the settlor covenanted that, as soon as estates at H. were disincumbered, he would charge them in substitution for the other estates with the payment of £10,000 for portions under the same limitation as had been expressed in the settlement, & would also further charge the same estates at H. with the sum of £30,000 for the younger children of the marriage, to be paid to them in such shares & proportions as he, the settlor, should by deed or will appoint. By a deed of 1816, which was a general conveyance of all the settlor's estates in trust for payment of his debts, reciting amongst other things that the settlor had not then performed the covenant contained in the deed of 1811, it was declared that the trustee of the deed should hold the estates at H., or otherwise convey the same to the trustees of the settlement for the purpose of securing the portions, according to the deed of 1811; & by a deed of 1816, reciting the former deeds, the trustees of the deed of trust by the direction of the settlor, conveyed the estates at H. to the trustee of the settlement, upon trust, after the death of the settlor, to raise £10,000 in lieu & satisfaction of the £10,000 under the settlement, in trust for all & every the children of the marriage, under the same limitations as were contained in the settlement, & upon trust to raise the further sum of £30,000 for all & every the children of the marriage except the eldest son J., in the same manner in all respects, excluding J., as by the indenture of settlement was declared concerning the sum of £10,000 thereby directed to be raised:—*Held*: the deed of 1817 was a complete execution of the power of appointing the £30,000 contained in the deed of 1811; & consequently, the younger children of the marriage who were living at the time of the execution of the deed of 1817 were entitled to the £30,000 in equal shares.

(2) A father executed a power of appointment under which his four younger children, B., C. D. & E., became entitled, subject to his life interest to £30,000 in equal shares. The father afterwards by several instruments of appointment, affected to appoint the whole fund, to B., C. & D. in the following shares; viz., to B. £13,000, to C. £5,000 & to D. £12,000. E., who was a son, died in his father's lifetime intestate & without issue; whereupon his share devolved to the father. After E.'s decease the father, with a view to support the subsequent appointments, executed a deed poll, declaring that the original appointment under which the children took equally was made by

mistake:—*Held*: though the subsequent appointments were invalid so far as related to the shares of B., C. & D., yet as regarded the share of E. the father was bound by the statement in the deed poll; & E.'s share, amounting to £7,500, must be apportioned between B. & D. in satisfaction *pro tanto* of the losses which, through the invalidity of the subsequent appointments, had been sustained by their respective shares.—*ARMYTAGUE v. ARMYTAGUE* (1842), 1 Y. & C. Ch. Cas. 461; 6 Jur. 790; 62 E. R. 971.

1373. *Successive executions.*—*DOE d. MILBORNE v. MILBORNE*, No. 1319, *ante*.

1374. *Power to appoint in praesenti*—Appointment to take effect after death of appointor.—*DAWSON v. CLEVELAND (DUKE)* (1737), *West temp. Hard.* 106; 25 E. R. 815.

1375. *Devise to trustees to pay debts & incumbrances—Portions payable out of residue.*—*TEMPLEST v. SABINE, POLLEXFEN v. ADELMERE* (1713), *Sugden on Powers*, 8th ed. 915.

1376. *Right to annex condition to appointment.*—A father having a power to appoint portions to younger children, to be raised at all events, in such shares as he shall think fit, cannot annex a condition to the appointment of any child's share.—*PAWLET v. PAWLET* (1718), 1 Wils. 224; 95 E. R. 586.
Annotation:—*Refd. Davies v. Huguenin* (1863), 2 New Rep. 101.

1377. *Exercise by will.*—Covenant to settle an estate in strict settlement; subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, & at such times, as he should appoint. The power was held well executed by a will directing a sale & appointing the money.—*LONG v. LONG* (1800), 5 Ves. 445; 31 E. R. 674, L. C.

Annotations:—*Refd. Kenworthy v. Bate* (1802), 6 Ves. 793; *Thornton v. Bright* (1836), 2 My. & Cr. 250; *Sheehy v. Muskerry* (1848), 1 H. L. Cas. 576; *Re Adams' Trustees' & Frost's Contract*, [1907] 1 Ch. 695.

1378. —[.]—By a settlement made on the marriage of plff. an estate was settled in trust for plff.'s father, the settlor, & his wife, for their lives, remainder to plff. for life, remainder to his children, & in default of issue to plff. & his heirs. A power was reserved to the settlor of charging the estate by deed or instrument in writing to the extent of £500, for portions of his younger children, & of creating a term for that purpose. By his will the settlor devised the settled estate to plff., his heirs & assigns, subject to & charged with legacies to three daughters of the settlor, amounting together to £500. He afterwards bequeathed the legacies, & directed them to be paid by plff. his heirs & assigns. He did not create a term of years, nor in any way refer to the power contained in the settlement:—*Held*: the sums mentioned in the will were well charged on the property comprised in the settlement.—*DAVIES v. DAVIES* (1858), 28 L. J. Ch. 102; 32 L. T. O. S. 156; 4 Jur. N. S. 1291; 7 W. R. 85.

1379. *Necessity for reference to power—Execution by subsequent deed—Reciting deed containing power.*—*ARMYTAGUE v. ARMYTAGUE*, No. 1372, *ante*.

1380. — *Execution by will.*—*DAVIES v. DAVIES*, No. 1378, *ante*.

1381. — *Will comprising object of power.*—Although a will does not state that it is made in

13771. *Exercise by will.*—*FENTON v. FENTON* (1837), 1 Dr. & Wal. 66.—*IR.*

137711. —[.]—*MANDEVILLE v. ROE* (1844), 1 Jo. & Lat. 371.—*IR.*

n. Portions not to exceed capital

amount.—*Re BORROWES' ESTATE* (1868), 2 L. R. Eq. 468.—*IR.*

o. Execution in favour of children of former marriage.—*COOKE v. BRISCO*

(1838), 1 Dr. & Wal. 596.—*IR.*

p. Promise to appoint—Whether valid appointment.—*Re JENNING* (1854), 8 L. Ch. R. 421, P. C.—*IR.*

younger children living at the father's death. A child *en ventre sa mère* is a child within the power.

(3) Where lands are settled on A. for life, remainder to such woman as he should marry for life, remainder over, with power to charge the premises with any sum of money, such power, unless there be a clause inserted to the contrary, will, like a power of leasing, overreach all the estates.—*BEALE v. BEALE* (1713), 1 P. Wms. 244; 24 E. R. 373, L. C.

Annotations:—As to (1) *Refd.* *Teynham v. Webb* (1751), 2 Ves. Sen. 198; *Scarisbrick v. Skelmersdale* (1840), 4 Y. & C. Ex. 78. As to (2) *Refd.* *Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357; *Villar v. Gilbey* (1906), 75 L. J. Ch. 308.

1393. Eldest daughter—Where son living—Or estate going to remainderman.—*BEALE v. BEALE*, No. 1392, *ante*.

B. Trusts for Children Other than Eldest Child.

(a) *In General.*

1394. All children entitled except persons succeeding to estates.—*DUKE v. DOIDGE* (1746), 2 Ves. Sen. 203, n.; 28 E. R. 131.

Annotations:—*Consd.* *Wilbraham v. Scarisbrick* (1847), 1 H. L. Cas. 167; *Gray v. Limerick* (1848), 2 De G. & Sm. 370; *Macoubrey v. Jones* (1856), 2 K. & J. 681; *Collingwood v. Stanhope* (1869), L. R. 4 H. L. 43; *Reid v. Hoare* (1884), 26 Ch. D. 363. *Refd.* *Ellison v. Thomas* (1862), 1 De G. J. & Sm. 18.

1395. —]—When a real estate is so settled that it must on the death of a parent go to his eldest son, & provision is made by that parent or by any person in *loco parentis*, whether by settlement in contemplation of marriage, or by will, for the younger children of such parent, *cts.* of equity have considered the presumption, that it was intended to make provision for all the children, so strong, as to warrant it in holding that by the word "younger" must have been intended all except the one child who succeeds to the estate. But this does not apply to the case of a will in which the primary intention of testator appears to have been to found certain families, or to do something beyond merely making a provision for children. The circumstances that the will is of an executory nature, will make no difference.—*SCARISBRICK v. SKELMERSDALE* (LORD) (1840), 4 Y. & C. Ex. 78; 1 H. L. Cas. 173, n.; 160 E. R. 927; *affd. sub nom.* *WILBRAHAM v. SCARISBRICK* (1847), 1 H. L. Cas. 167, H. L.

Annotations:—*Consd.* *Meredith v. Treffry* (1879), 12 Ch. D. 170; *Shuttleworth v. Murray*, [1901] 1 Ch. 819. *Refd.* *Maddison v. Chapman* (1859), 3 De G. & J. 536; *Thellusson v. Rendlesham* (1859), 28 L. J. Ch. 948; *Sandeman v. Mackenzie* (1861), 1 John. & H. 613.

1396. Eldest child not taking estate—Entitled to portion.—*Pltf.* is entitled to the £1,000 & £300 & the two freehold houses, under a trust in marriage arts.; for an elder daughter, where there is a son, is accounted a younger child.—*HENEAGE v. HUNLOKE* (1742), 2 Atk. 456; 26 E. R. 676, L. C.

Annotations:—*Consd.* *Wilbraham v. Scarisbrick* (1847), 1 H. L. Cas. 167. *Refd.* *Woodroffe v. Danell* (1843), 7 Jur. 959; *Re Bayley's Settlement* (1870), L. R. 9 Eq. 491.

1397. —]—*DUKE v. DOIDGE* (1746), 2 Ves. Sen. 203, n.; 28 E. R. 131.

Annotations:—*Consd.* *Wilbraham v. Scarisbrick* (1847), 1 H. L. Cas. 167; *Gray v. Limerick* (1848), 2 De G. & Sm. 370; *Macoubrey v. Jones* (1856), 2 K. & J. 684; *Collingwood v. Stanhope* (1869), L. R. 4 H. L. 43; *Reid v.*

Hoare (1884), 26 Ch. D. 363. *Refd.* *Ellison v. Thomas* (1862), 1 De G. J. & Sm. 18.

1398. —]—*COLLINGWOOD v. STANHOPE*, No. 1420, *post*.

1399. Younger child considered as eldest—Only as between parents or persons in loco parentis & children.—Younger child is never considered as an eldest, but between parent & children, or one in *loco parentis*, not in the case of a provision by a stranger.—*HALL v. HEWER* (1753), Amb. 203; 27 E. R. 135, L. C.

Annotations:—*Consd.* *Matthews v. Paul* (1819), 2 Wils. Ch. 64. *Afd.* *Scarisbrick v. Skelmersdale* (1840), 1 Y. & C. Ex. 78; *Sandeman v. Mackenzie* (1861), 1 John. & H. 613. *Consd.* *Shuttleworth v. Murray*, [1901] 1 Ch. 819.

1400. —]—Not as between child & stranger.—*HALL v. HEWER*, No. 1399, *ante*.

1401. Only daughter succeeding to estate—Considered as eldest son.—The ct. will, from the general frame of a settlement, collect the intent contrary to the express words of a particular clause, & therefore, where an estate in N., part of the general estate, was, in default of issue male of that marriage, limited to the first & other daughters, & terms were created of the whole estate, to raise portions for daughters, payable at certain times, & in certain events; & in case there was no issue male of that marriage, such portions were directed to be augmented; with a proviso, that in case any daughter should be entitled to the estate in N. before the portion appointed for her should be to be paid, then her portion should cease, & not be paid; there being an only daughter, & the father having died without issue male after her portion was vested:—*Held*: she ought to be considered as an eldest son, & she was not entitled to the augmented portion, though the estate vested after it became payable.—*NORTHUMBERLAND (EARL) v. EGREMONT (EARL)* (1759), 1 Eden, 435; 28 E. R. 753.

Annotation:—*Consd.* *Rainy v. Ellis* (1872), 26 L. T. 602.

(b) *Death of Eldest Child.*

"Eldest son for the time being."—*See* No. 1425, *post*.

1402. Whether younger child becoming eldest child excluded.—(1) Grandmother under a power, creates, by deed, a term to commence after her death for raising money for younger children; as their father should appoint: If no appointment, equally; if but one, besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own exors. At the date of the deed there was one grandson & one granddaughter. The father afterwards had another son, & died without appointment. The eldest son having died under age, held that the whole sum belonged to the daughter, & that the younger son having thus become an eldest son, was excluded. Elder son unprovided for considered as a younger. Vesting not suspended, in general by a power to appoint.

(2) Portions not to be raised for the representatives of a child, who died before it was naturally required.—*TEYNHAM (LORD) v. WEBB* (1751), 2 Ves. Sen. 198, 28 E. R. 128, L. C.

Annotations:—As to (1) *Distd.* *Northumberland v. Egremont* (1759), 1 Eden, 435. *Consd.* *Cholmondeley v. Clinton*

d. "Younger children."—"Younger children" are those which were such at the death of the institute or heir in possession.—*CATTON v. MACKENZIE* (1872), L. R. 2 Sc. & Div. 202.—*SCOT*.

PART IX. SECT. 5, SUB-SECT. 3.—*B. (b).*

1402 i. Whether younger child becoming eldest child excluded.—*SLEEMAN v. MAGRATH* (1858), 8 I. Ch. R. 195; 10 Ir. Jur. 233.—*IR*.

PART IX. SECT. 5, SUB-SECT. 3.—*B. (a).*

1396 i. Eldest child not taking estate—Entitled to portion.—*ROOKE v. PLUNKETT*, [1902] 1 I. R. 299.—*IR*.

a. Children of two marriages take as one class.—*GREEN v. GREEN* (1845), 2 Jo. & Lat. 529; 8 I. Eq. R. 473.—*IR*.

r. Younger child taking estate.—*TENNISON v. MOORE* (1850), 13 I. Eq. R. 424.—*IR*.

t. — Regarded as elder child.—*L'ESTRANGE v. WINNIETT*, [1911] 1 I. R. 62.—*IR*.

a. Daughter surviving son—Predeceasing father.—*SIMPSON v. FREW* (1855), 4 I. Ch. R. 428; *reversd.* (1856), 5 I. Ch. R. 517; 8 Ir. Jur. 222.—*IR*.

b. Daughter succeeding to estate.—*STIRUM v. RICHARDS* (1861), 12 I. Ch. R. 323; 14 Ir. Jur. 69.—*IR*.

c. —] — Re SMITH'S ESTATE (1891), 27 L. R. Ir. 121.—*IR*.

Sect. 5.—Portions: Sub-sect. 3, B. (b).]

(1820), 2 Jac. & W. 1; *Windham v. Graham* (1826), 1 Russ. 331; *Willbraham v. Scarsbrick* (1847), 1 H. L. Cas. 167; *Lyddon v. Ellison* (1854), 19 Beav. 565; *Sandeman v. Mackenzie* (1861), 1 John. & H. 613; *Ellison v. Thomas* (1862), 1 De G. J. & Sm. 18. *Refd.* *Lawrence v. Maggs* (1759), 1 Eden, 453; *Matthews v. Paul* (1819), 3 Swan. 328; *Reid v. Hoare* (1884), 26 Ch. D. 363; *Re Stawell's Trusts, Poole v. Riversdale*, [1909] 1 Ch. 534. *Generally, Mentd.* *Lincoln v. Pelham* (1804), 10 Ves. 166.

1403. —.] — *Re THEED'S SETTLEMENT*, No. 1640, *post*.

1404. —.] — By voluntary settlement, A. settled a sum to be raised out of his real estate among his children as he should appoint, & in default of appointment for his children, other than an eldest or only son, equally. On the marriage of C., one of his daughters, A. covenanted that he would not execute any appointment, nor do any act to diminish the share or interest of C., in the division of the trust property below a certain sum:—*Held*: (1) the covenant entered into by A. upon the marriage of C. operated as a release of his power *pro tanto*; (2) that in the absence of mention of any given period for vesting, the shares vested at twenty-one, or marriage; (3) the first born son having attained twenty-one but died in A.'s lifetime, & consequently before succeeding to the real estate, was to be considered as a younger son, & therefore entitled, through his representatives, to a share in the money raisable for portions.—*DAVIES v. HUGUENIN* (1863), 1 Hem. & M. 730; 2 New Rep. 101; 32 L. J. Ch. 417; 8 T. T. 443; 11 W. R. 1040; 71 E. R. 320.

Annotations:—As to (1) Consd. *Re Evered, Molineux v. Evered*, [1910] 2 Ch. 147. *Refd.* *Coffin v. Cooper* (1865), 2 Drew. & Sm. 365. *As to (3) Refd.* *Henty v. Wrey* (1882), 21 Ch. D. 332. *Generally, Refd.* *Walford v. Gray* (1865), 5 New Rep. 235; *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510. *Mentd.* *Palmer v. Locke* (1880), 15 Ch. D. 291; *Re Bradshaw, Bradshaw v. Bradshaw* (1902), 71 L. J. Ch. 230.

1405. —.] — By an indenture of settlement certain real estates stood limited to J., for life & after his death as to part thereof to E., the son of J., for life, remainder to H., the eldest son of E., for life, & to his first & other sons in tail, remainder to D., the second son of E., for life, & to his first & other sons in tail, with remainders over; & as to the remaining part thereof, to trustees upon trusts for sale & conversion, the proceeds to be held as personal estate in trust for the children of E., "other than or not being an eldest or only son for the time being entitled under the limitations hereinbefore contained to the manors," etc., the unsold part of the settled estates, "either in possession or in remainder expectant on the decease of the survivor of J., the grandfather, & E.," the shares to vest in such of them as should attain twenty-one, or, if daughters, marry under that age, & to be paid at such age or days of marriage, or immediately after the decease of the survivor of J. & E., which should last happen. E., the father, died in the lifetime of J., the grandfather, & D., having attained twenty-one, died in the lifetime of both his father & grandfather. D., the second son of E., attained twenty-one in the lifetime of H., & became entitled as tenant for life in possession to the unsold part of the settled estates on the death of his grandfather:—*Held*: under these circumstances, & notwithstanding the fact that the settlement contained a separate provision for H. by way of rentcharge, his personal representative was, & D., the second son, was not, entitled to share the personal estate with the younger children.—*SWINBURNE v. SWINBURNE* (1868), 17 W. R. 47.

1406. — *Estate of no value.*] — *SANDS v. FLEETWOOD* (1691), Nels. 186; 21 E. R. 822.

1407. — *Sale under paramount title.*—]

By marriage settlement an estate was settled on the wife & the husband successively for life, with remainder to trustees for a term of six hundred years, & subject thereto to the first & other sons in tail. Other estates were settled free from the portions term, but subject to prior charges which entirely absorbed them. The trusts of the term were if there should be any child or children of the husband & wife other than or besides an eldest or only son, who by virtue of the limitations should for the time being be entitled to the hereditaments & premises, to raise for the portions of such child or children other than or besides such eldest or only son, £5,000 to be vested in such of them as the husband & wife, or the survivor, should appoint, & in default of appointment equally. There were three children of the marriage, two sons & a daughter. In 1841 the estate was sold, under a paramount title, & produced a sum of about £2,400. In 1841, the eldest son died an infant. In 1882 the surviving tenant for life died & the portions became payable. There had been no appointment. The younger son who had become the elder & had attained twenty-one claimed to take a share with his sister of the £2,400:—*Held*: the effect of the settlement was to give £5,000 to the sister as a first charge on the estate, & the rest of the estate to the brother, & whether the value of the residue were more or less than the portion, or as in this case, nothing at all, the brother had no right to claim any share in the prior charge.—*REID v. HOARE* (1884), 26 Ch. D. 363; 53 L. J. Ch. 486; 50 L. T. 257; 32 W. R. 609.

1408. — *Specific portion appointed to such younger child—Implied condition that status remains unaltered.*]—A. by marriage settlement is tenant for life, remainder to trustees, to raise £4,000 for younger children's portions, as A. should appoint; remainder to his first, etc. sons in tail. A. appoints the £4,000 amongst his younger children, & particularly £2,600 thereof to B. his second son. The eldest son dies six years afterwards, whereby B. became eldest son, & entitled to the whole estate after his father's death; & thereupon A. makes a new appointment of the £2,600 to one of his daughters. Decreed the last appointment to take place; the first being made to B. upon a tacit or implied condition, that he should not become the eldest son.—*CHADWICK v. DOLEMAN* (1705), 2 Vern. 528; 1 Eq. Cas. Abr. 344; 23 E. R. 941.

Annotations:—Distd. *Jernyn v. Fellows* (1735), Cas. temp. Talb. 93. *Apld.* *Teynham v. Webb* (1751), 2 Ves. Sen. 198. *Consd.* *Driver v. Frank* (1814), 3 M. & S. 25; *Windham v. Graham* (1826), 1 Russ. 331; *Willbraham v. Scarsbrick* (1847), 1 H. L. Cas. 167; *Macoubrey v. Jones* (1856), 2 K. & J. 684; *Sandeman v. Mackenzie* (1861), 1 John. & H. 613. *Distd.* *Sing v. Leslie* (1864), 2 Hem. & M. 68. *Consd.* *Collingwood v. Stanhope* (1869), L. R. 4 H. L. 43; *Reid v. Hoare* (1884), 26 Ch. D. 363. *Refd.* *Domville v. Wintonington* (1884), 26 Ch. D. 382. *Refd.* *Lomax v. Holmeden* (1732), 3 P. Wms. 176; *Northumberland v. Egremont* (1759), 1 Eden, 435; *Matthews v. Paul* (1819), 3 Swan. 328; *Ellison v. Thomas* (1862), 1 De G. J. & Sm. 18; *Davis v. Huguenin* (1863), 1 Hem. & M. 730; *Re Stawell's Trusts, Poole v. Riversdale*, [1909] 1 Ch. 534.

1409. — —.] — By a family settlement dated July 21, 1888, power was given to B. to appoint portions to her younger named children. By deed of poll dated June 3, 1890, B. appointed £3,000 to a younger son, G., & directed that £1,500 should be paid to him forthwith & the balance on her death. Before the death of B. the eldest son died. On B.'s death G. became tenant for life under the settlement:—*Held*: the fact of G. having become tenant for life under the settlement did not prevent his taking the

£1,500 payable on B.'s death.—*Re BANKES, ALISON v. BANKES* (1909), 101 L. T. 778.

1410. — Younger child named in power.]—Where there is a sum of money provided for younger children; one of the younger becomes eldest, he shall have no part of this money; but where the money was, by a private Act of Parliament, to be appointed among A. B. & C., naming them, & A. afterwards becomes eldest, he is capable of an appointment in his favour.—*JERMYN v. FELLOWS* (1735), *Cas. temp. Talb.* 93; 25 E. R. 682, L. C.

Annotation:—Refd. *Teynham v. Webb* (1750-1), 2 Ves. Sen. 198.

1411. — —.]—Under a power to appoint a sum of money among younger children, but that the eldest son, or the son possessing the estate, shall have no part of the money, a younger son becoming an eldest is excluded, though mentioned by name in the execution of the power whilst he was a younger son.—*BROADMEAD v. WOOD* (1780), 1 Bro. C. C. 77; 28 E. R. 996, L. C.

1412. — Vesting suspended during father's lifetime.]—The vesting of portions suspended during the father's lifetime. Power to father to raise for younger children not exceeding £3,000, if no appointment, the estate charged with £3,000 for sons at twenty-one, daughters at twenty-one or marriage. Nothing vested in father's life; & representative of one who attained twenty-one & became elder, but died in father's life, not entitled to a share.—*LODER v. LODER* (1751), 2 Ves. Sen. 530; 28 E. R. 339, L. C.

Annotation:—Refd. *Ilabergham v. Vincent* (1793), 2 Ves. 204.

— **Portion directed to vest at twenty-one**

— **Person younger child when attaining age.]**—A son, who, when he attained twenty-one, was a younger child, but, by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions, which are directed to vest in younger sons at twenty-one, though not payable till after the death of the parents; there being enough in the settlements, by which the portions were provided, to show, that the character of younger child was to be ascertained by reference to the time when the portions vested, & not to the time when they became payable.—*WINDHAM v. GRAHAM* (1826), 1 Russ. 331; 38 E. R. 128.

Annotations:—Consd. *Gray v. Limerick* (1848), 2 De G. & Sm. 370. *Apld.* *Sing v. Leslie* (1864), 2 Hen. & M. 68. *Consd.* *Stanhope v. Collingwood* (1867), L. R. 4 Eq. 286. *Distd.* *Re Bayley's Settmt.* (1871), 6 Ch. App. 590. *Apld.* *Re Wise's Settmt.*, *Smith v. Waller*, [1913] 1 Ch. 41.

1414. — —.]—*Re WISE'S SETTLEMENT, SMITH v. WALLER*, No. 1433, *post*.

1415. — Exclusion by term of trust.]—Lands were settled to the use of A. for life, remainder to his eldest son B. for life, remainder to C., eldest son of B., for life, with remainder to C.'s first & other sons successively in tail, remainder to D., the second son of B., for life, remainder to D.'s first & other sons in tail, with remainders over; with a power of limiting portions in favour of the children of B. "not being & besides an eldest or other son, who, on the decease of B. & A., shall be entitled to the settled estates"; the portions to vest, in the case of sons, at twenty-one, but not to be raisable in the lifetime of A. & B., or either of them, without consent. B. died first; then C., without issue, but having attained twenty-one; then A.; whereupon D. succeeded to the estates. He had attained twenty-one in C.'s lifetime. No portion had been limited or raised:

—*Held*: neither D. nor C.'s representatives had any title under the portion trusts.—*GRAY v. LIMERICK (EARL)* (1848), 2 De G. & Sm. 370; 17 L. J. Ch. 413; 11 L. T. O. S. 533; 12 Jur. 817; 64 E. R. 166.

Annotation:—Apld. *Ellison v. Thomas* (1862), 2 Drew. & Sm. 111.

1416. — Younger child not taking under original settlement.—Estate disentailed by father & deceased elder child.]—By a marriage settlement estates were limited in strict settlement, subject to a term for raising £15,000 for the portions of all the children of the marriage, except an eldest or only son; & to be vested & paid at such times as the husband should appoint, & in default of appointment, to vest at twenty-one, but not to be paid till after the husband's death: provided that if any son should become an eldest or only son before the time appointed for payment of his portion, then & in default of any such appointment, his share should go to the other children. There was issue of the marriage two sons & three daughters. The eldest son attained twenty-one, together with his father, suffered a recovery of the estates to the use of the father for life, remainder to himself in fee. After all the younger children had attained twenty-one the eldest son died intestate & without issue, whereupon the reversion in fee of the estates descended to the other son. Afterwards the father appointed the £15,000 amongst the son & the three daughters, & directed that the shares should vest immediately, but should not be paid till after his death. The second son died before the father:—*Held*: the share of the £15,000 appointed to him did not go over to his sisters, but belonged to his estate.—*SPENCER v. SPENCER* (1836), 8 Sim. 87; 5 L. J. Ch. 310; 59 E. R. 35.

Annotations:—Consd. *Gray v. Limerick* (1848), 2 De G. & Sm. 370. *Apld.* *Macoubrey v. Jones* (1856), 2 K. & J. 684. *Consd.* *Reid v. Hoare* (1881), 26 Ch. D. 363. *Apld.* *Re Wrottesley's Settmt.*, *Wrottesley v. Fowler*, [1911] 1 Ch. 708. *Refd.* *Domville v. Wilmington* (1881), 26 Ch. D. 382.

1417. — —.]—Construction of a clause of accruer "in case of any younger son becoming an eldest or only son."

An estate was limited to A. for life, with remainder to his first & other sons in tail; & a term was created, for raising portions for younger children, to be interests vested in sons at twenty-one, but payable after the death of A.; & it was provided, that in case any of the younger sons should become an eldest or only son, his portion should accrue to the other children. A. had two sons, B. & C., & one daughter; B. attained twenty-one, suffered a recovery, whereby he destroyed C.'s estate in remainder: B. died in 1807, leaving C., an infant, to whom he devised the estate for his life. A. died in 1833:—*Held*: C. was not entitled to participate in the portion.—*PEACOCKE v. PARES* (1837), 2 Keen, 689; 6 L. J. Ch. 375; 1 Jur. 575; 48 E. R. 791.

Annotations:—N.F. *Macoubrey v. Jones* (1856), 2 K. & J. 684. *Consd.* *Reid v. Hoare* (1881), 26 Ch. D. 363.

1418. — —.]—A second son, becoming the eldest son in the lifetime of his father, who was tenant for life with remainder, subject to trusts for younger children's portions in strict settlement, was prevented from taking an interest in the bulk of the estate by reason of a disentailing deed executed by his father & elder brother:—*Held*: he was entitled to a share of the portions provided for younger children, notwithstanding a proviso for accruer in the event of a younger son becoming an eldest son; the ct. being of opinion that, in being excluded by the disentailing deed,

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he was in effect excluded by the settlement, of which the disentailing deed was necessarily an incident, & the intention was clear to exclude none from the portions who were excluded by the settlement from taking the bulk of the estate.—*MACOUBREY v. JONES* (1856), 2 K. & J. 684; 69 E. R. 957.

Annotations:—Apld. Collingwood v. Stanhope (1869), L. R. 4 H. L. 43; *Domville v. Winnington* (1884), 26 Ch. D. 382. *Consd.* Reid v. Hoare (1884), 26 Ch. D. 363. *Apld.* *Re* Wrottesley's Settlement, *Wrottesley v. Fowler*, [1911] 1 Ch. 708.

1419. ————*—A.*, on his marriage, settled real estates on himself for life, then to trustees for a term to raise portions for his younger children, & subject thereto, to his first & other sons in tail. The portions were to vest in sons at twenty-one, but to be payable after the decease of the husband & wife. G., the second son, attained twenty-one, after which W., the eldest son, having barred the entail, died without issue, & subsequently, the portions became payable:—*Held*: G., though the eldest at the period of distribution, was entitled to a share of portions for younger children *ADAMS v. BECK* (1858), 25 Beav. 618; 53 E. R. 784.

Annotation:—Apld. *Re* Wrottesley's Settlement, *Wrottesley v. Fowler*, [1911] 1 Ch. 708.

1420. ————*—C.*, who died in 1857, by deed in 1852, appointed a fund to trustees in trust for his daughter W. for life, & after her death in trust for the child or all the children, "except an eldest or only son" if more than one, of W., who should attain twenty-one or marry; & failing such trusts then over. W. died in 1883, having had four children only, viz. T., her eldest born son, who attained twenty-one in Jan. 1869, & died in Apr. following, F., who attained twenty-one in 1880, H., who attained twenty-one in 1865, & E., who died in infancy, in 1864; so that the fund vested in H., subject to let in other children, in the lifetime of the eldest born son, & before he attained twenty-one. At the date of the deed certain estates stood limited under a settlement, to which C. was a party, to the use of X., the husband of W., for life with remainder to the use of the first & other sons of X. & W. in tail male. In Mar. 1869, X. & his son T., disentailed the estates, & limited them to the appointees of both, or of the survivor. The joint power was not exercised; but after the death of T. X. by will appointed the estates to F. for life, with remainder to his sons in tail male. Upon W.'s death F. claimed half the fund, & H., the whole of it:—*Held*: (1) if the expression "eldest or only son" was to be read as referring to a son entitled under a settlement to settled estates, the time for ascertaining the excluded son would be the time for distributing the younger children's portions; but if that expression was to be read according to its natural meaning, the time of vesting would be the time for exclusion; (2) the words an "eldest or only son" *prima facie* mean an individual, & as there was an eldest son in existence when the provision vested in H. the clause of exclusion applied to him, & its operation was exhausted, so that any other son who attained twenty-one was entitled to take; F. was entitled to one-half of the fund.

—*DOMVILLE v. WINNINGTON* (1884), 26 Ch. D. 382; 53 L. J. Ch. 782; 50 L. T. 519; 32 W. R. 699.

Annotation:—As to (1) *Reid*. *Shuttleworth v. Murray*, [1901] 1 Ch. 819.

1421. ———— *Succession by descent.*—*SING v. LESLIE*, No. 1391, *ante*.

1422. ———— *Settlement by parent or person in loco*

parentis.—(1) The rule, that a limitation in favour of younger children will not operate in favour of a younger child who becomes an eldest son & succeeds to the estates, is confined to cases where the provision is made by a parent or a person *in loco parentis*.

Where, in a marriage settlement, the husband covenanted to pay £10,000 for the children of the marriage; & for want of such children, for the children of the wife by a former marriage, other than A., her eldest son, as the husband should appoint; & in default, for all who should attain twenty-one, equally, or, if only one, then for such one younger child:—*Held*: the wife could not be considered as purchasing the provision in such a sense as to make her the settlor; & the settlement was not by a person *in loco parentis*.

(2) In cases of provisions made by strangers, the time for ascertaining the class of younger children is in general the period of vesting, not the period of distribution as in settlements by parents.—*SANDEMAN v. MACKENZIE* (1861), 1 John. & H. 613; 30 L. J. Ch. 838; 5 L. T. 175; 7 Jur. N. S. 1231; 70 E. R. 889.

Annotations:—As to (1) *Apld.* *Shuttleworth v. Murray*, [1901] 1 Ch. 819. *As to* (2) *Reid*. *Domville v. Winnington* (1884), 26 Ch. D. 382.

1423. ———— *Younger child dying before taking possession.*—*SING v. LESLIE*, No. 1391, *ante*.

1424. ———— *Mortgage of portion by younger child—Father joining in mortgage.*—Testator by his will settled real estates on his daughter for life with remainder to her first & other sons successively in tail male with remainders over, & with power for her on her marriage, by deed to limit a life estate to her husband & to charge £6,000, on the estates as portions for her younger children, to be payable at such times or time & in such manner as she should by deed appoint, & in default of appointment to be divided equally amongst such younger children to become vested interests in sons at twenty-one & in daughters at twenty-one or marriage.

In 1845 the daughter married, & by her marriage settlement a life estate was given to the husband & a term of years was limited upon trusts, in the events which happened, after the death of the survivor of the husband & wife to raise the portions to vest in & be payable to younger sons at twenty-one & daughters at that age or marriage, but payment to be postponed until the death of the survivor of the husband & wife, unless the husband should signify in writing that the same should be sooner paid. There were three children, two sons & a daughter, all of whom attained twenty-one before 1882, when the mother died. In 1897, W., the younger son, mortgaged his portion, £3,000, the father joining in the mtge. deed to signify that the sum should be raisable immediately. In 1900 W., on the death of his elder brother without issue, became the eldest son, & in 1905, on the death of the father, succeeded to the estates as tenant in tail, & afterwards died without issue. The question then arose whether W.'s estate was entitled to have the £3,000, raised & paid:—*Held*: upon the construction of the will & settlement & in the events which happened the wife's power of appointment among younger children had not been exercised in favour of W. & his estate was not entitled to the £3,000.—*Re STAWELL'S TRUSTS*, *POOLE v. RIVERSDALE*, [1909] 2 Ch. 239; 78 L. J. Ch. 677; 101 L. T. 49; 53 Sol. Jo. 542, C. A.

1425. *Right of representatives of deceased eldest son to share—Death before time appointed for*

raising portions.—(1) By a settlement, a sum of money was to be raised after the death of the settlor & another person for all the children of the settlor's son, other than an eldest or only son, for the time being entitled to certain other property. The eldest grandson died before the period when the amount could be raised or he became entitled to the other property:—*Held*: his representative was entitled to share in the fund to be raised for the younger children.

(2) "Eldest son for the time being" denotes not the person who was actually the eldest son at the date of the deed, but that individual who at a particular future period, that is, when the money is directed to be raised, might be the eldest son.—*ELLISON v. THOMAS* (1862), 1 De G. J. & Sm. 18; 1 New Rep. 37; 32 L. J. Ch. 32; 7 L. T. 342; 8 Jur. N. 1139; 11 W. R. 56; 46 E. R. 7, L. C.

Annotations:—As to (1) *Apld.* *Davies v. Huguenin* (1863), 1 Hem. & M. 730. *Folld.* *Swinburne v. Swinburne* (1868), 17 W. R. 47. *Consd.* *Collingwood v. Stanhope* (1869), L. R. 4 H. L. 43. *Apld.* *Re Cavendish's Settlement*, *Grosvenor v. Butler* (1912), 106 L. T. 510. *Refd.* *Sing v. Leslie* (1864), 2 Hem. & M. 68; *Reid v. Hoare* (1884), 26 Ch. D. 363. As to (2) *Consd.* *Collingwood v. Stanhope* (1869), L. R. 4 H. L. 43. *Apld.* *Re Stawell's Trusts*, *Poole v. Riversdale*, [1909] 1 Ch. 534. *Generally, Refd.* *Domville v. Winnington* (1884), 50 L. T. 519.

1426. ———.—*SWINBURNE v. SWINBURNE*, No. 1405, *ante*.

1427. ———.—**Effect of prior mortgage by eldest son—To full extent of possible portion.**—A person who is to be excluded from sharing in a portions fund by reason of his being, at a particular time, the eldest son entitled to a settled estate, is ordinarily entitled, if he dies before that time, to share as if he were a younger child; but he is not so entitled when he has concurred, as remainderman in tail, in disentailing the estate & in raising by mtge. thereof money out of which he received a sum equal in value to a younger child's aliquot share of the fund, as he then would, in effect, be taking a double portion. *Qu.*: whether it is material that such eldest son should receive a substantial amount of the sum raised, in order to exclude him.—*Re FITZGERALD'S SETTLED ESTATES*, *SAUNDERS v. BOYD*, [1891] 3 Ch. 394; 60 L. J. Ch. 624; 65 L. T. 242; 40 W. R. 29.

(c) *Period for Ascertaining Eldest or Younger Child.*

1428. Whether period fixed for distribution.—*ELLISON v. THOMAS*, No. 1425, *ante*.

1429. ———.—In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund. In such a case "eldest" is not solely senior in age. A. was, under a will, tenant for life of an estate, remainder to his first & other sons in tail. On A.'s marriage a settlement was executed by which a fund was created & vested in trustees for the husband & wife for life, & after the decease of the survivor for the benefit of the children of the marriage, "other than & except an eldest son entitled under the will to an estate in tail male in possession or remainder immediately expectant on the death of A." There was a power of appointment in this husband & wife, & in the survivor of them. There were three children of the marriage—a son & two daughters. No joint appointment was made. The wife died. The

son, on attaining twenty-one, joined with his father in barring the entail & resettling the estate, which was settled on the father for life, on the son for life, & on the sons of the son in tail. The father appointed one moiety of the trust fund to a daughter on her marriage. No appointment was made of the other moiety. On the death of the father the son claimed a share of the trust fund:—*Held*: though the character of eldest son was to be ascertained at the time of distribution of the fund, the son here was to be treated as the "eldest son entitled under the will," & consequently was not entitled to a share of the trust fund, for that his resettlement of the estate, & his taking under such resettlement an estate different from that given by the will, had in no way affected the character of "eldest son entitled under the will" which belonged to him when he came of age.

Although it should be, in terms, said in the settlement that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child, the first born, does not take the family estate, it has been held that, the family estate going to a younger son, which I also ought, indeed, to have mentioned as a leading part of that same system of exposition, the Ct. of Ch. does not regard the elder born as the elder son, but regards the younger brother who is in possession of the family estate, as the elder, & the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children (*LORD HATHERLEY, C.*).—*COLLINGWOOD v. STANHOPE* (1869), L. R. 4 H. L. 43; 38 L. J. Ch. 421; 17 W. R. 537, H. L.; *varying* *S. C. sub nom. STANHOPE v. COLLINGWOOD* (1867), L. R. 4 Eq. 286.

Annotations:—*Consd.* *Reid v. Hoare* (1884), 26 Ch. D. 363; *Re Pritchard, Pritchard v. Williams* (1889), 42 Ch. D. 590; *Shuttleworth v. Murray*, [1901] 1 Ch. 819; *Law Union & Crown Insee. v. Hill*, [1902] A. C. 263. *Refd.* *Re Bayley's Settlement*, (1871), 6 Ch. App. 590; *Carter v. Duke* (1871), 41 L. J. Ch. 153; *Domville v. Winnington* (1884), 26 Ch. D. 382; *Re Fitzgerald's S. E. Saunders v. Boyd*, [1891] 3 Ch. 394; *Re Bankes, Allison v. Bankes* (1909), 101 L. T. 778; *Re Stawell's Trusts, Poole v. Riversdale*, [1909] 1 Ch. 534; *Re Cavendish's Settlement, Grosvenor v. Butler* (1912), 106 L. T. 510.

1430. ———.—**Or time of vesting.**—*WINDHAM v. GRAHAM*, No. 1113, *ante*.

1431. ———.—*SANDEMAN v. MACKENZIE*, No. 1422, *ante*.

1432. ———.—*DOMVILLE v. WINNINGTON*, No. 1420, *ante*.

1433. ———.—By a marriage settlement made in 1828 real estate was limited to trustees upon trust to raise portions for the younger children of the marriage, such portions to vest at twenty-one in the case of sons, or, in the case of daughters, at twenty-one or marriage under that age. The settlement further provided that if any of the children for whom portions were intended, being a son or sons, should die under twenty-one "or should, before attaining such age, become an eldest or only son," then the share in the portions fund of the child so dying, or of the son so becoming an eldest or only son, was to go to the survivors or survivor who should live to attain a vested interest therein. G., a younger son of the marriage, in whom a share in the portions fund became vested by his attaining twenty-one in his father's lifetime, subsequently became the eldest son by the death of his elder brother in the lifetime of his father:—*Held*: according to the true construction of the settlement, G. was a

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younger son for the purpose of participating in the portions fund, the position of the son in the family having to be determined at the moment when his share vested.—*Re WISE'S SETTLEMENT, SMITH v. WALLER*, [1913] 1 Ch. 41; 82 L. J. Ch. 25; 107 L. T. 613; 57 Sol. Jo. 28.

SUB-SECT. 4.—AMOUNT OF PORTIONS.

1434. Amounts ranging according to number of younger children—Death of one or more of children entitled—Whether amount paid to survivors dependent on number.]—*GREAVES v. MATTISON* (1682), T. Jo. 201; 84 E. R. 1216; *sub nom. GRAVES v. MADDISON*, Skin. 38.

*Innotations:—*Distd. *Reresby v. Newland* (1722), 2 P. Wms. 93. *Consd. Bromo v. Berkley* (1728), 2 P. Wms. 484; *Stanley v. Stanley* (1737), West. temp. Hard. 135. *Dtd. Adams v. Danvers* (1755), 9 Mod. Rep. 486. *Consd. Codrington v. Foley* (1801), 6 Ves. 361. *Refd. Corbet v. Maydewell* (1710), 3 Rep. Ch. 190; *Butler v. Duncomb* (1718), 1 P. Wms. 418; *Hebblethwaite v. Cartwright* (1734), *Consd. Talb. 31*; *Hall v. Carter* (1742), 2 Atk. 354; *Stevens v. Dethick* (1713), 3 Atk. 39; *Clinton v. Seymour* (1799), 4 Ves. 410.

1435. ————.]—*WILLIS v. WILLIS*, No. 1651, *post*.

1436. ————.]—Trusts for raising portions in marriage arts. were as follows: If there should be but one child of the marriage other than an eldest or only child, then to levy & raise the sum of £8,000 for the portion of such child; if there should be two such children, then to levy & raise the sum of £12,000 for the portions of such children; & if there should be three or more such children, then the sum of £15,000 for the portion or portions of such children; the sum of £8,000 to be paid to such one child & the other sums to such children as the husband & wife should jointly appoint; in default, as the survivor should appoint; in default, to become a vested interest in such child or children, being a son or sons, at twenty-one, or being a daughter or daughters at twenty-one, or marriage. If the husband should survive the wife, the portion not to be payable until after his decease. Powers were also contained in the arts. for raising any part of the portion or portions for advancement; & during the suspense of vesting, of raising interest on the portions for maintenance & education.

There were three younger children of the marriage, two of whom died in infancy. The husband survived the wife, & the present petitioner, a daughter, now the sole surviving younger child, was a married woman:—*Held*: as there were three younger children born, the only part of the trust which could come into operation was that which related to the sum of £15,000; & petitioner was entitled to a portion of £15,000.—*HEMMING v. GRIFFITH, GRIFFITH v. HEMMING* (1860), 2 Giff. 463; 2 L. T. 592; 6 Jur. N. S. 745; 8 W. R. 687; 66 E. R. 168.

*Annotation:—**Refd. Henty v. Wrey* (1882), 21 Ch. D. 332.

1437. ————.]—Tenant for life of real estates, being empowered by the settlement to charge by deed or will for portions for younger children of his, by any woman he might marry,

any sum not exceeding, if there should be but one such child or two such children, & no more, £3,000; if three & no more £4,000; & if four or more, £5,000, "to vest in, be paid to, or divided amongst the child or children respectively for whom the same respectively shall & may be charged, or to or among him, her, them & his, her or their respective issue," at such ages or times, "with such maintenance meanwhile," as he should appoint by his marriage settlement, dated in 1829, in exercise of the power, charged the estates with the payment for younger children of the marriage, if there should be but one such child, or two children, & no more of £3,000; if three, & no more, of £4,000, & if four or more of £5,000, "to vest in & be paid to such children respectively, or in & to any one or more of them" exclusively, at such ages or times, in such shares & proportions, & with such yearly sums for maintenance "until their respective portions shall become payable" as he should by deed or will appoint & in default of appointment, the sum so charged to be equally divided between & amongst such younger children, "to become a vested interest in such of them, as" being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry, which should first happen. If any younger child should die under twenty-one or being a daughter, without being married, then the portion of such child, original & accruing, was to accrue & belong to the survivors or survivor, others or other of the younger children. There were issue of the marriage three daughters & two sons. One daughter died under twenty-one, & unmarried; & a second died leaving issue. After the death of both, the husband, having survived the wife, appointed £5,000, as to £2,500 for the surviving daughter, as to £2,000 for one of the sons, & as to £500 for the two infant children, of whom one had since died, of the deceased daughter:—*Held*: in the events that had happened, the whole sum of £5,000 had become appointable under the power; & the interest of the £500 was applicable for the benefit of the grandchild during her minority.—*KNAPP v. KNAPP* (1871), L. R. 12 Eq. 238; 24 L. T. 540.

1438. — One child of marriage—Appointment of larger sum—Along with additional sum.]—*PHIPPS v. MULGRAVE (LORD)*, No. 1351, *ante*.

1439. Deficiency in value of portions—Direction to pay according to seniority—Payment in equal shares.]—A. B., a widower, settles land to raise £100 a year for his eldest son, & £100 a piece for his younger children, & afterwards he marries again, & has children by his second wife.

Decreed the children by the second wife were equally entitled with the other younger children.

Though the portions of the younger children were by the settlement to be paid according to their seniority, yet in case of a deficiency they shall be paid in average.

The portions of the younger children who died in the life of their father, not to be raised in favour of the administrators. Otherwise if any of the daughters had married in the life of their father, & afterwards died.—*BRATHWAITE v. BRATHWAITE* (1685), 1 Vern. 334; 23 E. R. 503, L. C.

1440. — Liability of tenant for life to pay—Rights against settlors estate.]—A. on the marriage of his son, settles lands, which he covenants to be

PART IX. SECT. 5, SUB-SECT. 4.

1434 i. Amounts ranging according to number of younger children—Death of one or more of children entitled—Whether amount paid to survivors dependent on number.]—*VANE v. DUNGAN-*

NON (LORD) (1804), 2 Sch. & Lef. 118. —IR.

1434 ii. ————.]—*CLARKE v. JESSOP* (1844), Drury temp. Sug. 301. —IR.

1434 iii. ————.]—*STUART v. CASTLESTUART (LORD)* (1858), 8 L. Ch.

R. 408.—IR.

1434 iv. ————.]—*RYE v. RYE* (1878), 1 L. R. Ir. 413.—IR.

1434 v. ————.]—*DUNCOMBE v. LEINSTER (DUKE)* (1907), 42 L. L. T. 33.—IR.

£800 *per annum*, reserving to himself a power of charging the same with £1,200 for the portions of his younger children. A. charged the estate with only £800, but because the value of the lands was defective, the son refused to pay these portions:—*Held*: the portions were well charged, as they only amounted to a moiety of what the father had power to charge, & if there was a deficiency in the value of the lands, the son ought to sue upon the covenant for satisfaction, out of his father's assets.—*ORMSBY v. DODWELL* (1702), 6 Bro. Parl. Cas. 41; 2 E. R. 919, II. L.

1441. Different amounts payable by settlement—Subsequent devise of lands to portionists equally.—*TEVIOT (VISCOUNT) v. SPENCER (LADY)* (1689), 2 Eq. Cas. Abr. 350; Prec. Ch. 5; 22 E. R. 298.

1442. Trust to raise sum for portions—Subsequent trust to raise similar sum on failure of issue male—Daughter becoming heir-at-law—One sum payable.—On marriage, lands are settled on A. for life, remainder to the first, etc., son of the marriage in tail male, remainder to trustees for five hundred years, to raise £5,000 portions for daughters, payable at eighteen or marriage, remainder to A. in fee. After the marriage A. settles other lands, & a term is created for raising the like sum of £5,000 for daughters on failure of issue male, payable at sixteen, or marriage. A. dies leaving a daughter his heir at law, who attains eighteen & dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughter's exors., & is disposable by her will; but there shall be but one £5,000 raised.—*THOMAS v. KEMEYS* (1696), 2 Vern. 348; Freem. Ch. 207; 23 E. R. 821, L. C.; *affd.* (1701), Colles, 112, H. L.

Annotations:—*Consd.* Saville v. Saville (1719), 11 Mod. Rep. 327; Compton v. Oxenden (1793), 4 Bro. C. C. 397. *Refd.* Best v. Stamford (1705), Freem. Ch. 288; Chandos v. Talbot (1731), 2 P. Wms. 601; Price v. Seys (1740), Barn. Ch. 117; Johnson v. Smith (1749), 1 Ves. Sen. 311; Chester v. Willes (1751), Amb. 216; Warren v. Warren (1783), 1 Bro. C. C. 305; Forbes v. Moffatt, Moffatt v. Hammond (1811), 18 Ves. 381; Powell v. Grigby (1835), 3 Cl. & Fin. 103.

1443. Trust for certain sum if only one daughter—Smaller sums to each of other younger daughters.—In a marriage settlement it was agreed, that if there should be but one daughter, she should have £500 for her portion; & that £200 a piece should be paid to every of the other younger daughters. There were three daughters of the marriage, & the eldest claimed to be entitled to a portion of £500, but held, that she was only entitled to a portion of £200.—*CHAMBERLAIN v. WHITE* (1720), 6 Bro. Parl. Cas. 60; 2 E. R. 933, II. L.

1444. Power to appoint to children living at death of appointor—Appointment of equal sums—Death of child in lifetime of appointor—Survivor entitled to whole.—*GARNIER v. COWPER, LEHEUPS v. GARNIER* (1732), 2 Eq. Cas. Abr. 619; 22 E. R. 544.

1445. Power to appoint sum not exceeding certain amount—Provision for larger aggregate sums in default of appointment—Shares of children dying to go to survivors—Larger sum payable.—A. settles his estate to his sister B. for life, remainder to her second & other sons in tail, etc., & gives her a power with the consent of C. her husband & for C. surviving B., to charge it with a sum not exceeding £12,000 for their children; & if they or the survivor of them do not appoint the provision, then £2,000 each to be raised for younger sons, & £3,000 each for daughters, at their ages of twenty-one, with interest at £5 per cent. for their maintenance to commence from the time of the appointment; & if no appointment, then from

the death of the survivor of B. & C., & if any of the younger children die before their shares become payable, the same to go to the survivors. A. dies, C. dies, leaving four younger sons & two daughters: one of which died an infant soon after her father; then B. dies without making any appointment, the whole £14,000 shall be raised, & carry interest only from the death of B.—*ROLT v. ROLT* (1735), Cas. temp. Talb. 189; 25 E. R. 731, L. C.

1446. Settlement varied by private Act.—By settlement, estates were limited to A. for life, with remainder to trustees for a term of years, for raising £4,000 for the portions of his younger children, remainder to his first & other sons in tail male. There was one son, B., & two daughters, C. & D. By Act of Parliament passed during the children's minority, the estates were vested in trustees in fee, discharged from the uses of the settlement, upon trust to raise by mtge. or sale, the expenses of the Act, & of the trusts, & afterwards certain portions affecting the estate prior to the settlement, & private debts of A. to a large amount & to convey the unsold estates, & the equity of redemption of those which should be mortgaged, to the uses of the settlement. Under this Act the estates were mortgaged in fee for £41,386 to E., who having died largely indebted to the Crown, & it appearing that the former Act was obtained by false representations, it was provided by another Act, that if on payment of £25,000 into the Exchequer, the real & personal representatives of E. should convey the estates to some person to be approved by B., who had then succeeded to the estate, the estates should be vested in such person, discharged of all claims of E. & of the Crown, to the intent to secure the repayment of the money so paid into the Exchequer, to the person advancing the same, & subject thereto, in trust for securing such proportionable provision for C. & D. as they should be entitled to in respect of the portions originally secured upon the settled estates, & subject thereto in trust for B. The money was paid into the Exchequer, & the estates conveyed accordingly:—*Held*: C. was entitled to a full half of the £4,000 with interest from A.'s death, & was not bound to contribute towards payment either of the £25,000 or the expenses incurred in obtaining or executing the Acts of Parliament.—*HANSARD v. KEMEYS* (1819), 2 Wils. Ch. 106; 37 E. R. 248.

1447. Power to appoint shares—Release by child for whom provision made—Exercise of power excluding child provided for—Other children entitled to whole fund.—A father being tenant for life under his marriage settlement, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, & by a codicil revoked the appointment in his will, so far as it respected her:—*Held*: her share did not sink into the freehold, or belong to his residuary legatee, but the other younger children were entitled to the whole fund.—*NOEL v. WALSHINGHAM (LORD)* (1824), 2 Sim. & St. 99; 3 L. J. O. S. Ch. 12; 57 E. R. 283.

Annotation:—*Consd.* Lee v. Head (1855), 1 K. & J. 620.

1448. Trust to raise certain sums—Partial appointment in favour of one portionist—Right of appointee to share in unappointed fund.—*WALMSLEY v. VAUGHAN*, No. 1034, *ante*.

Presumption against double portions.—See *EQUITY*, Vol. XX., pp. 453-478.

Sect. 5.—Portions: Sub-sects. 5 & 6, A. & B.]

SUB-SECT. 5.—PRIORITIES OF PORTIONS.

1449. As against mortgagees.]—WALLIS v. CRIMES (1662), 1 Cas. in Ch. 89; 22 E. R. 708.

Annotations.—**Refd.** Fry v. Porter (1669), 1 Cas. in Ch. 138; Albemarle's Case (1692), 2 Rep. Ch. 417; Bath & Mountague's Case (1693), 3 Cas. in Ch. 55; Marks v. Marks (1718), 1 Stra. 129; Blake v. Luxton (1815), Coop. G. 178.

1450. — Effect of notice.]—A subsequent lease made to one by way of mtge., who had notice of a prior lease made for raising children's portions, was set aside.—ALDRIDGE v. DUKE (1679), Cas. temp. Finch, 439; 23 E. R. 239.

1451. — —.]—FOUR v. TYNTE, No. 1246, ante.

1452. —.]—M. had three daughters, & in the case of two of them, D. & R., he secured by bond or covenant on their respective marriages the payment of a portion of £5,000 after his death to the trustees of their marriage settlements, & an annuity until the £5,000 became payable. By his will M. gave to his third daughter E., then unmarried, an annuity for life, & in case she should marry he gave a portion of £5,000 for her children attaining twenty-one, & he charged all the three sums of £5,000 on his real estate. The real estate was settled by the will. In 1880 the tenant for life, who was also legal personal representative of M., commenced an action to get the real estate cleared of the charges. Defts. to that action were the remaindermen. The two portions given to D. & E. were then raisable, & an order was made that those portions should be raised by a mtge. of the estate to be settled by the judge, together with a sum paid for the enfranchisement of certain copyholds, part of the estate. The annuitant R. & the portioners were served with notice of the judgment. The mtge. was executed, & the money paid into ct. & distributed amongst the persons entitled. The mtge. was made by the tenant for life, who was appointed to execute the mtge. for the purpose of conveying the interests of the remaindermen. It contained a recital of the proceedings in the action, & was expressed to be without prejudice to any charge subsisting in the mtged. property under the will. The mtgee. brought an action for a declaration that his mtge. took priority over the third portion:—**Held**: the course of the proceedings & the orders made showed that the ct. in authorising the mtge. had not intended to interfere with the annuity of R., or the portion raisable for her children, & the mtgee. did not as regards the money advanced other than the enfranchisement money, take priority over that annuity & portion.—NIGHTINGALE v. REYNOLDS, [1903] 2 Ch. 236; 72 L. J. Ch. 564; 88 L. T. 654; 52 W. R. 1, C. A.

1453. — Covenant by mortgagors for quiet enjoyment.]—NOTTIDGE v. DERING, RABAN v. DERING, No. 1357, ante.

1454. As against jointress.]—A. charges land in D. with a portion for a daughter by a first venter, & then marries, & settles part of these lands for the jointure of a second wife, who has no notice of the charge. A. believing the portion would take place of the jointure, by will gives other lands in E. in lieu thereof.

The wife by combination with the heir refuses to accept the devise. Decreed the daughter should hold the lands in E. till her portion was paid.—

REEVE v. REEVE (1683), 1 Vern. 219; 23 E. R. 426; *sub nom.* REEVE'S CASE, 2 Vent. 363.

Annotations.—**Consd.** Burgoyne v. Benson (1738), West temp. Hard. 340. **Refd.** Lanoy v. Athol (1742), 2 Atk. 444; Whittaker v. Whittaker (1792), 4 Bro. C. C. 31.

1455. —.]—BEALE (OR BEAL) v. BEALE (OR BEAL) (1715), Gilb. Ch. 93; Prec. Ch. 405; 25 E. R. 64, L. C.

1456. —.]—By a marriage settlement, estates were limited to A. for life, with remainder to trustees for six hundred years, to be computed from the decease of A., in trust, to raise portions for younger children, with remainder to his first & other sons successively in tail. Power was given to A. to create a rentcharge in favour of any second wife, & to grant the estate for a term of years, to take effect immediately after his decease, for the purpose of securing it:—**Held**: the term of one hundred years, created in pursuance of this power, was not concurrent with, but took priority over, the term of six hundred years; & the person in whom the term of one hundred years was vested might sue alone, without joining the trustee of the term of six hundred years.—BAILEY v. TENNANT (1856), 11 Exch. 776; 156 E. R. 1045.

1457. As against creditors.]—Trust for raising portions & maintenance for children & for payment of debts by sale of lands. The maintenance of the children shall be paid for before the debts.—BELLS (SIR ROBERT) v. BELLS (SIR JOHN) (1673), Cas. temp. Finch, 88; 23 E. R. 47.

1458. As against purchaser with notice.]—TUCKER v. SEARLE (1680), 2 Rep. Ch. 173; 21 E. R. 649.

SUB-SECT. 6.—TIME FOR RAISING PORTIONS.

A. In General.

1459. Question of construction — Intention of parties.]—CODRINGTON v. FOLEY (LORD), No. 1477, post.

1460. — —.]—SMYTH v. FOLEY, No. 1474, post.

1461. — —.]—(1) Where portions for younger children are created, if their interests are vested, & the contingencies have happened on which the portions are to be paid, interest on them is payable, & the portions must be raised, although the only means of raising them may be the sale or mtge. of a reversionary term. The intention of the parties creating the portions is to govern.

(2) But if the principal is not raisable till the death of the survivor of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time, except on express words.

(3) The question as to the time when portions become payable is one of construction, & when according to that construction the period has arrived when the portion is directed to be raised & paid, this must be done although it can only be done by a waste of property, & sale or mtge. of a reversionary term.

(4) A portion is not properly said to be payable by trustees until two things have occurred, namely, when the time appointed for raising has arrived, & when the person entitled is able to give a discharge; but a portion is often said to be payable to a child so soon as the event has happened which gives the child a vested interest in it.—MASSY v. LLOYD (1863), 10 H. L. Cas. 248; 8

PART IX. SECT. 5, SUB-SECT. 5.

1454 i. As against jointress.]—Re ARMSTRONG, [1895] 1 I. R. 87.—IR.

1457 i. As against creditors.]—Re

JONES'S ESTATE (1852), 2 I. Ch. R. 544.—IR.

i. How determined.]—The priority of annuities & of portions appointed

under a power & secured by a term, determined by the position of the term in the original deed creating them.—BEVAN v. BEVAN (1883), 13 L. R. Ir. 53.—IR.

L. T. 122; 9 Jur. N. S. 391; 11 W. R. 484; 11 E. R. 1021, H. L.

Annotation:—*As to* (1) *Consd. Re Glsborough's S. E.*, [1921] 2 Ch. 39.

1462. On arrival of time appointed—Though waste of property involved.—*MASSY v. LLOYD*, No. 1461, *ante*.

1463. When portionist capable of giving discharge.—*MASSY v. LLOYD*, No. 1461, *ante*.

1464. Portion charged in reversionary term—Whether term must first come into possession.—The portions charged on a reversionary fund shall not, in general, be raised till the term comes into possession; yet when it is expressly directed, under a power, that they shall be raised as soon as conveniently may be, they shall bear interest from the death of testator.—*CONWAY v. CONWAY* (1791), 3 Bro. C. C. 267; 29 E. R. 529, L. C.

Annotation:—*Dbtd. Codrington v. Foley* (1801), 6 Ves. 364.

1465. Delay in raising portions—Whether portionists barred by lapse of time.—*YOUNG v. WATER-PARK (LORD)*, No. 1370, *ante*.

1466. Interest of owner of estate to be considered—As well as portionist.—Trustees of a term for raising portions by sale or mtge. or by "any other reasonable means," with power in their discretion to postpone the raising of the same, are bound to take into account the interests of the persons entitled to the estate as well as the interests of the portioners.

Testator, in exercise of a power contained in a settlement to appoint portions to the amount of £25,000, appointed the estate to trustees for a term of one thousand years on trust upon the death of a tenant for life, who died in 1915, to raise the portions by mtge. or sale of the hereditaments, or by receipt of the income thereof, or by sale of timber or minerals, or by any other reasonable means, with power in their discretion to postpone the raising of the same. The trustees of the term found that the only practicable way of raising the portions immediately was by mtge. at the rate of 6 per cent. The total value of the estate & capital moneys was estimated at some £171,000. The present tenant for life objected to the immediate raising of the portions & offered to increase the rate of interest on the portions from 4 to 5 per cent. as a condition of postponing the raising of the portions. On a summons for directions taken out by the trustees of the term:—*Held*: the trustees of the term ought to have regard to the interests of the persons entitled to the estate as well as to the interests of the portioners, & under the circumstances the ct. gave liberty to the trustees to postpone the raising of the portions for the period of one year if & so long as the tenant for life paid the increased rate of interest, with liberty to apply at the end of the year.—*Re SANDYS, UNION OF LONDON & SMITHS BANK v. LITCHFIELD*, [1916] 1 Ch. 511; 85 L. J. Ch. 418; 114 L. T. 690; 32 T. L. R. 355.

Annotation:—*Refd. Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379.

Postponement.—*See* Sub-sect. 6, E., *post*.

B. Where Period Fixed.

1467. Whether raisable in lifetime of parent—Where term limited in remainder after parent's death.—*GREAVES v. MATTISON* (1682), T. Jo. 201; 84 E. R. 1216; *sub nom.* *GRAVES v. MADDISON*, Skin. 38.

Annotations:—*Distd. Corbet v. Maydewell* (1710), 3 Rep. Ch. 190; *Butler v. Duncomb* (1718), 1 P. Wms. 448;

Reresby v. Newland (1722), 2 P. Wms. 93; *Hebblethwaite v. Cartwright* (1734), *Cas. temp. Talb.* 31; *Stanley v. Stanley* (1737), *West temp. Hard.* 135; *Consd. Stevens v. Dethick* (1743), 3 Atk. 39. *Dbtd. Adams v. Danvers* (1755), 9 Mod. Rep. 486. *Consd. Clinton v. Seymour* (1799), 4 Ves. 440; *Codrington v. Foley* (1801), 6 Ves. 364. *Refd. Brome v. Berkley* (1728), 2 P. Wms. 481; *Hall v. Carter* (1742), 2 Atk. 354.

1468. ————]—*HELLIET v. JONES* (1689), 1 Eq. Cas. Abr. 337; 21 E. R. 1085.

Annotation:—*Refd. Corbett v. Maydewell* (1710), 2 Vern. 655.

1469. ————]—By marriage settlement a term is limited to raise £5,000 if but one daughter to be paid at twenty-one or marriage, which should first happen after the death of the father & mother, or within six months after either of those days or times. There being one daughter only, & she having attained twenty-one, & her father being dead her portion was decreed to be raised in the lifetime of her mother.—*GERRARD v. GERRARD* (1703), 2 Vern. 458; 1 Eq. Cas. Abr. 337; 23 E. R. 894; *sub nom.* *GERARD v. GERARD*, *Freem.* Ch. 271.

Annotations:—*Consd. Corbet v. Maydewell* (1710), 3 Rep. Ch. 190. *Distd. Butler v. Duncomb* (1718), 1 P. Wms. 448.

Dbtd. Adams v. Danvers (1755), 9 Mod. Rep. 486. *Refd. Brome v. Berkley* (1728), 2 P. Wms. 481; *Stevens v. Dethick* (1743), 3 Atk. 39.

1470. ————]—A term limited in remainder after the father's death, in trust for raising daughters' portions at such an age or marriage, when either happens the portions may be raised in the father's lifetime. So if on contingency & the contingency happens in the life of the father; but not before the contingency happened.

The daughter must be a daughter unmarried or unprovided for at the time of the father's death, which is a contingency not yet happened (*LORD COWPER, C.*)—*CORBETT v. MAIDWELL* (1710), 1 Salk. 159; 3 Rep. Ch. 190; 1 Eq. Cas. Abr. 337; 2 Vern. 640, 655; 91 E. R. 147, L. C.

Annotations:—*Distd. Butler v. Duncomb* (1718), 1 P. Wms. 448. *Consd. Reresby v. Newland* (1722), 2 P. Wms. 93; *Hall v. Carter* (1724), 2 Atk. 354. *Distd. Brome v. Berkley* (1728), 2 P. Wms. 481; *Hebblethwaite v. Cartwright* (1734), *Cas. temp. Talb.* 31. *Consd. Stanley v. Stanley* (1737), *West temp. Hard.* 135; *Stevens v. Dethick* (1743), 2 Atk. 39; *Adams v. Danvers* (1755), 9 Mod. Rep. 486. *Distd. Churchman v. Harvey* (1757), *Amb.* 335. *Consd. Smith v. Evans* (1766), *Amb.* 834; *Clinton v. Seymour* (1799), 4 Ves. 440; *Codrington v. Foley* (1801), 6 Ves. 364. *Refd. Pierpoint v. Cheney* (1718), 1 P. Wms. 488; *Worsley v. Granville* (1751), 2 Ves. Sen. 331.

1471. ————]—A term is limited in remainder after the death of a man & his wife, to raise daughters' portions at eighteen or marriage. One of the daughters attains that age after the death of her father. Decreed that the portion should be raised in the mother's lifetime.—*COTTON v. COTTON* (1738), 3 Y. & C. Ex. 149, n.; 7 L. J. Ex. Eq. 41; 160 E. R. 651.

Annotation:—*Consd. Smyth v. Foley* (1838), 3 Y. & C. Ex. 142.

1472. ————]—On a settlement previous to a marriage, the trust of a term was, in case the husband should have no issue male, & there should be issue daughters, etc., to raise, if two daughters £25,000 to be paid to them when they attain twenty-one or are married, but not to be raised till after the death of their grandfather. The father died & left issue two daughters, only, the grandfather since is dead; the bill is brought by plff. in the right of his wife, one of the daughters, for £12,500, with interest for same from the time of the marriage:—*Held*: the portion vested on the marriage upon the words of the settlement, & interest was due from the

PART IX. SECT. 5, SUB-SECT. 6.—B.

14671. Whether raisable in lifetime of parent—Where term limited in remainder after parent's death.—*WHALEY v. MORGAN* (1839), 2 Dr. & Wal. 330.—*IR.*

Sect. 5.—Portions: Sub-sect. 6, B. & C.]

time of the marriage.—*LYON v. CHANDOS* (DUKE) (1746), 3 Atk. 416; 26 E. R. 1040, L. C.

Annotation:—Expld. *Clinton v. Seymour* (1799), 4 Ves. 440.

1473. ———.]—Estate settled on husband & wife for life, & then to trustees for a term to raise portions for daughters, by leasing, assigning, or mortgaging. The husband dies, leaving daughters at his death, & no issue male. The portions shall be raised in the life of the mother, out of the reversion.—*SMITH v. EVANS* (1766), Amb. 633, App. M. 834; 27 E. R. 410, 523, L. C.

Annotation:—Consd. *Codrington v. Foley* (1801), 6 Ves. 364.

1474. ———.]—Under a marriage settlement lands were limited to the use of the intended husband for life, with remainder to trustees to preserve the contingent remainders, with remainder to the intended wife for life, with remainder to trustees for the term of five hundred years, with remainder to the first & other sons of the marriage successively in tail, with remainder to the daughters in tail, & the trusts of the term were declared to be for raising portions for the younger children at twenty-one, by sale or mtge. of the term.

The marriage took effect, & the wife died, leaving her husband & several children of the marriage, both sons & daughters, surviving her, who all attained the age of twenty-one:—*Held*: the younger children were entitled to have their portions raised by sale or mtge. of the term in the lifetime of their father, the tenant for life.

In the construction of marriage settlement, etc. of equity will decline to act upon any views of the expediency or in expediency of the provisions in such settlements.

I take the rule . . . to be this, that where a term is limited in remainder to commence in possession after the death of the father, yet if the trust is to raise a portion payable at a fixed period, the child shall not wait for the death of the father before the portion is raised, but at the fixed period may compel a sale of the term; & secondly, where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens: & thirdly, where not only the period, but the class of children in favour of whom the portions are to be raised, depends on a contingency, as when it is limited to take effect, in case the father dies without issue male by his wife, there, also, on the contingency happening by the death of the wife without issue male, the portions are raisable immediately, & the term is saleable in the lifetime of the father. . . .

LORD ELDON . . . has, I think, laid down the rule on its true & sound foundation—that the ct. holding an equal mind ought to look at all the circumstances, & to see what, on a sound construction of the instrument, was the actual intention of the party. I entirely adopt this principle (ALDERSON, B.).—*SMYTH v. FOLEY* (1838), 3 Y. & C. Ex. 142; 7 L. J. Ex. Eq. 34; 160 E. R. 684.

1475. ———.]—(1) Portions for children:—*Held*: raisable during the life of a tenant for life, out of a reversionary term.

(2) The costs of raising portions are payable out of the estate, & not out of the portions.—*MICHELL v. MICHELL* (1842), 4 Beav. 549; 7 Jur. 887; 49 E. R. 452.

1476. ———] **Whether court will postpone**

time.]—Where there is a term for years for raising daughters' portions, payable at a certain time & a vested interest, they shall not stay till the death of father & mother; but the ct. will lay hold of the slightest circumstance in a settlement, that shows an intention to postpone the raising them in the life of the father & mother.—*STANLEY v. STANLEY* (1737), 1 Atk. 549; West temp. Hard. 135; 26 E. R. 345, L. C.

Annotations:—Consd. *Clinton v. Seymour* (1799), 4 Ves. 440. *Consd. & Distd.* *Codrington v. Foley* (1801), 6 Ves. 364.

1477. ———.]—Portion raised out of a reversionary term. The rule is, that it depends upon the particular penning of the trust & a fair construction of the whole instrument as to the intention. Upon a limitation to the parent for life with a term to raise portions at twenty-one or marriage, if there is nothing more, & the interests are vested, & the contingencies have happened, at which the portions are to be paid, upon the general rule the interest is payable, & the portions must be raised by sale or mtge. of the term.—*CODRINGTON v. FOLEY* (LORD) (1801), 6 Ves. 364; 31 E. R. 1095, L. C.

Annotations:—Consd. *Lygon v. Coventry* (1845), 14 Sim. 41; *Massy v. Lloyd* (1863), 9 Jur. N. S. 391. *Refd.* *Milltown v. Trench* (1837), 11 Ill. 1; *Lawton v. Ford* (1866), L. R. 2 Eq. 97. *Mentd.* *Mansfield v. Ogle* (1855), 1 Jur. N. S. 414.

1478. ———] **Expression of contrary intention.]**—(1) Land settled upon husband & wife for their lives, & the longest liver of them, then to trustees for a term of years, which term was in trust for raising, after the commencement of a term, a portion of £3,000 payable at twenty-one, or marriage; husband dies, leaving issue a daughter, who marries, living the mother. Decreed, that the portion should not be raised by sale or mtge. of the term, living the mother, by reason of those words "after the commencement, etc."

(2) The portion in this case, though vested, was not to carry interest until the term should commence, for all interest is in default of payment (LORD PARKER, C.).—*BUTLER v. DUNCOMB* (1718), 10 Mod. Rep. 433; 1 P. Wms. 448; 2 Vern. 760; 1 Eq. Cas. Abr. 339; 88 E. R. 797, L. C.

Annotations:—As to (1) *Consd.* *Brome v. Berkeley* (1728), 2 P. Wms. 484; *Bradley v. Powell* (1736), Cas. temp. Talb. 193. *Distd.* *Hall v. Carter* (1742), 9 Mod. Rep. 347. *Consd.* *Stevens v. Dethick* (1743), 3 Atk. 39. *Distd.* *Teynham v. Webb* (1751), 2 Ves. Sen. 198. *Consd.* *Clinton v. Seymour* (1799), 4 Ves. 440. *Refd.* *Codrington v. Foley* (1801), 6 Ves. 364. *Refd.* *Itershev v. Nowland* (1722), 2 P. Wms. 93; *Mills v. Banks* (1724), 3 P. Wms. 1; *King v. Withers* (1735), Cas. temp. Talb. 117; *Stanley v. Stanley* (1737), West temp. Hard. 135; *Worsley v. Granville* (1751), 2 Ves. Sen. 331; *Loder v. Loder* (1754), 2 Ves. Sen. 530; *Godwin v. Munday* (1783), 1 Bro. C. C. 191. *As to (2)* *Consd.* *Churchman v. Harvey* (1757), Amb. 824. *Distd.* *Re Gravoys v. B. Jones v. Gravoys*, [1900] 2 Ch. 683. *Generally, Mentd.* *Wilbraham v. Scarisbrick* (1840), 1 H. L. Cas. 173, n.

1479. ———.]—The rule is, that if a reversionary term or estate be limited to trustees to raise portions at a certain time, when that time comes the portion must be raised, unless on a declaration of the trust of the term the intention of the parties appears to the contrary (LORD HARDWICKE, C.).—*ADAMS v. DANVERS* (1755), 9 Mod. Rep. 486; 88 E. R. 592.

1480. ———.]—An estate was limited to trustees for a term, with remainders to A., & afterwards to his sons in tail, with similar limitations, successively, to B. & C., & their sons in tail. The trusts of the term were, on the death of A., & of B. & of C., respectively, to raise portions for their respective younger children:—*Held*: on the death of C. in the life of B., the

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1496. ————.]—The trust of a term under a settlement was that if there should be two or more daughters of the marriage,, then the trustees were to raise & pay to each the sum of £2,000 if she marry with the consent of her mother, if living, & a widow; if not then with the consent of the trustees or the survivor of them, his exors., administrators or assigns.

Pltf. H. married one of the daughters without consent, & C. another also without consent. They were not entitled to the portions under the settlement.—*HARVEY v. ASTON (LADY) (1737)*, 1 Atk. 361; 2 Com. 726; 26 E. R. 230; *sub nom. HERVEY v. ASTON*, *Cas. temp. Talb.* 212; *West temp. Hard.* 350; *Willes*, 83.

Annotations:—Apld. *Parsons v. Parsons (1744)*, 9 Mod. Rep. 464. *Consd.* *Reynish v. Martin (1746)*, 3 Atk. 330; *Clarke v. Parker (1812)*, 19 Ves. 1; *Newton v. Marsden (1862)*, 2 John. & H. 356. *Refd.* *Berkley v. Ryder (1752)*, 2 Ves. Sen. 533; *Burleton v. Humfrey (1755)*, Amb. 256; *Low v. Peers (1770)*, *Wilm.* 364; *Scott v. Tyler (1788)*, 2 Bro. C. C. 431; *Lloyd v. Branton (1817)*, 3 Mer. 108; *Re Nourse*, *Hampton v. Nourse (1898)*, 79 L. T. 376. *Mentd.* *Wheeler v. Bingham (1746)*, 3 Atk. 364; *Pearce v. Loman (1796)*, 3 Ves. 135; *Re Moore*, *Trafford v. Maconochie (1888)*, 39 Ch. D. 116.

1497. ————.]—*PARSONS v. PARSONS (circa 1747)*, 9 Mod. Rep. 464; 88 E. R. 577, L. C.

Annotations:—Refd. *Stroud v. Norman (1854)*, Kay, 313; *Haswell v. Haswell (1860)*, 3 L. T. 393; *Re Stone's Estate (1869)*, 18 W. R. 222; *Re Master's Settlement*, *Master v. Master*, [1911] 1 Ch. 321. *Mentd.* *Wickham v. Wing (1865)*, 2 Hem. & M. 436.

1498. ———— & prior settlement by husband.—**Failure to settle through no default of husband.**—Trust term by will to raise out of real estate portions for daughters, to be paid on marriage, upon condition, that they should be married with consent of their mother, or, after her death, of the trustees, & that the husband should previously make a settlement, the residue of the personal estate, subject to debts & legacies, to be applied in discharging the portions in ease of the real estate or for any purpose the trustees might judge most beneficial for the devisee. A marriage having taken place with the consent of the mother & the privity of the trustee, but without any settlement by the neglect of the trustee, the husband having before & after the marriage offered all, that was required of him, & been ready to execute a settlement within the condition, relief was given upon those circumstances by raising the portion upon executing the settlement.—*O'CALLAGHAN v. COOPER (1799)*, 5 Ves. 117; 31 E. R. 501, L. C.

1499. ———— **Default of issue male.**—The trust of the term was, on failure of issue male, out of the rents, etc., or by sale, etc., to raise portions for daughters, payable at twenty-one or marriage, & maintenance till their portions grew due, to be paid by half-yearly payments, viz. Christmas & St. John Baptist, the first payment to be made at the first of those feasts next coming or happening after the estate so limited to the trustees should take effect in possession. The father died without issue male, leaving a daughter who attained her age of twenty-one, it was adjudged that her portion could not be raised in the lifetime of the mother, because the maintenance was to precede the portion, & that was not to be raised till after the death of the father & mother, when the term came into possession.—*GOODAL v. RIVERS (1730)*, Mos. 395; *Kel. W.* 2; 2 Eq. Cas. Abr. 647; 25 E. R. 459, L. C.

1500. ———— **Of marriage.**—The trust of a term here was for raising portions for a daughter in default of issue male, payable at twenty-one or marriage; the mother died, leaving no son, & only one daughter, pltf.'s wife, who with her

husband brought their bill against the father & the trustees to raise the portion immediately; the ct. was of opinion she was not entitled to have it raised in the father's lifetime.—*STEVENS v. DETHICK (1743)*, 3 Atk. 39; 26 E. R. 826.

Annotation:—Refd. *Clinton v. Seymour (1799)*, 4 Ves. 440.

1501. ————.]—*DOMINICK v. LANGLEY (1684)*, 1 Vern. 299; 23 E. R. 482.

1502. ————.]—By marriage settlement, lands were limited to husband & wife for their lives, remainder to the heirs male of their bodies; & if there should be no issue male of their bodies, & one or more daughters, then to trustees for five hundred years from the decease of the survivor, in trust by sale or mtge., to raise £1,000 for daughters' portions, but there is no time appointed for the payment of them. The father died leaving a daughter only. The portion vesting in the daughter in the lifetime of the mother, it was decreed to be raised by a sale, with reasonable maintenance in the meantime, though no maintenance was provided by the settlement.—*STANFORTH & CLERKSON v. STANFORTH (1703)*, 2 Vern. 460; 23 E. R. 895; *sub nom. STANFORTH v. STANFORTH*, 1 Eq. Cas. Abr. 337.

Annotations:—Distd. *Corbett v. Maydwell (1709)*, 2 Vern. 640. *N.F.* *Adams v. Danvers (1755)*, 9 Mod. Rep. 486. *Refd.* *Brome v. Berkley (1728)*, 2 P. Wms. 484; *Hall v. Carter (1742)*, 2 Atk. 354.

1503. ————.]—*GERRARD v. GERRARD*, No. 1469, *ante*.

1504. ————.]—*CHAMPNEY v. CHAMPNEY (1715)*, 10 Mod. Rep. 314; 88 E. R. 743.

1505. ————.]—A. upon his marriage with B. settled his estate to the use of himself for life, remainder to first & other sons in tail male, remainder to trustees for one thousand years, remainder to his brother C. for life, remainder to the heirs male of his body hereafter to be begotten; & then declared the trust of the term, that if there should be no issue male of the bodies of A. & B. begotten, that should live to the age of twenty-one years, or be married & have issue, & that there should be a daughter or daughters of the bodies of A. & B. such daughter should have £4,000 for her portion; & if two or more, they to have £5,000, equally to be divided at their ages of twenty-one, or days of marriage, which should first happen; & if only one daughter, she to have the yearly sum £100 to be paid her half-yearly for her maintenance; if two or more, the like sum to be paid them half-yearly in equal shares, until their respective portions paid; if the portions not paid, the trustees to raise them out of the rents, or by sale or mtge. of the premises, or of part. Provided that if the father should in his lifetime prefer them in marriage with portions equivalent, or the remainderman should, after the father's death, or that there should be no daughter who should attain the age of twenty-one, or be married, then the term to cease. B. died in the life of A. leaving no son, but three daughters, who were all unmarried, C. took an estate tail under this settlement: & the portions might be raised for the daughters in the lifetime of A. their father.

Where a certain day is appointed for portions becoming due, nothing is more certain, than that reversionary terms may be sold before they fall into possession, & that though there is no express clause or sale to warrant it (*LORD TALBOT, C.*).—*HEBBLETHWAITE v. CARTWRIGHT (1734)*, *Cas. temp. Talb.* 31; 2 Barn. K. B. 438; 25 E. R. 643, L. C.

Annotations:—Consd. *Verney v. Verney (1761)*, 2 Eden, 26; *Doe d. James v. Hallett (1813)*, 1 M. & S. 124. *Refd.* *Clinton v. Seymour (1799)*, 4 Ves. 440; *Early v. Benbow (1846)*, 2 Coll. 342; *Almack v. Horn (1863)*, 1 Hem. &

1520. — — —.]—The trusts of a term of years were to raise as portions for younger children £5,000, if there should be one; £8,000, if two; & £10,000, if three or more, to be divided among them equally, the shares of the sons at twenty-one, & the shares of the daughters at twenty-one or marriage. There were three younger children:—*Held*: the heir-at-law, on attaining twenty-one, was not entitled to have the portions raised, & his estate discharged, before the portions became payable; & the ct. would not order a larger sum

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to be raised for portions than had actually become vested & payable to the children who had attained twenty-one or married.—*SHEPPARD v. WILSON* (1845), 4 Hare, 392; 9 Jur. 920; 67 E. R. 701.

Annotation:—*Consd.* *Marsh v. Keith* (1861), 29 Beav. 625.

1521. — *In favour of other portionists—Survivorship & accruer clause.*—One has several daughters & being seised in fee charges his lands with £1,000 a-piece to his daughters payable at twenty-two or marriage; & if any die, then to the survivors, but no time limited when the additional portion should be paid to the surviving daughters. If one dies unmarried before twenty-two, the additional portion shall not be paid to the surviving daughters until the deceased daughter should have come to twenty-two.—*FELTHAM v. FELTHAM* (1725), 2 P. Wms. 271; *Cas. temp. King*, 15; 24 E. R. 726.

1522. — *Only some portionists entitled—Whether whole sum raised.*—Where, under a settlement, a sum of money is to be raised out of real estates for the portions of younger children, & some of the portions have become payable, the ct. will raise the whole sum at once, although some of the children have not acquired vested interests.—*GILLIBRAND v. GOOLD* (1833), 5 Sim. 119; 3 L. J. Ch. 100; 58 E. R. 294.

1523. — — — — —.—*SHEPPARD v. WILSON*, No. 1520, *ante*.

1524. — — — — —.—*Investment of sum not immediately acquired.*—Lands were limited to trustees for a term of years in trust to raise a sum for portions for younger children, to be vested at twenty-one or marriage; with a proviso that no sale or disposition should be made until some one of the portions should be actually payable. The eldest of the younger children had attained twenty-one:—*Held*: the whole sum was raisable at once; & after paying the adult child her share, the remaining portions ought to be provided for by carrying over a sum of stock sufficient, at the present price, to provide for them, with a margin for depreciation.—*PEARETH v. GREENWOOD* (1880), 28 W. R. 417.

SUB-SECT. 7.—METHOD OF RAISING PORTIONS.

A. In General.

1525. *Direction for particular method—Whether other methods excluded.*—*IVY v. GILBERT*, No. 1510, *ante*.

1526. — — — — —.—The trust of a term is, to raise daughters' portions by rents, issues, & profits; or by making leases for three lives at the ancient rent; or by granting copyholds on fines; the money to be paid to the daughters at their age of eighteen or marriage, or as soon after as the same can be raised out of the premises as aforesaid; the portions, as it seems, may not be raised by sale or mtge.—*MILLS v. BANKS* (1724), 3 P. Wms. 1; 24 E. R. 943, L. C.

Annotations:—*Consd.* *Haldenby v. Spofforth* (1839), 1 Beav. 390; *Stroughill v. Anstey* (1852), 1 De G. M. & G. 635. *Refd.* *Allan v. Backhouse* (1813), 2 Ves. & B. 65; *Ball v. Harris* (1839), 4 My. & Cr. 264.

1527. *Sale or mortgage.*—A portion charged on lands by virtue of a power shall be raised by a sale or mtge., & not by the rents & profits of the lands charged; because it could not thereby be received

in any reasonable time, & the party entitled might be abridged of half the value of the portion by that manner of raising it.—*KELLY v. BELLEW* (LORD) (1707), 4 Bro. Parl. Cas. 495; 2 E. R. 338, H. L.

1528. — *Sale—Where no directions as to mode of raising—Portions to be raised “as soon as they conveniently could.”*—Lands are settled on marriage upon condition, if there should be a daughter, the persons in remainder should pay her £2,000 at sixteen with power for the daughter, in case of non-payment, to distrain for the £2,000 & damages. Though no power to sell, yet a sale decreed for raising the portion.—*MEYNELL v. MASSEY* (1686), 2 Vern. 1; 23 E. R. 614, L. C.

1529. — — — — —.—Trust of a term to raise portions out of rents & profits, to be paid as soon as conveniently may be. By virtue of the word profits trustees may sell or mortgage; *secus*, if said annual profits.—*TRAFFORD v. ASHTON* (1718), 1 P. Wms. 415; 24 E. R. 451; *sub nom.* *ASHTON v. —*, 10 Mod. Rep. 401, L. C.

Annotations:—*Consd.* *Metcalf v. Hutchinson* (1875), 1 Ch. D. 591. *Refd.* *Okeken v. Okeken* (1738), 1 Atk. 550; *Allan v. Backhouse* (1813), 2 Ves. & B. 65; *Re Drax, Savile v. Drax*, [1903] 1 Ch. 781.

1530. — — — — —.—*Joinder of heir—On application for sale.*—Land settled on trustees for raising portions for daughters, on bill for a sale, ct. will decree the heir to join in the sale, though he has no legal interest.—*ROLL v. ROLL* (1689), 2 Vern. 99; 23 E. R. 673.

1531. — *Mortgage—Of different parts of estate.*—Charges upon an estate more than sufficient to answer them directed to be raised by mtges. of different parts.—*MOSLEY v. MOSLEY* (1800), 5 Ves. 248; 31 E. R. 570.

1532. — — — — —.—*Inclusion of costs of effecting security.*—Power to raise a sum of money by mtge. includes power to raise also by mtge. the costs of effecting the security.

Trustees of a marriage settlement made in 1802 were empowered to raise & levy the sum of £6,000 for portions on the security of a term of three hundred years in certain freeholds. Part of the £6,000 was raised. In 1872 it became necessary to raise the residue, which then amounted to the sum of £3,290 8s. 4d. By an order then made in this suit which was instituted for the execution of the trusts of certain indentures of settlement, certain trustees were authorised to advance this amount out of their trust funds upon the security of the term. Considerable costs had to be incurred in effecting the security, & it was now asked that the lastly named trustees might be at liberty to advance a further sum out of their trust funds upon the same security to cover the costs so incurred:—*Held*: the term of three hundred years might properly be taken as a security, not only for the whole amount of £6,000, but also for the costs.—*ARMSTRONG v. ARMSTRONG* (1874), L. R. 18 Eq. 541; 43 L. J. Ch. 719.

Annotations:—*Consd.* *Nightingale v. Reynolds*, [1902] 2 Ch. 117. *Refd.* *Sewell v. Bishopp* (1893), 62 L. J. Ch. 615.

Where portions raisable out of rents & profits.—*See* Sub-sect. 7, C., *post*.

— *Of reversionary term.*—*See* Sub-sect. 7, D., *post*.

1533. *Leasing.*—*EDWARDS v. SLEATER* (1665), Hard. 410; 145 E. R. 522.

Annotations:—*Refd.* *King v. Melling* (1672), 3 Keb. 52; *West v. Berney* (1819), 1 Russ. & M. 431; *Walmesley v. Butterworth* (1835), 4 L. J. Ch. 253. *Mentd.* *Neale v. Mackenzie* (1836), 1 M. & W. 747.

PART IX. SECT. 5, SUB-SECT. 6.—F.

1522.1. *Whether raising of portions anticipated—Only some portionists en-*

titled—Whether whole sum raised.—*LEECH v. LEECH* (1842), 2 Dr. & War. 568.—*IR.*

PART IX. SECT. 5, SUB-SECT. 7.—A.

1525.1. *Direction for particular method—Whether other methods excluded.*—

1534. —.]—*IVY v. GILBERT*, No. 1510, *ante*.

1535. —.]—*MILLS v. BANKS*, No. 1526, *ante*.

1536. **Where portions become entitled to estate charged.**—Where four portioners, entitled each to a fifth of a portions fund, became entitled in undivided shares to the estate upon which the portions fund was charged, the entire estate being also subject to a mtge.:—*Held*: no one of the portioners could claim the right of having the whole fund divided, & thrown in fourths upon the respective shares, in order that, by payment of the difference between what was chargeable on her share of the estate, & what was due to her in respect of the portion, her share of the estate might be cleared; but such a proposal was a proper subject for arrangement in chambers; & upon bill filed by a portioner under the above circumstances to have her share in the estate discharged, & to have the trusts of the portions term administered by the ct., leave was given to plff. to bring into chambers a scheme for the purpose.—*OTWAY-CAVE v. OTWAY* (1866), 1 L. R. 2 Eq. 725; *sub nom. OTWAY-CAVE v. CAVE*, 15 W. R. 6.

1537. **Out of capital moneys.**—By a settlement dated Oct. 2, 1906, lands & other hereditaments in Yorkshire were settled in the events which happened to the use of trustees for a term of ninety-nine years if G. should so long live upon the trusts therein mentioned, & subject thereto to the use of G. for life, & after his death to the use that his wife should receive during the remainder of her life a yearly rentcharge of £800, & subject & charged as aforesaid to the use of trustees for the term of a thousand years from the death of G. upon the trusts thereafter declared with divers remainders over. The trusts of the thousand years' term were, in the event which happened of G. leaving five younger children, that the trustees "shall," after the death of G. or in his lifetime, at his request in writing raise the sum of £25,000 for portions to go to or amongst all or any the younger children of G. & their issue as G. should by deed or will appoint. In a deed dated Nov. 4, 1920, appointing this sum amongst these younger children & their issue, G. requested the trustees to raise this sum by any means authorised by the settlement or by law or preferably, if the law permitted, out of capital moneys; & on Jan. 13, 1921, G. in writing requested & directed his trustees to raise the sum out of capital moneys. This summons raised the question whether the trustees could & ought to comply with G.'s direction. There was evidence that it was desirable to do so if it was lawfully possible:—*Held*: although Settled Land Act, 1882 (c. 38), s. 21, did not sanction the application of capital moneys in the manner directed, the ct. would sanction such application subject to the consent being obtained of incumbrancers or persons whose interests had priority to the thousand years' term, because if, as the trustees were bound to do at the direction of G., they raised the sum of £25,000 by mtge. of the reversionary term of a thousand years, such mtge. would be an incumbrance "affecting the inheritance" within Settled Land Act, 1882 (c. 38), s. 21 (ii), so that it could at once be discharged out of capital moneys. It was not the practice of the ct. to leave trustees to do indirectly what it would involve less expense to do directly.—*Re GIBBOROUGH'S (LORD) SETTLED ESTATES*, [1921] 2 Ch. 39; 90 L. J. Ch. 400; 125 L. T. 701; 65 Sol. Jo. 553.

B. Whether Payable out of Personalty.

1538. **Where portions charged on land.**—*MIDDLETON v. MIDDLETON* (1685), 2 Rep. Ch. 377; 21 E. R. 692.

Annotation:—*Refd.* *Gaynesborough's Case* (1692), *Freem. Ch.* 188.

1539. —.] *STRODE v. ELLIS* (1692), *Nels.* 203; 21 E. R. 826.

1540. —.]—A. by several deeds, charges different parts of his real estates with portions for his younger children, & afterwards by his will confirms the charges so made; & then gives the residue of his personal estate, after payment of his debts & legacies, to trustees, in trust to lay out the same in the purchase of land, to be settled to particular uses. The eldest son brings his bill controverting the validity of the deeds, & insisting that the personal estate was liable to make good the several charges so far as it would extend:—*Held*: the personal estate should go according to the will, & each particular estate should bear the specific charge made upon it.—*FERRIERS (EARL) v. FERRIERS (COUNTESS)* (1725), 6 Bro. Parl. Cas. 97; 2 E. R. 958, H. L.

1541. —.]—Portions secured by settlement out of lands or article so to be, are not to be paid out of the personal estate.—*EDWARDS v. FREEMAN* (1727), 2 P. Wms. 435; 1 Eq. Cas. Abr. 219; 24 E. R. 803, L. C.

Annotations:—*Consd.* *Evelyn v. Evelyn* (1731), 2 P. Wms. 639. *Refd.* *Morris v. Burroughs* (1737), 1 Atk. 399; *Green v. Ekins* (1742), 2 Atk. 473; *Parsons v. Parsons* (1744), 9 Mod. Rep. 464; *Elliot v. Collier* (1747), 3 Atk. 526; *Boyd v. Boyd* (1867), L. R. 4 Eq. 305; *Taylor v. Taylor* (1875), L. R. 20 Eq. 155; *Re Blockley, Blockley v. Blockley* (1885), 29 Ch. D. 250. *Mentd.* *Wallis v. Hodson* (1740), Barn. Ch. 272; *Re Ford, Ford v. Ford* (1901), 46 Sol. Jo. 51; *Villar v. Gilbey*, [1907] A. C. 139.

1542. —.]—The £10,000 charged by B., on the term of a thousand years, shall not be paid out of his personal estate, but the land on which it was originally charged must bear the burden of it.—*BURGOIGNE v. FOX* (1738), 1 Atk. 575; 26 E. R. 362, L. C.

1543. —.]—*LANOY v. ATHOL (DUKE)* (1742), 2 Atk. 444; 9 Mod. Rep. 398; 26 E. R. 668, L. C.

Annotations:—*Folld.* *Lechmere v. Charlton* (1808), 15 Ves. 193. *Apld.* *Graves v. Hicks* (1833), 6 Sim. 391. *Folld.* *Loosemore v. Knapman* (1853), Kay, 123. *Refd.* *Sykes v. Meynal* (1763), 1 Dick. 369; *Barnes v. Raster* (1842), 1 Y. & C. Ch. Cas. 401; *Hickling v. Boyer* (1851), 3 Mac. & G. 635; *Gibson v. Seargent* (1855), 20 Beav. 641. *Mentd.* *Bugden v. Bignold* (1813), 2 Y. & C. Ch. Cas. 377; *Flint v. Howard*, [1893] 2 Ch. 51.

1544. —.]—Portions, to be raised by a trust term in a marriage settlement: the real estate held the primary fund; & a covenant by the settlor to pay them auxiliary only.—*LECHMERE v. CHARLTON* (1808), 15 Ves. 193; 33 E. R. 727. *Annotation*:—*Consd.* *Loosemore v. Knapman* (1853), Kay, 123.

1545. —.]—By a settlement in contemplation of marriage, reciting, that, the intended husband being entitled to certain real estate, it was agreed on the treaty for the marriage, that he should secure to the intended wife, in case she should survive him, a certain annuity by way of jointure, "in manner thereafter expressed," the husband demised certain real estate to trustees for a long term of years, upon the trusts thereafter declared, & then covenanted that his heirs, exors., administrators, or assigns, should pay the jointure to his wife surviving him, upon certain specified days; & the covenant was followed by a declaration that

Re MARSHALL'S ESTATE, [1899] 1 I. R. 96.—*IR.*

PART IX. SECT. 5, SUB-SECT. 7.—B.

1538 i. *Where portions charged on*

land.—A portion charged on lands by virtue of a power shall be raised by sale or mtge., & not by the rents & profits of the lands charged; because it could not thereby be received

in any reasonable time, & the party entitled might be abridged of half the value of the portion by that manner of raising it.—*KELLY v. BELLEW* (1715), 4 Bro. Parl. Cas. 501.—*IR.*

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the demised lands were to be held upon trust for the settlor until some default in making any of the payments of the jointure; & in case of non-payment of any part for forty days next after any day of payment, then, upon trust to secure the same:—*Held*: as between the real & personal representatives of the settlor, the land was the primary fund for payment of the jointure, because the jointure was not in satisfaction of any debt due from the settlor at the time of executing the settlement, nor had his personal estate been augmented by any consideration given for it; & therefore the presumption was, that a primary charge upon the land was intended; & that presumption was not rebutted by anything in the recitals, or in the form of the deed of settlement.—*LOOSEMORE v. KNAPMAN* (1853), Kay, 123; 2 Eq. Rep. 710; 23 L. J. (Ch. 174); 24 L. T. O. S. 21; 2 W. R. 664; 69 E. R. 52.

Annotation:—*Distd. Field v. Moore, Field v. Brown* (1855), 7 De G. M. & G. 691.

1546. —.]—Under a covenant that if the covenantor's wife survived him, he, his heirs, exors. or administrators would pay her a specified annuity for life, & that for better securing it, he or his heirs would grant & secure the same out of a sufficient part of the real estates devised to him by a particular will:—*Held*: the real estates were only secondarily liable, & the personal estate of the covenantor was the primary fund.—*FIELD v. MOORE, FIELD v. BROWN* (1855), 7 De G. M. & G. 691; 25 L. J. Ch. 66; 26 L. T. O. S. 207; 2 Jur. N. S. 145; 4 W. R. 187; 44 E. R. 269, L. J. J.

Annotations:—*Apld. Campbell v. Ingilby* (1856), 21 Beav. 567. *Distd. Barrow v. Barrow* (1858), 4 K. & J. 409. *Consd. Buckmaster v. Buckmaster* (1887), 35 Ch. D. 21. *Refd. Mandeno v. Mandeno* (1853), 2 Eq. Rep. 419; *Head v. Godlee, Reynolds v. Godlee* (1859), John. 536; *Re Howarth* (1873), 8 Ch. App. 416, n.; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Dye v. Dye* (1884), 13 Q. B. D. 147; *Re Sampson & Wall* (1884), 25 Ch. D. 482.

C. Portions to be Raised out of Rents and Profits.

(a) In General.

Estate not in possession.—*See* No. 1499, *ante*.

1547. **Right to accumulate.**—Directing a gross sum to be raised does not imply that it shall be raised at once, for it may be raised out of the rents & profits, & so laid up till it amounts to that sum.

This ct. lays great stress upon a particular time being appointed for the payment of a portion, & has enlarged the power of trustees to raise it within the time.

If the surplus profits will not be sufficient to answer the purpose, then I shall be strongly inclined that the estate shall be sold to make up the deficiency (*LORD HARDWICKE, C.*)—*OKEDEN v. OKEDEN* (1738), 1 Atk. 550; 26 E. R. 345; *sub nom. OKEDEN v. WALTER*, West temp. Hard. 514, L. C.

Whether infringement of rule against perpetuities.—*See* PERPETUITIES, Vol. XXXVII., pp. 139–143, Nos. 671–689.

1548. **Tenant for life permitted to take rents & profits—Right of trustees of term to enter subsequently.**—Where a limitation was in a settlement made before marriage of A. to the use of trustees & their heirs until they should raise certain portionary sums of money, if not paid at a fixed time by A.; & the portions were not then paid; & the trustees permitted the assignees of A. to enter & take profits of the lands beyond the amount of the portions; still the trustees may afterwards enter & hold over to raise the portions.

—*THOMASON v. MACKWORTH* (1666), O. Bridg. 502; Cart. 75; 124 E. R. 713.

Annotation:—*Mentd. Re Stroud & East & West India Docks & Birmingham Junction Ry.* (1849), 19 L. J. C. P. 117.

1549. — **Right of portionists—Against tenant for life & remainderman.**—*SANDERS v. SANDERS*, No. 1266, *ante*.

1550. **Deficiency of ordinary profits—Right to sell timber.**—Where the ordinary profits of a term are not sufficient to raise a portion, timber may be felled, or a mine worked for it against the heir.—*OFFLEY v. OFFLEY* (1691), Prec. Ch. 26; 24 E. R. 14.

1551. — **Right to work mines.**—*OFFLEY v. OFFLEY*, No. 1550, *ante*.

1552. **Appointment of receiver of rents & profits—Tenant for life obstructing decree of raising portions.**—Limitation of a term for five hundred years to raise portions for younger children, & afterwards estate limited to T. for life, with remainders over, & a decree made to sell the term for raising the portions. T., the tenant for life, refusing to produce the title deeds before the master, & obstructing the decree, an order was made on motion for a receiver of the rents & profits of the estate.—*BRIGSTOCKE v. MANSEL* (1818), 3 Madd. 47; 56 E. R. 427.

1553. **Application in discharge of capital sum & interest—Pending mortgage.**—*BALFOUR v. COOPER*, No. 1727, *post*.

Term prior to estate tail—Violation of rule against perpetuities.—*See* PERPETUITIES, Vol. XXXVII., pp. 86, 87, Nos. 243–245.

(b) Whether Sale or Mortgage Allowed.

1554. **General rule.**—A trust to pay portions out of rents & profits, at prefix days gives the trustees power to sell.—*BACKHOUSE v. MIDDLETON* (1670), as reported in 1 Cas. in Ch. 173; 22 E. R. 748.

Annotation:—*Folld. Metcalfe v. Hutchinson* (1875), 1 Ch. D. 591.

1555. —.]—*CARY v. APPLETON* (1674), 1 Cas. in Ch. 240; 22 E. R. 780.

1556. —.]—Where there is a trust in a settlement for raising portions out of rents & profits, the lands may be sold.—*SHELDON v. DORMER* (1693), 2 Vern. 310; 23 E. R. 802.

Annotations:—*Refd. Hervoy v. Aston* (1736), Cas. temp. Talb. 212; *Okeden v. Okeden* (1738), 1 Atk. 550.

1557. —.]—Where a term is limited to raise portions for younger children by rents & profits, the heir may have the portions raised by a sale, though the younger children oppose it; as well as he may insist on a sale if he think fit.—*WARBURTON v. WARBURTON* (1701), 2 Vern. 420; 23 E. R. 869; *on appeal* (1702), 4 Bro. Parl. Cas. 1, H. L.

Annotations:—*Mentd. Potter v. Chapman* (1750), Amb. 98; *Kemp v. Kemp* (1801), 5 Ves. 849; *Boulger v. Smith* (1851), 17 L. T. O. S. 247.

1558. —.]—The words "rents & profits" extended beyond their natural meaning, annual profits, to mtge. or sale, when necessary to effect the object, raising a gross sum, for fines on renewal therefore as well as portions, & not controlled by the apparent general intention to preserve the estate entire.—*ALLAN v. BACKHOUSE* (1813), 2 Ves. & B. 65; 35 E. R. 243; *affd.* (1821), Jac. 631, L. C.

Annotations:—*Consd. Shaftsbury v. Marlborough* (1833), 2 My. & K. 111. *Distd. Haldenby v. Spoforth* (1839), 1 Beav. 390. *Apld. Jones v. Jones* (1846), 5 Hare, 440. *Distd. Solley v. Wood* (1861), 29 Beav. 482. *Apld. Wragg v. Morley* (1866), 14 W. R. 949. *Refd. Garmstone v. Gaunt* (1845), 1 Coll. 577; *Forbes v. Richardson* (1853), 11 Hare, 354; *Hayward v. Pile* (1870), 22 L. T. 893; *Bute v. Ryder* (1884), 53 L. J. Ch. 1090.

1559. —.]—Where a term is created for the purpose of raising money out of the rents & profits, if the trusts of the will require that a gross sum should be raised, the expression "rents & profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mtge. (LORD ELDON, C.).—*BOOTLE v. BLUNDELL* (1815), 1 Mer. 193; 19 Ves. 494; 35 E. R. 646, L. C.

Annotations.—*Apld.* Metcalfe v. Hutchinson (1875), 1 Ch. D. 591. *Mentd.* Gittins v. Steele (1818), 1 Swan. 24; Tatham v. Wright (1831), 2 Russ. & M. 1; Slaney v. Wade (1836), 7 Sim. 595; Collis v. Robins (1847), 1 De G. & Sm. 131; Cunningham v. Murray (1847), 1 De G. & Sm. 366; Boughton v. Boughton, Boughton v. James (1848), 1 H. L. Cas. 406; Waters v. Waters (1848), 2 De G. & Sm. 591; McGregor v. Topham (1850), 3 H. L. Cas. 132; Paterson v. Scott (1852), 1 De G. M. & G. 531; Plenty v. West (1852), 16 Beav. 173; Boys v. Bradley (1853), 4 De G. M. & G. 58; Key v. Key (1853), 4 De G. M. & G. 73; Boyse v. Rossborough (1854), 2 De G. M. & G. 817; Smith v. Smith (1861), 3 Giff. 263; Mellish v. Vallins (1862), 2 John. & H. 194; Vernon v. Manvers (No. 2) (1862), 31 Beav. 623; Eno v. Tatham (1863), 4 Giff. 181; Gilbertson v. Gilbertson (1865), 34 Beav. 354; Hensman v. Fryer (1867), 3 Ch. App. 420; Allan v. Gott (1872), 7 Ch. App. 439; *Re* Simpson, *Ex p.* Morgan (1876), 34 L. T. 329; Howard v. Dryland (1877), 38 L. T. 24; Patching v. Barnett (1880), 49 L. J. Ch. 665; Kilford v. Blaney (1885), 31 Ch. D. 56.

1560. —.]—*SMYTH v. FOLEY*, No. 1474, *ante*.

1561. Where raisable out of "annual profits."—

Trust of a term to raise portions out of rents & profits, to be paid as soon as conveniently may be. By virtue of the word profits trustees may sell or mtge.; *secus*, if said annual profits.—*TRAFFORD v. ASHTON* (1718), 1 P. Wms. 415; 24 E. R. 451; *sub nom.* *ASHTON v.* —, 10 Mod. Rep. 401, L. C.

Annotations.—*Consd.* Allan v. Backhouse (1813), 2 Ves. & B. 65; Metcalfe v. Hutchinson (1875), 1 Ch. D. 591. *Refd.* Okeden v. Okeden (1738), 1 Atk. 550. *Mentd.* *Re* Drax, Savile v. Drax, [1903] 1 Ch. 781.

1562. —.]—*IVY v. GILBERT*, No. 1510, *ante*.

1563. —.]—On settlement before marriage, a proviso, that if a husband & wife die, leaving issue unprovided for, that then the trustees might enter upon an estate, & take the rents thereof, till they had received £200 for the benefit of such unprovided children, in such manner & proportion as the survivor of the husband & wife should appoint. The wife survived, & appointed the £200 for a daughter, *pltf.*'s wife, being an unprovided child, bill brought to have the £200 raised. Decreed the £200 & interest by way of maintenance, from the death of the mother; *deft.* appealed from that part which allowed interest, & decree affirmed.

Wherever the words to be raised by rents & profits are used in a deed, unless there are other words to make it annual, the *ct.* has always made a liberal construction, in order to obtain the end which the party intended by raising the money, has allowed a mtge. & a sale.

The appointment of the £200 being in such manner, & proportions, as the survivor of father & mother shall think fit, the father or mother might have made it payable at any time.—*GREEN v. BELCHIER* (1737), 1 Atk. 505; *West temp. Hard.* 217; 26 E. R. 319, L. C.

Annotations.—*Apld.* Allan v. Backhouse (1813), 2 Ves. & B. 65. *Consd.* Metcalfe v. Hutchinson (1875), 1 Ch. D. 591. *Mentd.* *Re* Bowly, Bowly v. Bowly, [1904] 2 Ch. 685.

1564. On deficiency of rent & profits.—*OKEDEN v. OKEDEN*, No. 1547, *ante*.

1565. —.]—Where real estates were devised in strict settlement, subject to a trust for raising portions for younger children during the minority of the tenant for life, out of the rents & profits, or by sale or mtge. :—*Held* : certain funds which had

arisen from the rents during the minority of the tenant for life were applicable to the payment of the portions, & the deficiency only could be raised by sale or mtge.—*WATER v. HUTCHINSON* (1823), 1 Sim. & St. 276; 57 E. R. 112.

1566. Effect of concurrent provision for leasing.—

—*IVY v. GILBERT*, No. 1510, *ante*.

1567. —.]—*MILLS v. BANKS*, No. 1520, *ante*.

1568. No time limited for payment.—*IVY v. GILBERT*, No. 1510, *ante*.

1569. —.]—(1) A term of five hundred years created to raise portions for daughters in failure of issue male, as soon as conveniently may be after the father's death, but no maintenance nor any express time mentioned when the portions are payable; there are three daughters, & the eldest but eight years old, the father is dead, but the mother who has a jointure on the estate is living; the *ct.* will not raise the portions for daughters so young, out of the reversionary term.

(2) Portions secured by a trust term out of land payable to daughters, to be raised by rents & profits, & no time limited for payment, shall carry no interest, & be raised only by perception of profits, not by sale or mtge.

Where a particular certain time is limited for the payment of the portion, there it carries interest from that time (*JEKYLL, M.L.*).—*EVELYN v. EVELYN* (1731), 2 P. Wms. 659; 2 Barn. K. B. 118; 24 E. R. 904; *on appeal* (1733), 6 Bro. Parl. Cas. 114, H. L.

Annotations.—*As to* (1) *Refd.* Allan v. Backhouse (1813), 2 Ves. & B. 65. *As to* (2) *Apld.* Cowper v. Scott (1731), 3 P. Wms. 119; Okeden v. Okeden (1738), 1 Atk. 550.

Refd. Hall v. Carter (1742), 2 Atk. 351. *Generally, Mentd.* Leman v. Newnham (1747), 1 Ves. Sen. 51; Hearle v. Greenbank (1749), 3 Atk. 695; Ancester v. Mavor (1785), 1 Bro. C. C. 451; Tweddell v. Tweddell (1787), 2 Bro. C. C. 152; Clinton v. Hooper (1791), 3 Bro. C. C. 201; Clarendon v. Barham (1842), 1 Y. & C. Ch. Cas. 688; Bond v. England (1855), 2 K. & J. 44.

1570. Contrary intention—Rents & profits distinctly appropriated.—*IVY v. GILBERT*, No. 1510, *ante*.

D. Sale or Mortgage of Reversionary Term.

1571. Right to raise portions out of reversionary term.—*COTTON v. COTTON* (1738), 3 Y. & C. Ex. 149, n.; 7 L. J. Ex. Eq. 41; 160 E. R. 651.

Annotation.—*Refd.* Smyth v. Foley (1838), 3 Y. & C. Ex. 142.

1572. —.]—The *ct.* leans against the construction for raising portions or maintenance out of a reversionary term. Appointment, by father & son under a power, of money charged on an estate, that in case the son should survive, it should be applied by him in & towards payment of the debts of the father; & subject thereto the residue, if any, should go & be considered as part of the personal estate of the father, & in case the father should survive, it should go & be paid by him, his exors., etc., in & towards satisfaction of his debts, with a similar provision as to the residue; the father surviving appointed in favour of another son, for valuable consideration as to part: as to that, the decree directed payment under the appointment: the residue to be paid into *ct.*, with liberty to apply; in case of no application within twelve months to be paid according to the appointment.—*CLINTON v. SKYMOUR* (1799), 4 Ves. 440; 31 E. R. 226.

Annotation.—*Consd.* Codrington v. Foley (1801), 6 Ves. 364.

1573. — *By sale.*—A reversionary term sold for the raising a daughter's portion.—*SANDYS v.*

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15731. Right to raise portions out of reversionary term—By sale.—*WHALEY v. MORGAN* (1839), 2 Dr. & Wal. 330.—*IR.*

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SANDYS (1721), 1 P. Wms. 707; 24 E. R. 580, L. C.

*Annotation:—***Consd.** **Brome v. Berkley** (1728), 2 P. Wms. 484.

1574. ———.]—Where there is a power, in a trust term to raise portions, that the father, with consent of the trustees, may revoke all the uses; this suspends the portion, & it cannot be raised until after the father's death.

The trust of a term was for raising a portion for a daughter, in default of issue male, payable at eighteen or marriage, or as soon after as the same might conveniently be raised. The mother died, leaving no son, and only one daughter:—**Held**: this portion could not conveniently be raised, by sale of the reversion of the term, in the father's lifetime.—**RERESBY v. NEWLAND** (1723), 6 Bro. Parl. Cas. 75; 2 E. R. 942, H. L.

*Annotations:—***Refd.** **Adams v. Danvers** (1755), 9 Mod. Rep. 486; **Piper v. Piper** (1834), 3 M. & K. 159.

1575. ———.]—**HEBBLETHWAITE v. CARTWRIGHT**, No. 1505, *ante*.

1576. ———.]—**CODRINGTON v. FOLEY (LORD)**, No. 1477, *ante*.

1577. ———.]—**MASSY v. LLOYD**, No. 1461, *ante*.

1578. ——— **By mortgage.**]—A reversionary term raised for securing maintenance & portions for daughters, shall, in cases of necessity, be mortgaged to pay either, & when fallen into possession, shall pay all the arrears of maintenance incurred before it came into possession.—**RAVENHILL v. DANSEY** (1723), 2 P. Wms. 179; 24 E. R. 690, L. C.

1579. ———.]—**CODRINGTON v. FOLEY (LORD)**, No. 1477, *ante*.

1580. ———.]—**MASSY v. LLOYD**, No. 1461, *ante*.

1581. ——— **Discretion of trustees—Application of capital moneys.**]—**Re GIBBOROUGH'S (LORD)**, **SETTLED ESTATES**, No. 1537, *ante*.

SUB-SECT. 8.—VESTING OF PORTIONS.

A. In General.

1582. **Presumption as to time of vesting—When child most requires it—Twenty-one or marriage.**]—**EMPEROR v. ROLFE**, No. 1646, *post*.

1583. ———.]—**MOSTYN v. MOSTYN**, No. 1074, *ante*.

1584. ———.]—By a voluntary settlement, expressed to be made in consideration of natural love & affection for settlor's son G., & daughters M. & E., property was settled in trust for settlor for life, with remainder, as to part, in trust for G. for life, & after his decease, in trust for all G.'s children which might be living at the time of his decease, as tenants in common; & if G. should have but one such child, then for such only child; the share of every such child to be vested at twenty-one, or, if a daughter, at twenty-one or marriage; with proviso for survivorship if more than one child of G., & any of them being a son should die under twenty-one, or, being a daughter, under twenty-one without having been married; & in case all such of G.'s children as were sons should die under twenty-one, & all such of them as were daughters under that age without

having been married, then over; & as to other parts of the property, in trust for M. for life, & after her decease, for all her children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or be married, in such manner & form, & in such shares & proportions, & subject to such clauses of survivorship, etc., as before declared with respect to G.'s children; & as to a third part of the property, upon trusts for E. & her children, similar to the trusts for M. & her children:—**Held**: the instrument, though voluntary, & not expressed to be made in consideration of natural love & affection for the settlor's grandchildren, was within the rule in **Emperor v. Rolfe**, No. 1646, *post*; & having regard to the terms of the limitation over, after the trusts for G.'s children, & notwithstanding the different form in which the trusts for the children of M. & E. were expressed, two children of G. who attained twenty-one, & subsequently died in his lifetime, took vested & transmissible interests equally with those of G.'s children who survived him: the rule being that, whereas, in ordinary instruments, an express estate thereby limited cannot be enlarged except by necessary inference, yet, upon instruments of this description, there is an implication of law, arising upon the instrument itself, subject to any expression to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when such portions will be wanted, namely, upon their attaining the age of twenty-one, or, in the case of daughters, upon their attaining that age or marriage; & such portions shall then vest, whether the children do or do not survive their parents.—**SWALLOW v. BINNS** (1855), 1 K. & J. 417; 26 L. T. O. S. 37; 1 Jur. N. S. 843; 69 E. R. 522.

*Annotations:—***Refd.** **Moor v. Abbott** (1857), 30 L. T. O. S. 70; **Re Crosse's Will** (1863), 32 L. J. Ch. 344; **Jackson v. Dover** (1864), 2 Hem. & M. 209; **Jeyes v. Savage** (1875), 10 Ch. App. 558, n.; **Wakefield v. Maffet** (1885), 10 App. Cas. 422; **Leader v. Duffey** (1888), 13 App. Cas. 294. **Mentd.** **McC Knowles, Nottage v. Buxton** (1882), 21 Ch. D. 806.

Compare No. 1598, *post*.

1585. ———.]—On marriage arts. £9,000 in trust for husband & wife for life, & for eldest son subject to raise & pay £5,000 for younger children as father should appoint; for want of appointment at twenty-one; the interest for maintenance. Mother dies, only one younger son then, who dies two years old. Father cannot claim this £5,000 as his representative; not vesting in the children. There are no words for vesting except those for raising & paying at twenty-one. Portions by will governed by rules from civil law or ecclesiastical ct. not applicable to a deed. Construction of portion, is when the children want it. Interest evidence of vesting in legatory cases.—**HUBERT v. PARSONS** (1751), 2 Ves. Sen. 261; 28 E. R. 169, L. C.

*Annotations:—***Refd.** **Griffith v. Hemming** (1860), 8 W. R. 687; **Henty v. Wrey** (1882), 30 W. R. 317.

1586. ———.]—**Re WILMOTT'S TRUSTS**, No. 1681, *post*.

1587. ——— **Uncertainty in settlement.**]—**HOWGRAVE v. CARTIER**, No. 1655, *post*.

1588. ———.]—**PERFECT v. CURZON (LORD)**, No. 1071, *ante*.

1589. ———.]—**MOSTYN v. MOSTYN**, No. 1074, *ante*.

PART IX. SECT. 5, SUB-SECT. 8.—A.

g. **Presumption as to time of vesting—Where settlement ambiguous.**]

RICHARDSON v. GOODMAN (1851), 3 113.—**IR.**

h. ——— **Twenty-one or marriage.**]—**Re WARD'S ESTATE** (1909), 43 L. T.

k. ———.]—**J. E. v. J. P.**, [1919] N. Z. L. R. 161.—**N.Z.**

1590. ——— **Settlement by person in loco parentis.]**—*SWALLOW v. BINNS*, No. 1584, *ante*.

1591. ——— **]**—In construing a will equally with a settlement made by a person in loco parentis, the ct. leans to the presumption that the intention is to vest the portions in the children when they most require it, whether they survive the tenant for life or not; & where there is any reasonable ground for supposing such an intention, the benefit of any doubt is to be given in favour of the vesting.

Testatrix, after giving certain property upon trust for S., her adopted daughter, for life, & after her death for the benefit of all her children, in the same manner as thereafter declared respecting one moiety of the residue, bequeathed the residue upon trust for S. for life, & after her decease, as to one moiety, for all the children of S. who should be living at the time of her decease, to be paid to them at the age of twenty-one or marriage; but if such times should happen in the lifetime of S., the payment to be postponed till after her decease; but testatrix directed that the same should become a vested interest in each of the children of S. at twenty-one or marriage. There was a similar limitation of the other moiety. & a gift over in case of the death of all the children under twenty-one or marriage. One of the children attained twenty-one in the lifetime of testatrix, but predeceased her:—*Held*: the representative of such child was entitled to his share.—*JACKSON v. DOVER* (1864), 2 Hem. & M. 209; 4 New Rep. 136; 10 L. T. 489; 10 Jur. N. S. 631; 12 W. R. 855; 71 E. R. 442.

Annotations:—*Apld. Re Knowles, Nottage v. Buxton* (1882) 21 Ch. D. 806. *Consd. Re Hamlet, Stephen v. Cunningham* (1888), 39 Ch. D. 426.

1592. ——— **Applicable to wills as well as settlements.]**—*JACKSON v. DOVER*, No. 1591, *ante*.

1593. ——— **]**—*Re KNOWLES, NOTTAGE v. BUXTON*, No. 1662, *post*.

1594. ——— **Presumption rebuttable only on strong grounds.]**—The presumption, that a prenuptial settlement is intended to provide for children of the marriage at the time when they require a provision, is so strong that the ct. will not, unless absolutely compelled by the language of the instrument, adopt a construction of such a settlement, which would exclude from its benefit a child who comes of age but does not survive both parents.—*CURRIE v. LARKINS* (1864), 4 De G. J. & Sm. 245; 3 New Rep. 621; 10 L. T. 47; 10 Jur. N. S. 349; 12 W. R. 515; 46 E. R. 913, L. JJ.

Annotations:—*Consd. Re Hamlet, Stephen v. Cunningham* (1888), 39 Ch. D. 426. *Refd. Jeyes v. Savage* (1875), 23 W. R. 764.

1595. Conditions as to vesting — In will of parent.]—(1) A. by will gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughters should marry with consent of his wife; & if any married without such consent her portion to go over. On a bill brought by the daughters for their portions, the ct. decreed the portions to be paid; but on security to refund, if the condition should be broken.

(2) Where portions are provided for daughters by a settlement, the father cannot by his will annex any condition to the payment of them, or devise them over, in case of the death of any of the daughters, before their portions become payable.—*ASTON v. ASTON* (1703), 2 Vern. 452; 23 E. R. 890.

Annotations:—*As to* (1) *Consd. Garbut v. Hilton* (1739), 9 Mod. Rep. 210. *Apld. Re Whiting's Settlement, Whiting v. De Rutzen*, [1905] 1 Ch. 96. *Refd. Harvey v. Aston* (1740), 2 Com. 726; *Reynish v. Martin* (1746), 3 Atk. 330.

1596. ——— **Portions payable on future day—Not vested until such day.]**—*PHIPPS v. MULGRAVE* (LORD), No. 1351, *ante*.

1597. Under power to appoint portions—Whether vesting suspended.]—*TEYNHAM (LORD) v. WEBB*, No. 1402, *ante*.

1598. ——— **Validity of immediate vesting—Whether fraud on power.]**—W. having a power of charging portions for younger children on real estate under a settlement which gave him in the clearest terms power to fix the ages, & times at which the portions should vest, & contained no provision for raising portions in default of appointment, & having three daughters aged nine, seven, & one, appointed by deed in 1828 £10,000, being the full amount he was entitled to charge for the portions of the daughters, to be a vested interest in the three daughters respectively immediately on the execution of the deed, the portions to be paid to them at such times & in such proportions as he should by deed or will appoint, & in default of appointment to be paid to them share & share alike, at twenty-one or marriage, if the same age or time should happen after his decease, but if in his lifetime, then the payment to be postponed till after his death, unless he should signify his consent in writing to their being raised & paid in his lifetime; maintenance at 4 per cent. to be raised from his death, & the deed contained a power of revocation. In 1832 he made by a deed a similar appointment by way of confirmation of the former, the portions to be vested immediately on the execution of the deed. One daughter married & attained twenty-one, & in 1851 W. appointed £5,000, part of the £10,000, to her. The other two died infants & spinsters, one in 1836, the other in 1845. W. assigned to plff. for value in 1875 the £5,000 appointed to the two deceased daughters, & after his death plff. brought this action to have it raised:—*Held*: (1) where a donee of a power of charging portions on real estate has, under the terms of the power, clear authority to fix the times at which portions shall vest, & appoints a portion to vest immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one & unmarried, & the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was not within the power; (2) the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was a fraud on the power as being made with a view to secure a benefit to the appointor; for that having regard to the fact that if the father had died without making any appointment, the children would have been unprovided for, it was manifestly for the benefit of the children that the father should make an appointment, & as there was nothing to lead to the conclusion that when the appointments were made the children were likely to die young, & as in the event of the early death of the appointor the children might have derived a benefit from the absolute vesting of their portions, there was no ground for attributing to him an intention to benefit himself by making the portions vest immediately, plff. was entitled to have the £5,000 raised.

(3) Powers to appoint portions charged on land ought if their language is doubtful to be construed so as not to authorise appointments vesting those portions in the appointees before they want them, that is before they attain twenty-one or if daughters, marry (*LINDLEY, L.J.*).

(4) Where the language of the power is clear &

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unambiguous effect must be given to it (LINDLEY, L.J.).

(5) Where upon the true construction of the power & the appointment the portion has not vested in the lifetime of the appointee the portion is not raisable but sinks into the inheritance (LINDLEY, L.J.).

(6) Where upon the true construction of both instruments the portion has vested in the appointee the portion is raisable even though the appointee dies under twenty-one or (if a daughter) unmarried (LINDLEY, L.J.).

(7) Appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion, & very little additional evidence of improper motive or object will induce the ct. to set aside the appointment or treat it as invalid, but that without some additional evidence the ct. cannot do so (LINDLEY, L.J.).—*HENTY v. WREY* (1882), 21 Ch. D. 332; 53 L. J. Ch. 667; 47 L. T. 231; 30 W. R. 850, C. A.

Annotation:—As to (3), (4) & (7) Apld. Re De Hoghton, De Hoghton v. De Hoghton, [1896] 2 Ch. 385.

1599. — *Where language doubtful—Not before twenty-one or marriage.*—*HENTY v. WREY*, No. 1598, ante.

1600. — *Charged on land—Vesting in children of tender years.*—A power in a settlement to raise a portion for a younger child at such time as the parent should direct; he directs it to be raised when she is fourteen, & she dying, files his bill for it as her administrator; the portion shall not be raised for the father.

The meaning of a charge for children is that it shall take place when it shall be wanted (LORD THURLOW, C.).—*HINCHINBROKE v. SEYMOUR* (1784), 1 Bro. C. C. 395; 28 E. R. 1200; *sub nom.* SANDWICH'S (LORD) CASE, cited in 11 Ves. 479, L. C.

Annotations:—Consd. McQueen v. Farquhar (1805), 11 Ves. 467; *Queensberry Leases Case* (1819), 1 Bl. 339; *Domville v. Lamb* (1853), 1 W. R. 246; *Wellesley v. Mornington* (1855), 2 K. & J. 143. *Expld. Henty v. Wrey* (1882), 21 Ch. D. 332. *Refd. Topham v. Portland* (1863), 1 New Rep. 496.

1601. — *When court will set aside.*—*HENTY v. WREY*, No. 1598, ante.

1602. *Period of vesting violating rule against perpetuities.*—Limitations of a term to trustees, upon trust to raise portions for the children of A. surviving A. & B., "to vest in & to be paid & payable to" them at their ages of twenty-four years, with maintenance, etc., in meanwhile, out of the expectant or presumptive shares, & a gift over on the death of all before their shares should become vested:—*Held: void for remoteness.*—*Re BLAKEMORE'S SETTLEMENT* (1855), 20 Beav. 214; 52 E. R. 585.

Rule against perpetuities generally.—*See PERPETUITIES*, Vol. XXXVII., pp. 55 *et seq.*

Compare Part VIII., Sect. 14, ante.

PART IX. SECT. 5, SUB-SECT. 8.—
B. (a).

1603 i. *Effect of death of portionist before happening of event—Whether portion sinks into inheritance.*—The trusts of a term were to raise, at twelve years from a mother's death, £2,500 for younger children; £1,000 of that sum for one of them, & the remainder for the others; the sums to be paid to them respectively, when raised pursuant to the deed. The dead was one in which the mother, tenant for life, joined her eldest son, the remainderman, in open-

ing the estate. That younger child, to whom the £1,000 was to have been paid at twelve years from the mother's death, died during her life:—*Held: the £1,000 was not vested, & could not be raised.*—*RUBY v. FOOT & BEAMISH* (1817), Beat. 581.—*IR.*

1603 ii. — *—*—*EDGEWORTH v. EDGEWORTH* (1829), Beat. 328, 334, 335; 2 Ir. L. Rec. 1st ser. 461.—*IR.*

1603 iii. — *—*—A trust disposition & settlement directed the trustees to reconvey the grantor's property to his children in equal shares, to the sons on attaining the age of twenty-

B. Portion Payable on Event Personal to Portionist.

(a) Out of Realty.

1603. *Effect of death of portionist before happening of event—Whether portion sinks into inheritance.*—*WENTWORTH v. YOUNG* (1638), Nels. 36; 21 E. R. 783.

1604. — *—*—£1,000 to be raised & divided amongst five children, one dies before distribution, the survivors shall have his share & not the devisee of him that is dead.—*WOOLSTENHOLM v. SWETNAM* (1677), 2 Rep. Ch. 129; 21 E. R. 636.

1605. — *—*—*POULET (LADY) v. POULET (LORD)*, No. 1629, post.

1606. — *—*—*BRATHWAITE v. BRATHWAITE*, No. 1439, ante.

1607. — *—*—*BOND v. BROWN* (1685), 2 Cas. in Ch. 165; 22 E. R. 896.

Annotation:—Refd. Pawlett v. Pawlett (1685), 1 Vern. 321.

1608. — *—*—Portion devised out of land, payable at a future day; if the person to whom payable dies before the day of payment, it is sunk; *aliter* out of personal estate.—*YATES v. FETTIPLACE* (1700), 12 Mod. Rep. 276; 1 Ld. Raym. 508; 2 Vern. 416; *Freem. Ch.* 243; *Prec. Ch.* 140; 88 E. R. 1319.

Annotations:—Consd. Jennings v. Looks (1725), 2 P. Wms 276; *Chandos v. Talbot* (1731), 2 P. Wms. 601; *Bellasis v. Athwatt* (1737), *West temp. Hard.* 273; *Prowse v. Abingdon* (1738), *West temp. Hard.* 312; *A.-G. v. Milner* (1744), 3 Atk. 112. *Distd. Reynish v. Martin* (1746), 3 Atk. 330. *Refd. Billingsley v. Eckerhall* (1738), 2 Eq. Cas. Abr. 570; *Hall v. Terry* (1738), *West temp. Hard.* 500; *Harvy v. Aston* (1740), 2 Com. 726; *Richardson v. Greese* (1743), 3 Atk. 65; *Hanson v. Graham* (1801), 6 Ves. 539; *Henty v. Wrey* (1882), 21 Ch. D. 332.

1609. — *—*—Term of one thousand years to secure daughters' portions payable at sixteen; proviso, if no daughter at the time of failure of issue male, the portion to sink. There is a daughter, who attains to sixteen, & marries without consent, & no son by the marriage: but the daughter dies in the lifetime of the father & mother & consequently while there might be a son; the portion sinks.

Portion secured out of land & the daughter dies before the portion becomes payable; it sinks into the land, so if a legacy be given out of land payable to J. at twenty-one, & J. dies before twenty-one, the legacy sinks. *Secus* in both cases where the legacy or portion is given out of a personal estate.—*GORDON v. RAYNES* (1732), 3 P. Wms. 134; 24 E. R. 1001, L. C.

Annotation:—Refd. Hutchins v. Foy (1710), 2 Com. 716.

1610. — *—*—A. devised lands to his son B., but if he should die without issue male of his body then living, or which might be afterwards born, that then his daughter M. should receive at her age of twenty-one, or day of marriage, which should first happen, £3,500 over & above £2,500 before given her; & in case the contingency of his son's dying without issue male should not happen before his daughter's said age, or day of marriage, that then she should receive the £3,500 whenever such contingency might happen; & testator charged this legacy or portion on his real estate.

five years, & to the daughters on attaining majority. Certain of the children having predeceased the term at which the provisions were payable:—*Held: under the settlement, no right to the shares provided thereby to them vested in the predeceasing children.*—*STEWART'S TRUSTEES v. STEWART* (1851), 13 Dunl. (Ct. of Sess.) 1386; 23 Sc. Jur. 644.—*SCOT.*

1. — *—*—*ARBUTHNOT v. ARBUTHNOT* (1816), Hume, 536.—*SCOT*
m. — *—*—*WALKER'S TRUSTEES* (1870), 8 Macph. (Ct. of Sess.) 870; 42 Sc. Jur. 509.—*SCOT.*

1624. — Whether portion secured by settlement or will.]—One devises £1,000 to his daughter for her portion charged upon a real estate, & payable at twenty-one. Daughter dies before twenty-one. The portion shall sink in the land ; otherwise, if no time had been limited for the payment of the portion, for in that case it goes to the exors. of the daughter. No difference where the portion is secured by a settlement or a will, if secured out of a real estate, & the party

Sect. 5.—Portions: Sub-sect. 8, B. (a) & (b), & C. (a).]

dies before it is payable. In either case it sinks in the lands.—*SMITH v. SMITH* (1688), 2 Vern. 92 23 E. R. 669.

*Annotations:—***Consd.** *Sanders v. Sanders* (1739), West temp. Hard. 686. **Refd.** *Hervey v. Aston* (1738), West temp. Hard. 350; *Prowse v. Abingdon* (1738), West temp. Hard. 312; *Hutchins v. Foy* (1739), 2 Com. 716 *Godwin v. Munday* (1779), 1 Bro. C. C. 191; *Parker v. Hodgson* (1861), 1 Drew. & Sm. 568; *Henty v. Wrey* (1882), 21 Ch. D. 332.

1625. ————*—*.—If I secure a portion to a child by deed payable at twenty-one out of land, & the child dies before twenty-one, the portion shall sink into the land & not go to the exor. So if I devise a portion to a child out of land payable at twenty-one, & the child dies before twenty-one, the portion shall sink. Also the portion shall sink as well for the benefit of the *heres factus* as of the *heres natus*. So though the money given to the child be not said to be for a portion, if it appears to be so in fact. If by the will the portion be given out of a real & personal estate payable to the child at twenty-one, & the child dies before twenty-one, then so much as will arise out of the personal estate shall go to the exor. or administrator, but what would arise out of the land must sink.—*JENNINGS v. LOOKS* (1725), 2 P. Wms. 276; 24 E. R. 728.

*Annotations:—***Consd.** *Chandos v. Talbot* (1731), 2 P. Wms. 601; *Reynish v. Martin* (1746), 3 Atk. 330. **Refd.** *Prowse v. Abingdon* (1738), West temp. Hard. 312; *Anon.* (1744), 2 Eq. Cas. Abr. 551; *Basset v. Basset* (1744), 3 Atk. 203.

1626. ————*—*.—Although money declared not to be portion—Money appearing in fact to be such.—*JENNINGS v. LOOKS*, No. 1625, *ante*.

1627. Children deceased after attaining vested interest—Right of representatives.—*DAVIES v. HUGUENIN*, No. 1404, *ante*.

(b) Out of Personality.

1628. Portion payable—Notwithstanding prior death of portionist.—*WENTWORTH v. YOUNG* (1638), Nels. 36; 21 E. R. 783.

1629. ————*—*.—(1) Term limited by a settlement to raise portions for younger children payable at twenty-one or marriage. One of them dies under twenty-one & unmarried. Her portion shall not be raised for the benefit of the administratrix. (2) Otherwise, if the portion was to be raised out of a personal estate.—*POULET (LADY) v. POULET (LORD)* (1685), 1 Vern. 204; 23 E. R. 415; *sub nom.* *PAWLETT v. PAWLETT*, 1 Vern. 321; 2 Rep. Ch. 286; 1 Eq. Cas. Abr. 267; *sub nom.* *PAWLETT'S (LORD) CASE*, 2 Vent. 366; *Freem. Ch. 93*; *affd.* 14 Lords Journals 87, H. L.

*Annotations:—**As to* (1) **Consd.** *Rivers v. Derby* (1688), 2 Vern. 72. **Apld.** *Smith v. Smith* (1688), 2 Vern. 92. **Distd.** *Harrison v. Buckle* (1719), 1 Stra. 238. **Consd.** *King v. Withers* (1735), Cas. temp. Talb. 117. **Distd.** *Whaley v. Cox* (1737), 2 Eq. Cas. Abr. 549. **Apld.** *Prowse v. Abingdon* (1738), West temp. Hard. 312. **Consd.** *Sherman v. Collins* (1745), 3 Atk. 319; *Hodgson v. Rawson* (1747), 1 Ves. Sen. 44. **Expld.** *Manning v. Herbert* (1769), Amb. 575. **Consd.** *Henty v. Wrey* (1882), 21 Ch. D. 332. **Refd.** *Hall v. Terry* (1738), 1 Atk. 502; *Harvey v. Aston* (1740), 2 Com. 726; *Hutchins v. Foy* (1740), 2 Com. 716; *Lowther v. Condon* (1741), 2 Atk. 127; *Nicholls v. Judson* (1742), 2 Atk. 300; *A.-G. v. Milner* (1744), 3 Atk. 112; *Tunstall v. Brachen* (1753), Amb. 167. *As to* (2) **Refd.** *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510. *Generally*, **Refd.** *Godwin v. Munday* (1779), 1 Bro. C. C. 191; *Remnant v. Hood* (1859), 27 Beav. 71; *Davis v. Huguenin* (1863), 1 Hcm. & M. 730.

1630. ————*—*.—A portion devised to a child with interest, but not to be paid or payable

until the child attain twenty-one years or was married: the child dies under twenty-one & unmarried decreed the portion to the administrator.

—*COLLINS v. METCALFE* (1687), 1 Vern. 462; 23 E. R. 588, L. C.

*Annotation:—***Refd.** *Ammurst v. Litton*, *Litton v. Ammurst* (1729), 1 Barn. K. B. 217.

1631. ————*—*.—*YATES v. FETTIPLACE*, No. 1608, *ante*.

1632. ————*—*.—A. by will gives £500 to his daughter, to be paid by his exors. at her age of twenty-one, out of his personal estate, & rents of his real; & if not raised by that time, the exors. to stand seised, & take the rents, till the £500 was raised, & after payment gives the land to his son. The daughter marries at eighteen & dies under twenty-one; the husband takes administration. Decreed, the portion to be raised, & that by a sale, though the land by reason of the incumbrances would produce little more than the £500.—*JACKSON v. FARRAND* (1701), 2 Vern. 424; 1 Eq. Cas. Abr. 268; 16 Vin. Abr. 448; 23 E. R. 871; *subsequent proceedings, sub nom.* *FERRAND v. JACKSON* (1703), 3 Bro. Parl. Cas. 2, H. L.

*Annotations:—***Apld.** *Wilson v. Spencer* (1732), 3 P. Wms. 172. **Expld.** *King v. Withers* (1735), Cas. temp. Talb. 117; *Boycot v. Totton* (1738), 1 Atk. 552. **Distd.** *Prowse v. Abingdon* (1738), 1 Atk. 482. **Consd.** *Godwin v. Munday* (1779), 1 Bro. C. C. 191.

1633. ————*—*.—*JENNINGS v. LOOKS*, No. 1625, *ante*.

1634. ————*—*.—*GORDON v. RAYNES*, No. 1609, *ante*.

1635. ————*—*.—*WHALEY v. COX* (1737), 2 Eq. Cas. Abr. 549; 22 E. R. 462.

*Annotations:—***Distd.** *Van v. Clarke* (1739), West temp. Hard. 699. **Refd.** *Hall v. Terry* (1738), West temp. Hard. 500.

1636. ————*—*.—Devise of lands to wife for life & after her death to the son he paying out of such lands £600 to testator's daughters within six months after death of wife with power of entry in case of non payment. The daughters died in the life of testator's wife:—*Held*: the legacies vested & on his death to be raised for their representatives.—*MANNING v. HERBERT* (1769), Amb. 575; 27 E. R. 372, L. C.

1637. ————*—*.—*HUTCHINS v. FOY* (1740), 2 Com. 716; 92 E. R. 1282.

*Annotations:—***Refd.** *Hodgson v. Rawson* (1747), 1 Ves. Sen. 44; *Jeale v. Titchener* (1771), Amb. 703; *Godwin v. Munday* (1779), 1 Bro. C. C. 191; *Scarfild v. Howes* (1790), 3 Bro. C. C. 90.

1638. ————*—*.—By a marriage settlement trustees were directed, after the death of the husband & wife, to transfer the trust fund to all & every the child & children of the marriage, his, her, or their respective exors., administrators, & assigns, equally to be divided between them, the children, if more than one; & if but one, then to such only child; the shares of such of the children as should be minors at the death of the survivor of the husband & wife to be paid to them at twenty-one; with power for the trustees to apply the income of the respective shares of such minors for their maintenance & education; & in case there should be no child of the marriage, or all of them should die, "before they became entitled to their respective shares," then over. There were six children of the marriage; two of them died infants in the lifetime of their parents; the others survived both parents, & attained twenty-one:—*Held*: all six children took vested & transmissible

PART IX. SECT. 5, SUB-SECT. 8.—
B. (b).

1628 i. Portion payable—Notwith-

standing prior death of portionist.—
GILL v. GILMOUR (1887), 14 O. R. 129.
—CAN.

1628 ii. ————*—*.—*Re DENNIS'S*

TRUSTS (1857), 6 I. Ch. R. 422.—IR.

1628 iii. ————*—*.—*BARDON v. B.*
(1865), 16 I. Ch. R. 415.—IR.

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Willis v. Willis (1796), 3 Ves. 51. **Consd.** Hope v. Clifden (1801), 6 Ves. 499. **Apld.** Evans v. Scott (1847), 1 H. L. Cas. 43. **Refd.** Powis v. Burdett (1804), 9 Ves. 428. Driver v. Frank (1814), 3 M. & S. 25.

1649. ————.]—Covenant in marriage articles, that in case the father should happen to die leaving issue male, & one or more younger son or daughter, to raise portions: if but one then living £1,000, if two £1,200, if three £1,500, to be paid at their respective ages of twenty-one, or marriage, in such proportions as the survivors of the father & mother should direct, in default of such direction, equally:—**Held:** the share of a son who attained twenty-one was vested though he died in the father's lifetime.—**ROOKE v. ROOKE** (1761), 2 Eden, 8; 28 E. R. 797.

1650. ————.]—**WOODCOCK v. DORSET** (DUKE) (1792), 3 Bro. C. C. 569; 3 Ves. & B. 82, n.; 29 E. R. 704, L. C.

Annotations:—**Folld.** Hope v. Clifden (1801), 6 Ves. 499. **Distd.** Schenck v. Legh (1804), 9 Ves. 300. **Consd.** Powis v. Burdett (1804), 9 Ves. 428; Howgrave v. Cartier (1814), 3 M. & S. 66. **Apld.** Maitland v. Challe (1822), 6 Madd. 213. **Consd.** Fry v. Sherborne (1829), 3 Sim. 243. **Apld.** Bulmer v. Jay (1830), 4 Sim. 48. **Consd.** Whatford v. Moore (1837), 3 My. & Cr. 270; Jeffery v. Jeffery (1849), 17 Sim. 26. **Distd.** Bythsea v. Bythsea (1854), 23 L. J. Ch. 1004. **Apld.** Jackson v. Dover (1864), 4 New Rep. 136. **Expld.** Jeyes v. Savage (1875), 10 Ch. App. 555. **Refd.** Driver v. Frank (1814), 3 M. & S. 25; Spencer v. Spencer (1836), 5 L. J. Ch. 310; Woodhouse v. Woodhouse (1841), 5 Jur. 404; Evans v. Scott (1847), 1 H. L. Cas. 43; Baillie v. Jackson (1853), 1 Sm. & G. 175; Jopp v. Wood (1860), 28 Beav. 53; Currie v. Larkins (1864), 4 De G. J. & Sm. 245; Whitman v. Aitken (1866), L. R. 2 Eq. 414; Re Watson's Trusts (1870), 39 L. J. Ch. 770; Re Orlebar's Settlements (1875), L. R. 20 Eq. 711; Trehanne v. Layton (1875), L. R. 10 Q. B. 459; Day v. Radcliffe (1876), 3 Ch. D. 654; Re Ball, Slattery v. Ball (1887), 36 Ch. D. 508; Re Hamlet, Stephen v. Cunningham (1888), 38 Ch. D. 183.

—Settlement on marriage to the use of the husband for life; remainder to trustees for five hundred years in trust after the death of the husband, & not before unless with his consent as therein mentioned, to raise portions for younger children, to be paid in such shares, & at such times, as the husband & wife should appoint; in default of appointment to be paid, if but one besides an eldest or only son, £5,000, if two, £6,000, if three, £8,000, & if four or more £10,000 equally; to be paid respectively at twenty-one, or marriage of daughters if after the age of sixteen, if such times of payment happen after the death of the husband; if in his life, then within twelve months after his decease, & not before, unless with such consent: provided, that if any of such younger children should die before his, her or their portions should become payable, so that the number should be reduced to less than four, no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such younger children equal to the sum originally limited for the portion or portions of such child or children, if one, two, or three. Three younger children only survived their father; but more than four had attained twenty-one. The sum to be raised is £10,000.

If but one had remained, attaining the age of twenty-one, but dying in the lifetime of the parent, it is clear that must have been a vested interest; for there are no words to make it sink for the benefit of the inheritance (**LORD LOUGHBOROUGH, C.**).—**WILLIS v. WILLIS** (1796), 3 Ves. 51; 30 E. R. 888, L. C.

Annotations:—**Distd.** Hope v. Clifden (1801), 6 Ves. 499. **Consd.** Fry v. Sherborne (1829), 3 Sim. 243. **Refd.** Powis v. Burdett (1804), 9 Ves. 428; Driver v. Frank (1814), 3 M. & S. 25.

1652. ————.]—Portion vested in the case of parent & child by implication from the

whole settlement, against express words; & a clause of survivorship upon the death of a child, before the portion should become payable, was upon the authorities construed, before it should be vested.—**HOPE v. CLIFDEN** (LORD) (1801), 6 Ves. 499; 31 E. R. 1164, L. C.

Annotations:—**Consd.** Schenck v. Legh (1804), 9 Ves. 300. **Apld.** Poulett v. Poulett (1821), 8 Madd. 187. **Consd.** Fry v. Sherborne (1829), 3 Sim. 243. **Refd.** King v. Hake (1804), 9 Ves. 438; Powis v. Burdett (1804), 9 Ves. 428; Driver v. Frank (1814), 3 M. & S. 25; Howgrave v. Cartier (1814), 3 M. & S. 66; Clutterbuck v. Edwards (1832), 2 Russ. & M. 577; Whatford v. Moore (1837), 3 My. & Cr. 270; Evans v. Scott (1847), 1 H. L. Cas. 43; Re Yates's Trust (1851), 21 L. J. Ch. 281; Bythsea v. Bythsea (1854), 23 L. J. Ch. 1004; Currie v. Larkins (1864), 4 De G. J. & Sm. 245; Eastwood v. Lockwood (1867), L. R. 3 Eq. 487; Jeyes v. Savage (1875), 10 Ch. App. 558, n.

1653. ————.]—Trust, in case husband & wife shall at the death of the survivor leave any child or children, & such child or children attain twenty-one, to convey to such child, if but one; & if there shall be more than one child, who shall live to attain twenty-one, to convey to such children, who shall attain twenty-one, according to the appointment of the father, or the mother, surviving; in default of appointment, equally, at twenty-one, with survivorship; & if both parents die without leaving any child, etc., remainder to the father, vested in children, having attained twenty-one, who died in the life of one parent, with those, who survived both.—**KING v. HAKE** (1804), 9 Ves. 438; 32 E. R. 671.

Annotations:—**Distd.** Swallow v. Bluns (1855), 1 K. & J. 417. **Consd.** Dalton v. Hill (1862), 6 L. T. 446. **Refd.** Howgrave v. Cartier (1814), 3 Ves. & B. 79; Jackson v. Dover (1864), 4 New Rep. 136; Jeyes v. Savage (1875), 10 Ch. App. 558, n.

1654. ————.]—Term in trust, after the decease of the father, in case he shall leave a younger child, etc., to raise portions; to be paid according to appointment, & in default, etc., at twenty-one or marriage; with a provision for advancement in the life of the father by his direction, & survivorship upon the death of any child, before the portion shall be payable; & if there shall be no such child, or all die before the portions become payable, not to be raised. Vested in an only younger child; who, having attained twenty-one, died in the life of the father; no appointment having been made.—**POWIS v. BURDETT** (1804), 9 Ves. 428; 32 E. R. 607.

Annotations:—**Consd.** King v. Hake (1804), 9 Ves. 438. **Apld.** Maitland v. Challe (1822), 6 Madd. 243; Fry v. Sherborne (1829), 3 Sim. 243; Walker v. Simpson (1855), 1 K. & J. 713. **Distd.** Whitman v. Aitken (1866), L. R. 2 Eq. 414. **Refd.** Howgrave v. Cartier (1814), 3 M. & S. 66; Clutterbuck v. Edwards (1832), 2 Russ. & M. 577; Whatford v. Moore (1837), 3 My. & Cr. 270; Woodhouse v. Woodhouse (1841), 5 Jur. 404; Re Yates's Trust (1851), 21 L. J. Ch. 281; Baillie v. Jackson (1853), 1 Sm. & G. 175; Bythsea v. Bythsea (1854), 23 L. J. Ch. 1004; Malden v. Maine (1855), 2 Jur. N. S. 206; Re Ball, Slattery v. Ball (1888), 59 L. T. 800.

1655. ————.]—Power of appointment in a marriage settlement held to comprehend, as its objects, all the children of the marriage, & not to be confined to such of the children only as should be living at the death of the survivor of the parents.

If the settlement clearly & unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a ct. of equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting & contradictory clauses, so as to leave in a degree uncertain the period, at which, or the contingency upon which, the shares are to vest, the ct. leans strongly towards the construction, which gives a vested interest to the child, when that child stands in need of a provision (**GRANT, M.R.**).—

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Sect. 5.—Portions: Sub-sect. 8, C. (a) & (b).]

& proportions as tenants in common & not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, & the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years, or day or days of marriage, whichever shall first happen. Provided always that such marriage during minority shall be had by & with the consent & approbation of "the parents "or the survivor of them: with interest for the same by way of maintenance at the rate of £6 by the hundred, to be computed from the day of the death of the survivor of "the parents," with benefit of survivorship to the survivors or survivor of such children if any of such children shall die before his, her, or their share or shares shall become payable unmarried & without leaving issue as aforesaid, it being the true intent & meaning of these presents that none of the children of the said intended marriage, who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands & premises hereby conveyed . . . shall be entitled to any part of "the said sum. A son attained twenty-one & died in the lifetime of his father:—*Held*: there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the son took a vested interest in his share on attaining twenty-one.—*WAKEFIELD v. MAFFET* (1885), 10 App. Cas. 422; 55 L. J. Ch. 4; 53 L. T. 169, H. L.

1664. Exclusion of rule—Construction of settlement—Vesting conditional on survival of portionist.—By marriage settlement, a term is created for raising £100 a piece for younger children, to be paid them within a year after the father's death, & with interest from his death; one of the children dies after the father, but within a year after his death, the portion not being raised:—*Held*: it should sink in the inheritance, & not be raised for the benefit of its representative.—*TOURNAY v. TOURNAY* (1709), Prec. Ch. 290; 2 Eq. Cas. Abr. 654, pl. 6; 24 E. R. 139, L. C.

Annotations:—*Refd.* King v. Withers (1735), Cas. temp. Talb. 117; Boycot v. Cotton (1738), 1 Atk. 552; Ilervcy v. Aston (1738), West temp. Hard. 350; Emes v. Hancock (1742), 2 Atk. 507; Teynham v. Webb (1751), 2 Ves. Sen. 198; Godwin v. Munday (1783), 1 Bro. C. C. 191; Henty v. Wrey (1882), 21 Ch. D. 332.

1665. ———.—*]*—Term raised to secure daughters' portions. Trust thereof declared, that if the husband should leave no heir male by the marriage, & should leave a daughter or daughters, then the trustees to raise portions payable to daughters at twenty-one or marriage; proviso, that if the husband should die without leaving a daughter living at his death, then the term to cease. There is no issue male by the marriage; but there is a daughter who attains twenty-one & marries. Mother died, & daughter died in father's lifetime leaving issue; her husband administered to her, he shall have no portion.—*WINGRAVE v. PALGRAVE* (1717), 1 P. Wms. 401; 24 E. R. 444, L. C.

Annotations:—*Consd.* Fry v. Sherborne (1829), 3 Sim. 243. *Refd.* Cholmondeley v. Meyrick (1758), 1 Eden, 77; Hope v. Clifden (1801), 6 Ves. 499; Powis v. Burdett (1804), 9 Ves. 428; Howgrave v. Cartier (1814), Coop. G. 66; Hotchkin v. Humfroy (1817), 2 Madd. 65; Fitzgerald v. Field (1826), 1 Russ. 416; Clutterbuck v. Edwards (1832), 2 Russ. & M. 577.

1666. ———.—*]*—*GADON v. RAYNES* (1732), 2 Eq. Cas. Abr. 652, pl. 2; 22 E. R. 547.

1667. ———.—*]*—Power to husband &

wife to charge a term of years in lands with such sum or sums of money, not exceeding £200 for their two daughters, A. & B., as the husband & wife should appoint, & in failure of their joint appointment, as the survivors should appoint, with interest from such time as the term of years should commence in possession, & not before. The term was not to commence in possession until after the death of the survivor. Husband & wife, in execution of the power, directed the £200 to be equally divided between the two daughters six months after the decease of the father & mother; & if either of them died before payment, or the money became due, then the share of her so dying to be laid out for the benefit of her exors. One of the daughters died after the appointment, & before the time of payment. This was a good appointment to the daughters themselves, & the appointment to exors. was void; but as one of the appointees died before time of payment, her share sank into the estate. The joint appointment having appointed the whole, the share of the daughter who died was not the subject of any further appointment.—*BROWN v. NISBETT* (1750), 1 Cox, Eq. Cas. 13; 29 E. R. 1040, L. C.

Annotation:—*Consd.* Webster v. Boddington (1848), 16 Sim. 177.

1668. ———.—*]*—Marriage settlement on husband & wife for life, & trust term if no issue male, or if all should die without issue male before twenty-one years, to raise portions for daughters, etc. A son attained twenty-one, but died in father's lifetime without issue male. The portions not raisable.—*WORSLEY v. GRANVILLE* (EARL) (1751), 2 Ves. Sen. 331; 28 E. R. 214, L. C.

Annotation:—*Refd.* Clinton v. Seymour (1799), 4 Ves. 440.

1669. ———.—*]*—*LODER v. LODER*, No. 1412, ante.

1670. ———.—*]*—*HOWGRAVE v. CARTIER*, No. 1655, ante.

1671. ———.—*]*—By a settlement before marriage, whereby lands given to trustees for five hundred years, in trust that, if the intended husband & wife should leave one or more daughter or daughters, younger son or sons, that should be living at the time of the decease of the survivors of them, the trustees should raise, etc., £2,000 for the portion or portions of such daughter or daughters, younger son or sons, the same to be paid to such daughter, if but one, & no younger son, at eighteen or marriage; & to such younger son, if but one, & no daughter, at twenty-one, with allowance for maintenance in the meantime, etc.; & if there shall be more than one daughter or younger son, then to be paid to such daughter or daughters at eighteen or marriage; & to such younger son or sons at twenty-one years, etc.:—*Held*: the settlement did not vest anything in the surviving parent.—*HOTCHKIN v. HUMFREY* (1817), 2 Madd. 65; 56 E. R. 259.

Annotations:—*Refd.* Fitzgerald v. Field (1826), 1 Russ. 416; Fry v. Sherborne (1829), 3 Sim. 243; Clutterbuck v. Edwards (1832), 2 Russ. & M. 577; Whatford v. Moore (1837), 3 My. & Cr. 270; Swallow v. Binns (1855), 1 K. & J. 417.

1672. ———.—*]*—(1) In a marriage settlement, the father of the wife, after making a provision for her during her life, covenants, that, in case there shall be a child or children of the marriage living at her decease, he will pay £3,000 to such child or children on their attaining twenty-one, or, if they shall have attained that age in their mother's life time, at her death; in the directions that are afterwards given for the distribution of the sums in different events among the children of the marriage, & their issue, no reference is

made to the contingency of their surviving the mother; & though there is an express enumeration of the cases in which the money is not to be payable, the death of a child in the mother's life time, after having attained twenty-one, is not specified as one of those cases:—*Held*: the interest, which a child who has attained twenty-one takes in these sums, remains contingent during the life of the mother; there not being enough in the subsequent clauses to control the plain words of the covenant.

(2) In the same settlement, the father covenants to pay upon the death of the husband £2,000 to the eldest or only son of the marriage:—*Held*: this covenant is controlled by subsequent clauses, so as not to give a vested interest upon the death of the father to an only son who was then under age.—*FITZGERALD v. FIELD* (1826), 1 Russ. 416; 4 L. J. O. S. Ch. 170; 38 E. R. 162.

Annotations:—*Consd.* *Swallow v. Binns* (1855), 1 K. & J. 417. *Refd.* *Fry v. Sherborne* (1829), 3 Sim. 213; *Whatford v. Moore* (1837), 3 My. & Cr. 270; *Pickford v. Brown*, *Brown v. Brown* (1856), 2 K. & J. 426.

1673. ————.]—A term was created by a marriage settlement, upon trust, in case the intended husband should die, leaving issue by the intended wife an eldest or only son, who should attain twenty-one, or die before that, if leaving issue & one or more younger child or children; then, after the several deaths of the husband wife; & the commencement of the term, but not sooner, unless with the consent of the husband, to raise portions for the younger children, there being an elder or only son, or the heirs of the body of such son, then living, such portions to be paid to daughters at eighteen or days of marriage, which should first happen after the several deaths of husband & wife, otherwise within three months after the death of the survivor of them:—*Held*: the representatives of a daughter who attained eighteen married, & died in the lifetime of her parents, were not entitled to her portion.—*WHATFORD v. MOORE* (1837), 3 My. & Cr. 270; 6 L. J. Ch. 378; 40 E. R. 928, L. C.

Annotations:—*Consd.* *Jackson v. Dover* (1864), 2 Hem. & M. 209. *Apld.* *Jeyes v. Savare* (1875), 10 Ch. App. 555. *Consd.* *Day v. Radcliffe* (1876), 3 Ch. D. 651. *Refd.* *Rammell v. Gillow* (1845), 15 L. J. Ch. 35; *Re Williams* (1849), 12 Beav. 317; *Farrer v. Barker* (1852), 9 Hare, 737; *Swallow v. Binns* (1855), 1 K. & J. 417; *Remnant v. Hood* (1860), 2 De G. F. & J. 396; *Re Hamlet*, *Stephen v. Cunningham* (1888), 38 Ch. D. 183.

1674. ————.]—A clause in a will provided for the date at which the interest should vest in the case of sons, namely, twenty-one. It then provided for the date of the vesting in the case of daughters, namely, twenty-one or marriage. These two provisions were in a continuous sentence, & at the end of the words dealing with the case of daughters came the following passage, "if the same respectively shall happen after the death of H., the father, but if the same should happen in his lifetime, then immediately after his death." Resp., as mtgee. of B.'s one-third share of a portion of £6,000, claimed to have a sum of £2,000 raised, notwithstanding that B. had died in the lifetime of his father, H.:—*Held*: according to the canon of construction it had been the practice to construe a deed providing portions as vesting the portions at twenty-one, or, in the case of daughters' marriage, unless the deed throughout all its provisions clearly treated the vesting as contingent on the portioner surviving the parent, & therefore the one-third share of the portions sum became vested in B. on his attaining the age of twenty-one, & was not contingent on his surviving his father.—*WALLER v. STEVENSON* (1912), 56 Sol. Jo. 660, H. L.

(b) Out of Personalty.

1675. General rule—Portion payable on happening of event—Though portionist dead.]—By a settlement made previous to the marriage of A. & B. certain exchequer annuities were vested in trustees, in trust for the husband for life, then to the wife for life, & after both their deaths, for the children of the marriage equally, if more than one; & if but one, for such only child; to be assigned over to such child or children respectively, at their ages of twenty-one, happening after the death of the survivor of the father & mother; but if either of the children should attain twenty-one during the joint lives of the father & mother, or the life of the survivor, then his or her share was to be paid within three months after the death of such survivor. But if there should be no children of the marriage, or being such, all of them should die before their shares should become transferable as aforesaid, then the annuities were to go to the survivor of the husband & wife. There was issue only one son, who attained twenty-one, but died in the lifetime of his mother, who survived her husband. Upon a question between her & the son's exor., who was entitled to these exchequer annuities it was held, that they became vested in the son on his attaining twenty-one, & were transmissible & devisable by him, notwithstanding he died in his mother's lifetime.—*JEFFREYS v. REYNOLDS* (1767), 6 Bro. Parl. Cas. 398; 2 E. R. 1158, H. L.; *affg.* S. C. *sub nom.* *REYNOLDS v. JEFFREYS* (1766), 2 Eden, 365, L. C.

Annotations:—*Consd.* *Schenck v. Legh* (1804), 9 Ves. 300; *Fry v. Sherborne* (1829), 3 Sim. 213. *Refd.* *Eaton v. Hewitt* (1862), 1 New Rep. 10.

1676. ————.]—Portions to be paid or transferred at twenty-one or marriage; if in the lives of the parents, entitled for life, not to be paid, assigned, or transferred, till their decease; with survivorship in case of the death of any before his, her or their, shares should be payable, etc., vested at twenty-one or marriage in the life of the parents. *Qu.*: upon a further proviso for a limitation over in the event of no child living at the death of the survivor of the parents, or the death of all, before the fund should be so, as aforesaid, payable, etc., whether contingent.—*SCHENCK v. LEGH* (1803), 9 Ves. 300; 32 E. R. 618.

Annotations:—*Apld.* *Bayard v. Smith* (1808), 14 Ves. 470. *Consd.* *Walker v. Main* (1819), 1 Jac. & W. 1; *Clutterbuck v. Edwards* (1832), 2 Russ. & M. 577; *Rammell v. Gillow* (1845), 15 L. J. Ch. 35. *Refd.* *Howgrave v. Cartier* (1814), Coop. G. 66.

1677. ————.]—*PERFECT v. CURZON* (LORD), No. 1071, ante.

1678. ————.]—By a marriage settlement, stock was settled, subject to life interests in the husband & wife, in trust for their children, share & share alike, the shares to be paid to them at twenty-one or marriage, & the shares of children dying leaving issue before their shares had become payable, were to be in trust for their issue, but in case any of the children should die before their shares should become payable, without leaving any issue, then their shares were to be in trust for the surviving children. There were six children of the marriage, who all attained twenty-one, two of them died in the lifetime of their surviving parent:—*Held*: the word "payable" must be held to mean "vested," & consequently, the representatives of deceased children were entitled to shares of the stock.—*MOCATTA v. LINDO* (1837), 9 Sim. 56; 59 E. R. 278.

Annotations:—*Consd.* *Rammell v. Gillow* (1845), 15 L. J. Ch. 35. *Distd.* *Re Wilmott's Trusts* (1869), L. R. 7 Eq. 532.

1679. ————.]—By settlement, personal estate was limited, after the death of the

Sect. 5.—Portions: Sub-sect. 8, C. (b), & D. (a) & (b); sub-sect. 9, &

husband & wife, in trust for all the children as tenants in common, & the several issue of the body of such children; & failing issue of any such children, their shares to the use of the surviving children, as tenants in common, & the issue of their bodies. There was a gift over, in case there should be no issue of the marriage, or any issue of such issue, or being such, all should die before their shares should become payable:—*Held*: the children of the marriage took absolute interests, & the representatives of a child who died an infant, without issue, in the life of his parents, were entitled to a share.—*MOUNT v. MOUNT* (1851), 13 Beav. 333; 51 E. R. 128.

1680. ———.—.]—*SWALLOW v. BINNS*, No. 1581, *ante*.

1681. Exclusion of rule—Construction of settlement—Vesting conditional on survival of portionist.—By a marriage settlement trustees were directed to hold a sum of stock, & the income, after the death of the survivor of husband & wife, unto & amongst a child, J., of the husband by a former marriage, & all the children of the then intended marriage, in equal shares, & in case any or either of them should happen to be dead, leaving issue, unto the issue of such one or more which should be then dead, equally to be divided amongst them or their issue respectively, to each being a son at twenty-one, & to each being a daughter at twenty-one or marriage; & until their respective shares should become "payable as aforesaid," upon trusts as to income for maintenance & education. In case J. or either or any of such children of the marriage should die without issue before his, her, or their share should become "due & payable," the share was to be paid & divided unto & amongst the survivors & survivor, & the issue of any one or more of them who might happen to be dead leaving issue, in equal shares, in manner aforesaid, & when & as his, her, or their original or proper share or shares should become "due & payable." In case at the time of the decease of the survivor of husband & wife there should be neither J., nor any child or children of the marriage, nor any issue of J., or of such child or children, living, or if there should be any then living, if all of them should die before his, her, or their share or shares were "payable, then" there was a gift over. In case the trustees should see it necessary or requisite for a child or the issue of a child to have his, her, or their share or shares paid, assigned, or transferred to him, her, or them before the expiration of "the respective times hereinbefore limited for the payment & division thereof respectively," they were empowered to pay or assign & transfer the same accordingly. J. died without leaving issue in the lifetime of the tenant for life:—*Held*: the provision for the issue of a deceased child relieved the ct. from the necessity of applying the rule in *Emperor v. Rolfe*, No. 1646, *ante*; & upon the construction of the whole settlement, the share of J. was divested, & went over to the survivors.

The case of *Emperor v. Rolfe*, No. 1646, *ante*, originally established the strong & un rebuttable presumption, that in marriage settlements the shares of children are intended to become vested when they are wanted: that is to say, in the case of sons at twenty-one & of daughters at twenty-

one or marriage (*JAMES, V.-C.*).—*Re WILMOTT'S TRUSTS* (1869), L. R. 7 Eq. 532; 38 L. J. Ch. 275.

Annotations:—*Apld.* *Chell v. Chell* (1875), 23 W. R. 252. *Distd.* *Wakefield v. Mafet* (1885), 10 App. Cas. 422.

1682. ———.—.]—By a marriage settlement, reciting an intention to provide for the husband & wife & their issue, a fund was settled in trust for the husband for life, then for the wife for life, & after the death of the survivor, if they should leave any issue who being daughters should marry or attain twenty-one, or being sons attain twenty-one, to transfer the fund unto & equally among all such issue when they should attain twenty-one, or be married if a daughter or daughters with consent; & in the meantime & until the said issue should attain twenty-one or be married as aforesaid, to pay the income for their maintenance: Provided always, that if any such issue as aforesaid should happen to die before they should respectively become entitled to & actually receive their portions, leaving issue of their respective bodies then surviving, then such last-mentioned issue should take & be entitled to his, her, or their father's or mother's share or shares equally among them, to be paid & transferred at the same time or times as was declared concerning the whole original trust-moneys & the immediate issue of the marriage. There was a gift over if the husband & wife should die without leaving any issue of their two bodies begotten, or being such, they should all die before they should respectively become entitled to receive their portions, & without leaving issue. Two of the four children of the marriage died infants & unmarried in the lifetime of their parents. Another attained twenty-one & died a bachelor in the lifetime of the father, & the fourth attained twenty-one & survived both parents:—*Held*: the representative of the child who attained twenty-one & died in the lifetime of the father took nothing; but the whole fund went to the survivor.—*JEYES v. SAVAGE* (1875), 10 Ch. App. 555; 41 L. J. Ch. 706; 33 L. T. 139; 23 W. R. 764, L. J. J. *Annotations*:—*Apld.* *Re Hamlet, Stephen v. Cunningham* (1888), 38 Ch. D. 183. *Refd.* *Re Orlebar's Settlement, Trusts* (1875), L. R. 20 Eq. 711; *Day v. Radcliffe* (1876), 3 Ch. D. 654.

D. Where No Time Specified.

(a) In General.

1683. Portion vests on attainment of full age.—Where no time is appointed for the payment of children's portions, they shall be paid at the age of twenty-one or day of marriage.—*DORMER v. DORMER* (1679), Cas. temp. Finch, 432; 23 E. R. 235.

Annotation:—*Consd.* *Doe d. Oxenden v. Chichester* (1816), 4 Dow, 65.

1684. ———.—.]—Portions provided by marriage settlement for younger children, to be paid at such time as the trustees shall think proper. One of the children dying at seventeen before any appointment, his portion shall sink in the inheritance; but maintenance, & a sum paid in placing him out apprentice, to be allowed out of the trust estate.—*WARR v. WARR* (1702), Prec. Ch. 213; 1 Eq. Cas. Abr. 267, pl. 3; 24 E. R. 104.

Annotations:—*Refd.* *Davies v. Huguenin* (1863), 8 L. T. 443; *Henty v. Wrey* (1882), 21 Ch. D. 332

1685. ———.—.]—*ASTON v. ASTON*, No. 1595, *ante*.

1686. — Or on marriage.—A term is created by marriage settlement to raise £3,000 for daughters' portions, within twelve months after the death of the survivor of the husband & wife.

PART IX. SECT. 5, SUB-SECT. 8.— D. (a).

1686.1. *Portion vests on attainment of full age—Or on marriage.*—

HAVERTY v. CURTIS, [1895] 1 I. R. 23.—IR.

n. Death of settlor.—*Re CHARLEVILLE* (1892), 13 I. Ch. R. 6.—IR.

o. At birth.—*BRATTIE'S TRUSTEE v. COOPER'S TRUSTEES* (1862), 24 Dnnl. (Ct. of Sess.) 519; 34 Sc. Jur. 259.—SCOT.

There being one daughter; the father devises the trust lands to make good his wife's jointure, & to raise £3,000 for his daughter's portion. The daughter shall not have two portions of £3,000, & she dying at the age of five years, & the portion to be raised out of land, it shall not be raised for her administrator, but the interest or maintenance the child was entitled to shall.—*BREWIN v. BREWIN* (1702), *Prec. Ch.* 195; *Freem. Ch.* 254; 24 E. R. 94; *sub nom.* *BRUEN v. BRUEN*, 2 *Vern.* 439.

Annotations:—*Apprvd.* *Boycot v. Cotton* (1738), 1 *Atk.* 552. *Consd.* *Hutchins v. Foy* (1740), 2 *Com.* 716; *Lowther v. Condon* (1741), 2 *Atk.* 130; *Teynham v. Webb* (1751), 2 *Ves. Sen.* 198; *Remnant v. Hood* (1860), 2 *De G. F. & J.* 396; *Davies v. Huguenin* (1863), 1 *Hen. & M.* 730. *Refd.* *A. G. v. Thompson* (1712), *Prec. Ch.* 337; *King v. Withers* (1735), *Cas. temp. Talb.* 117; *Hervey v. Aston* (1738), *West temp. Hard.* 350; *Tunstall v. Brachen* (1753), *Amb.* 167; *Northumberland v. Egremont* (1759), 1 *Eden*, 435; *Godwin v. Munday* (1783), 1 *Bro. C. C.* 191; *Henty v. Wrey* (1882), 21 *Ch. D.* 332.

1687. ———.]—*REMNANT v. HOOD*, No. 1660, *ante*.

1688. ———.]—*DAVIES v. HUGUENIN*, No. 1404, *ante*.

(b) *Portion Raisable out of Rents and Profits.*

1689. *Portion vests immediately.*]—On a marriage, lands are limited to the husband for life, remainder to the wife for life, remainder to the first & other sons of the marriage in tail male, remainder to J. in fee. Provided, if there be no issue male of the marriage, & there be one or more daughters living at the husband's death, then the trustees to stand seised subject to the jointure to the intent such daughter or daughters should receive out of the rents £10,000 & £100 *per annum* for maintenance; but not time limited for payment of the portions. The husband dies leaving only one daughter, who lives to seventeen, & by her will disposes of the £10,000. Decreed this is a vested interest in the daughter, & well disposed of by her will.—*RIVERS (EARL) v. DERBY (EARL)* (1688), 2 *Vern.* 72; 23 E. R. 656, L. C.; *affd.* (1689), 14 *Lords Journals*, 195, H. L.

Annotations:—*Distd.* *Smith v. Smith* (1688), 2 *Vern.* 92. *Follid.* *Cowper v. Scott* (1731), 3 *P. Wms.* 119. *Consd.* *Evelyn v. Evelyn* (1731), 2 *P. Wms.* 659; *Hutchins v. Foy* (1739), 2 *Com.* 716; *Henty v. Wrey* (1882), 21 *Ch. D.* 332. *Refd.* *Godwin v. Munday* (1779), 1 *Bro. C. C.* 191.

1690. ———.]—*SMITH v. SMITH*, No. 1621, *ante*.

1691. ———.]—Devise of lands to trustees in fee, in trust within six years after testator's death, to raise & pay £1,500 to his daughter A. A. dies within the six years; the £1,500 shall go to her administrator, here being no certain time limited when, but only the ultimate time within which, it shall be raised.

Where lands are charged with portions [payable out of rents & profits], & not time appointed for payment, the right to the portion vests immediately.—*COWPER v. SCOTT* (1731), 3 *P. Wms.* 119; 24 E. R. 993.

Annotations:—*Refd.* *Henty v. Wrey* (1882), 21 *Ch. D.* 332. *Mentd.* *Chapman v. Blisset* (1738), *West temp. Hard.* 328; *Re Ford*, *Ford v. Ford*, [1902] 1 *Ch.* 218; *Re Roby*, *Howlett v. Newington*, [1908] 1 *Ch.* 71.

1692. ———.]—*EVELYN v. EVELYN*, No. 1569, *ante*.

SUB-SECT. 9.—INTEREST ON PORTIONS.

A. *In General.*

1693. *When payable—Infant portionists—Portions in hands of trustees.*]—Portions left in trust-

tees' hands for children, though no mention of interest, yet the trustees decreed to pay interest.—*GLIDE v. WRIGHT* (1666), 1 *Rep. Ch.* 265; 21 E. R. 568.

Annotation:—*Refd.* *Harvey v. Harvey* (1722), 2 *P. Wms.* 21.

——— *Interest applicable for maintenance.*]—*See* Sub-sect. 9, B., *post*.

1694. ——— *Charge substituted for portions.*]—*ODELL v. GRAYDON*, No. 1339, *ante*.

1695. ——— *No time limited for payment—Portion to be raised from rents & profits.*]—*EVELYN v. EVELYN*, No. 1569, *ante*.

1696. *When payment into court ordered—Portion contingent on death or marriage.*]—Portion & interest devised upon a contingency of dying or marriage decreed to be paid into ct. for the benefit of the heir according to the will, in case of the devisee's death.—*BOURNE v. TYNT* (1678), 2 *Rep. Ch.* 148; 21 E. R. 612.

Annotations:—*Consd.* *Heath v. Perry* (1744), 3 *Atk.* 101. *Refd.* *Harvey v. Harvey* (1722), 2 *P. Wms.* 21.

1697. *What moneys first applicable for payment—Money available to raise portion.*]—What is expressly paid towards a portion shall be first applied to discharge the interest of such portion.—*KINGSLAND (LORD) v. TYRCONNEL (LADY)* (1724), 2 *Eq. Cas. Abr.* 658; 22 E. R. 553.

1698. ———.]—*BALFOUR v. COOPER*, No. 1727, *post*.

Power to charge interest on land charged with portion.]—*See* Sect. 7, *post*.

B. *When Payable.*

1699. *General rule—From time when portion payable.*]—A term of forty years is limited for raising £2,000, either by profits or sale; the trustee takes possession, but makes no interest of the profits:—*Held*: the portion should carry interest, from the time it was payable; as the estate was sufficient, & the trustee might have raised it immediately.—*ROSEBERRY (LORD) v. TAYLOR* (1702), 6 *Bro. Parl. Cas.* 43; 2 E. R. 921, H. L.

1700. ———.]—*BEAL (OR BEALE) v. BEAL (OR BEALE)* (1715), *Prec. Ch.* 405; *Gilb. Ch.* 93; 24 E. R. 182; *previous proceedings* (1713), 1 *P. Wms.* 244.

Annotations:—*Refd.* *Wilbraham v. Searisbrick* (1840), 1 H. L. Cas. 173, n. *Mentd.* *Teynham v. Webb* (1751), 2 *Ves. Sen.* 198; *Thellusson v. Woodford* (1805), 1 *Bos. & P. N. R.* 357; *Villar v. Gilbey* (1906), 75 *L. J. Ch.* 308.

———.]—*BUTLER v. DUNCOMB*, No.

1478, *ante*.

1702. ———.]—*HALL v. CARTER*, No. 1789, *post*.

1703. ———.]—*CHURCHMAN v. HARVEY* (1757), *Amb.* 335, *App. I.* 824; 27 E. R. 225, 519.

Annotation:—*Mentd.* *Thornton v. Bright* (1836), 2 *My. & Cr.* 230.

1704. ———.]—Devise to A. for life, with remainder to his first & other sons, remainder to his daughters; & in default of such issue, the premises to stand charged with two sums, to be paid after the death of A. without issue, & subject to such charge over, with a power to A. of jointuring the whole estate, which he executed, A. dying without issue:—*Held*: the sums only carried interest from the death of the jointress, who survived him.

The early cases in this ct. went so far as to raise portions on reversionary terms in the life of parents, the time of payment being come, & gave them interest from that time as for the detention of a debt. By that equity they exhausted family

PART IX. SECT. 5, SUB-SECT. 9.—A.

p. *When payable—Effect of delay.*
—Interest will not be given *ch. a*

portion beyond the filing of the bill, when *pltf.* being under no disability, & where no compromise had taken place, had slept upon his rights, of

which debt. not guilty of fraud was ignorant.—*HARRINGTON v. O'BRIEN* (1809), 1 *Ball & B.* 180.—*IR.*

Sect. 5.—Portions: Sub-sect. 9, B. & C.]

estates, encouraged disobedience & set up an unnatural independency. Those considerations have of late introduced a different, & I think a more reasonable construction to settlement, by taking the design of the whole settlement into consideration, & has not extorted fruit from a barren reversion, except where the owners have expressly directed it (*LORD NORTHINGTON, KEEPER*).—*REYNOLDS v. MEYRICK* (1758), 1 Eden, 48; 28 E. R. 602.

1705. ———.]—A., by a deed, dated in 1826, settled property on himself for life, with remainder for such of his children as he should by deed or will appoint, with remainder in default of appointment to all of his children equally. The deed contained a power enabling A. to give a jointure to any wife whom he might afterwards marry, & a direction that, unless the contrary should be directed by any appointment, it should be lawful for the trustees to apply the income of the share of any child for his maintenance. A. married soon after the date of this deed, & his wife died in 1836, & there were two children of this marriage. In 1836 A. married B., & by a deed dated in that year, he gave a jointure to B., & directed that, if there should be two children of the marriage, the trustees should raise £4,000 for the portions of such children, to be paid to them at their ages of twenty-one years, after the death of the survivor of A. & B., with power for the trustees to give interest on the portions between the death of the survivor of A. & B. & the time of payment. A. afterwards appointed portions for the children of the first marriage, with interest from his death. There were two children of the second marriage. A. died in 1849:—*Held*: the children of the second marriage were not entitled to interest on their portions between the death of A. & the death of his widow.—*GARDNER v. PERRY* (1851), 20 L. J. Ch. 429.

1706. ———.]—*MASSY v. LLOYD*, No. 1161, *ante*.

1707. ———.]—*Re DRAX, SAVILE v. DRAX*, No. 1729, *post*.

1708. Interest by way of maintenance for children—Whether payable before portions payable.]—*GLIDE v. WRIGHT*, No. 1693, *ante*.

1709. ———.]—*GREENHILL v. WALDOE*, (1713), Prec. Ch. 367; Gilb. Ch. 31; 2 Eq. Cas. Abr. 640; 24 E. R. 166, L. C.

Annotation:—*Reid. Mole v. Mole* (1758), 1 Dick. 311.

1710. ———.]—Where no other provision.]—*BOYCOT v. COTTON*, No. 1611, *ante*.

1711. ———.]—Where portions are given to younger children under a settlement made by a father, or other person standing *in loco parentis*, & the settlement contains no provision for the maintenance of the children, interest by way of maintenance for the children during minority will be allowed on their portions although their interests are contingent.—*Re GREAVES' SETTLED ESTATES, JONES v. GREAVES*, [1900] 2 Ch. 683; 69 L. J. Ch. 596; 82 L. T. 799; 49 W. R. 236; 44 Sol. Jo. 610.

1712. ———.]—*GREEN v. BELCHIER*, No. 1563, *ante*.

1713. ———.]—Where special power to trustees.]—Trust term, by marriage settlement, without impeachment of waste, immediately expectant upon the father's death, subject to a jointure to the mother, by sale or mtge., rents & profits, or

by any other ways & means to raise portions for younger children, at twenty-one, if after the death of both parents, & by such ways & means as the trustees think fit to raise interest for maintenance, until the portions shall respectively become payable: if the remainderman should pay the portions & the interest, or if there should be no younger child, the term or so much as should remain unsold, to attend the inheritance; which was limited in the usual way. Interest due from the death of the father, in the minority of all the children; & the wife surviving.—*LYDDON v. LYDDON* (1808), 14 Ves. 558; 33 E. R. 635.

Annotations:—*Apld. Milltown v. Trench* (1837), 11 Bl. N. S. 1. *Distd. Massy v. Lloyd* (1863), 10 H. L. Cas. 248.

1714. ———.]—*DENNY v. DENNY*, No. 1731, *post*.

1715. ———.]—Where provision for maintenance.]—Portions held to be raisable before the time of payment, under the particular construction of the will by which they were given.

Where testator made special provision for the maintenance of his younger children until receipt of their portions, & stated the sum appointed for the maintenance of the sons to be "in lieu of interest":—*Held*: the daughters were not entitled to interest on their portions, although there was a general clause in the will that the trustees should stand possessed of the trust funds, & the interest, dividends, & annual produce thereof, for the benefit of the daughters, upon their attaining twenty-one.—*SELBY v. GILLUM* (1836), 2 Y. & C. Ex. 379; 160 E. R. 444.

1716. ———.]—Testator directed his trustees to raise a sum of £12,000 for portions of the children of his son J. & his daughter E., towards whom he stood *in loco parentis*, & also to levy & raise for their maintenance & education in the meantime, until the respective portions should become payable, such yearly sum, not exceeding what the interest of the expectant portion would amount to after the rate of 4 per cent. *per annum*, as to the trustees should seem sufficient. The trustees raised for maintenance less than the 4 per cent.:—*Held*: upon a petition by the legatees, they were not entitled to interest, but to maintenance only.—*RUDGE v. WINNALL* (1849), 12 Beav. 357; 18 L. J. Ch. 469; 14 L. T. O. S. 325; 13 Jur. 737; 50 E. R. 1098.

Annotations:—*Distd. Re Rouse's Estate* (1852), 9 Hare, 649. *Mentd. Re Rouse, Evans v. Williamson* (1880), 17 Ch. D. 696.

1717. Where portion to be raised from rents & profits.]—A term is created for the purpose of raising out of the yearly profits, several sums for the maintenance & education of younger children, until their portions become due; & then, upon trust, for raising such sums of money out of the estate, not exceeding £2,000, as the father & mother, or the survivor of them, should appoint:—*Held*: this £2,000 should carry interest from the time that it might have been raised out of the yearly rents & profits of the lands; & an inquiry was directed in order to ascertain that time.—*BAGENAL v. BAGENAL* (1725), 6 Bro. Parl. Cas. 81; 2 E. R. 917, H. L.

Annotation:—*Mentd. Maddison v. Alderson* (1883), 31 W. R. 820.

1718. ———.]—*GREEN v. BELCHIER*, No. 1563, *ante*.

1719. Where time fixed for payment.]—*EVELYN v. EVELYN*, No. 1569, *ante*.

1720. Annual payment.]—*BOYCOT v. COTTON*, No. 1611, *ante*.

PART IX. SECT. 5, SUB-SECT. 9.—B.

1716 i. Interest by way of maintenance for children—Whether payable

before portions payable—Where provision for maintenance.]—*BREDIN v. BREDIN* (1841), 1 Dr. & War. 404.—*IR.*

1716 ii. ———.]—*CLAYTON v. GLENGAIL (EARL)* (1841), 1 Dr. & War. 1.—*IR.*

1721. Portion to be raised out of reverserionary term.]—*LYON v. CHANDOS (DUKE)*, No. 1472, *ante*.

1722. — Depends on construction of trust.]—*CODRINGTON v. FOLEY (LORD)*, No. 1477, *ante*.

1723. Proviso for reduction of portion.—If money advanced in lifetime of settlor.]—By settlement on the marriage of G. E. & E. M. a term of six hundred years was created to raise portions for daughters; by which it was provided that in case there should be but one daughter, the sum of £5,000 should be raised for such only daughter, to be paid at eighteen or day of marriage, with maintenance in the meanwhile. There was a proviso in the settlement, that in case the daughters should be advanced with portions in money or lands, equal in value to the portions thereby provided, in the lifetime of G. E. or he should give or leave them money or lands not equal in value, the trustees should raise only so much as should make the money, or value of the lands so given, equal to the portions provided. Applt. E., being the only daughter of the marriage, attained her age in her father's lifetime; who many years afterwards, being possessed of £5,000 East India annuities, which he had saved from the income of the estate, transferred them to applt. E. then a widow. A bill was filed, & the cause was heard before Lord Bathurst; in which there was a decree in favour of applt. for her portion of £5,000, with interest from her father's death; the question of satisfaction not being then before the ct. Resps. afterwards exhibited their bill of review, stating, that since the former decree they had discovered that G. E. had transferred to applt. these East India annuities, in part of her portion. On the hearing of that cause it was declared by the Chancellor, that the annuities were to be considered as having been so transferred in part satisfaction of the portion, & he therefore varied the former decree so far.—*PUGHE v. LEEDS (DUKE)* (1780), 6 Bro. Parl. Cas. 125; 2 E. R. 976, H. L.

1724. Portions to be raised under power in will—“As soon as conveniently may be.”]—*CONWAY v. CONWAY*, No. 1404, *ante*.

1725. Settlement varied by private Act.]—*HANSARD v. KEMEYS*, No. 1446, *ante*.

C. Rate of Interest.

See, generally, MONEY & MONEY-LENDING, Vol. XXXV., pp. 191-201.

1726. Right of donees of power to fix—Legal rate not to be exceeded—Whether court will interfere.]—*LEWIS v. FREKE*, No. 1790, *post*.

1727. — Power of distribution only.]—By a settlement made in England on the marriage of D. certain real estates in Ireland were limited to trustees for one thousand years, upon trust by mortgaging the estates, or out of the rents & profits thereof, to raise £15,000, to be divided among the younger children of the marriage as D. should appoint. D. appointed the whole of the portions among his children, appointing £4,000 to his daughter, to be raised at certain specified times, with interest in the meantime at 5 per cent. The trustees being unable to raise the portions by mortgage, an action was brought to carry the trusts into effect:—*Held*: (1) D. having only a power of distributing the portions & not of charging them, had no power to fix the rate of interest; but the land being in Ireland 5 per cent. was the proper rate to be fixed by the ct.; (2) under the terms of the settlement the trustees of the term had right to apply the rents & profits first in pay-

ment of the interest, & secondly in reduction of the capital.—*BALFOUR v. COOPER* (1883), 23 Ch. D. 472; 52 L. J. Ch. 495; 48 L. T. 323; 31 W. R. 569, C. A.

Annotation:—*As to* (1) *Appl. Re Drax, Savile v. Drax*, [1903] 1 Ch. 781.

1728. Rate not fixed by parties—Practice of court.]—*LEWIS v. FREKE*, No. 1790, *post*.

1729. — — —.]—Where any settlement or contract contains a provision that a certain fixed sum of money is to be charged on land & to be paid at a fixed time, then, as between the owner of the land & the person entitled to the money, the money, in the eye of a ct. of equity, bears interest from the date fixed for payment of the money, although nothing is said as to interest in the settlement or contract—unless there are circumstances negating the presumption that interest is payable.

In 1823 an order was made in a lunacy giving the lunatic's committees power to purchase on his behalf a freehold estate, & to pay the purchase-money out of the rents & profits of his real estate; & the order went on to declare that the rents & profits so to be applied “shall form a lien on the purchased estate in trust for the lunatic, his exors. & administrators”; but the order was silent as to interest. The committees accordingly paid the purchase-money out of the rents & profits of the lunatic's real estate, & in 1824, in consideration of the purchase-money, a conveyance was executed to trustees for the lunatic. The conveyance contained a declaration of lien corresponding to the terms of the order, but again without mentioning interest. In 1828 the lunatic died intestate, leaving a married sister his heiress-at-law & sole next of kin, who thereupon took out administration to his estate. In 1853 she died, when her husband, D., became tenant by the curtesy of the purchased property, & continued in enjoyment as such until his death in 1887. After his wife's death he had taken out administration to her estate, & also to the estate of the lunatic. No steps had ever been taken for raising the amount of the lien or charge, & no interest had ever been paid upon it. In an action by D.'s legal personal representatives against the persons who had become entitled to the purchased estate to enforce the lien:—*Held*: (1) there had been no merger of the lien either at law or in equity, & nothing to justify a presumption of satisfaction through lapse of time; (2) although interest was not mentioned either in the Order in Lunacy or in the conveyance, the ct. would in accordance with its well settled practice in other cases of equitable charges on land where interest is not mentioned, such as loans on deposit of title deeds, portions & legacies charged on land, & having regard to the circumstances of the case, treat the lien as an interest-bearing debt—that is to say, as bearing interest at 4 per cent. as from the death of the lunatic; & inasmuch as, in the events which had happened, such interest must be regarded as having been virtually paid down to D.'s death in 1887, the lien was not statute barred at that date. As by arrangement between the parties the statute was treated as not running from D.'s death, interest was allowed as from that date.—*Re DRAX, SAVILE v. DRAX*, [1903] 1 Ch. 781; 72 L. J. Ch. 505; 88 L. T. 510; 51 W. R. 612; 47 Sol. Jo. 405, C. A.

1730. — — — Property partly situate abroad—Partly situated in England.]—*YOUNG v. WATER-PARK (LORD)*, No. 1370, *ante*.

PART IX. SECT. 5, SUB-SECT. 9.—C.

1728 i. Rate not fixed by parties—Practice of court.]—*PURCELL v. PURCELL* (1842), 1 Jon. & Law. 371.—*IR*.

Sect. 5.—Portions: Sub-sect. 9, C. Sect. 6: Sub-sects. 1 & 2.]

1731. ———.]—By a deed of settlement B. was empowered to charge certain lands in Ireland with any sum, not to exceed £400 a year, as a jointure for his wife, & with any sum not to exceed £2,000 sterling for his younger children.

In exercise of the power B. charged the lands with £2,000 late Irish currency, to be vested in & paid to his younger children in equal shares on their attaining twenty-one or marriage; & he directed, in the event of his dying before the shares became vested, that his children should be entitled to interest on their presumptive portions at 5 per cent. by way of maintenance from the time of his death until such portions should be payable:—*Held*: the £2,000 carried interest at 5 per cent. Irish currency, from the death of B. until the shares of the younger children became payable.—*DENNY v. DENNY* (1866), 14 L. T. 854.

1732. ———.]—*BALFOUR v. COOPER*, No. 1727, *ante*.

SECT. 6.—INTERESTS IN REMAINDER.

SUB-SECT. 1.—IN GENERAL.

See, generally, REAL PROPERTY, Vol. XXXVIII., pp. 699 *et seq.*

1733. Remainder to illegitimate child not in esse—*Void*.]—A remainder limited to a bastard not *in esse* is void.—*BLODWELL v. EDWARDS* (1596), Cro. Eliz. 509; Moore, K. B. 430; 78 E. R. 758; *sub nom.* *BLADWELL v. EDWARDS*, Nov. 35.

Annotations:—*Consd.* *Oceleston v. Fullalove* (1874), 9 Ch. App. 147. *Reid*. *Wilkinson v. Adam* (1813), 1 Ves. & B. 422; *Beachcroft v. Beachcroft* (1816), 1 Madd. 430; *Barnett v. Tugwell* (1862), 31 L. J. Ch. 629; *Re Hastie's Trusts* (1887), 35 Ch. D. 728. *Mentd.* *Irwin v. Grey* (1865), 14 W. R. 208.

1734. ———.]—Where by deed an estate was limited to an after-born illegitimate son in fee, & if he should die before he attained twenty-one, then in fee to a living illegitimate child, who died an infant, & an after-born illegitimate son attained the age of twenty-one:—*Held*: the last limitation failed, & the devised estate resulted to the heir of the grantor.—*LOMAS v. WRIGHT* (1833), 2 My. & K. 769; 3 L. J. Ch. 68; 39 E. R. 1138.

Annotations:—*Mentd.* *Watson v. Parker* (1843), 6 Beav. 283; *Morse v. Tucker* (1846), 5 Hare, 79; *Northen v. Carnegie* (1859), 4 Drew. 587.

1735. Remainder to settlor's fifth son—How computed—Eldest son dead at time of settlement.]—A remainder in a settlement was limited to the settlor's fifth son: *qu.*: whether, in computing the fifth, the eldest son, who was dead at the time of the settlement, ought to be included.—*GROVE v. WOLLESCUTT* (1873), 1 Freem. K. B. 76; Cart. 219; 89 E. R. 56.

1736. Remainder to daughters until payment of sum certain—By next remainderman—Fee simple determinable on payment of sum.]—*BLAGRAVE v. LUNN* (1706), 2 Vern. 576; 23 E. R. 975.

1737. Remainder to eldest daughter—Eldest daughter when remainder vests in possession.]—A limitation to the eldest daughter is not to be construed as exclusively to the eldest born daughter, but must be extended to the eldest daughter at the time the succession opens.—*SHEPHERD v. GRANT* (1838), 2 Jur. 487, H. L.

1738. Remainder to settlor & his heirs—Settlement in favour of settlor until marriage of heir—Death before marriage of heir—Heir takes estate

in fee.]—Settlement of premises to T. & his heirs, to the use of W. & his heirs, until a marriage between R. & E.; then to the use of W. for the life of R., with several limitations over on the death of R. in favour of his wife & children, with a term for three hundred years in T., to commence on the death of R., for securing a rentcharge to the wife of T., & to determine on the performance of that trust, & subject to the foregoing, to W. & his heirs. W. died before the marriage of R., who was his heir-at-law, leaving a will & exors.:—*Held*: the exors. did not take any interest in the premises, & R. took a fee in them, subject to the term for three hundred years.—*TREVELYAN v. TREVELYAN* (1826), 3 Bing. 616; 12 Moore, C. P. 19; 5 L. J. O. S. C. P. 114; 130 E. R. 651.

1739. Settlement & recovery by tenant for life—Remainders under previous settlement not barred.]

—Under a voluntary settlement lands were limited unto J. & N. & their heirs, to the use of such persons as J. & A. should jointly appoint; & in default of appointment, to the use of J. for life, & after his death to the use of A. for life, remainder to the use of J. & N. & their heirs to support contingent remainders, & from & after the death of the survivor of J. & A. to the use of W. during the term of one hundred years for certain purposes, & subject thereto to the use of T., son of J. for life, remainder to the use of J. & N. & their heirs, to support contingent remainders; & after the death of T. to the use of his first & other sons in tail male, with remainders over:—*Held*: a settlement & recovery suffered by T. in consideration of his marriage & after he came into possession as tenant for life were ineffectual to bar the limitations under the previous voluntary settlement.—*LEWIS v. REES* (1856), 3 K. & J. 132; 26 L. J. Ch. 101; 28 L. T. O. S. 229; 3 Jur. N. S. 12; 5 W. R. 96; 69 E. R. 1052.

Annotation:—*Mentd.* *Cooper v. Kynock* (1872), 7 Ch. App. 398.

1740. Remainder to heirs of deceased person—Heirs take estate in fee.]—Under a limitation of real estate in a marriage settlement, after the decease & failure of issue of husband & wife, "in trust for nephews & nieces then living, & the several & respective heirs of nephews & nieces then dead, having left lawful issue living at the time of the failure of issue of the marriage, as tenants in common":—*Held*: nephews & nieces took life estates, & the eldest son of a nephew deceased at the time of such failure of issue took in fee.—*MARSHALL v. PEASCOD* (1861), 2 John. & H. 73; 70 E. R. 976.

Remainder subject to appointment.]—*See, generally*, POWERS, Vol. XXXVII., pp. 384 *et seq.*

Concurrent interests.]—*See, generally*, REAL PROPERTY, Vol. XXXVIII., pp. 685 *et seq.*

Descent.]—*See, generally*, DESCENT, Vol. XVIII., pp. 5 *et seq.*

Of copyholds.]—*See* COPYHOLDS, Vol. XIII., pp. 102 *et seq.*

Conversion & reconversion.]—*See* EQUITY, Vol. XX., pp. 335 *et seq.*

SUB-SECT. 2.—WHERE NO WORDS OF LIMITATION.

1741. General rule—Remainderman takes life estate.]—Remainder in a settlement, after successive estates tail in the sons, to the daughters as tenants in common & not as joint-tenants, & in default of such issue to the right heirs of the

father, admitted without argument an estate for life only in the daughters.—*SNELL v. SILCOCK* (1800), 5 Ves. 469; 31 E. R. 687, L. C.

Annotation.—*Consd. Lucas v. Brandreth* (No. 2) (1860), 28 Beav. 274.

1742. ———.]—Real estate was vested in a trustee in fee for a party for life, with remainder to her children equally.—*Held*: the children took life estates only all words of limitation being omitted.—*HOLLIDAY v. OVERTON* (1852), 15 Beav. 480; 21 L. J. Ch. 769; 19 L. T. O. S. 211; 16 Jur. 346; 51 B. R. 623; *affd. sub nom. HALLIDAY v. OVERTON*, 20 L. T. O. S. 12, L. J.J.

Annotations.—*Apld. Lucas v. Brandreth* (No. 2) (1860), 28 Beav. 274; *Tatham v. Vernon* (1861), 29 Beav. 604. *Distd. Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752. *Consd. Re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487. *Distd. Re Bostock's Settlmt.*, *Norrish v. Bostock*, [1921] 2 Ch. 469. *Refd. Osborn v. Bellman* (1860), 3 L. T. 265; *Re Whiston's Settlmt.*, *Lovatt v. Williamson*, [1894] 1 Ch. 661; *Re Hudson, Kuhne v. Hudson* (1895), 72 L. T. 892.

1743. ———.]—*LUCAS v. BRANDRETH* (No. 2), No. 1158, *ante*.

1744. ———.]—Real estate was conveyed to trustees upon the ultimate trust to convey & divide the trust estate to & among all the children of the settlor, & the issue of such children who should be living at the death of the wife of the settlor, as tenants in common.—*Held*: the children took life estates only.—*TATHAM v. VERNON* (1861), 29 Beav. 604; 4 L. T. 531; 7 Jur. N. S. 814; 9 W. R. 822; 51 E. R. 762.

Annotations.—*Distd. Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752. *Consd. Re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487; *Re Clarke's Settlmt. Trust*, *Wanklyn v. Streetfield*, [1916] 1 Ch. 467. *Distd. Re Bostock's Settlmt.*, *Norrish v. Bostock*, [1921] 2 Ch. 469. *Refd. Re Whiston's Settlmt.*, *Lovatt v. Williamson*, [1894] 1 Ch. 661; *Re Hudson, Kuhne v. Hudson* (1895), 72 L. T. 892.

1745. ———.]—An equitable limitation, by way of trust executed, now has the same construction as a legal limitation.

The settlement contains a series of formal limitations in favour of the settlor's wife, the settlor, & their children; but when you come to read the actual words of limitation to the children, the words "heirs" or "fee simple" are not used. If the case had to be decided according to the doctrine of legal limitations, it is plain that these children would only take life interests; but the limitations are, as a fact, only of an equitable interest, & on this point some of the older text writers, such as *Cruise*, Vol. I., p. 313, & *Hayes, Hayes' Conveyancing*, 5th Ed., Vol. I., p. 91, seem to have been of opinion that equity regarded the intention of the settlor in these cases, & did not follow the law; so that the ct. had some considerable latitude in the construction of equitable limitations like the present; but the more modern text writers seem to have rather come round in their opinions, & in *Elphinstone on the Interpretation of Deeds* it is stated an equitable limitation by way of trust executed has the same construction as a legal limitation. . . . Without considering it necessary to review all the authorities again in detail, I hold that these children took a life interest only under the settlement (*CHITTY, J.*).—*Re WHISTON'S SETTLEMENT, LOVATT v. WILLIAMSON*, [1894] 1 Ch. 661; 63 L. J. Ch. 273; 70 L. T. 681; 42 W. R. 327; 38 Sol. Jo. 253; 8 R. 175.

Annotations.—*Apld. Dearberg v. Letchford* (1895), 72 L. T. 489. *Distd. Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752. *Consd. Re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487; *Re Gillies' Settlmt.*, *Archer v. Penney*, [1917] 2 Ch. 205; *Re Bostock's Settlmt.*, *Norrish v. Bostock*, [1921] 2 Ch. 469.

1746. ———.]—By a settlement made upon his second marriage the husband conveyed freeholds, subject to existing mtges. thereon, to

trustees in fee simple to the use of the wife & himself for successive life interests & after his decease "in trust for the child or children" of the husband "now born or hereafter to be born who shall attain the age of twenty-one years & if more than one in equal shares as tenants in common & if there shall be no such child then in trust for the right heirs" of the husband. The husband then assigned leaseholds, chattels & a policy of insurance upon similar trusts which so far as the children were concerned were expressed in identical terms. The settlement also contained a provision enabling the trustees to "mortgage or charge the premises hereinbefore expressed to be hereby conveyed & assigned with any sum or sums not exceeding together one-half of the expectant share of any child" & to "apply same for his or her benefit or advancement." There was also a hotchpot clause to the effect that no child of his first marriage was "to take any part of the trust premises herein comprised without bringing into hotchpot all sums of money & other benefits which he or she may receive" under an earlier settlement.—*Held*: the limitations in trust having been perfected & declared by the settlor, they must have the same construction as in the case of legal estates executed, & in the absence of words of limitation the children took life estates only in the freeholds.—*Re BOSTOCK'S SETTLEMENT, NORRISH v. BOSTOCK*, [1921] 2 Ch. 469; 91 L. J. Ch. 17; 126 L. T. 145; 66 Sol. Jo. W. R. 7, C. A.

— See REAL PROPERTY, Vol. XXXVIII., pp. 668, 669, Nos. 107–116.

1747. Exception to rule—Clear intention to pass fee simple.—If the intention of a deed be clear to pass an equitable estate in fee simple, it is not necessary that the proper words of inheritance should be used for the purpose.

By deed of settlement, on Mar. 7, 1818, certain leaseholds were settled, as to a third share thereof, in trust, in the events which happened, for A. & B. absolutely in equal shares. In 1819, certain freeholds were settled "upon such & the same trusts, & for such & the same ends, intents, & purposes, & subject to such & the same powers, provisos, & declarations as in the indenture of Mar. 7, 1818, are expressed, declared, & contained of & concerning the premises therein mentioned & described, or as near thereto as the difference of the respective estates of C., M., & J." (the trustees) "& their respective heirs, exors., & administrators, therein respectively would admit, to the intent that the rents, issues, & profits of the hereditaments & premises might be had, received, & taken, & the hereditaments & premises held, sold, conveyed & assigned, & the produce thereof paid & applied unto such person or persons, & in such manner, & at such time & times, in every respect as in the indenture of Mar. 7, 1818, is expressed & declared of & concerning the premises therein particularly mentioned & described":—*Held*: the want of proper words of inheritance was not fatal, but A. & B. took equitable estates in fee simple, & not for life only, in one-third share of the freeholds.—*PUGH v. DREW* (1869), 17 W. R. 988.

Annotations.—*Consd. Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752. *Fold. Re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487. *Consd. Re Bostock's Settlmt.*, *Norrish v. Bostock*, [1921] 2 Ch. 469.

1748. ———.]—*MIDDLETON v. BARKER* (1873), 29 L. T. 643.

Annotations.—*Refd. Re Whiston's Settlmt.*, *Lovatt v. Williamson*, [1894] 1 Ch. 661; *Re Hudson, Kuhne v. Hudson* (1895), 72 L. T. 892.

1749. ———.]—A limitation, in a deed, of a trust of real estate for A, without any words of

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inheritance, may confer the equitable fee upon him where the intention to do so is expressed or sufficiently shown upon the face of the instrument.

By surrender & a settlement dated in 1831 copyhold hereditaments were limited in trust for M. for life, & after her death for her husband, & after the death of the survivor in trust for the children of the marriage equally as tenants in common, & in default of issue then to such uses as M. should declare by her will, with remainder to the right heirs of M. There were three children of the marriage:—*Held*: there being upon the face of the instrument sufficient indication of intention on the part of the settlor that absolute interests should be given, the three children, notwithstanding the absence of any limitation to their "heirs," were entitled as tenants in common in equal shares for equitable estates in customary fee simple.—*Re TRINGHAM'S TRUSTS*, *TRINGHAM v. GREENHILL*, [1901] 2 Ch. 487; 73 L. J. Ch. 693; 91 L. T. 370; 20 T. L. R. 657.

Annotations:—*Distd.* *Re Irwin*, *Irwin v. Parkes*, [1901] 2 Ch. 752. *Appld.* *Re Oliver's Settlement*, *Evered v. Leigh*, [1905] 1 Ch. 191. *Distd.* *Re Monckton's Settlement*, *Monckton v. Monckton*, [1913] 2 Ch. 636. *Overd.* *Re Bostock's Settlement*, *Norrish v. Bostock*, [1921] 2 Ch. 469. *Refd.* *Re Thurstby's Settlement*, *Grant v. Littledale*, [1910] 2 Ch. 181.

1750. ———.]—A limitation in a deed of a trust of real estate for a class of children without any words of inheritance may confer the equitable fee upon them where the intention to do so is expressed or sufficiently shown on the face of the instrument.

By a marriage settlement dated in 1831 real estate was conveyed to a trustee upon trust for the husband & wife successively for life, after their death upon trust to convey & transfer the trust estate between or among the children of the marriage as the husband & wife should jointly appoint, & in default as the survivor should appoint, & in default to all the children of the marriage who attained twenty-one, or married, in equal shares. The settlement contained a provision that no child taking under any appointment should receive anything more until all the other children had received shares equal in value to the appointed share; a power of advancement up to one-half the value of each child's share; & a gift over if no child attained a vested interest:—*Held*: there was on the face of the instrument amply sufficient indication of an intention that the children should take equitable interests in fee simple.—*Re OLIVER'S SETTLEMENT*, *EVERED v. LEIGH*, [1905] 1 Ch. 191; 74 L. J. Ch. 62; 53 W. R. 215; 21 T. L. R. 61.

Annotations:—*Consd.* *Re Bostock's Settlement*, *Norrish v. Bostock*, [1921] 2 Ch. 469. *Refd.* *Re Beales' Settlement*, *Barrett v. Beales*, [1905] 1 Ch. 256; *Re Wright*, *Whitworth v. Wright*, [1906] 2 Ch. 288; *Re Nash*, *Cook v. Frederick*, [1910] 1 Ch. 1; *Re Thurstby's Settlement*, *Grant v. Littledale*, [1910] 2 Ch. 181. *Mentd.* *Re Macartney*, *Macfarlane v. Macartney*, [1918] 1 Ch. 300; *Re Ogilvie*, *Ogilvie v. Ogilvie*, [1918] 1 Ch. 492.

1751. ———.]—By a voluntary settlement made in 1869, the settlor after reciting that he was seized of or entitled to the hereditaments thereafter described for an estate of inheritance in fee simple in possession & that, in consideration of the natural love & affection which he bore towards his wife & children, was desirous of conveying the same to the uses upon the trusts & with & subject to the powers & provisions thereafter declared granted unto the trustees therein named, their heirs & assigns certain freehold here-

ditaments & all the estate, right, title, property, claim & demand of the settlor in, to or out of the same hereditaments to hold the same unto the trustees & their heirs to the uses & upon the trusts thereafter declared, that is to say, upon certain trusts in favour of the settlor & his wife during their joint lives & the life of the survivor, & subject thereto upon trust for such or more of their children as they should by deed jointly appoint, & in default of such appointment as the survivor of them should by deed or will appoint & in default of such appointment then in trust for all their children who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares, the shares of daughters to be for their separate use. The settlor empowered the trustees to apply the annual income of the share or fortune, to which any child should for the time being be entitled in expectancy for his or her maintenance & further empowered them to sell the hereditaments & invest the moneys to arise from such sale & stand possessed of the investments & the income thereof upon the trusts thereafter declared of the hereditaments:—*Held*. under the trust in default of appointment the children were entitled to equitable estates in fee simple notwithstanding the absence of express words of limitation.—*Re GILLIES' SETTLEMENT*, *ARCHER v. PENNEY*, [1917] 2 Ch. 205; 86 L. J. Ch. 769; 117 L. T. 333.

Annotation:—*Refd.* *Re Bostock's Settlement*, *Norrish v. Bostock* (1921), 91 L. J. Ch. 17.

1752. ———.]—*Re BOSTOCK'S SETTLEMENT*, *NORRISH v. BOSTOCK*, No. 1716, *ante*.

Rectification of settlement.]—*See* Part VI., Sect. 1, *ante*.

SUB-SECT. 3.—ESTATES TAIL.

See Law of Property Act, 1925 (c. 20), s. 130, & generally, *REAL PROPERTY*, Vol. XXXVIII., pp. 710 *et seq.*

1753. Whether interest liable to be devested—On birth of second child—After death of father.]—If a conveyance, in consideration of an intended marriage, be made to the husband for life; remainder to the wife for life; with remainder to the use of all the issues female of their two bodies, & the heirs of the bodies of such issues female; & the husband dies leaving issue a daughter; the remainder in tail to the issues female is not so attached in that daughter as not to be devested for a moiety on the birth of another daughter before the particular estate determines.—*MATHEW v. TOMPSON* (1698), 5 Mod. Rep. 384; 87 F. R. 720.

1754. Effect of covenant to bar entail—Tenant in tail in remainder—Entitled to freehold.]—One upon his marriage covenants to levy a fine of his freehold, & to surrender his copyhold, to the use of himself & his wife for their lives, remainder to the heirs male of their bodies, remainder to the heirs of their bodies, & dies leaving issue a son & a daughter before any fine levied, or surrender made. The son, for securing of money covenants to levy a fine of the freehold lands, & to surrender the copyhold, & surrenders the copyhold, but dies without having levied a fine & without issue:—*Held*: it being in case of arts. for valuable consideration, the settlement should be to the first, etc., son of the marriage, with the remainder to the daughters; & the daughter was entitled to the freehold.—

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a. Whether interest liable to be de-

vested—On birth of second child.—*Re FRENCH'S ESTATE* (1862), 12 I. Ch. 11. 367.—*IR.*

r. Construction of settlement.]—*Re CROSE'S ESTATE*, [1910] 1 I. R. 357.—*IR.*

WHITE v. THORNBOROUGH (1715), 2 Vern. 702; Gilb. Ch. 107; Prec. Ch. 425; 23 E. R. 1056, L. C. *Annotations*:—**Refd.** Price v. Powel (1729), 1 Barn. K. B. 201; Carr d. Dagwel v. Singer (1750), 2 Ves. Sen. 603; Moore v. Moore (1755), 2 Ves. Sen. 596; Doe d. Wightwick v. Truby (1774), 2 Wm. Bl. 944.

1755. Effect of barring entail—Limitation by way of security—Until particular amount raised from rents & profits.—Father & son, on the son's marriage, by lease & release, convey lands to trustees & their heirs, to the use of the father for life; remainder to his wife for life; remainder to the son for ninety-nine years, if he should so long live; remainder to trustees during his life, to support contingent remainders; remainder to the son's intended wife for life, for her jointure; remainder to the first & every other son of that marriage, in tail male; remainder to the daughter or daughters of that marriage, & the heirs of their bodies, till they shall, out of the rents, issues & profits, have received £3,000; remainder to the heirs of the body of the son; remainder to the second son of the father, & to his first & other sons; remainder to the right heirs of the son, for ever. There were issue of the marriage only two daughters, who being in possession after all the particular precedent estates determined, suffer a common recovery:—**Held**: this was no bar of the subsequent remainders, the limitation to them being only a security till the £3,000 was raised.—**STANHOPE v. THACKER** (1716), Prec. Ch. 435; 24 E. R. 194, L. C.

Annotations:—**Refd.** Bagshaw v. Spencer (1743), 2 Atk. 570; Re Green, Baldock v. Green (1888), 40 Ch. D. 610. **Mentd.** Fitzgerald v. Fauconberge (1731), Fitz-G. 207.

1756. — Proceeds of estate paid into court—Right to payment out—Quasi tenant in tail in possession.—Order made for payment out of ct. of a sum of stock, of which the petitioner was quasi tenant in tail in possession under a settlement, on his producing the deed enrolled, or an affidavit of the enrolment of the deed, whereby, in pursuance of the provisions of Fines & Recoveries Act, 1833 (c. 74), s. 71, he had barred the estate tail & remainders over in the stock in question.—**Re SMYTHE** (1834), 3 My. & K. 249; 40 E. R. 91.

1757. — — — Tenant for life & tenant in tail.—Testator devised & bequeathed his real & personal estate unto & to the use of trustees, upon trusts for the benefit of his wife for life; from & after her death, the surplus rents were to be accumulated for the purpose of paying off mtges. on the real estates; & upon the expiration or other determination of the period of accumulation, but subject to the life interest of the wife, the trustees were directed to convey the real estates to the use of G. in tail male; but if G. should be then dead, to the use of the person who should then be the first heir male of the body of G., with remainder to the use of the person who for the time being should be entitled to the dignity & title of Earl of Cardigan in tail male, with remainder to the use of testator's right heirs. By a codicil testator revoked the devise of the estate tail to G., & devised the said estates, after the death of his wife, to R., in tail male, "with all the limitations as in my said will mentioned." R., with the consent of the wife, as protector of the settlement, had executed a disentailing deed of £100,000 Consols in ct., representing proceeds of sale of the settled estates, & the trust for accumulations having now come to an end by the payment off of all the mtges., R. claimed to be absolutely entitled to this fund, subject to the wife's life interest. On a petition for payment out of this fund by the wife & her incumbrancers, with the consent of R.:—**Held**: (1) as the peti-

tioners & R. together were claiming immediate relief, on the ground that between them they were now absolutely entitled to this £100,000 Consols, the question was ripe for decision, & the ct. had jurisdiction to decide it; & all necessarily unascertained persons were sufficiently represented by the trustees of the will; (2) on the question of construction, R. was now entitled to a vested equitable estate in tail male in remainder expectant upon the decease of testator's wife, & the subsequent estates had been barred by the disentailing deed, being estates to take effect in a certain event after, if not in defeasance of, the vested estate in tail male of R., & the £100,000 Consols in ct. could be paid out to the petitioners.—**CARDIGAN (LADY) v. CURZON HOWE**, [1901] 2 Ch. 479; 70 L. J. Ch. 763; 49 W. R. 715; 17 T. L. R. 655; 45 Sol. Jo. 652.

Annotation:—**Generally, Refd.** Re Staples, Owen v. Owen, [1916] 1 Ch. 322.

1758. Construction of settlement—Remainder to "first son."—By a marriage settlement, an estate was limited to the use of J. G. for life, remainder to the use of the first son of J. G. upon A. S., his intended wife, & for default of such issue to the use of the second, third, & other sons of J. G. upon A. S. severally & successively, as they shall be in seniority of age, & of the several heirs male of their several bodies; & for default of such issue, then, in case A. S. should be eniente by J. G. at the time of his death, to the use of T. P. until A. S. should be delivered, in trust for after-born child or children; & in case such child or children should be a son or sons, to the use of such after-born son & sons severally & successively, as they should be in priority of birth, & the heirs male of the body & bodies of such after-born son & sons:—**Held**: the eldest son of J. G., the settlor, took an estate tail under the above limitations.—**GALLEY v. BARRINGTON** (1825), 2 Bing. 387; 10 Moore, C. P. 21; 130 E. R. 355.

Annotations:—**Consd.** Lucas v. Brandreth (No. 2) (1860), 28 Beav. 274; Locke v. Dunlop (1888), 39 Ch. D. 387. **Refd.** Wheeler v. Duke (1832), 1 Cr. & M. 210.

1759. — — — Exception of eldest son—Right of issue of younger son succeeding to father's estate.—A father's estate was limited after his death to the eldest son in tail, & the mother's estates were limited after her death to the sons & daughters, other than an eldest son, as tenants in common in tail:—**Held**: the rule of construction was the same as to realty & personalty, & the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estates.—**Re BAYLEY'S SETTLEMENT** (1871), 6 Ch. App. 590; 25 L. T. 249; 19 W. R. 789, L. JJ.

Annotations:—**Consd.** Re Wise's Settlement, Smith v. Waller, [1913] 1 Ch. 41. **Refd.** Domyile v. Winnington (1884), 50 L. T. 519; Shuttleworth v. Murray, [1900] 1 Ch. 795; Re Stawell's Trusts, Poole v. Riversdale, [1909] 1 Ch. 534.

1760. — — — Right of only son.—The only son of a marriage cannot succeed to an estate which had been limited to A., & his heirs in tail male, "except an eldest son," & does not come in under a proviso giving the estate to A. & "all & every other the son of the body of A., save & except an eldest son."—"Eldest" & "first-born" to be treated as synonymous terms.

H. T., who was possessed of an estate called S., married in 1792, C., who was possessed of an estate called B. They had three children, X., Y. & Z. On the marriage of X. in 1820, the estate of S. was settled on H. T. & C., father & mother, for life, with an annuity to X. & on the death of the father & mother the estate of S. was to go to X. for life, & then to his sons in tail male, in

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default, etc., to Y., & his sons in tail male. On the marriage of Y. in 1834 the estate of B. was settled on H. T., the father, for life, then on his wife, then on X. for life, then to his sons in tail male, & in default, etc., to C. for life, then to the use of X. then to the use of the second son of X. & his heirs male, & in default, to the use of the third, fourth, fifth, & of "all & every other the sons of the body of X. save & except an eldest son, severally, successively, & in remainder one after another," etc., "the elder of such son & sons, other than an eldest son as aforesaid, to be preferred," etc., "& in default or failure, etc., to the use of A., his heirs & assigns for ever." In case, under the deed of 1826, any person of the issue of Y. other & except a youngest or only son, or the heir male of his body, should become entitled to S. then the use of the estate of B. should thereupon cease, & the lands of B. should thereupon go over to the person next entitled. X. had only one son. Y. had no issue. C. had been in possession of the estate B., & was dead:—*Held*: on her death the ultimate remainder in the estate of B. given to A. took effect under the words which excluded an eldest son of X. holding S., from succeeding to the possession of B., & an only son of X. had no title to B., & was not to be treated as other than an eldest son under the clauses which gave B. to the second, third, fourth, fifth, & all & every other son of X., save & except an eldest son.—*TUTE v. BIRMINGHAM* (1875), L. R. 7 H. L. 634; 24 W. R. 540. H. L.

—*See, generally*, Part II., Sect. 3, sub-sect. 3, *ante*; *WILLS*.

SUB-SECT. 4.—CROSS-REMAINDERS.

1761. Whether implied—Settlement created by deed.—*COLE v. LEVINGSTON* (1672), 1 Vent. 224; 86 E. R. 151.

Annotations:—*Consd.* Doe d. Burden v. Burville (1773), 2 East, 48, n.; Doe d. Tanner v. Dorvill (1794), 5 Term Rep. 518. *Refd.* Twisden v. Lock (1768), Amb. 663; Watson v. Foxon (1801), 2 East, 36.

1762. ———. *Arts.* on marriage, for settling land to be bought with money on all the children of the marriage & their respective issues; & for default of such children & their issue, over:—*Held*: there should be cross-remainders by implication.

I am clear there cannot be cross-remainders by implication in a deed (LORD CAMDEN).—*TWISDEN v. LOCK* (1768), Amb. 663; 27 E. R. 430, L. C.

1763. ———. *Arts.*—Cross-remainders cannot be implied in the construction of a deed.—*DOE d. TANNER v. DORVELL* (1794), 5 Term Rep. 518; 101 E. R. 291.

Annotations:—*Apld.* Doe d. Foquett v. Worsley (1801), 1 East, 416. *Consd.* Driver v. Frank (1814), 3 M. & S. 25. *Refd.* Watson v. Foxon (1801), 12 East, 36; Doe d. Scott v. Roach (1816), 5 M. & S. 482; Doe d. Long v. Prigg (1828), 8 B. & C. 231.

1764. ———. *Arts.*—Cross-remainders cannot be implied in a deed; & can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be.

Under a limitation in a marriage settlement to the use of all & every the daughter & daughters of etc. to be begotten, share & share alike, equally to be divided between them & of the heirs of the body & bodies of all & every such daughter &

daughters; & for default of such issue to the right heirs, etc.:—*Held*: there were no cross-remainders between the daughters or their issue.—*DOE d. FOQUETT v. WORSLEY* (1801), 1 East, 416; 102 E. R. 161.

Annotations:—*Consd.* Doe d. Littledale v. Smiddle (1818), 2 B. & Ald. 126; Doe d. Clift v. Birkhead (1849), 4 Exch. 110.

1765. ———. *Arts.*—*LEVIN v. WEATHERALL* (1819), 1 Brod. & Bing. 401; 4 Moore, C. P. 116; 129 E. R. 777.

1766. ———. *Arts.*—Cross-remainders cannot be implied in a deed, & are not created as to accruing shares by a limitation of the entire estate to an only surviving child & his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross-remainders as to the original shares.—*EDWARDS v. ALLISTON* (1827), 4 Russ. 78; 6 L. J. O. S. Ch. 30; 38 E. R. 734.

Annotations:—*N.F.* Doe d. Clift v. Birkhead (1849), 4 Exch. 110. *Refd.* Goodwin v. Finlayson (1858), 25 Beav. 65.

1767. ———. *Arts.*—By deeds of lease & release, being the settlement made on the marriage of E. M. H. & W. B. by which deeds & a fine levied in pursuance of the covenants contained in the release, certain lands of which E., the wife of W. H. & mother of E. M. H., was then seised in fee, a settlement was made after the solemnisation of the marriage, to the use of W. H. for his life, with remainder to the use of E., the wife of W. H. for her life, & then with remainder for the use of W. B. for his life; & then for the use of E. M. his intended wife for her life, with remainder to the use of all & every the children of the body of W. B. on the body of E. M. H. his intended wife to be begotten, to be equally divided among them, share & share alike, to take as tenants in common, & not as joint tenants, & of the several & respective heirs of the bodies of all & every such children lawfully issuing; & in case one or more of such children should happen to die without issue of his or their body or bodies, then as to the share or shares of him or them so dying without issue, to the use of the survivors or others of them, share & share alike; to take as tenants in common & not as joint tenants, & the several & respective heirs of their bodies lawfully issuing; & in case all such children but one should happen to die without issue, or if there should be but one such child, then to the use of such surviving or only child & of the heirs of his or her body lawfully issuing, & for default of such issue, then to the use of E. M. H. the wife of W. H. & of their heirs & assigns for ever. The marriage was duly solemnised. There was issue of it eight children, three of whom died infants, unmarried & in the lifetime of their parents. E. M., the wife of W. B., survived her husband as well as W. H., & at the time of her death the limitation in favour of the issue of the marriage came into operation:—*Held*: cross-remainders were here created by apt words in the deed, & the word "share" must be understood as embracing accruing as well as original shares.—*DOE d. CLIFT v. BIRKHEAD* (1849), 4 Exch. 110; 18 L. J. Ex. 441; 13 L. T. O. S. 529; 154 E. R. 1145.

Annotations:—*Distd.* Douglas v. Andrews (1851), 14 Beav. 347. *Consd.* Goodwin v. Finlayson (1858), 25 Beav. 65; Dutton v. Crowdy (1863), 33 Beav. 272. *Refd.* Edmonstone v. Farley (1868), 18 L. T. 847.

1768. ———. *Arts.*—Leaseholds for life were settled by deed on the parents for life, with remainder to the children of the wife equally & the

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1761 i. *Whether implied—Settlement created by deed.*—*Re BATTERSBY'S ESTATE*, [1911] 1 I. R. 453.—*IR.*

heirs of their bodies, & if but one child then to such child & the heirs of his body, & in default of such issue, to the heirs of the wife:—*Held*: there were no cross-remainders between the children, & on the death of a child without issue & without having made any disposition, his share went to the heir of the wife.—*BAINTON v. BAINTON* (1865), 34 Beav. 563; 55 E. R. 752.

1769. — *Settlement created by will.*—*COLE v. LIVINGSTON* (1672), 1 Vent. 224; 86 E. R. 151. *Annotations*:—*Consd.* Doe d. Burden v. Burville (1773), 2 East, 48, n.; Doe d. Tanner v. Dorvell (1794), 5 Term Rep. 518. *Refd.* Twisden v. Lock (1768), Amb. 663; Watson v. Foxon (1801), 2 East, 36.

— *See, further, WILLS.*

1770. — *Agreement to settle—Remainder over on default of children & issue.*—*TWISDEN v. LOCK*, No. 1762, *ante*.

1771. *Construction of express provision—Survivorship among tenants in common.*—The limitations in a deed were to trustees to the use of A. & B. for their lives, remainder to the use of the child or children of B. in tail as tenants in common; “& in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be & remain to the use of the surviving child or children of B. & the heirs of his, her, or their bodies issuing, & in case all the children should die without issue,” etc., then to A. in fee:—*Held*: the deed created cross-remainders between the children of B.; & on the death of one without issue, his share vested in a surviving child & the heir of one deceased, as tenants in common.—*DOE d. WATTS v. WAINE-WRIGHT* (1793), 5 Term Rep. 427; 101 E. R. 240.

Annotations:—*Consd.* Edwards v. Alliston (1827), 4 Russ. 78. *Appld.* Cole v. Sewell (1848), 2 H. L. Cas. 186. *Consd.* Holland v. Allsop (1861), 29 Beav. 498; Hurry v. Morgan (1866), L. R. 3 Eq. 152. *Refd.* Lowe v. Land (1837), 6 L. J. Ch. 234; Taylor v. Beverley (1844), 1 Coll. 108; Brown v. Rainsford (1867), 16 W. R. 198; Williams v. James (1872), 20 W. R. 1010; Wake v. Varah (1876), 2 Ch. 348; Lucena v. Lucena (1877), 7 Ch. D. 255; *Re* Friends Settlement, Cole v. Allcot, [1906] 1 Ch. 47.

1772. — *A. by marriage settlement, conveyed certain estates to trustees with remainder to his children of the marriage, share & share alike, as tenants in common; & for default of such issue & if any of such children, there being more than one, shall happen to die without issue before twenty-one, that in every such case, the share of such child, should go to the survivors, as tenants in common; & in case all such children should die without issue, then to the use of the settlor in fee.*—*Held*: there were no cross-remainders between the children of the marriage, except in the case of a child having died without issue, & under twenty-one; & one of the children having died without issue, but after twenty-one, his share vested in the settlor, & not in the survivor.—*MEYRICK v. WHISHAW* (1819), 2 B. & Ald. 810; 106 E. R. 561.

1773. — *—*—*DOE d. CLIFT v. BIRKHEAD*, No. 1767, *ante*.

1774. — *Application to accruing shares.*—*EDWARDS v. ALLISTON*, No. 1766, *ante*.

1775. — *Meaning of “share.”*—*DOE d. CLIFT v. BIRKHEAD*, No. 1767, *ante*.

1776. — *Survivorship among class—Must include as many objects as possible.*—In construing limitations to a parent for life, & afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class

who are to take & the contingency to which the survivorship refers is to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument.—*BOUVERIE v. BOUVERIE* (1847), 2 Ph. 349; 16 L. J. Ch. 411; 9 L. T. O. S. 469; 11 Jur. 661; 41 E. R. 977, L. C.

Annotations:—*Consd.* Evans v. Evans (1858), 25 Beav. 81; Jackson v. Dover (1864), 2 Hem. & M. 209. *Refd.* Vorley v. Richardson (1856), 8 De G. M. & G. 126; Alty v. Moss (1876), 34 L. T. 312; *Re* Poultney, Poultney v. Poultney, [1912] 1 Ch. 245.

1777. — *“Survivor.”*—*COLE v. SEWELL*, No. 144, *ante*.

1778. — *—*—*Re PALMER'S SETTLEMENT TRUSTS*, No. 115, *ante*.

SUB-SECT. 5.—CONTINGENT REMAINDERS.

See, generally, REAL PROPERTY, Vol. XXXVIII., pp. 704–708, Nos. 495–524; WILLS.

1779. *Whether vested or contingent—Remainder to son & intended wife—Variation if father remarries.*—*FOSSET v. FOSSET* (1665), 1 Keb. 886; 83 E. R. 1300.

1780. — *Remainder to heirs male—Limitation to elder son in tail male—Contingent interest of second son.*—A. having two sons, B. & C. & being seised of lands in fee, covenants, in consideration of marriage to stand seised to the use of A. & the heirs male of his body; & for want of such issue to his own heirs male, with remainder to his own right heirs in fee. B. has issue one son D. & five daughters, & dies in the lifetime of his father. The estate in tail on the death of A. vests in D. by purchase, & on the death of D. without issue goes by descent to his uncle C. *per formam doni*, as heir male of A.—*SOUTHCOT v. STOWELL* (1677), 2 Mod. Rep. 207; 1 Mod. Rep. 237; 1 Freeman. K. B. 225; 3 Keb. 704; 86 E. R. 1028.

Annotations:—*Consd.* Roe d. Dodson v. Grew (1767), Willm. 272; Winter v. Perratt (1843), 9 Cl. & Fin. 606. *Refd.* Wright v. Vernon (1854), 2 Drew. 439.

1781. — *Variation if no provision for issue.*—It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise; & therefore a limitation in a settlement to trustees to the use of A. the settlor, for life, remainder to B., his intended wife for life, except as thereafter excepted, remainder to the heirs of the body of A., begotten on B., remainder to A. & his heirs, with a proviso, that if A. should die, & leave such issue as aforesaid, without making any provision for such child or children in his lifetime, the said trustees should stand seised of one moiety, from & after the decease of A., to the use of such child:—*Held*: a contingent remainder, & not a springing use, & therefore barred by a fine levied by A. & B.—*CARWARDINE v. CARWARDINE* (1758), 1 Eden, 27; 28 E. R. 504.

Annotations:—*Refd.* Parker v. Bolton (1835), 5 L. J. Ch. 98; Cole v. Sewell (1848), 2 H. L. Cas. 186; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; *Re* Finch, Abbiss v. Burney (1881), 17 Ch. D. 211.

1782. — *Remainder to husband—If wife die without issue.*—Settlement of the wife's estate on herself for life, remainder to the husband for life if any issue of the marriage so long live, remainder if she dies sans issue of one moiety to him in fee, & of the other to the wife's relations;

PART IX. SECT. 6, SUB-SECT. 5.

t. Whether vested or contingent.—*LANGDON v. SPENCER* (1905), 7

W. A. L. R. 174.—*AUS.*

a. ——*MARSHALL v. KING* (1888), 16 R. (Ct. of Sess.) 40; 26 Sc. L. R. 24.—*SCOT.*

b. When vesting.—*LAZIER v. ROBERTSON* (1899), 30 O. R. 517; *affd.* (1900), 27 A. R. 114.—*CAN.*

Sect. 6.—Interests in remainder: Sub-sect. 5. Sect. 7. Part X. Sect. 1: Sub-sect. 1.]

his remainder in fee does not arise, unless he survives his wife.—*MOORHOUSE v. WAINHOUSE* (1767), 1 Wm. Bl. 638; 96 E. R. 370.

1783. — Ultimate remainder in default of appointment—To right heirs of grandfather—Settlor himself heir of grandfather.]—A., in a conveyance to uses, reciting that he was desirous that certain estates derived from his mother's family, should remain in the family & blood of S. R., his maternal grandfather, in consideration of his natural love & affection to his relations, the heirs of S. R., & to the intent that the said estates might continue in the family & blood of his late mother, on the side of her father, settles them to the use of himself for life, remainder to the heirs of his body; for default of such issue as he should appoint, & for default of appointment to the use of the right heirs of S. R., with a power of revocation & new appointment. The ultimate remainder is contingent, & will vest in the person who happens to be the right heir of S. R., at the expiration of the estates previously limited.—*CHOLMONDELEY (MARQUIS) v. CLINTON (LORD)* (1820), 2 Jac. & W. 1; 37 E. R. 527; *on appeal* (1821), 4 Bli. 1, H. L.

*Annotations:—*Consd. *Biddell v. Golightly* (1842), 12 L. J. Ch. 187. *Refd.* *Bennett v. Colley* (1832), 5 Sim. 181; *Doe d. Pilkington v. Spratt* (1833), 5 B. & Ad. 731; *Sturges v. Champneys* (1839), 5 My. & Cr. 97; *Farr v. Sheriffe*, *Dykes v. Farr* (1845), 1 Hare, 512; *Stone v. Godfrey* (1854), 5 De G. M. & G. 76; *Penny v. Allen* (1857), 7 De G. M. & G. 409; *Wing v. Angrave* (1860), 8 H. L. Cas. 183; *Marshall v. Smith* (1865), 5 Giff. 37; *Farrar v. Farrars* (1858), 40 Ch. D. 395; *Sour v. Ashwell*, [1893] 2 Q. B. 390. *Mentd.* *Beer v. Ward*, *Ward v. Beer* (1821), Jac. 77; *Dillon v. Parker* (1822), Jac. 505; *Cuthbert v. Cressy* (1823), 4 Bli. 125; *Hood v. Pimm* (1831), 4 Sim. 101; *Ashton v. Milne* (1833), 6 Sim. 369; *Leith v. Irvine* (1833), 1 My. & K. 277; *Parrott v. Palmer* (1834), 3 My. & K. 632; *Grenfell v. Girdlestone* (1837), 2 Y. & C. Ex. 662; *Bent v. Young* (1838), 2 Jur. 202; *Davies v. Quarterman* (1840), 4 Y. & C. Ex. 257; *Anderson v. Wallis* (1842), 12 L. J. Ch. 291; *Sayer v. Wagstaff* (1843), 2 Y. & C. Ch. Cas. 230; *Fulham v. McCarthy* (1818), 1 H. L. Cas. 703; *Christ's Hospital v. Grainger* (1849), 1 H. & Tw. 533; *Baboo Kasi Persad Narain v. Mussumat, Kawalbasi v. Kooer* (1851), 5 Moo. Ind. App. 146; *A. G. v. Murdock* (1852), 1 De G. M. & G. 86; *Cottrell v. Hughes* (1855), 3 C. L. R. 496; *Robertson v. Norris* (1858), 1 Giff. 421; *Bryant v. Easterson* (1859), 7 W. R. 298; *Hornby v. Toxteth Park Burial Board* (1862), 31 Beav. 52; *Pearce v. Morris* (1869), 5 Ch. App. 227; *Beckett v. Attwood* (1881), 18 Ch. D. 54; *Warner v. Jacob* (1882), 20 Ch. D. 220; *Charles v. Jones* (1887), 35 W. R. 645; *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 25; *Bolton v. Salmon*, [1891] 2 Ch. 48; *Turner v. Walsh*, [1909] 2 K. B. 481.

1784. — Remainder to children living at death of husband.]—A fund was settled on trust for the wife for life & in case she should leave any issue living at her death for the husband for life & after his decease upon trust to divide it amongst the children of the marriage "that should be then living on their respectively attaining the age of twenty-one years" & in case there should be no child or of their all dying in the wife's life to pay the fund to such person as the wife should by will appoint & in default to the execution or administration of the husband & wife or the survivor of them; & in case the wife should survive her husband without leaving issue then living to pay the fund to the wife. The wife died leaving children who had attained twenty-one & the husband was still living.—*Held:* the limitation to the children remained contingent until the death of their father.—*Re WOLLASTON'S SETTLEMENT* (1860), 27 Beav. 642; 54 E. R. 255.

1785. — Remainder to class—Survivorship as to share of member dying without issue.]—*COLE v. SEWELL*, No. 144, *ante*.

1786. — Appointment among class—Living at death of appointor & wife—Survivorship as to share of appointee dying under twenty-five.]—In exercise of a power created by a marriage settlement of real estate, executed in 1819, the husband & wife by deed, executed in Sept. 1848, jointly appointed that the estate should after the death of the survivor of them, they being tenants for life under the settlement, be to the use of the three children then born of the only son of the marriage, & all other his child & children who should be living at the death of the survivor of the appointors, & to the heirs & assigns of such of them as should attain the age of twenty-five, equally as tenants in common. But in case either of the three named children of the son & any such other child & children as aforesaid should die under twenty-five, then immediately after his or her death to the use of the survivors or other of them, their, his, or her heirs & assigns. Provided that, in case the appointment intended to be thereby made to the after-born children of the son should from any cause fail of effect, the appointors did thereby further declare that the deed should operate as an appointment of the hereditaments to the three then born children of the son, or such of them as should attain twenty-five, their respective heirs & assigns. The husband died in 1867, & his widow died in Nov. 1873. There were seven children of the son, all of whom were then living, but only the three elder ones had attained twenty-five. The other four attained twenty-five subsequently.—*Held:* the limitations of the deed of appointment took effect as legal contingent remainders on the death of the widow; each of the seven children of the son took one-seventh of the property for life; & the three who had attained twenty-five at the death of the widow took the remainder in fee, subject to the life estates, equally between them as tenants in common.—*SYMES v. SYMES*, [1896] 1 Ch. 272; 65 L. J. Ch. 265; 73 L. T. 684; 41 W. R. 521.

*Annotation:—**Refd.* *Re Wrightson, Battie-Wrightson v. Thomas* [1901] 2 Ch. 95.

SECT. 7.—POWER TO CHARGE INTEREST.

See, generally, MONEY & MONEY-LENDING, Vol. XXXV., pp. 177–201.

1787. General rule—Power implied.]—If a man has power to charge land with any sum not exceeding the sum of £3,000 he may charge it with £3,000 & the interest besides; for the intention is to charge the premises with £3,000 principal money, & that of course carries interest, & none would lend such sum on such security, if the law were otherwise.—*KILMURRY (LORD) v. GEERY* (1713), 2 Salk. 538; 1 Eq. Cas. Abr. 341; 91 E. R. 456.

*Annotations:—**Expld.* *Evelyn v. Evelyn* (1731), 2 P. Wms. 659. *Apld.* *Boycot v. Cotton* (1738), *West temp. Hard.* 520; *Hall v. Carter* (1742), 2 Atk. 354. *Expld.* *Hearle v. Greenbank* (1749), 3 Atk. 695. *Consd.* *Pomfret v. Windsor* (1752), 2 Ves. Sen. 472.

1788. — — —.]—*BOYCOT v. COTTON*, No. 1611, *ante*.

1789. — — —.]—(1) The ct., in late cases, have thought it hard to raise daughters' portions in the father's lifetime, & therefore refused to do it.

(2) The portions cannot be raised in the lifetime of the jointress, so as to affect her, for when T. executed the power, the estate rose out of the will of T. & is precedent to the two hundred years' term.

PART IX. SECT. 7.

*o. Whether chargeable.]—**Re GARDINER* (1861), 11 I. Ch. R. 519.—*IR.*

(3) Conveyancers now insert negative words, to prevent portions being raised in a father & mother's lifetime.

(4) A power in trustees of raising portions by rents or by mtge., is no reason for postponing the raising, in order that they may make their election.

(5) Where there is a power of charging land with a gross sum, it imports interest of course.—*HALL v. CARTER* (1742), 2 Atk. 354; 9 Mod. Rep. 347; 26 E. R. 615.

Annotations.—As to (1) *Distd.* *Stevens v. Dethick* (1713), 3 Atk. 39. *Consd.* *Clinton v. Seymour* (1799), 4 Ves. 110. As to (5) *Consd.* *Lyddon v. Lyddon* (1808), 14 Ves. 558.

1790. ———.]—A power to charge a sum in gross implies a power to give any rate of legal interest; & the rule of the ct. to give 4 per cent. applies only where no rate is specified by the party having power to fix it.

The reason of the rule in Chancery to give interest at 4 per cent. only is, that money is generally to be had at that rate; but the rule is not invariable.

Where there is a power to raise portions for children charged upon an estate, that power necessarily imports, that from the time the portion is to be raised, is payable or vested, it is also in the discretion of the party as a necessary consequence of it to prescribe what interest shall

be given, provided it does not exceed legal interest. This ct. has, according to my view of it, not upon an arbitrary rule laid down by itself, but upon a consideration of plain & evident convenience, at a particular period fixed, that where there is a charge upon land, & afterwards it was extended, & wisely, to personal property, the interest shall not exceed 4 per cent.

If the party entitled to charge, or to give interest from the time the fund is to be productive, fixes the rate, the ct. cannot control it, or diminish it, if he gives more than 4 per cent. or increase it, if he gives less than legal interest. Therefore the course of the ct. obtains only, where no rate is specified by him, who has a right to fix the sum, & any rate of interest he thinks proper, not exceeding legal interest (*LORD LOUGHBOROUGH, C.*).—*LEWIS v. FREKE* (1794), 2 Ves. 507; 30 E. R. 748, L. C.

Annotations.—*Foll.* *Roe v. Pogson* (1816), 2 Madd. 457. *Distd.* *Balfour v. Cooper* (1883), 23 Ch. D. 472. *Refd.* *Sitwell v. Bernard* (1801), 6 Ves. 520.

1791. ———.]—Power to charge a sum in gross implies a power to give interest.—*ROE v. POGSON* (1816), 2 Madd. 457; 56 E. R. 403.

Interest on portions.—*See* Sect. 5, sub-sect. 9, *ante*.

Part X.—Tenant for Life and Remainderman.

SECT. 1.—RIGHT TO POSSESSION.

SUB-SECT. 1.—DISCRETION OF COURT.

1792. *Legal tenant for life.*—Whether or not legal tenants for life, whose legal estate is subject to a term of years in trustees, there being trusts, for management & payment of incumbrances, ought to be let into possession is a question for the ct. to decide in the exercise of its discretion, & having regard to all the circumstances & in particular the best way of dealing with the property. Such tenants for life are not entitled as of right to be let into possession.—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, [1925] Ch. 162; 94 L. J. Ch. 294; 133 L. T. 337; 69 Sol. Jo. 194; *on appeal*, [1925] Ch. 589, C. A.

1793. *Exercise of discretion—Terms imposed—Undertaking for protection of estate.*—(1) The ct. has a judicial discretion as to giving possession upon proper terms, to an equitable tenant for life, & the Settled Land Acts afford additional ground for exercising this discretion in favour of the person having such extensive statutory powers.

(2) A married woman, restrained from anticipation under a settlement [of real estate subject to a rentcharge] by way of trust for sale, which conferred wide powers of management upon the trustees until sale, was held entitled, upon proper undertakings for the protection of the estate & the trustees being given, to be let into possession of the settled land, & to exercise all the powers conferred by the Acts on a tenant for life, except the power of sale & exchange; but as no complaint was made against the conduct of the trustees she was directed to pay the costs of the application.

(3) The owner of the rentcharge was not a necessary party to the application.—*Re BAGOT'S SETTLEMENT, BAGOT v. KITTOE*, [1894] 1 Ch. 177; 63 L. J. Ch. 515; 70 L. T. 229; 42 W. R. 170; 38 Sol. Jo. 80; 8 R. 41.

Annotations.—As to (1) *Consd.* *Re Richardson Richardson v. Richardson*, [1900] 2 Ch. 778. *Refd.* *Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297; *Re Hunt, Pollard v. Geake*

(1900), 44 Sol. Jo. 314; *Re Stamford & Warrington, Payne v. Grey* (1925), 94 L. J. Ch. 291. As to (2) *Foll.* *Re Money Kyrie, Money Kyrie v. Money Kyrie* (1900), 69 L. J. Ch. 780. As to (3) *Refd.* *Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297. *Generally, Refd.* *Re Hanbury's S. E.* (1913), 57 Sol. Jo. 616; *Re Rayer, Rayer v. Rayer*, [1913] 2 Ch. 210; *Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

1794. ———.]—*Re NEWEN, NEWEN v. BARNES*, No. 1811, *post*.

1795. *Assignee in bankruptcy of equitable tenant for life.*—*Re HUNT, POLLARD v. GREAKE* (1901), 15 Sol. Jo. 652, C. A.

1796. *Exercise of discretion—Terms imposed—Undertaking for protection of estate.*—*Re BAGOT'S SETTLEMENT, BAGOT v. KITTOE*, No. 1793, *ante*.

1797. ———.]—Land which was subject to mtgs. was settled, subject to a term for securing incumbrances, to the use, in the events which happened, of A. for life, with remainders over. The trusts of the term provided that so long as the mtgs. remained unpaid the trustees should receive the rents & profits & manage the premises & keep down the interest of the mtgs. debts & certain rentcharges created by the settlement, that they should then pay to the tenant for life for the time being subject to the term an annuity of £600 a year, & should apply the residue of the rents & profits towards the payment of the principal moneys charged by the mtgs. & there was a proviso for the cesser of the term upon the discharge of the mtgs. debts. The settlement conferred on the trustees an immediate power of sale & exchange, but no power of leasing. The ct. having held that A. was a person having the powers of a tenant for life under Settled Land Act, 1882 (c. 38), ordered him to be let into possession upon his undertaking to perform the trusts of the terms & gave him the custody of the title deeds.—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, [1900] 2 Ch. 778; 69 L. J. Ch. 804.

Annotations.—*Foll.* *Re Money Kyrie's Settlement, Money Kyrie v. Money Kyrie*, [1900] 2 Ch. 539; *Re Wilkinson, Lloyd v. Steel* (1901), 85 L. T. 43. *Distd.* *Re Llanover*,

Sect. 1.—Right to possession: Sub-sects. 1 & 2.]

Herbert v. Ram, [1907] 1 Ch. 635. *Apld. Re Stamford & Warrington, Payne v. Grey* (1925), 94 L. J. Ch. 294. *Refd. Wheeler v. Tootell* (1903), 47 Sol. Jo. 710; *Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417.

1798. ——— Form of undertaking.]—

Testator gave his annual ground rents, secured on two estates, to trustees upon trust to collect & apply the same in reduction of a mtge. debt thereon, & subject thereto upon trust as to two-fifths of the annual income for J. for life, as to other two-fifths for P. for life, & as to the remaining one-fifth for L. for life; & he directed that on the decease of either J., P. or L. his or her share of the ground rents should go to his or her children, & testator empowered his trustees to sell the ground rents, pay off the mtge. debt, invest the residuary proceeds of sale, & stand possessed thereof upon the trusts declared respecting the annual ground rents should they remain unsold. Testator died in 1891. J. had three, & P. one, infant children entitled to the ground rents in remainder. The trustees considered it advisable in the interest of all the beneficiaries to retain the ground rents & apply the income in reduction of the mtge. debt thereon, which by Jan. 1901, was reduced to less than half. The mtge. debt became vested in the surviving trustee of the will. Upon a summons taken out by the tenants for life against the surviving trustee & infant remaindermen:—*Held*: the tenants for life were entitled to immediate possession of the ground rents & to sell them to pay off the mtge. debt & also to delivery up of the documents of title held by the surviving trustee, as trustee, relating to the ground rents.

It is in accordance with the settled practice of the cts. & with the decision of *Re Richardson, Richardson v. Richardson*, No. 1797, *ante*, that they should be let into immediate possession on giving a proper undertaking that what remains to be done for the benefit of persons other than the tenants for life shall be duly performed. The undertaking must be the same as in the case of *Re Money Kyrle's Settlement, Money Kyrle v. Money Kyrle*, No. 1801, *post*, to pay all outgoing in respect of the ground rents & to keep down the interest on all charges & incumbrances thereon or any part thereof & to account to the trustee for all receipts & payments (COZENS-HARDY, J.).—*Re WILKINSON, LLOYD v. STEEL* (1901), 85 L. T. 43. *Annotation*:—*Consd. Re Stamford & Warrington, Payne v. Grey* (1925), 94 L. J. Ch. 294.

1799. ——— Whether security ordered.]—

Reversion of goods after a life given to S., the possessor for life, decreed to give security to deliver the goods or value after her death.—BRACKEN v. BENTLY (1637), 1 Rep. Ch. 110; 21 E. R. 522.

Annotation:—*Refd. Bill v. Kinston* (1740), 2 Atk. 82.

1800. ——— Administration action.]—

It is not now the practice, upon an order on further consideration in an administration action in ordinary cases, to require the tenant for life to give security before being let into possession of settled land & heirlooms, but he is only required to sign an inventory of the latter.—TEMPLE v. THRING (1887), 56 L. J. Ch. 767; 56 L. T. 283.

1801. ——— To pay income to trustees.]—

—A portion of family estates was subject to a term, created in 1868, in trustees to manage & apply the net income in paying off mtges., on which large sums were still due. The ct. put the tenant for life into possession of the land subject to the term,

he giving security to pay the net income over to the trustees.—*Re MONEY KYRLE'S SETTLEMENT, MONEY KYRLE v. MONEY KYRLE*, [1900] 2 Ch. 839; 69 L. J. Ch. 780; 83 L. T. 74; 49 W. R. 44.

Annotations:—*Foll. Re Wilkinson, Lloyd v. Steel* (1901), 85 L. T. 43. *Dist. Re Llanover, Herbert v. Ram*, [1907] 1 Ch. 635. *Consd. Re Stamford & Warrington, Payne v. Grey* (1925), 94 L. J. Ch. 294. *Refd. Wheeler v. Tootell* (1903), 47 Sol. Jo. 710.

1802. ——— Security for protection of trustees—Leasehold property subject to onerous covenants.]—*Re NEWEN, NEWEN v. BARNES*, No. 1811, *post*.

1803. ——— Court dissatisfied with applicant's means.]—*Re HUNT, POLLARD v. GREAKE* (1901), 45 Sol. Jo. 652, C. A.

1804. ——— Effect of Settled Land Acts.]—Testator, who died in 1883, devised his real estate to the use of his trustees, upon trust, as to part thereof, after the attainment of twenty-one by his grandson, to pay the rents & profits to him during his life, or until he should become bkpt., or assign, charge or incumber the same, & he gave his trustees powers of maintaining, managing, & improving his real estate, & of leasing, sale, & exchange. The grandson applied to be given possession of the real estate, & for custody of the title deeds:—*Held*: (1) the Settled Land Acts have raised a presumption in favour of possession by an equitable tenant for life which did not before exist, & the grandson's application should be granted upon his giving a sufficient undertaking for the preservation of the property.

(2) Form of order.—*Re WYTHES, WEST v. WYTHES*, [1893] 2 Ch. 369; 62 L. J. Ch. 663; 68 L. T. 520; 41 W. R. 375; 9 T. L. R. 327; 37 Sol. Jo. 327; 3 R. 433.

Annotations:—*As to* (1) *Refd. Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297; *Re Stamford & Warrington, Payne v. Grey* (1925), 94 L. J. Ch. 294. *As to* (2) *Foll. Re Bagot's Settlement, Bagot v. Kittoe* (1893), 63 L. J. Ch. 515; *Re Money Kyrle, Money Kyrle v. Money Kyrle* (1900), 69 L. J. Ch. 780; *Re Phillimore, Phillimore v. Milnes* (1904), 52 W. R. 682. *Generally, Refd. Wheeler v. Tootell* (1903), 47 Sol. Jo. 710.

1805. ———.]—*Re BAGOT'S SETTLEMENT, BAGOT v. KITTOE*, No. 1793, *ante*.

SUB-SECT. 2.—TENANT FOR LIFE.**1806. Where trusts to keep down charges.]—**

Devise of real estates to trustees, for a term of twenty-one years, & subject thereto, & to the trusts thereof, to A. for life, with liberty to cut timber, etc., for buildings & repairs only; remainder to B. for life, with like liberty, etc.; remainder to the sons of B. successively in tail; & after like remainders, to C. & D. & their sons respectively, remainder to E. for life, with like liberty, etc.; remainder to the sons of E. successively in tail, with divers remainders over; remainder to testator's own right heirs, with the declaration that the trustees of the term should receive the rents & profits of the estates, cut, fell & sell the timber at mature growth in due succession, & yearly, until testator's debts & pecuniary legacies should be paid, thereout pay, (a) a certain annuity, & also a yearly rentcharge of £1,000, to the person entitled to the estates expectant on the determination of the term; (b) the expenses of the trust; (c) his funeral expenses; & (d) the pecuniary legacies & annuities given by his will, or so much as his per-

PART X. SECT. 1, SUB-SECT. 2.

d. *Where trust to pay debts—Accumulation of rents to pay debts.]—Re WOODHOUSE, ANNESLEY v. WOODHOUSE*, [1898] 1 I. R. 69.—IR.

sonal estate should not pay; & after such payment, or the raising of a fund sufficient for the same, to permit the person entitled to the estates expectant on the term to enter into possession thereof, subject to such annuities as should then remain charged, & the term then to cease. Testator empowered the tenants for life, & the respective devisees in possession, to exchange part of the devised lands for others of greater or equal value, & authorised his exors. to preserve the wood, so as to continue a succession in the falls thereof, & he empowered them during & after the term, until some person was entitled to the estates in tail, or for some greater estate, to enter & cut timber at mature growth for sale, & to apply the proceeds in payment of his funeral expenses, debts & legacies, until the trusts of the term should be satisfied; & then, with the consent of the devisees in possession, to invest the surplus in the purchase of other lands in fee, to be settled to the same uses as the devised estates. Testator died in 1803. The personal estate sufficed to pay his debts & pecuniary legacies, but not to provide for the annuities. B. then the first tenant for life on the death of testator, entered into possession of the estates, & so continued during his life. B. died in 1837 without issue, whereupon E., the next surviving tenant for life, entered into possession. In a suit instituted in 1842, by the first son of E. as tenant in tail expectant on the decease of E., against the representatives of the trustees, & the exors. of B. deceased tenant for life:—*Held*: (1) *pltf.*, as such tenant in tail expectant, was not entitled to relief in equity, on the ground that the exchange effected by B. of certain of the devised estates for other estates was not a due exercise of the power of exchange; for, if the exchange was not warranted by the power, the legal estate in the devised premises did not pass by the conveyance.

(2) I do not mean to express any doubt but that when all the above charges had been satisfied, & the settled estates were thereby cleared of all charges except annuities, the arrears of which were paid, the person for the time being entitled in possession to the settled estates subject to the term would be entitled during the residue of the term to the beneficial receipt of the rents & profits of the estates, keeping down the annuities (WIGRAM, V.-C.).—*FERRAND v. WILSON* (1845), 4 Ilarc, 344; 15 L. J. Ch. 41; 9 Jur. 860; 67 E. R. 680.

Annotations:—As to (1) *Consd.* Langdale v. Briggs (1856), 8 De G. M. & G. 391. *Generally*, *Mentd.* Dungannon v. Smith (1846), 12 Cl. & Fin. 546; Kekewich v. Marker (1851), 3 Mac. & G. 311; Briggs v. Oxford (1852), 1 De G. M. & G. 363; Carroll v. Graham (1865), 11 Jur. N. S. 1012; Birmingham Canal Co. v. Cartwright (1879), 11 Ch. D. 421; Dashwood v. Magniac, [1891] 3 Ch. 306.

1807. Where trust to pay debts.—On discharge of receiver.—*HOSKINS v. CAMPBELL, GIBBON v. CAMPBELL*, [1869] W. N. 59.

1808. ———.—Testator, who died in 1844, devised to trustees a moiety of his real estates upon trusts for his son for life, with remainder to his grandson for life & his sons in tail, & to pay all his debts & sums of money as he should owe at the time of his decease, whether by way of *mtge.* bond, or otherwise, including a sum of £8,000 charged upon the estates; & he directed that the rents & profits of the estates should be received by the trustees & be applied in liquidation of the debts until the whole, including the £8,000, should be paid; that no person to whom any estate for life or in tail was limited should be entitled to the rents & profits until the estates were totally disincumbered & clear of debts; & that the trustees should invest the moneys which might come to

their hands upon good security at interest until the same should be applied in payments under the trusts. A receiver had been appointed. The whole of the debts had been paid excepting the £8,000, by sales of parts of the estates under orders of the ct., & there was an accumulation fund in ct. sufficient to pay the £8,000:—*Held*: the receiver must be discharged, & the tenant for life be let into possession of the estates.—*TEWART v. LAWSON* (1874), L. R. 18 Eq. 490; 43 L. J. Ch. 673; 22 W. R. 822.

Annotations:—*Fold.* Norton v. Johnstone (1885), 30 Ch. D. 649. *Appld.* *Re* Green, Baldoek v. Green (1888), 40 Ch. D. 610; *Re* Heathcote, Heathcote v. Trench, [1904] 1 Ch. 826. *Distd.* *Re* Webster, Thompson v. Thompson (1910), 102 L. T. 905. *Refd.* Honywood v. Honywood, [1902] 1 Ch. 347; *Re* Stamford & Warrington, Payne v. Grey (1925), 94 L. J. Ch. 294. *Mentd.* *Re* Cresswell, Lineham v. Cresswell (1913), 57 Sol. Jo. 578.

1809. ——— Accumulation of rents to pay debts.—Accumulation sufficient for payment.—Testator devised his real estates to the use of *pltf.* for life, with an ultimate remainder to A. in fee, & provided that the trustees should receive the rents, & after paying thereout the interest on the *mtges.* affecting the estates, should accumulate the residue "until the amount of such accumulation should be sufficient to discharge the principal of the *mtges.*" Testator directed that, as soon as the accumulations should be sufficient to pay off the *mtges.*, the trustees should forthwith pay off the same. Testator declared that *pltf.*, or other the person for the time being entitled for life or in tail to the estates under the limitations of the will, should not be entitled to receive any part of the rents until the *mtges.* had been paid off. After testator's death the part of the estates which was subject to a *mtge.* was sold by the *mtges.* under their power of sale, in effect, at the request of *pltf.* & with the sanction of the ct. The proceeds of sale were not enough to pay off the whole of the *mtge.* debt, & the balance was paid out of the accumulation of rents. A part of the accumulated fund remained:—*Held*: the tenant for life was entitled, to be let into possession of the estates remaining unsold, & to have the surplus of the accumulated fund paid to him.—*NORTON v. JOHNSTONE* (1885), 30 Ch. D. 649; 55 L. J. Ch. 222; 34 W. R. 13.

Annotations:—*Distd.* *Re* Webster, Thompson v. Thompson (1910), 102 L. T. 905. *Refd.* Honywood v. Honywood, [1902] 1 Ch. 347.

1810. Female tenant for life.—A bare trustee, who, under Fines & Recoveries Act, 1833 (c. 74), s. 31, is protector of a settlement, can insist on retaining the legal estate, only so long as the purposes of the trust exist—that is, so long as, according to the rules of this ct., he is required to be a trustee.

Therefore, where there was a devise of lands to trustees upon trust for testator's daughter during her life, for her separate use, without power of anticipation, with remainder to the use of her children as tenants in common in tail, with remainders over:—*Held*: testator's daughter, having become *discoverte* & being *sui juris*, could compel a conveyance by the trustees of their legal estate.—*BUTTANSHAW v. MARTIN* (1859), John. 89; 33 L. T. O. S. 300; 70 E. R. 351; *sub nom.* *BURTANSHAW v. MARTIN*, 5 Jur. N. S. 647.

1811. ———.—(1) The power of the ct. to make an order allowing an equitable tenant for life to take possession of settled property is discretionary & will only be made upon proper undertakings. The order on an application for the purpose must contain terms protecting the trustees especially where the property is subject, as in the case of leaseholds, to onerous covenants. (2) The application may be made by originating summons, which

Sect. 1.—Right to possession: Sub-sects. 2 & 3.
Sects. 2 & 3: Sub-sects. 1 & 2.]

must be served upon the trustees, & upon the mtgees., if any, of the interest of the tenant for life, though not, under ordinary circumstances, upon the reversioner. (3) Where the tenant for life has mortgaged his interest, the order letting him into possession does not carry with it the right to the custody of the title deeds; these the mtgee. can insist on being retained by the trustees.

(4) A female equitable tenant for life is not necessarily disqualified from being let into possession.—*Re NEWEN, NEWEN v. BARNES*, [1894] 2 Ch. 297; 63 L. J. Ch. 763; 70 L. T. 653; 58 J. P. 767; 43 W. R. 58; 8 R. 309.

Annotations:—As to (1) *Reid*, *Re Stamford & Warrington*, *Payne v. Grey* (1925), 94 L. J. Ch. 294. As to (2) *Reid*, *Re Hunt, Pollard v. Geake* (1900), 44 Sol. Jo. 314. As to (3) *Reid*, *Wheeler v. Tootell* (1903), 47 Sol. Jo. 710. **Generally, *Mentid***, *Montefiore v. Guedalla*, [1903] 2 Ch. 723; *Re Sampson, Sampson v. Sampson*, [1906] 1 Ch. 435. **Discretion of court.**—*See* Sub-sect. 1, *ante*.

SUB-SECT. 3.—APPLICATION TO COURT.

1812. Form of application—Originating summons.]—*Re NEWEN, NEWEN v. BARNES*, No. 1811, *ante*.

1813. Who are necessary parties.]—*Re BAGOT'S SETTLEMENT, BAGOT v. KITTOE*, No. 1793, *ante*.

—*Re NEWEN, NEWEN v. BARNES*, No. 1811, *ante*.

1815. Costs of application.]—*Re BAGOT'S SETTLEMENT, BAGOT v. KITTOE*, No. 1793, *ante*.

SECT. 2.—CUSTODY OF TITLE DEEDS.

See Part XI., *post*.

SECT. 3.—WASTE.

SUB-SECT. 1.—IN GENERAL.

1816. Tenant for life—Subsequent life estate with remainder in fee—Rights of remainderman in fee—Death of intermediate tenant for life.]—Tenant for life, remainder for life, remainder in fee, tenant for life commits waste, he in the remainder for life dies. The remainderman in fee may have an action of waste against the tenant for life.

So also if the remainderman for life, after the waste committed, had surrendered to him in the remainder in fee.—*PAGER'S CASE* (1593), 5 Co. Rep. 76 b; 77 E. R. 170.

Annotations:—*Consd.* *Bowles's Case* (1615), 11 Co. Rep. 77 b. *Appld.* *Bray v. Tracey* (1624), W. Jo. 51. *Consd.* *Garth v. Cotton* (1753), 3 Atk. 751. *Reid*, *Berry v. Heard* (1632), Cro. Car. 242.

—*Bray v. TRACY* (1624), W. Jo. 51; Cro. Jac. 688; 82 E. R. 28.

1818. ———.]—*ANON.* (1599), Moore, K. B. 554; 72 E. R. 754.

Annotation:—*Reid*, *Garth v. Cotton* (1753), 1 Ves. Sen. 546.

1819. ———.]—A remainderman in fee may have an injunction to stay waste in the first tenant for life notwithstanding an intermediate estate for life.—*FARRANT v. LOVEL* (1750), 3 Atk. 723; 26 E. R. 1214, L. C.

Annotation:—*Reid*, *Harper v. Aplin* (1886), 54 L. T. 383.

1820. ——— Property settled on married woman—For her separate use.]—Testator devised his real

estate to trustees upon trust for one of his granddaughters, & directed that in the event of her marrying under twenty-one, which event happened, then they should assure same by deed to her for her life to her separate use, without power of anticipation, with remainder to her children as tenants in common in tail with remainders over, with power to the trustees to secure a life interest to the husband after the death of the granddaughter either with or without impeachment for waste.—*Held*: the life estate of the granddaughter must be subject to impeachment for waste.—*CLIVE v. CLIVE* (1872), 7 Ch. App. 433; 41 L. J. Ch. 386; 26 L. T. 409; 20 W. R. 477, L. JJ.

1821. ——— On widow “with full & absolute control.”]—By his will G., who died in 1884, devised an estate to his wife M. for life with remainder to his brother F. in fee. M. was appointed sole extrix, with full & absolute control over all testator's property during her life. F. died in 1892, having by his will settled the estate subject to the life interest on pltf. in tail male with remainder over. M. having cut & sold timber, including, oak, ash, & elm of twenty years of age & upwards, this action was brought claiming a declaration that this constituted waste & for an injunction.—*Held*: on the true construction of the will the words “with full & absolute power over all my property” did not render deft. punishable for waste, but merely conferred large powers of management.—*PARDOE v. PARDOE* (1900), 82 L. T. 547; 16 T. L. R. 373; 44 Sol. Jo. 449.

1822. ——— Liability under separate instruments.]—Testator by his will devised all his estates to trustees & their heirs to the use of pltf. for life without impeachment of waste, with remainder to his sons successively in tail male. By a codicil he revoked in part the disposition made by his will, & devised part of his estates to trustees, their exors., administrators & assigns during the life of deft., a married woman, without impeachment of waste, upon trust to permit her to receive the rents, issues & profits for her life for her separate use with restraint upon anticipation, & divers remainders over. Subsequently testator conveyed the same hereditaments by deed to the use of a trustee during the life of deft. upon trust to permit her to receive the rents & profits for the life for her separate use without anticipation, with remainders over. Neither the trustee nor the lady herself was made by that instrument punishable for waste.—*Held*: the life estates given by the codicil were revoked by the settlement, & the life tenants were impeachable of waste under the latter instrument.—*JOWNDES v. NORTON* (1864), 4 New Rep. 452; 33 L. J. Ch. 583; 11 L. T. 290, L. JJ.

1823. Equitable tenant for life—Remedy of remainderman—Against incumbrances of life interest.]—Equitable tenant for life mortgaged his interest, & afterwards committed waste.—*Held*: as against the incumbrancers upon the life interest, the remaindermen had an equity to have the injury done to the inheritance made good, & had for that purpose a lien upon the rents in the hands of the trustees of the settlement accrued during the life interest.—*BRIGGS v. OXFORD (EARL)*, *BEAVAN v. OXFORD (EARL)* (1855), 25 L. T. O. S. 265; 1 Jur. N. S. 817; 3 W. R. 588; *on appeal*, 4 W. R. 38, L. JJ.

1824. Amelloratory waste — Improvements effected exceeding waste committed.]—When it was shown that the tenant for life, being also ultimate remainderman in fee, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realised by the acts of waste, which were themselves of trivial amount, the bill was dismissed; & where the exor. of a deceased tenant for life, who was also ultimate remainderman in fee, admitted having received the proceeds of certain timber cut or ordered to be cut by his testator, he was allowed in the account to be taken against him, to take credit for the sums laid out by his testator in permanent improvements.—*BIRCH-WOLFE v. BIRCH* (1870), L. R. 9 Eq. 683; 39 L. J. Ch. 345; 23 L. T. 216; 18 W. R. 594.

1825. ———.]—Tenant for life permitted her tenants to dig turf from fen lands. The turf, when sold, realised a considerable sum. It being proved in evidence that such digging, though technically an act of waste, had considerably improved the lands for agricultural purposes:—*Held*: the tenant for life was not bound to account to the persons entitled in remainder for the value of the turf so removed.—*HARRIS v. EKINS* (1872), 26 L. T. 827; 20 W. R. 999.

1826. Remedy by injunction.—Tenant in tail after possibility of issue extinct.]—Tenant [in tail] after possibility restrained from waste.—*ABRAHAM v. BUBB* (1679), 2 Show. 69; Freem. Ch. 53; 2 Swan. 172; 89 E. R. 798, L. C.

Annotations:—*Consd.* *Aston v. Aston* (1749), 1 Ves. Sen. 264; *Williams v. Williams* (1808), 15 Ves. 419. *Refd.* *Garth v. Cotton* (1753), 1 Ves. Sen. 546.

1827. ——— Tenant in possession.]—*A.-G. v. ANCASTER (DUKE)* (1737), 1 Dick. 68; 21 E. R. 193.

1828. ——— Right of reversioner or remainderman to be joined.]—A. is tenant for years, remainder to B. for life, remainder to C. in fee; A. is doing waste; B. though he cannot bring waste, as not having the inheritance, yet he is entitled to an injunction, but not unless the reversioner or remainderman in fee be made a party, who possibly may approve of the waste.—*MOLINEUX v. POWELL* (1730), 2 Eq. Cas. Abr. 169; 3 P. Wms. 268, n.; 22 E. R. 144, L. C.

Annotation:—*Apprvd.* *Doherty v. Allman* (1878), 3 App. Cas. 709.

Limitation of action.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 345, 465, 466, Nos. 273–276, 1307–1312.

Bond not to commit waste.]—*See* BONDS, Vol. VII., p. 178, No. 159.

SUB-SECT. 2.—TENANT FOR LIFE UN-IMPEACHABLE FOR WASTE.

Sec. nov. Settled Land Act, 1925 (c. 18), ss. 47, 89.

1829. Position of.]—Tenant for life without impeachment of waste, has as great power to do waste, & to convert it, at his own pleasure, as

tenant in tail has. The privilege is annexed to the privacy of estate; if one who has a particular estate without impeachment of waste, changes his estate, he loses his advantage.—*BOWLES'S CASE* (1615), 11 Co. Rep. 79 b; 77 E. R. 1252; *sub nom.* *BOWLES v. BERRIE*, 1 Roll. Rep. 177.

Annotations:—*Consd.* *Abraham v. Bubb* (1680), Freem. Ch. 53; *Williams v. Williams* (1808), 15 Ves. 419. *Refd.* *Secheverel v. Dale* (1627), Poph. 193; *Berry v. Heard* (1632), Cro. Car. 242; *Harris v. Belchey* (1679), 2 Show. 91; *Carrick v. Errington* (1726), Mos. 8; *Aston v. Aston* (1749), 1 Ves. Sen. 264; *Garth v. Cotton* (1753), 3 Atk. 751; *A.-G. v. Marlborough* (1818), 3 Madd. 498; *Tooker v. Annesley* (1832), 5 Sim. 235; *Waldo v. Waldo* (1841), 12 Sim. 107; *Gent v. Harrison* (1859), John. 517. *Mentd.* *Oxford's Case* (1615), 1 Rep. Ch. 1; *R. v. Hampden* (1637), 3 State Tr. 826; *Petty v. Goddard* (1662), O. Bridg. 35; *Skelton v. Bide* (1665), O. Bridg. 390; *Bamfield v. Popham* (1703), Holt, K. B. 233; *Gore v. Gore* (1733), Kel. W. 254; *Hooker v. Hooker* (1734), 2 Barn. K. B. 379; *Cunningham v. Moody* (1748), 1 Ves. Sen. 174; *Goodright d. Larmer v. Searle* (1756), 2 Wils. 29; *Doe d. Willis v. Martin* (1790), 4 Term Rep. 39; *Boydell v. McMichael* (1834), 3 Tyr. 974; *Chambers v. Taylor* (1837), 2 My. & Cr. 376; *Leigh v. Dickeson* (1883), 12 Q. B. D. 194.

1830. Privilege annexed to the estate.]—A feoffment was made unto A. unto the use of him, & his wife, dispositive of waste during their lives; one died, & the survivor committed waste; it was the opinion of the whole ct., that an action of waste should not lie by him in the reversion; for it is a privilege which is annexed to the estate, which shall continue as long as the estate doth continue.—*ANON.* (1587), Godb. 132; 78 E. R. 80.

1831. What words confer the privilege—"In strict settlement" insufficient.]—Where an executory trust for the settlement of freehold estates "in strict settlement" directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispositive for waste.—*STANLEY v. COULTHURST* (1870), L. R. 10 Eq. 259; 39 L. J. Ch. 650; 23 L. T. 761; 18 W. R. 969.

1832. Extent of privilege—Woods & houses.]—*KING v. BLUNDAVILE* (1629), Toth. 83; 21 E. R. 130.

1833. ——— Dilapidations.]—Demurrer to a bill against representative of deceased tenant for life for an account of equitable waste committed by him, & for relief, overruled.—*LANSDOWNE (MARQUIS) v. LANSDOWNE (MARCHESS DOWAGER)* (1815), 1 Madd. 116; 56 E. R. 44.

Annotations:—*Consd.* *Phillips v. Homfray* (1883), 21 Ch. D. 439. *Refd.* *Powys v. Blagrave* (1854), Kay, 495; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578. *Mentd.* *Peck v. Gurney* (1873), L. R. 6 H. L. 377.

1834. Liability for waste by lessee—At suit of remainderman.]—Reversioner in possession may maintain an action for waste committed during the life of the tenant for life, although there be an intermediate remainder without impeachment of waste.—*BRAY v. TRACY* (1624), Cro. Jac. 688; W. Jo. 51; 79 E. R. 597.

1835. Right of reversioner to sell timber during life of tenant for life.]—A reversioner cannot sell the timber trees during the life of a tenant for life

1827 i. Remedy by injunction.—Tenant in possession.]—Where the house & buildings were in need of repairs, & proper timber & shingles were obtainable from a dealer, whereas the timber on the place was unsuitable for the repairs needed, & the tenant for life proposed to sell a sufficient amount of timber off the place to pay for what was required, & for that purpose only, & an injunction was sought to restrain him:—*Held*: no case of waste was made out to justify an injunction, nor could damages be awarded if the

timber was cut with due regard to the situation of the bush & the cleared land, & no unreasonable amount was taken off to recoup the cost of the timber used or to be used in the repairs.—*HIXON v. REAVELY* (1904), 25 C. L. T. 14; 9 O. L. R. 6; 4 O. W. R. 437.—*CAN.*

1827 ii. ———.]—Action by remainderman to restrain deft. from breaking up ancient pasture:—*Held*: the farm was an ancient pasture & it would be injurious & burdensome to the inheritance for deft. to break up

an area exceeding 30 acres until an equivalent area had been restored to its original carrying power as pasture land.—*DOBETT v. KENNEDY* (1916), 50 I. L. T. 171.—*IR.*

PART X. SECT. 3, SUB-SECT. 2.

1829 i. Position of.]—*CURRIE v. CURRIE* (1910), 15 O. W. R. 389; 20 O. L. R. 375.—*CAN.*

1. Extent of privilege.]—*ANNESLEY v. ANNESLEY* (1918), 52 I. L. T. 189.—*IR.*

Sect. 3.—Waste: Sub-sects. 2, 3 & 4, A.]

without impeachment of waste.—*WALLER v SANDS* (1632), Cro. Car. 274; 79 E. R. 839.

1836. Effect of trust for payment out of rents & profits.]—Where an equitable tenant for life unimpeachable of waste, was entitled to estates, subject to a trust for payment by the trustees out of the rents & profits, but not by sale or mtge. of such estates, of certain mtges. on the estates; & timber had been cut on the estates by the direction of the ct.:—*Held*: the term "rent & profits" meant annual rents & profits, & the tenant for life in possession, though not in possession of the rents & profits of the estate, was entitled to all other rights incident to his estate, & therefore, he was entitled to the proceeds of the timber which had been cut.—*LOVAT (LORD) v. LEEDS (DUCHESS)* (No. 1) (1862), 2 Drew. & Sm. 75; 6 L. T. 307; 10 W. R. 398; 62 E. R. 550.

Annotation:—*Reid. Leppington v. Freeman* (1891), 66 L. T. 357.

Waste relating to trees & timber.]—*See* AGRICULTURE, Vol. II., pp. 80–83, Nos. 606–632.

SUB-SECT. 3.—EQUITABLE WASTE.

See, now, Law of Property Act, 1925 (c. 20), s. 135.

Injunction to restrain waste generally.]—*See* INJUNCTION, Vol. XXVIII., pp. 489–491, Nos. 930–947; AGRICULTURE, Vol. II., pp. 110–112, Nos. 922–940.

1837. Nature of equitable waste.]—(1) A tenant in fee simple subject to an executory devise over in case he should die without leaving issue, is dispensable of legal, but not of equitable waste.

(2) Equitable waste intervenes between malicious waste & legal waste, & is that which a prudent man would not do in the management of his own property.—*TURNER v. WRIGHT* (1860), 2 De G. F. & J. 234; 29 L. J. Ch. 598; 2 L. T. 619; 6 Jur. N. S. 809; 8 W. R. 675; 45 E. R. 612, L. C. *Annotation*:—*As to* (1) *Consd. Re Hanbury's S. E.*, [1913] 2 Ch. 357.

1838. Application of doctrine.]—The ct., by applying the doctrine of equitable waste, controls & restrains the excessive use of the legal power incident to an estate unimpeachable of waste, but with reference only to the presumed will & intention of the party by whom the power was created.—*MARKER v. MARKER* (1851), 9 Hare, 1; 20 L. J. Ch. 246; 17 L. T. O. S. 176; 15 Jur. 663; 68 E. R. 389.

Annotations:—*Reid. Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721; *Ashby v. Hincks* (1888), 58 L. T. 557; *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381.

1839. —.]—*POWYS v. BLAgrave*, No. 1866, *post*.

1840. What waste restrained.—Pulling down or defacing houses.]—*WILLIAMS v. DAY* (1680), 2 Cas. in Ch. 32; 22 E. R. 832, L. C.

Annotations:—*Reid. Bernard's Case* (1716), Prec. Ch. 454; *Aston v. Aston* (1749), 1 Ves. Sen. 264.

1841. —.]—A. on marriage of his son, settles a messuage on himself for life, sans waste, remainder to his son. The father, though his estate for life be sans waste, cannot pull down the house, nor commit any voluntary waste therein: if he does, the ct. will grant an injunction to stay waste, & compel the father to put the messuage in as good repair as before the waste committed.—*VANE v. BARNARD (LORD)* (1716), 2 Vern. 738; 1 Eq. Cas. Abr. 399; 1 Salk. 161; 23 E. R. 1082,

L. C.; *sub nom.* *BERNARD'S (LORD) CASE*, Gilb. Ch. 127; Prec. Ch. 454.

Annotations:—*Consd. Aston v. Aston* (1749), 1 Ves. Sen. 264. *Distd. Lempster v. Poinfret* (1752), Amb. 154. *Consd. Pyne v. Dor* (1785), 1 Term Rep. 55. *Reid. London (Bp.) v. Web* (1718), 1 P. Wms. 527; *Rolt v. Somerville* (1737), 2 Eq. Cas. Abr. 759; *Packington's Case* (1744), 3 Atk. 215; *Powys v. Blagrave* (1854), Kay, 495; *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721; *Turner v. Wright* (1860), 2 De G. F. & J. 234; *Baker v. Sebright* (1879), 13 Ch. D. 179.

1842. —.]—**Rebuilding better mansion with old materials.]**—A tenant for life, without impeachment for waste, pulled down the mansion house & built a better in a more desirable situation upon another part of the settled estates. After his death the persons entitled in remainder filed a bill to obtain compensation for the pulling down the old house. It was proved that the bulk of the materials of the old house had been employed in building the new one, & there was no evidence that any part of the materials had been sold:—*Held*: the bill had rightly been dismissed.—*MORRIS v. MORRIS* (1858), 3 De G. & J. 323; 28 L. J. Ch. 329; 32 L. T. O. S. 325; 5 Jur. N. S. 229; 7 W. R. 249; 44 E. R. 1293, L. JJ.

1843. —.]—**Felling trees of ornament or shelter.]**—*MATTHEW v. CRASSE* (1613), as reported in 2 Bulst. 89; 80 E. R. 983.

Annotation:—*Mentd. Harrison v. Cage* (1698), 1 Ld. Raym. 386.

1844. —.]—*VANE v. BARNARD (LORD)* (1716), 2 Vern. 738; 1 Eq. Cas. Abr. 399; 1 Salk. 161; 23 E. R. 1082, L. C.; *sub nom.* *BERNARD'S (LORD) CASE*, Gilb. Ch. 127; Prec. Ch. 454.

Annotations:—*Consd. Aston v. Aston* (1749), 1 Ves. Sen. 264; *Distd. Lempster v. Poinfret* (1752), Amb. 154. *Consd. Pyne v. Dor* (1785), 1 Term Rep. 55. *Reid. London (Bp.) v. Web* (1718), 1 P. Wms. 527; *Rolt v. Somerville* (1737), 2 Eq. Cas. Abr. 759; *Packington's Case* (1744), 3 Atk. 215; *Powys v. Blagrave* (1854), Kay, 495; *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721; *Turner v. Wright* (1860), 2 De G. F. & J. 234; *Baker v. Sebright* (1879), 13 Ch. D. 179.

1845. —.]—*CASTLEMAINE (LORD) v. CRAVEN (LORD)* (1733), 2 Eq. Cas. Abr. 758; 22 Vin. Abr. 523; 22 E. R. 644.

Annotations:—*Consd. Chamberlyne v. Dummer* (1792), 3 Bro. C. C. 549; *Barnes v. Dowling* (1881), 44 L. T. 809; *Re Cartwright, Avis v. Newman* (1889), 60 L. T. 891. *Reid. Chamberlyne v. Dummer* (1782), 1 Bro. C. C. 166; *Powys v. Blagrave* (1854), 4 De G. M. & G. 448; *Re Williames, Andrew v. Williames* (1884), 52 L. T. 41.

1846. —.]—*CHARLTON'S CASE (circa 1730)*, cited in 1 Ves. Sen. at p. 265; *sub nom.* *CHARLTON v. CHARLTON*, cited in 3 Atk. at p. 216, L. C.

Annotations:—*Consd. Rolt v. Somerville* (1737), 2 Eq. Cas. Abr. 759; *Packington's Case* (1744), 3 Atk. 215; *Aston v. Aston* (1749), 1 Ves. Sen. 264. *Reid. Pyne v. Dor* (1785), 1 Term Rep. 55.

1847. —.]—R. by his will devised to F. & his assigns for his life, all his real estates in W., without impeachment of waste, except the timber growing in the park avenues, demesne lands, & woods adjoining to the capital messuage called Arbury; remainder in trust for C. for life, remainder to his first & other sons in tail male:—*Held*: the restriction as to cutting timber was confined to the premises specified in the exception clause, & ought not to extend to the woods adjoining to the excepted parts, nor to the avenues made by testator in those woods; & no proceeding for equitable waste could be maintained as to trees planted, etc., for ornament, etc., as to a house which had formerly been a principal mansion, & having gone to decay had been restored by F., the tenant for life.—*NEWDEGATE v. NEWDIGATE* (1834), 8 Bli. N. S. 734; 2 Cl. & Fin. 601; 5 E. R. 1113, H. L.

1848. —.]—(1) *Held*: on demurrer, the Duke of Marlborough, for the time being, is, under

5 Anne, c. 3, bound to maintain Blenheim House, & is not therefore at liberty to cut trees, which are essential to its ornament or shelter.

(2) A tenant in tail, restrained by statute from barring issue & those in remainder, is not, for that reason, within the principle of equitable waste.—A.-G. v. MARLBOROUGH (DUKE) (1818), 3 Madd. 498; 56 E. R. 588; *subsequent proceedings* (1820), 5 Madd. 280.

Annotations:—**Consd.** Turner v. Wright (1860), 2 De G. F. & J. 234. **Refd.** Dashwood v. Magniac, [1891] 3 Ch. 306; *Re* Marlborough's Parliamentary Estates (1891), 8 T. L. R. 179; *Re* Marlborough's Blenheim Estates & Settled Land Acts (1892), 8 T. L. R. 582; *Re* Bolton Estates, Russell v. Meyrick, [1903] 2 Ch. 461.

1849. ———. What is ornamental timber—Intention of settlor decisive.]—STAFFORD (MARQUIS) v. SUTHERLAND (DUKE) (1892), 36 Sol. Jo. 381.

————.]—*See, further*, AGRICULTURE, Vol. II., pp. 92, 106–110 *et seq.*, Nos. 729, 730.

1850. ———. Failing to keep up a herd of deer.]—Tame deer in a park are personal property, & the ct. will not interfere to restrain waste in not keeping up the herd.—FORD v. TYNTE (1861), 2 John. & H. 150; 31 L. J. Ch. 177; 26 J. P. 228; 70 E. R. 1008.

Annotation:—**Consd.** White v. Paine (1914), 83 L. J. K. B. 895.

————. Removal of fixtures.]—*See* Sub-sect. 5, *post*.

1851. Who may be restrained.—Tenant for life unimpeachable for waste.]—WILLIAMS v. DAY (1680), 2 Cas. in Ch. 32; 22 E. R. 832, L. C.

Annotations:—**Refd.** Bernard's Case (1716), Prec. Ch. 454; Aston v. Aston (1749), 1 Ves. Sen. 264.

1852. ———.]—A. tenant for life, remainder to B. for life, remainder over. A. though punishable of waste at law, by reason of the mesne remainder for life, yet shall be enjoined from committing waste in a ct. of equity.—TRACY v. TRACY (1861), 1 Vern. 23; 23 E. R. 278, L. C.

Annotation:—**Refd.** Garth v. Cotton (1753), 3 Atk. 751.

1853. ———.]—VANE v. BARNARD (LORD), No. 1841, *ante*.

1854. ———.]—NEWDEGATE v. NEWDIGATE, No. 1847, *ante*.

1855. ———. Tenant for life after possibility of issue extinct.]—WILLIAMS v. DAY (1680), 2 Cas. in Ch. 32; 22 E. R. 832, L. C.

Annotations:—**Refd.** Bernard's Case (1716), Prec. Ch. 454; Aston v. Aston (1749), 1 Ves. Sen. 264.

1856. ———.]—A.-G. v. MARLBOROUGH (DUKE), No. 1848, *ante*.

1857. ———. Tenant in tail under statutory obligation to maintain estate.]—A.-G. v. MARLBOROUGH (DUKE), No. 1848, *ante*.

1858. ———. Tenant in tail restrained from barring issue or remainderman.]—A.-G. v. MARLBOROUGH (DUKE), No. 1848, *ante*.

1859. ———. Tenant in fee subject to executory devise over.]—TURNER v. WRIGHT, No. 1837, *ante*.

1860. Condition precedent to injunction.—Positive evidence of title.]—Injunction to restrain waste not granted without positive evidence of title.—DAVIES v. LEO (1802), 1 Ves. 784; 31 E. R. 1307.—L. C.

SUB-SECT. 4.—PERMISSIVE WASTE.

A. In General.

1861. General rule.—Tenant for life not liable.]—TURNER v. BUCK (1715), 2 Eq. Cas. Abr. 758; 22 E. R. 643, L. C.

Annotation:—**Consd.** Powys v. Blagrave (1854), Kay, 495.

PART X. SECT. 3, SUB-SECT. 4.—A.

1861 i. General rule.—Tenant for life not liable.]—ZIMMERMAN v. O'REILLY

(1668), 14 Gr. 646.—CAN.

1861 ii. ———.]—The tenant for life of settled land is not answerable for permissive waste.—*Re* HUDSON,

1862. ———.]—CASTLEMAINE (LORD) v. CRAVEN (LORD) (1733), 2 Eq. Cas. Abr. 758; 22 Vin. Abr. 523; 22 E. R. 644.

Annotations:—**Apld.** Powys v. Blagrave (1854), 4 De G. M. & G. 448; Barnes v. Dowling (1881), 44 L. T. 809; *Re* Cartwright, Avis v. Newman (1889), 60 L. T. 891. **Refd.** Chamberlyne v. Dummer (1792), 3 Bro. C. C. 549; *Re* Williamses, Andrew v. Williamses (1884), 52 L. T. 41.

1863. ———.]—WOOD v. GAYNON (1761), Amb. 395; 27 E. R. 263.

Annotations:—**Apld.** Powys v. Blagrave (1854), 4 De G. M. & G. 448; Barnes v. Dowling (1881), 44 L. T. 809.

1864. ———.]—GIBSON v. WELLS (1805), 1 Bos. & P. N. R. 290; 127 E. R. 473.

Annotations:—**Consd.** Yellowly v. Gower (1855), 11 Exch. 274. **Apld.** *Re* Cartwright, Avis v. Newman (1889), 41 Ch. D. 532. **Consd.** Blackmore v. White, [1899] 1 Q. B. 293. **Refd.** Powys v. Blagrave (1854), 4 De G. M. & G. 448; Barnes v. Dowling (1881), 44 L. T. 809.

1865. ———.]—LANDSOWNE (MARQUIS) v. LANDSOWNE (MARCHIONESS DOWAGER) (1820), 1 Jac. & W. 522; 37 E. R. 467.

Annotations:—**Consd.** Powys v. Blagrave (1854), Kay, 495; Phillips v. Homfray (1883), 24 Ch. D. 439.

1866. ———.]—Equity will not interfere to make a tenant for life liable in respect of permissive waste.—POWYS v. BLAGRAVE (1854), 4 De G. M. & G. 448; 2 Eq. Rep. 1204; 24 L. J. Ch. 142; 24 L. T. O. S. 17; 2 W. R. 700; 43 E. R. 582, L. C.

Annotations:—**Apld.** Barnes v. Dowling (1881), 44 L. T. 809. **Distd.** *Re* Williamses, Andrew v. Williamses (1884), 52 L. T. 41. **Apld.** *Re* Hotchkiss, Freke v. Calmady (1886), 32 Ch. D. 408; *Re* Freeman, Dimond v. Newburn, [1898] 1 Ch. 28. **Consd.** Blackmore v. White, [1899] 1 Q. B. 293. **Refd.** Warren v. Rudall, *Ex p.* Godfrey (1860), 1 John. & H. 1; *Re* Cartwright, Avis v. Newman (1889), 41 Ch. D. 532.

1867. ———.]—WARREN v. RUDALL, *Ex p.* GODFREY, No. 2352, *post*.

1868. ———.]—An action for permissive waste will not lie against a tenant for life.—BARNES v. DOWLING (1881), 44 L. T. 809; 45 J. P. 767, D. C.

Annotations:—**Distd.** Davies v. Davies (1888), 38 Ch. D. 499. **Refd.** *Re* Cartwright, Avis v. Newman (1889), 41 Ch. D. 532.

1869. ———.]—Testatrix devised all her land & hereditaments & bequeathed all her personal estate to trustees, upon trust at their discretion to sell & dispose of such part thereof as should not consist of money, & out of the produce of such sale should first pay her debts, & should then invest the residue as therein mentioned, & should stand possessed of such real & personal estates & securities, upon trust to pay the rents, dividends, & interest & annual produce thereof unto E. for her life; & after her death testatrix gave, devised, & bequeathed her said real & personal estate & the securities upon which the sums might be invested unto & to the use of V., his heirs, exors., administrators, & assigns, according to the nature & quality thereof. Testatrix at her death was seised of two estates in fee simple, P. & B.; the latter was subject to certain mtges., & the rents & profits of the estate were sufficient to pay the interest on the mtges., but were not sufficient to pay for the necessary repairs:—**Held**: (1) there was one aggregate gift to E. for life, & she could not take the rents & profits of the unincumbered estate & repudiate the incumbered estate, but the rents & profits of both estates were liable to keep down the interest on the incumbrances; (2) E. was not liable for repairs or permissive waste, but there was an obligation on the trustees to see that the property did not fall into decay for want of necessary repairs, but such repairs ought to

COOPER v. HUDSON (1906), 25 N. Z. L. R. 626.—N.Z.

g. Duty of trustees—To prevent premises falling into disrepair.]—Where

Sect. 3.—Waste: Sub-sect. 4, A. & B.]

be provided for in such a way as to throw the burden equitably on the tenant for life & remainderman.—*Re HOTCHKYS, FREKE v. CALMADY* (1886), 32 Ch. D. 408; 55 L. J. Ch. 546; 55 L. T. 110; 34 W. R. 569, C. A.

Annotations:—As to (1) *Apld.* *Frewen v. Law Life Assce. Soc.*, [1896] 2 Ch. 511. *Refd.* *Honywood v. Honywood*, [1902] 1 Ch. 347; *Re Kensington, Longford v. Kensington*, [1902] 1 Ch. 203; *Re Lysons, Beck v. Lysons* (1912), 107 L. T. 146. As to (2) *Consd.* *Re Montagu, Derbshire v. Montagu*, [1897] 1 Ch. 685. *Apld.* *Re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28; *Re McClure's Trusts, Carr v. Commercial Union Insee.* (1906), 76 L. J. Ch. 52. *Distd.* *Re Gray, Public Trustee v. Woodhouse*, [1927] 1 Ch. 242. *Refd.* *Conway v. Fenton* (1888), 40 Ch. D. 512; *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Re Willis, Willis v. Willis*, [1902] 1 Ch. 15; *Re Farnham's Settlement, Law Union & Crown Insee. v. Hartopp*, [1904] 2 Ch. 561. *Generally, Refd.* *Re Wagstaff's S. E.*, [1909] 2 Ch. 201; *Gresham Life Assce. Soc. v. Crowthor* (1914), 111 L. T. 887; *Re Johnson, Cowley v. Public Trustee*, [1915] 1 Ch. 435. *Mentd.* *Re Douglas & Powell's Contract*, [1902] 2 Ch. 296.

1870. ———.]—The estate of a legal tenant for life is not liable for permissive waste.

A legal tenant for life of land, upon whom no express duty to repair was imposed by the will under which her estate was derived, died leaving the buildings upon the land in a dilapidated condition. In the administration of her estate the remainderman in fee claimed from her exor. compensation by way of damages for permissive waste:—*Held*: the claim could not be sustained.—*Re CARTWRIGHT, AVIS v. NEWMAN* (1889), 41 Ch. D. 532; 58 L. J. Ch. 590; 60 L. T. 891; 37 W. R. 612; 5 T. L. R. 482.

Annotations:—*Apld.* *Re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28; *Re Parry & Hopkin*, [1900] 1 Ch. 160.

1871. ———.]—*Re PARRY & HOPKIN*, No. 1895, *post*.

1872. ———.]—**Effect of Law of Property Act, 1925 (c. 20), s. 28 (2).**—By virtue of above sect. the operation of which is not limited to the period of a minority, trustees for sale have in relation to the land the powers of management conferred by Settled Land Act, 1925 (c. 18), s. 102, including the power to repair mentioned in sub-sect. 2 (b) & by virtue of sub-sect. (3), power to pay the expenses incurred in management or in the exercise of any of the powers conferred by that sect. out of the income of the land.

Since Jan. 1926, it has become the duty of trustees for sale of settled land to execute the statutory powers so conferred upon them, so far as may be necessary for the performance of their trust; & it is no longer necessary for them to apply the equitable principles of apportioning the expenses between income & capital as explained in *Re Hotchkys, Freke v. Calmady*, No. 1869, *ante*.

Therefore, where, in the absence of any express powers or provisions in the settlement relating to repairs, a block of freehold flats, settled in favour of a tenant for life with beneficial remainders over & held upon trust for sale, had not been kept in a proper state of repair for a period of several years, with the result that a considerable sum was required to defray the expenses of substantial structural repairs so rendered necessary:—*Held*: (1) those repairs were repairs authorised by Settled Land Act, 1925 (c. 18), s. 102 (3) (b), & the expenses thereof were properly incurred by the trustee & payable out of the income of the settled land; (2) even if, upon the proper construction of above sect., those statutory powers were only exercisable during a minority, the expenses incurred by the trustee would, by virtue of above

sect, sub-sect. (2), nevertheless, still be payable out of the income of the land, as the expression "repairs" in that sub-sect. bears the same wide meaning as the word "repair" in Settled Land Act, 1925 (c. 18), s. 102 (2) (b).—*Re GRAY, PUBLIC TRUSTEE v. WOODHOUSE*, [1927] 1 Ch. 242; 96 L. J. Ch. 159; 136 L. T. 401; 70 Sol. Jo. 1112. **1873.** ———.]—*Re ROBINS, HOLLAND v. GILLAM*, [1928] W. N. 170.

1874. Application of rule—Liability of assignee of tenant for life.—A. & his wife being seised of a messuage for their joint lives & the life of the survivor, all the estate & interest of A. became vested in deft., who permitted waste during A.'s lifetime:—*Held*: the wife, who survived her husband, could not maintain an action on the case against deft. in respect of such waste.—*BACON v. SMITH* (1841), 1 Q. B. 345; Arn. & H. 280; 4 Per. & Dav. 651; 10 L. J. Q. B. 119; 5 Jur. 549; 113 E. R. 1164.

Annotation:—*Refd.* *Woodhouse v. Walker* (1880), 5 Q. B. D. 404.

1875. ———.]—**Estate purchased under power in settlement.**—Necessary repairs on real estate purchased in accordance with a power in a testamentary settlement of personality, by the direction or with the consent of the tenant for life, to invest in (*inter alia*) land to be held as personal estate:—*Held*: chargeable to capital.—*Re FREMAN, DIMOND v. NEWBURN*, [1898] 1 Ch. 28; 77 L. T. 460; *sub nom.* *Re FREEMAN, DIMOND v. NEWBURN*, 67 L. J. Ch. 14.

Annotation:—*Refd.* *Re Farnham's Settlement, Law Union & Crown Insee. v. Hartopp*, [1904] 2 Ch. 561.

1876. Exceptions to rule—Liability for repair of tenants' houses.—A tenant for life, though without impeachment of waste, shall be obliged to keep tenants' houses in repair.—*PATERRICHE v. POWLET* (1742), 2 Atk. 383; 26 E. R. 632, L. C.

Annotations:—*Refd.* *Hudson v. Carmichael* (1854), Kay, 613; *Powys v. Blagrave* (1854), 4 De G. M. & G. 448. *Mentd.* *Stowell v. Robinson* (1837), 3 Bing. N. C. 928.

1877. ———.]—**Covenant to repair by reversioner—Construed as covenant on behalf of tenant for life.**—The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, & covenanted to repair the premises:—*Held*: he was to be considered as having entered into the covenant on behalf of the tenant for life, & that the latter's estate was liable for dilapidations occasioned by his neglecting to repair.—*MARSH v. WELLS* (1824), 2 Sim. & St. 87; 2 L. J. O. S. Ch. 191; 57 E. R. 278.

Annotations:—*Distd.* *Powys v. Blagrave* (1854), Kay, 495. *Refd.* *Algar v. Murrell* (1842), 6 Jur. 775.

1878. ———.]—**Tenant for life with power to direct trustees to repair.**—A married woman, tenant for life, without power of anticipation, had power to direct trustees to do repairs, & charge the estate. She employed a builder to do repairs:—*Held*: he was entitled to be paid by having the amount raised by a charge on the estate.—*SKINNER v. TODD* (1881), 51 L. J. Ch. 198; 46 L. T. 131; 30 W. R. 287.

— **Direction by settlor to repair.**—*See Nos.* 1882–1891, *post*.

1879. Duty of trustees—To prevent premises falling into disrepair—Distribution of burden equitably between tenant for life & remainderman.—*Re HOTCHKYS, FREKE v. CALMADY*, No. 1869, *ante*.

1880. Action for damage for waste—Nature of action.—The limitations imposed by C. L. P. Act,

property is held by a trustee in trust for a life tenant & remaindermen, the trustee has active duties to perform, the

trustee may make such repairs as are necessary to keep the property in a good state of preservation for the

remaindermen.—*ROBERTS v. ROBERTS* (1915), 16 S. R. N. S. W. 6; 32 N. S. W. W. N. 161.—*AUS.*

1833 (c. 42), s. 2, are not applicable to an action by remaindermen against the exors. of a deceased tenant for life in respect of damage to the estate during his lifetime by reason of his failure to fulfil his obligation to repair. Such an action is not based on tort, but on the equitable principle that where a person accepts a benefit under a will on condition that he shall discharge a certain liability, he takes the benefit *cum onere*, & a ct. of equity will not apply to the equitable remedy the limitation contained in C. L. P. Act, 1833 (c. 42), s. 2, as to the time within which the action must be brought.—*JAY v. JAY*, [1924] 1 K. B. 826; 93 L. J. K. B. 280; 130 L. T. 667, D. C.
Annotation.—*Apld. Re Field, Sanderson v. Young*, [1923] 1 Ch. 636.

1881. — Limitation of time—Whether applicable.—*JAY v. JAY*, No. 1880, *ante*.

B. Direction by Settlor to Repair.

1882. Tenant for life liable for repairs.—*CALDWALL v. BAYLIS* (1817), 2 Mer. 408; 35 E. R. 906.
Annotations.—*Distd. Powys v. Blagrave* (1854), 4 De G. M. & G. 448. *Refd. Barnes v. Dowling* (1881), 41 L. T. 809.

1883. ——A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon & enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the exor. of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by C. L. P. Act, 1833 (c. 42), s. 2, which gives a right of action against the exor. of a person deceased in respect of wrongs committed by testator to another in respect of his property:—*Held*: an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, & lay under C. L. P. Act, 1833 (c. 42), against her exor. after her death.—*WOODHOUSE v. WALKER* (1880), 5 Q. B. D. 404; 49 L. J. Q. B. 609; 42 L. T. 770; 44 J. P. 666; 28 W. R. 765, D. C.

Annotations.—*Folld. Re Williamses, Andrew v. Williamses* (1884), 52 L. T. 41. *Apld. Batthyany v. Walford* (1886), 33 Ch. D. 624; *Re Bradbrook, Lock v. Willis* (1887), 56 L. T. 106. *Expld. Davies v. Davies* (1888), 38 Ch. D. 499. *Apld. Jenks v. Clifton*, [1897] 1 Ch. 691. *Consd. Blackmore v. White*, [1899] 1 Q. B. 293; *Jay v. Jay* [1924] 1 K. B. 826. *Refd. Morgan v. Hardy* (1886), 17 Q. B. D. 770. *Mentd. Joyner v. Weeks*, [1891] 2 Q. B. 31.

1884. — Destruction of premises by fire.—A, being devisee for life of premises, with a condition against committing any manner of waste & for keeping same in good & tenantable repair, became lunatic, & the premises were subsequently destroyed by accidental fire. A petition was then presented by the committee of the person who was also remainderman, praying a declaration that the premises ought to be rebuilt at the expense of the lunatic's estate, & a reference as to the amount of such expense, & out of what fund it ought to be defrayed. The Lord Chancellor made an order for the reference, holding that the words of the will created an obligation upon the tenant for life to rebuild the premises, & that the question of such liability was rightly brought before the ct. on the petition.—*Re SKINGLEY* (1851), 3 Mac. & G. 221; 20 L. J. Ch. 142; 16 L. T. O. S. 405; 15 Jur. 958; 42 E. R. 246, L. C.

Annotations.—*Distd. Powys v. Blagrave* (1854), 4 De G. M. & G. 448. *Folld. Gregg v. Coates, Hodgson v. Coates* (1856), 23 Beav. 33. *Distd. Micklethwait v. Micklethwait* (1857), 1 De G. & J. 504. *Refd. Barnes v. Dowling* (1881), 44 L. T. 809; *Re Williamses, Andrew v. Williamses* (1885), 54 L. T. 105; *Batthyany v. Walford* (1886), 33 Ch. D. 624; *Blackmore v. White*, [1899] 1 Q. B. 293. *Mentd. Re Williamses, Williams v. Williams*, [1897] 2 Ch. 12; *Re G.*, [1899] 1 Ch. 719.

1885. — Repairs payable out of income—Ordinary repairs only.—Testator gave his freehold, copyhold & leasehold estates, & all his stocks, shares & personal estate, to trustees, in trust to receive the "rents," issues & profits, & thereout to keep the houses, etc. in good, substantial & tenantable repair, & renew his leaseholds, etc., & then to pay "the net income arising from the residuary real & personal estate" to his wife for life:—*Held*: (1) the wife was entitled to the enjoyment *in specie*; (2) all ordinary repairs were to be paid out of the income, but not such extraordinary repairs as would amount to rebuilding the houses.—*Crowe v. Crisford* (1853), 17 Beav. 507; 2 W. R. 45; 51 E. R. 1130.

Annotations.—*As to* (1) *Consd. Re Gaine, Game v. Young*, [1897] 1 Ch. 881. *Overd. Re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312.

1886. ——Lands were devised in 1861 to trustees during the lives of certain tenants for life, in trust to receive the rents & manage the estate with the powers of absolute owners. An annuity was directed to be paid to the tenant for life in possession out of the rents, & the surplus rents were to be laid out in the purchase of real estates or accumulated for a period of twenty-one years from testator's death, & the income of the accumulations paid to the tenant for life. From the expiration of that period the whole of the surplus rents yearly accruing to be paid to the tenant for life in possession, & also the income of the accumulated surplus. The period of twenty-one years from testator's death expired in Jan. 1885. The trustees named in the will disclaimed, & the property had since been managed by a receiver appointed by the ct. The surplus rents accumulated during the twentyone years amounted to £37,000. Repairs & improvements amounting to between £4,000 & £5,000 were required to be made on the settled property:—*Held*: such of the proposed works as were in the nature of improvements within the description contained in Settled Land Act, 1882 (c. 38), s. 25, should be provided for out of the £37,000, which was capital money within the Act; & those which were merely repairs must be paid for out of the income of the property.—*CLARKE v. THORNTON* (1887), 35 Ch. D. 307; 56 L. J. Ch. 302; 56 L. T. 294; 35 W. R. 603; 3 T. L. R. 299.

Annotations.—*Apld. Re Stamford's Estate* (1887), 56 L. T. 484. *Folld. Re Stamford's S. E.* (1889), 43 Ch. D. 84. *Distd. Cardigan v. Curzon-Howe* (1893), 9 T. L. R. 244. *Apld. Re Gee, Pearson Gee v. Parson* (1895), 64 L. J. Ch. 606. *Distd. Re Partington, Leigh v. Kane*, [1902] 1 Ch. 711. *Expld. Re Keck's Settlement*, [1904] 2 Ch. 22. *Folld. Re Stamford & Warrington, Payne v. Grey*, [1916] 1 Ch. 404. *Refd. Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319; *Re Egmont S. E., Lefroy v. Egmont*, [1906] 2 Ch. 151; *Re Tubbs, Dykes v. Tubbs*, [1915] 2 Ch. 137.

1887. ——Testator gave all the residue of his leasehold & other property to trustees upon trust to receive the rents & profits thereof, & in the first place to pay thereout all the costs, charges, & expenses of the trust, & out of the balance thereafter remaining to pay certain legacies & annuities which latter were to abate *pro rata* in case of the balance being insufficient to pay all in full. The trustees, after notice from the lessors, repaired part of the leasehold estate at an expense greater than the value of the remainder of the term of the lease:—*Held*: the cost of these repairs was payable out of income, & not out of corpus.—*DEBNEY v. ECKFETT* (1894), 71 L. T. 659; 43 W. R. 54; 39 Sol. Jo. 44; 13 R. 207.

1888. — Repairs payable out of special fund.—*CARDIGAN (COUNTESS) v. CURZON-HOWE* (1893), 9 T. L. R. 244.

Annotation.—*Folld. Re Partington, Leigh v. Kane*, [1902] 1 Ch. 711.

Sect. 3.—Waste: Sub-sect. 4, B. & C.]

1889. Estate of deceased tenant for life liable.]—WOODHOUSE *v.* WALKER, No. 1883, *ante*.

1890. ——[Testator gave his real estate to trustees upon trust for his widow for life, with remainder over, in events which happened, to A. for life, & in events which happened, to B. for life, with remainders to his children, if any, in tail, with remainders over. The will contained a direction that each tenant for life or in tail of any of the hereditaments should, during her or his estate keep the buildings thereon in substantial repair; & if any such person should neglect to effect such repairs within six months after being thereunto requested by the trustees, the trustees should be at liberty to effect such repairs. The widow of testator was in possession of the hereditaments until her death in June, 1883. Her will was proved in Feb. 1884. She had omitted to repair the buildings. More than six months after her death, but within six months after probate of her will, a claim was carried in against her estate, in an administration action, in respect of the omission to repair, claimants being the trustees of the will & the then equitable tenant for life:—*Held*: the estate of deceased tenant for life was liable for such omission to repair.—*Re WILLIAMS, ANDREW v. WILLIAMS* (1885), 54 L. T. 105, C. A. *Annotations*:—*Consd.* Blackburn *v.* White, [1899] 1 Q. B. 293; Jay *v.* Jay, [1921] 1 K. B. 826. *Re* Field, Sanderson *v.* Young, [1925] 1 Ch. 636.

1891. ——[Testator devised to his wife for life two freehold houses with the buildings, land, & appurtenances thereto belonging, "she keeping same in good & tenantable repair." Testator directed the property to be sold by his trustees after the death of his wife, the proceeds to be held upon the trusts mentioned in his will. After the death of testator his widow entered into possession of the property & continued therein until the date

ticularly the outbuildings adjoining one of the houses, consisting of greenhouses & conservatories formerly used in the business of a fruit grower, in whose possession such house was before testator purchased it. An originating summons was accordingly taken out by the trustees of the will, asking that what sum the representative of testator's widow was liable to pay by reason of the property not having been kept by her in good & tenantable repair might be determined. Evidence was adduced to show that the greenhouses were wholly neglected & in complete disrepair at the time testator purchased; that he never intended to put same into repair, but had thought of having them pulled down. It was, therefore contended that the estate of testator's widow was not liable in respect of the repairs required to such greenhouses:—*Held*: the fact that testator did not himself keep the greenhouses in good & tenantable repair could not be regarded as an excuse for his widow not doing so, having regard to the express direction contained in the will; & her estate was liable for the amount of the repairs required.—*Re BRADBROOK, LOCK v. WILLIS* (1887), 56 L. T. 106.

1892. Extent of liability—Habitable repair.]—A direction to keep buildings in good repair means, not the state of repair in which they were at testator's death, but in habitable repair: "farming

buildings" includes "farmhouses."—*COOKE v. CHOLMONDELEY* (1858), 4 Drew. 326; 27 L. J. Ch. 828; 32 L. T. O. S. 59; 4 Jur. N. S. 827; 6 W. R. 802; 62 E. R. 126.

Annotation:—*Re*ld. Calthorpe *v.* McOscar, [1923] 2 K. B. 573.

1893. — Tenantable repair—Premises not in such repair at commencement of settlement—Settlor tenant for life.]—By a settlement by way of compromise of pending questions in Mar. 1912, deft. S. conveyed a residential country house & estate, farm buildings, & stables to trustees upon trust for deft. for life, & after his decease for pltf. E. in fee simple, & it was agreed & declared that S. should keep the settled messuages & buildings in good & tenantable repair, & would keep the grounds in a proper state & insure the messuages, buildings, & furniture against loss or damage by fire. Pltf. & trustees of the settlement claimed performance of the covenants. Deft. alleged that the settled houses & buildings were old, & that he had fulfilled his covenants. A reference for inquiry & report on the matters in dispute had been agreed upon:—*Held*: the reference ought to be framed on the footing that the tenant for life's obligation to keep in good & tenantable repair rendered him liable to put the premises into such repair although they were not in good & tenantable repair when he took them.—*EVANS v. SHOTTON* (1918), 87 L. J. Ch. 527; 119 L. T. 233; 62 Sol. Jo. 603.

1894. — Specific sum appropriated—No liability beyond such sum.]—*Re JERVIS, TURNER v. JERVIS* (1919), 146 L. T. Jo. 215.

C. Settled Leaseholds.

1895. Whether tenant for life liable.]—A tenant for life of leaseholds is not liable to the remainderman for permissive waste.

The estate of a tenant for life of leaseholds held not liable to the remainderman for repairs made necessary by the non-fulfilment, during the life tenancy, of covenants to repair.—*Re PARRY & HOPKIN*, [1900] 1 Ch. 160; 69 L. J. Ch. 190; 81 L. T. 807; 64 J. P. 137; 48 W. R. 345.

1896. — Lease containing covenant to repair.]—Testator gave leaseholds, some of which were held on short terms, to two trustees, one of whom was his wife, upon trust for her for life, & after her death upon trust that the whole should be sold, & the proceeds divided between four persons, & he authorised his trustees, provided they should deem it advisable to sell his short leaseholds & invest the proceeds & allow his wife to receive the income during her life. The leaseholds were in a bad state of repair at the death of testator; the widow kept them up in the same state of repair, but declined to do more than this. The remaindermen applied for an order to oblige the tenant for life to maintain the leaseholds in such a state of repair as to satisfy the covenants in the leases so as to avoid a forfeiture, or else to concur in selling the short leaseholds:—*Held*: there was no obligation on the tenant for life to put the premises in such a state of repair as to comply with the terms of the leases.—*Re COURTIER, COLES v. COURTIER, COURTIER v. COLES* (1886), 34 Ch. D. 136; 56 L. J. Ch. 350; 55 L. T. 574; 51 J. P. 117; 35 W. R. 85, C. A.

Annotations:—*Fold.* *Re* Baring, Jeune *v.* Baring, [1893] 1 Ch. 61. *Consd.* *Re* Redding, Thompson *v.* Redding,

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18961. Whether tenant for life liable.—*Lease containing covenant to repair.]—*As between the equitable tenant for

life of leaseholds & the remainderman, the tenant for life is liable for breaches of covenant to repair committed during the existence of the life estate, & the liability for such breaches

cannot be thrown by the tenant for life upon the corpus of the estate.—*Re WALDRON & BOGUE'S CONTRACT*, [1904] 1 I. R. 240.—*IR.*

[1897] 1 Ch. 876. **Fold.** *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232. **Consd.** *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821. **N.F.** *Re GJERS, Cooper v. GJERS*, [1899] 2 Ch. 54. **Reid.** *Debnay v. Eckett* (1894), 71 L. T. 659; *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319.

1897. ———.]—Testator, being possessed of a leasehold house held by him for a term of sixty-one years, renewable every fourteen years on fines for renewal, & under covenants to pay the rent, repair & insure, bequeathed the house to trustees, in trust for his widow for life, with remainder in trust for his son for life, with remainders over; & he bequeathed his residuary estate to his trustees upon trust out of the income to pay all the costs, charges, & expenses of carrying into execution the trusts of his will, & subject thereto, to hold such residuary estate upon trusts for his children in settled shares:—**Held:** neither tenant for life was under any obligation to pay the rent, repair, or insure, or to pay the fines or expenses of renewal; the rent & the expenses of repair & insurance, during the respective lives of the tenants for life, were payable out of the income of the residuary estate; & the fines & expenses of renewal were distributable among the beneficiaries of the house according to their enjoyment, such enjoyment to be ascertained by actuarial valuation.—*Re BARING, JEUNE v. BARING*, [1893] 1 Ch. 61; 62 L. J. Ch. 50; 67 L. T. 702; 41 W. R. 87; 9 T. L. R. 7; 3 R. 37.

Annotations:—**Apld.** *Debnay v. Eckett* (1894), 71 L. T. 659. **Consd.** *Re Redding, Thompson v. Redding*, [1897] 1 Ch. 876; *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Re GJERS, Cooper v. GJERS*, [1899] 2 Ch. 54. **Reid.** *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Wix, Hardy v. Lemon*, [1916] 1 Ch. 279.

1898. ———.]—Testator, who died possessed of a leasehold house held by him on a repairing lease bequeathed it directly, without the intervention of trustees, to his niece for life, & after her death to other persons absolutely, & appointed exors.:—**Held:** the niece, the tenant for life, was not bound to perform any of the covenants in the lease.—*Re TOMLINSON, TOMLINSON v. ANDREW*, [1898] 1 Ch. 232; 67 L. J. Ch. 97; 78 L. T. 12; 46 W. R. 299; 42 Sol. Jo. 114.

Annotations:—**Consd.** *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821. **N.F.** *Re GJERS, Cooper v. GJERS*, [1899] 2 Ch. 54.

1899. ———.]—Testator directed his exors. & trustees to arrange his affairs & manage his estate & to retain certain leaseholds & let them on lease at fair rentals & pay the income derived therefrom to his wife for life for the benefit of herself & her children & after her decease to divide the whole of his estate equally between his children:—**Held:** on the construction of the will, the "income derived" from the leaseholds meant the net income *i.e.*, the amount of the rents after deducting all property outgoing, & consequently ground rents, current repairs & other outgoing in respect of the leaseholds must be borne by the tenant for life.—*Re REDDING, THOMPSON v. REDDING*, [1897] 1 Ch. 876; 66 L. J. Ch. 460; 76 L. T. 339; *sub nom.* *Re RIDDING, THOMPSON v. RIDDING*, 45 W. R. 457; 41 Sol. Jo. 405.

Annotations:—**Consd.** *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821. **Reid.** *Re GJERS, Cooper v. GJERS*, [1899] 2 Ch. 54.

1900. ———.]—Testator bequeathed a leasehold house with the furniture & household effects to trustees upon trust for his adopted daughter for life, & after her death upon trust for sale & to hold the proceeds as part of his residuary estate which he gave upon trust for a charity to be controlled by a trustee, who declined to act. The daughter

alone proved the will, the other exors. renouncing probate, & took out an originating summons for the administration of testator's estate, deft. being the A.-G. The lease under which the house was held was for a long term at an annual ground rent, & contained a covenant to pay rent, & to repair, & insure the property. Upon the further consideration of the action the question was raised whether the daughter, or testator's estate, was liable for the ground rent, cost of repairs, & insurance premiums during her life:—**Held:** in the absence of a provision to the contrary in the will, the daughter must take the estate *cum onere*, & was therefore bound to pay the rent & perform the tenant's obligations to repair & insure during her tenancy; but testator's estate was liable in respect of any breaches of covenant by him.—*Re BETTY, BETTY v. A.-G.*, [1899] 1 Ch. 821; 68 L. J. Ch. 435; 80 L. T. 675.

Annotations:—**Fold.** *Re GJERS, Cooper v. GJERS*, [1899] 2 Ch. 54. **Reid.** *Re Parry & Hopkins*, [1900] 1 Ch. 160.

1901. ———.]—A tenant for life of leaseholds, specifically bequeathed by the will of testator who was assignee of the lease under which the property is held, is bound, during the continuance of her interest, as between herself & testator's estate to pay the rent reserved by the lease, & perform the covenants & conditions contained in it.—*Re GJERS, COOPER v. GJERS*, [1899] 2 Ch. 54; 68 L. J. Ch. 442; 80 L. T. 689; 47 W. R. 535; 43 Sol. Jo. 497.

1902. ———.]—**Liability for repairs necessary at commencement of interest.**—Testator gave all his freehold, copyhold, & leasehold hereditaments to one for life, with remainder over in fee; & he gave all the residue of his personal estate upon trust to pay debts, etc., & to keep his leasehold property in repair, & renew the leaseholds at the accustomed times, & subject thereto to pay to or permit the tenant for life to receive the annual proceeds, etc. Testator at the time of his death was under liability under covenants in leases to repair, & a sum of £91 6s. 8d. was found due from him in respect of dilapidations:—**Held:** the tenant for life was not bound to pay that sum out of her income, but it was payable out of the corpus of the residuary personal estate.—*PINFOLD v. SHILLINGFORD* (1877), 46 L. J. Ch. 491; 25 W. R. 425.

1903. ———.]—*Re BETTY, BETTY v. A.-G.*, No. 1900, *ante*.

1904. ———.]—**To make good testator's deficiencies.**—*Re COURTIER, COLES v. COURTIER, COURTIER v. COLES*, No. 1896, *ante*.

1905. ———.]—*Re BETTY, BETTY v. A.-G.*, No. 1900, *ante*.

1906. ———.]—Testator by his will declared that his trustees might permit his widow to reside in his leasehold house as long as she might desire, "she paying the rent & all rates, taxes, outgoing & repairs in connection therewith, & my trustees shall not be concerned to see to the upkeep of, or be responsible for, the said premises in any way during such time as my wife shall reside in the said premises":—**Held:** the widow was not liable to pay for dilapidations existing prior to testator's death.—*Re SMITH, BULL v. SMITH* (1901), 84 L. T. 835; 17 T. L. R. 588; 45 Sol. Jo. 596.

1907. ———.]—The tenant for life is only liable to keep leasehold properties in such a state of repair as they were in when she became tenant for life on the death of the settlor, & accordingly the trustees of the property should, at the date of

1904 i. ———.]—**To make good testator's deficiencies.**—As between tenant for life of a leasehold, specifically bequeathed, & the general assets of a

testator there is no equity of the latter to throw on the former the obligation of putting into repair the leasehold premises which were dilapidated at

the time of the testator's death.—*BRERETON v. DAY*, [1896] 1 I. R. 518.—**IR.**

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the death of the settlor, do all repairs necessary to put the property in a proper state of repair to satisfy the covenants in the leases, & pay the same out of the corpus of the estate. Repairs to freeholds must be borne by the corpus.—*Re SUTTON, SUTTON v. SUTTON* (1912), 56 Sol. Jo. 650.

1908. — Tenant only entitled to improved ground rent.—There is no distinction in the position of an equitable tenant for life of leaseholds where the property is sub-let at a rack rent, & where it is sub-let at an improved ground rent.—*Re COPLAND'S SETTLEMENT, JOHNS v. CARDEN*, [1900] 1 Ch. 326; 69 L. J. Ch. 240; 82 L. T. 191.
Annotation:—Mentd. Re Farnham's Settlement, Law Union & Crown Insec. v. Hartopp, [1904] 2 Ch. 561.

1909. — Failure to keep in repair—Appointment of receiver of rents—To enforce repair.—When leasehold houses are vested in trustees on behalf of a tenant for life & remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, & they are entitled to have the rents applied in keeping the houses in a proper state of repair. The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves & the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are entitled to require the covenants to be specifically performed. When a tenant for life of leasehold houses is allowed by the trustees to receive the rents & the houses are not kept in a proper state of repair according to the covenants of the lease the ct. will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair, of the houses.—*Re FOWLER, FOWLER v. ODELL* (1881), 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891.

Annotations:—Distd. Re Courtier, Coles v. Courtier, Courtier v. Coles (1886), 31 Ch. D. 136. **Consd. Re Baring, Jeune v. Baring, [1893] 1 Ch. 61. **Refd. Re Giers, Cooper v. Giers, [1899] 2 Ch. 54.****

1910. Liability of estate of tenant for life.—*Re PARRY & HOPKIN*, No. 1895, *ante*.

1911. Tenant for life also trustee—Limitation of liability—To period of enjoyment.—By deed poll, in 1878, R., in exercise of a power conferred upon her by the will of her father J. P. deceased, appointed that the trustees of his will should, after her death, stand possessed of certain leasehold houses upon trust, after payment of the rents reserved by the leases under which the same were respectively held & costs of insurance & the performance of the covenants, which included covenants to repair, in the said leases, to pay to Y. or otherwise permit her to receive the rents & profits of the leasehold houses during her life, & after her decease, the same were directed to be held upon trust, in the event which happened, for Y.'s daughters in equal shares.

R. died on Aug. 15, 1882, & after the death, in 1909, of the last surviving trustee of the will, whose personal representatives declined to intermeddle in the trusts thereof or to appoint new trustees, Y. entered into the receipt of the rents of the leasehold houses & continued therein down to her death in 1922. In an action by the daughters of Y. against her personal representatives for damages out of her estate by reason of Y.'s failure, while tenant for life in possession of the leasehold houses, to keep the same in repair in accordance with the covenants in the leases:—**Held:** upon entering into the receipt of the rents of the leasehold houses under the appointment in her favour with knowledge of the primary trust for the

application of the same, Y. assumed the duties of the trustees & became herself directly liable to perform that trust as a condition precedent to her taking the benefit of the appointment; but her liability must be limited to the period during which she was in actual receipt thereof, namely, from Mar. 27, 1909, to her death in 1922, & also to the amount of the rents which she received during that period, an inquiry being directed as to the amount of damages ptfs. were entitled to recover.—*Re FIELD, SANDEKSON v. YOUNG*, [1925] Ch. 636; 94 L. J. Ch. 322; 133 L. T. 463; 69 Sol. Jo. 661.

1912. Duty of trustees—To keep property in repair.—*Re FOWLER, FOWLER v. ODELL*, No. 1909, *ante*.

SUB-SECT. 5.—FIXTURES.

A. General Principles.

See LANDLORD & TENANT, Vol. XXXI., pp. 181–213.

1913. Annexation to freehold—Relaxation of common law rule.—(1) A fire engine set up for the benefit of a colliery by a tenant for life, shall be considered as part of his personal estate, & go to the exor., for the increase of assets in favour of creditors.

(2) The old cases go a great way upon the annexation to the freehold; but cts. of late have relaxed this strict construction of law, to encourage tenants for life to do what is advantageous to the estate during their term.

(3) To remove wainscot fixed only by screws, & marble chimney pieces is not waste.—*LAWTON v. LAWTON* (1743), 3 Atk. 13; 26 E. R. 811, L. C.

Annotations:—As to (1) Apld. Dudley v. Warde (1751), Amb. 113. **Consd. Elwes v. Maw (1802), 3 East, 38. **Apld. Trappes v. Harter (1833), 2 Cr. & M. 153. **Refd. Re Hulsc, Beattie v. Hulsc, [1905] 1 Ch. 406. **As to (3) Consd. Re De Falbe, Ward v. Taylor, [1901] 1 Ch. 523. **Refd. Grymes v. Boweren (1830), 6 Bing. 437; Bishop v. Elliott (1855), 11 Exch. 113. **Generally, Refd. Re Walsh, Ex p. King (1840), 4 Jur. 510; Wake v. Hall (1883), 8 App. Cas. 195; Ward v. Dudley (1887), 57 L. T. 20; Hill v. Bullock, [1897] 2 Ch. 55. **Mentd. Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Walmsley v. Milne (1859), 7 C. B. N. S. 115; Gough v. Wood (1894), 42 W. R. 469; *Re Whaley, Whaley v. Rochrich*, [1908] 1 Ch. 615.**************

1914. ——Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. First between different descriptions of representatives of the same owner of the inheritance; viz. between his heir & exor. In this first case, i.e. as the rule obtains with the most rigour in favour of the inheritance, & against the right to disannex therefrom, & to consider as a personal chattel, anything which has been affixed thereto. Secondly, between the exors. of tenant for life or in tail, & the remainderman or reversioner; in which case the right to fixtures is considered more favourably for exors. than in the preceding case between heir & exor. (LORD ELLENBOROUGH, C.J.).—*ELWES v. MAW* (1802), 3 East, 38; 102 E. R. 510.

Annotations:—Consd. Buckland v. Butterfield (1820), 2 Brod. & Bing. 54; *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443. **Refd. Lee v. Ridsd (1816), 7 Taunt. 188; *Farrant v. Thompson* (1822), 2 Dow. & Ry. K. B. 1; *Re Ogden, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Whithear v. Cottrell* (1853), 1 E. & B. 674; *Bishop v. Elliott* (1855), 11 Exch. 113; *Whitehead v. Bennett* (1858), 27 L. J. Ch. 474; *London & Westminster Loan & Discount Co. v. Drake* (1859), 5 Jur. N. S. 1407; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Powell v. Farmer* (1865), 18 C. B. N. S. 168; *Cornish v. Stubbs* (1870), 39 L. J. C. P. 202; *Wake v. Hall* (1883), 8 App. Cas. 195; *Ward v. Dudley* (1887), 57 L. T. 20; *Barff v. Probyn* (1895), 64 L. J. Q. B. 557; *Re De Falbe, Ward v. Taylor* (1901), 84 L. T. 273; *Mears v. Callender*, [1901] 2 Ch. 388; *Re***

Chesterfield's S. E., [1911] 1 Ch. 237; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97. **Mentd.** *Steward v. Lombe* (1820), 4 Moore, C. P. 281; *Winn v. Ingilby* (1822), 5 B. & Ald. 625; *Place v. Fagg* (1829), 4 Man. & Ry. K. B. 277; *Trappes v. Harter* (1833), 2 Cr. & M. 153; *Darby v. Harris* (1841), 10 L. J. Q. B. 294; *Powell v. Boraston* (1865), 13 W. R. 465; *Mowats v. Hudson* (1911), 105 L. T. 400; *Re Mann & Harvey* (1920), 123 L. T. 242.

1915. ———. —[As between landlord & tenant, the claim of the tenant to remove fixtures set up by himself is the most favoured; as between tenant for life & remainderman, the claim of the tenant for life to remove fixtures set up by himself is less favoured (*CHITTY*, J.).—*NORTON v. DASHWOOD*, [1896] 2 Ch. 497; 65 L. J. Ch. 737; 75 L. T. 205; 44 W. R. 680; 12 T. L. R. 512; 40 Sol. Jo. 635.

Annotations:—**Distd.** *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523. **Refd.** *Hill v. Bullock*, [1897] 2 Ch. 55; *Re Chesterfield's S. E.*, [1911] 1 Ch. 237.

1916. ———. **Question of fact in each case.**—*BULKELEY v. LYNE STEPHENS, Re LYNE STEPHENS, LYNE STEPHENS v. LUBBOCK* (1895), 11 T. L. R. 564.

Annotation:—**Refd.** *Hill v. Bullock*, [1897] 2 Ch. 55.

1917. ———. —[Whether a chattel is so annexed to the freehold as to be intended as an improvement to it, and to pass with it, or is annexed only for the purpose of temporary use or ornament, so as to be removable, is a question to be decided upon the facts of the case.

Valuable tapestries belonging to a tenant for life were fastened to the walls of the drawing room in a mansion house by fixing small strips of wood by means of nails & screws to the wood with which the walls were lined; canvas was then stretched over the strips of wood & nailed to them, & the tapestries were fastened to the canvas by very small tacks. Mouldings were fixed round the strips of wood by thin nails & screws, some of which penetrated the face of the wall. The tapestries were an essential feature of the general scheme of decoration of the room:—**Held:** the tapestries were fixed for purposes of ornament in the only way in which it was possible to use & enjoy them, & did not pass to the remainderman on the death of the tenant for life, but were removable by her exors.—*LEIGH v. TAYLOR*, [1902] A. C. 157; 71 L. J. Ch. 272; 86 L. T. 239; 50 W. R. 623; 18 T. L. R. 293; 46 Sol. Jo. 264, H. L.; *affg.* S. C. *sub nom. Re DE FALBE, WARD v. TAYLOR*, [1901] 1 Ch. 523, C. A.

Annotations:—**Apld.** *Re Hulse, Beattie v. Hulse*, [1905] 1 Ch. 406. **Distd.** *Re Whaley, Whaley v. Roehrich*, [1908] 1 Ch. 615. **Consd.** *Horwich v. Symond* (1914), 110 L. T. 1016. **Refd.** *Bickmore v. Dimmer*, [1903] 1 Ch. 158; *Reynolds v. Ashby*, [1904] A. C. 466.

1918. ———. **Intention of person by whom chattels attached.**—A tenant for life of settled estates granted a lease for twenty-one years of a steam mill & machinery. The lessee covenanted that he would at the end of the tenancy sell to the lessor all machinery then on the premises other than the demised machinery; & the lessor covenanted that he would pay for it. The tenant brought additional machinery into & affixed it to the mill. On the expiration of the tenancy the tenant for life bought this machinery under the provisions of the lease. He died, & his extrix. claimed the machinery thus bought:—**Held:** (1) as between tenant for life & remainderman, chattels affixed to the soil by the tenant for life for purposes of trade did not become part of the freehold, & might be removed by him; (2) the question must be determined by the intention of the person by whom the chattels were attached; & in the absence of evidence to show that the tenant for life intended to make a present to the remainderman, his

extrix. was entitled to the machinery.—*Re HULSE, BEATTIE v. HULSE*, [1905] 1 Ch. 406; 74 L. J. Ch. 246; 92 L. T. 232.

1919. Essential part of house—Or architectural design.—Testator, who was tenant for life of settled estates, on which he had erected, fitted up, & furnished a mansion house, an old one having fallen into decay, bequeathed all the tapestry, marbles, statues, pictures with their frames & glasses, which should be in or about the house at the time of his death, & of which he had power to dispose, to be enjoyed as heirlooms by the persons who, under the limitations in his will, would be entitled to his own estates thereby devised in strict settlement, being the same as those entitled to the settled estates, subject to a condition, with a shifting clause in case the condition were not fulfilled. After testator's death, A. became tenant for life of both the settled & devised estates, & on his death the settled estates devolved on B.; but, as the condition was not fulfilled, C. became entitled to the devised estates & to the heirlooms under the shifting clause in testator's will. The question arose, as between B. & C., which of the articles passed under the will:—**Held:** (1) tapestry, pictures in panels, frames filled with satin & attached to the walls, & also statues, figures, vases & stone garden seats, purchased & placed by the testator, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, & could not be removed; but glasses & pictures not in panels, not being part of the building, passed under testator's will; (2) articles purchased by testator but fixed by A. after his death, were not fixtures, & passed under the will to C.—*D'EYNCOURT v. GREGORY* (1866), L. R. 3 Eq. 382; 36 L. J. Ch. 107; 15 W. R. 186.

Annotations:—As to (1) **Consd.** *Bulkeley v. Lyne Stephens, Re Lyne Stephens, Lyne Stephens v. Lubbock* (1895), 11 T. L. R. 564. **Apld.** *Norton v. Dashwood*, [1896] 2 Ch. 497. **Distd.** *Hill v. Bullock*, [1897] 2 Ch. 482. **Expld.** *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523. **Consd.** *Monti v. Barnes*, [1901] 1 K. B. 205. **Refd.** *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Childley v. West Ham* (1874), 32 L. T. 486; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97; *Vaudeville Electric Cinema v. Muriel*, [1923] 2 Ch. 74.

1920. Things forming part of inheritance.—Whatever once becomes part of the inheritance cannot be severed by a limited owner whether he be owner for life or for years without the commission of . . . waste (*LORD CAIRNS*, C.).—*BAIN v. BRAND* (1876), 1 App. Cas. 762, H. L.

Annotations:—**Apld.** *Re Chesterfield's S. E.*, [1911] 1 Ch. 237. **Refd.** *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Re Hulse, Beattie v. Hulse*, [1905] 1 Ch. 406.

—[A tenant for life of real estate, who was entitled to hold & enjoy the working stock & plant of certain iron mines & collieries situate on the estate, & carry on such iron mines & collieries, erected on the estate, machinery, etc., blast furnaces, & a railway of considerable length connecting the mines & collieries. On his death the question arose whether, in an account between his exors. & the remainderman, the former should be credited with the value of the machinery, etc., or whether the same passed to the remainderman as things annexed to the soil:—**Held:** the machinery annexed to the soil for the purpose of rendering the minerals merchantable, if such machinery was capable of being removed therefrom by disturbing the soil without destroying the land, was machinery which could not be said to be so attached to the land as to become part of it & belong to the owner of the land, but was to be deemed to be trade fixtures which passed to the exor. as personality.—*WARD v. DUDLEY (COUNTS)* (1887), 57 L. T. 20; 3 T. L. R. 576.

Sect. 3.—Waste: Sub-sect. 5, A. & B.; sub-sects. 6 & 7. Sect. 4: Sub-sects. 1, 2 & 3, A.]

1922. —.]—The exor. of a deceased owner in fee has no right to remove from the inheritance more than that which really & properly considered is never fixed to it in a definite way.

By the will of the ninth Earl of C. the H. L. estates, of which he was the absolute owner, were settled to certain uses in strict settlement under which the present earl was tenant for life with remainder to his issue in tail male, with divers remainders over. Testator also bequeathed certain chattels to go as heirlooms, & gave to the present earl absolutely all his plate, except such as he had before given to his wife, books, pictures, & other works of art or curiosity, except the heirlooms, china, glass, furniture, carriages, horses, wines, &c, generally, all goods, effects, & live & dead stock which at his decease might be in or about his mansion house of H. L. At the death of tes-

These carvings were affixed to the walls of various rooms therein by means of nails or pegs driven through them into stiles built into the walls. Testator died in 1887. In 1909 the present earl sold portions of the settled estates including the mansion house, expressly reserving the carvings. He subsequently removed the carvings from the mansion house & sold a portion of them, claiming to be absolutely entitled to the proceeds of sale thereof. Upon the application by summons of the trustees:—*Held*: the carvings did not pass by the bequest of chattels, but, being fixed in a definite way to the inheritance so as to form part of the house, the proceeds of sale of such as had been sold must be treated as capital money subject to the trusts of the settlement.—*Re CHESTERFIELD'S (LORD) SETTLED ESTATES*, [1911] 1 Ch. 237; 80 L. J. Ch. 186; 103 L. T. 823.

Annotation:—Consd. Re Scott, Scott v. Scott (1914), 30 T. L. R. 345.

1923. Articles fixed after death of tenant for life.]—D'EYNCOURT *v.* GREGORY, No. 1919, *ante*.

B. Particular Instances.

1924. Blast furnaces.]—WARD *v.* DUDLEY (COUNTRESS), No. 1921, *ante*.

1925. Carvings.]—*Re CHESTERFIELD'S (LORD) SETTLED ESTATES*, No. 1922, *ante*.

1926. Chimney piece—Marble.]—LAWTON *v.* LAWTON, No. 1913, *ante*.

1927. Garden seats—Stone.]—D'EYNCOURT *v.* GREGORY, No. 1919, *ante*.

1928. Machinery—Colliery.]—LAWTON *v.* LAWTON, No. 1913, *ante*.

1929. —.]—Tenant for life, or in tail, erects a fire engine to work a colliery. It shall on his death be considered as part of his personal estate, & not go with the estate to remainderman.—DUDLEY (LORD) *v.* WARDE (LORD) (1751), Amb. 113; 27 E. R. 73, L. C.

Annotations:—Consd. Elwes v. Maw (1802), 3 East, 38; Hubbard *v.* Bagshaw (1831), 4 Sim. 326; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523; *Re Hulse, Beattie v. Hulse*, [1905] 1 Ch. 406. *Reid, Elliott v. Bishop* (1854), 10 Exch. 496. *Menté, Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443.

1930. — *Mill.]*—*Re HULSE, BEATTIE v. HULSE*, No. 1918, *ante*.

PART X. SECT. 4, SUB-SECT. 1.

h. Part of estate productive part unproductive—Taxes allowed to accumulate on unproductive part—Tenant for life not allowed to receive rents.]—As between a tenant for life in possession

& a remainderman of property, part of which is productive & part unproductive, the life tenant will not be permitted to receive rents from part of the property while he allows taxes to accumulate on the vacant portion.

Order made for a receiver of the estate of the tenant for life to pay the arrears of taxes out of the rents.—*Re DENISON, WALDIE v. DENISON* (1893), 24 O. R. 197.—**CAN.**

k. Conveyance by husband for use

1931. — Mine.]—WARD *v.* DUDLEY (COUNTRESS) No. 1921, *ante*.

1932. Pictures.]—D'EYNCOURT *v.* GREGORY, No. 1919, *ante*.

1933. Railway — Mine.]—WARD *v.* DUDLEY (COUNTRESS), No. 1921, *ante*.

1934. Statues.]—D'EYNCOURT *v.* GREGORY, No. 1919, *ante*.

1935. —.]—BULKELEY *v.* LYNE STEPHENS, *Re LYNE STEPHENS, LYNE STEPHENS v. LUBBOCK* (1895), 11 T. L. R. 564.

Annotation:—Distd. Hill v. Bullock, [1897] 2 Ch. 55.

1936. Stuffed-bird collection.]—A bird gallery in a settled mansion house contained a valuable collection, commenced over sixty years ago, of stuffed birds, which were attached to movable wooden trays placed in iron glass fronted cases affixed to the walls of the gallery. In an action between the present tenant for life of the mansion house & the trustee in bkpcy. of the late tenant for

movable personal chattels, & as such belonged to the trustee in bkpcy. of the late tenant for life.—HILL (VISCOUNT) *v.* BULLOCK, [1897] 2 Ch. 482; 66 L. J. Ch. 705; 77 L. T. 240; 46 W. R. 84; 13 T. L. R. 554; 41 Sol. Jo. 696, C. A.

1937. Tapestry.]—D'EYNCOURT *v.* GREGORY, No. 1919, *ante*.

1938. —.]—LEIGH *v.* TAYLOR, No. 1917, *ante*.

1939. Vases.]—D'EYNCOURT *v.* GREGORY, No. 1919, *ante*.

1940. —.]—BULKELEY *v.* LYNE STEPHENS, *Re LYNE STEPHENS, LYNE STEPHENS v. LUBBOCK* (1895), 11 T. L. R. 564.

Annotation:—Distd. Hill v. Bullock, [1897] 2 Ch. 55.

1941. Wainscot.]—LAWTON *v.* LAWTON, No. 1913, *ante*.

SUB-SECT. 6.—TIMBER.

See, generally, AGRICULTURE, Vol. II., pp. 61-114.

Waste as regards trees.]—*See AGRICULTURE*, Vol. II., pp. 79-83, 89, 104-110, Nos. 585-632, 702, 850-921.

SUB-SECT. 7.—MINES.

See MINES, Vol. XXXIV., pp. 627-632, 639-644, Nos. 230-290, 371-417.

SECT. 4.—RIGHT TO INCOME.

SUB-SECT. 1.—IN GENERAL.

1942. Fund in court—Paid in after death of trustees.]—A fund was in ct., & on the petition of two persons man & wife, who had successive life estates, an order was made for the payment of the dividends to the wife for her life, & after her death to the husband for his life.—*Re HOW'S TRUSTS* (1850), 15 L. T. O. S. 342; 15 Jur. 266.

1943. — Prospective order—Income of funds paid into court in future.]—Prospective order for payment by the Accountant-General to the tenant for life of the income of funds hereafter to be paid

into ct. to the same account.—*Re CHAMBERLAIN* (1856), 22 Beav. 286; 52 E. R. 1118.

1944. Presumption of death of tenant for life—Payment of dividends to remainderman—Security to refund.]—A tenant for life of a fund in ct. was transported in 1838, & had not since been heard of. Upon an application made in 1852 by the remaindermen for payment, the ct. would only direct payment of the dividends to them, & required an undertaking to replace the amount out of the capital, if the tenant for life should be still alive.—*Re MILEHAM'S TRUST* (1582), 15 Beav. 507; 51 E. R. 634.

1945. Calculation of income—Net amount—After deduction of tax.]—In applying the rule in *Allhusen v. Whittell*, No. 1958, *post*, the income of the estate should be calculated, not on the basis of the gross amount received, but on the basis of the net amount after deduction of tax.—*Re OLDHAM, OLDHAM v. MYLES* (1927), 71 Sol. Jo. 491.

SUB-SECT. 2.—INTEREST.

1946. Interest on arrears of income.]—Interest at 4 per cent. allowed to the tenant for life of a trust fund upon the amount found due to her for arrears of interest of the fund.—*WILLCOCKS v. BUTCHER* (1848), 16 Sim. 366; 60 E. R. 915.
Annotation:—*Conrad. Blogg v. Johnson* (1867), 2 Ch. App. 225.

Interest on share in partnership property.]—*See* No. 1985, *post*.

Interest on wasting property & unauthorised investments.]—*See* Sub-sect. 3, P. (b), *post*.

SUB-SECT. 3.—PARTICULAR INSTANCES.

A. Accumulations.

See Law of Property Act, 1925 (c. 20), s. 164; & generally, *PERPETUITIES*, Vol. XXXVII., pp. 130, 148, 149, Nos. 611, 744–752.

1947. Accumulation during minority—Allowance to persons entitled—Surplus rents & profits.]—Devise of real estate to trustees for five hundred years, & after the expiration or sooner determination of the said term, & in the meantime subject thereto, to the use of the first & other sons of his, testator's, two sisters who should be born within fifteen years after the date of the will, successively in tail male; with remainder to certain uses which failed; with remainder to the use of every daughter of A. then born, or thereafter to be born, in testator's lifetime, for life; with divers remainders over. The term was limited to trustees, upon trust during the lives of testator's uncle & sisters, & the survivor of them, & during the minorities of the persons beneficially entitled to enter upon the mansion, etc., receive the rents, keep up the mansion house, gardens, etc., with power to pull down, rebuild alter, etc., as might suit any tenant of the hall to grant leases of the estates, appoint bailiffs, etc., & to cut timber; & upon further trust to pay an annuity of £1,000 to testator's uncle, & annuities of £500 to his sisters, & testator's direction, that during the minority of any person

absolutely or presumptively entitled, the sisters or their husbands were not to reside in the mansion, but the trustees were to pay a competent part of the surplus interest & income of the estates, during the lives of his sisters, for the benefit of the person for the time being entitled thereto, the trustees accumulating the surplus. The sisters of testator had no children within the period of fifteen years from the date of the will, & *pltf.*, the first daughter of A., attained twenty-one before the death of testator:—*Held*: there was no intestacy during the lives of testator's sisters, & *pltf.*, in whom the first estate of freehold was vested inasmuch as no child had been born since testator's death to either of his sisters, was entitled to the surplus rents & profits.—*SIDNEY v. WILMER* (1863), 4 De G. J. & Sm. 84; 3 New Rep. 180; 9 L. T. 737; 10 Jur. N. S. 217; 46 E. R. 847, L. C.

Annotation:—*N.F. Wade-Gery v. Handley* (1876), 3 Ch. D. 374.

1948. — Interest on accumulations paid to life tenant after majority—Right to principal.]—A settlor assigned certain mtges. & "all interest thereon then due & payable, & thereafter to accrue & become due & payable" unto trustees for the equal benefit of his two infant granddaughters. The trusts as to one moiety were that, when one of the granddaughters attained twenty-one, the trustees were to pay the rents, interest, & annual produce of such moiety of the said principal moneys, interest, & securities to her for life; the moiety after her death to be in trust for her children, if any. There was no express provision for either accumulation or maintenance during the granddaughter's minority; but there was a power of maintenance during the minority of her possible children. In default of children, after her decease the moiety of "the said principal sums, securities, & premises" was to go over to petitioner.

The trustees accumulated & invested the produce of her moiety during her minority; & after she had attained her majority they paid her the interest of the invested accumulations, together with that of her moiety of the principal sums until her death. She died without having been married:—*Held*: the accumulated sum formed part of the principal of her moiety, & went over to petitioner under the trust in his favour declared in the settlement.—*Re MANIFOLD'S SETTLEMENT TRUSTS* (1866), 14 W. R. 729.

1949. Trust for payment of debts—Accumulation sufficient to pay debts—Surplus.]—*NORTON v. JOHNSTONE*, No. 1809, *ante*.

1950. Accumulation after expiration of period for conversion.]—Testator devised & bequeathed the residue of his property upon trust for conversion; but the trustees were empowered to postpone conversion for a period not exceeding twenty-one years. Until conversion & re-investment the income of unsold property was to be applied in paying debts & yearly charges, & the surplus accumulated in augmentation of capital. At the end of the twenty-one years a portion of the estate which had, in accordance with a power in the will, been let on mining lease for forty years was still unconverted:—*Held*: the rents & royalties accrued since the expiration of the twenty-one years formed part of the capital of the residuary estate, & ought to be distributed accordingly, &

of wife & children—Rights of children.]
—A husband conveyed lands to trustees to receive the rents, payment of a mtge. to pay the into the hands of his wife during her life, for her use & that of her children, to be at her separate disposal:—*Held*:

pltf., the sole surviving child, was entitled to half the yearly income.—*TURNER v. DREW* (1898), 28 O. R. 448.—*CAN.*

PART X. SECT. 4, SUB-SECT. 2. 1. Interest on bonus on stock.]—

Where a bonus is declared by the Bank of Ireland on their stock, in addition to the annual dividend, the interest only on such bonus belongs to the tenant for life of settled stock.—*Re HODGENS, Ex p. HODGENS* (1847), 11 I. Eq. R. 99.—*IR.*

Sect. 4.—Right to income: Sub-sect. 3, A., B., C. D., E., F., G. (a) & (b), & H.]

until sale or conversion the tenants for life of settled shares were entitled as from such date to receive out of the accrued & accruing rents & royalties such an annual sum as, in the opinion of the ct., would be a fair equivalent for the annual income which would have been received if the property had been sold at the end of the twenty-one years.

In this country in the case of income producing property directed by will to be converted, but retained for a time unconverted, for the benefit of the estate, it has been the practice of the ct. to put a value on the property & to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value (LORD MACNAGHTEN).—*WENTWORTH v. WENTWORTH*, [1900] A. C. 163; 69 L. J. P. C. 13; 81 L. T. 682; 16 T. L. R. 81, P. C.

*Annotations:—***Expld.** *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4. **Consd.** *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74; *Re Beech, Saint v. Beech*, [1920] 1 Ch. 40.

1951. Surplus of income of wasting property—Invested as capital—Right of tenant for life to interest.—(1) Interest at 3 & not 4 per cent. must at the present day be computed in applying the principle of *Brown v. Gellatly* (1867), 2 Ch. App. 751, whereby, when wasting securities, forming part of the residuary estate of testator given upon trust for conversion, are retained under a power to postpone conversion the tenant for life is entitled during the period of postponement to interest on the value of the securities.

(2) Where in such a case the interest at 3 per cent. is paid out of the actual income of the wasting securities to the tenant for life, & the balance is invested as capital of the estate, the tenant for life is entitled to the income of the invested fund.—*Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4; 73 L. J. Ch. 204; 90 L. T. 8; 48 Sol. Jo. 207.

*Annotations:—***As to (1)** **Apld.** *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233. **Distd.** *Re Beech, Saint v. Beech*, [1920] 1 Ch. 40. **As to (2)** **Apld.** *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233. **Generally, Mentd.** *Liverpool Corpn. v. Walker* (1907), 77 L. J. K. B. 46.

B. Compulsory Purchase of Lands.

Application of money deposited in bank, generally.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 236–252, Nos. 1268–1581.

C. Copyhold Fines.

See, now, Law of Property Act, 1922 (c. 16), s. 130 (1); & *generally*, COPYHOLDS, Vol. XIII., p. 93, Nos. 1161–1163.

1952. Fines payable on enfranchisement.]—Copyhold lands taken under the Lands Clauses Consolidation Act, 1845 (c. 18), are enfranchised under Lands Clauses Consolidation Act, 1845 (c. 18), s. 96, & no fine is payable to the lord under Copyhold Act, 1858 (c. 94), s. 6, as a condition of compulsory enfranchisement. Therefore, where the lord of the manor was tenant for life:—*Held*: he was not entitled to any part of the money paid into ct. by a railway co. as compensation for the enfranchisement of copyhold land taken by them.—*Re Wilson's Estate* (1863), 3 De G. J. & Sm. 410; 1 New Rep. 301; 32 L. J. Ch. 191; 7 L. T. 772; 9 Jur. N. S. 1043; 11 W. R. 295; 46 E. R. 693, L. J. J.

*Annotation:—***Refd.** *Leconfield v. L. & N. W. Ry.*, [1907] 1 Ch. 38.

D. Damages and Compensation.

1953. Damages—Damage to heirlooms—By former tenant for life.]—*Re Walton, Miller v. Walton* (1900), 44 Sol. Jo. 645.

—Breach of covenant in lease.]—*See* Nos. 1965–1969, *post*.

1954. Compensation—Freehold licensed premises—Extinction of license.]—Where licensed premises form part of a settled estate, & the license is extinguished under the provisions of Licensing Act, 1904 (c. 23), the proportion of the compensation allocated to the freeholder of the premises represents capital money of the estate.—*Re Bladon, Dando v. Porter*, [1912] 1 Ch. 45; 81 L. J. Ch. 117; 105 L. T. 729; 28 T. L. R. 57, C. A.

*Annotation:—***Distd.** *Re Williams' Settlement, Williams Wynn v. Williams*, [1922] 2 Ch. 750.

1955. —Under Indemnity Act, 1920 (c. 48)—Damage done by military authorities.]—When a legal tenant for life of settled land without impeachment of waste recovers compensation under above Act, for damages done to a park forming part of the settled land by military authorities during the war in exercise of the royal prerogative, the compensation money is a casual profit & he may retain it for his own use.—*Re Williams' Settlement, Williams Wynn v. Williams*, [1922] 2 Ch. 750; 92 L. J. Ch. 101; 128 L. T. 110; 38 T. L. R. 789; 66 Sol. Jo. 648.

1956. —Patronage of benefice—Extinction.]—The sum paid under Welsh Church Act, 1914 (c. 91), s. 16, by way of compensation for the extinction of the right of patronage of a benefice subject to a settlement does not belong to the tenant for life, as lay patron, under the settlement, but is payable to the trustees of the settlement as capital.—*Re Penrhyn's (Lord) Settlement Trusts, Penrhyn v. Roberts*, [1923] 1 Ch. 143; 92 L. J. Ch. 145; 128 L. T. 442; 39 T. L. R. 116; 67 Sol. Jo. 169.

—Waiver of claim to renewal of lease.]—*See* No. 1961, *post*.

Compulsory purchase of land.]—*See, generally*, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 290 *et seq.*

E. Emblements.

Who is entitled to emblements, generally.]—*See* AGRICULTURE, Vol. II., pp. 58–60, Nos. 316, 317, 321–341.

F. Funds for Answering Debts, Legacies and Portions.

See EXECUTORS, Vol. XXIII., pp. 464 *et seq.*

1957. Fund for legacies or debts.]—Testatrix, after devising her freehold & copyhold estates to trustees for sale, proceeds as follows:

"I will & direct that the moneys to arise from such sale be considered & taken as a part of my personal estate": In a subsequent part of her will, she uses the following words:—"I hereby direct, that, out of the moneys to arise by such sale, & out of all other my personal estate, the several legacies hereinafter mentioned be paid & satisfied": she then gives several legacies, & by the residuary clause in her will, she gives "all the residue of my personal estate, & of the moneys arising from the sale of my real estate," in the manner therein mentioned. The personal estate was not sufficient to pay the legacies, & several of the legacies lapsed. The legacies were not paid till the expiration of a year from testatrix's death, during which time the funds, out of which they were paid, yielded interest & dividends:—*Held*: such interest & dividends formed part of the corpus of the residue, & did not belong to the tenant for life of the residue.—*Amplett v. Parke* (1827), 1 Sim. 275; 5 L. J. O. S. Ch. 139; 57 E. R. 580; *subsequent proceed-*

ings, 4 Russ. 75; *on appeal* (1831), 2 Russ. & M. 221; 9 L. J. O. S. Ch. 161, L. C.

Annotations.—**Mentd.** *Phillips v. Phillips* (1832), 1 My. & K. 649; *Jessop v. Watson* (1833), 1 My. & K. 665; *Ackers v. Phipps* (1835), 3 Cl. & Fin. 665; *Cogan v. Stephens* (1835), 5 L. J. Ch. 17; *Green v. Jackson* (1835), 2 Russ. & M. 238; *Fitch v. Weber* (1848), 6 Hare, 145; *Flint v. Warren* (1848), 16 Sim. 124; *Spencer v. Wilson* (1873), 42 L. J. Ch. 754; *Court v. Buckland* (1876), 1 Ch. D. 605.

1958. —[.]—Where testator has bequeathed legacies, & given his residue to a tenant for life, with remainder over; exors., though, as between themselves & the persons interested in the residue, they are at liberty to have recourse to any funds they please in order to pay debts & legacies, yet will be treated by the ct., in adjusting the accounts between tenant for life & remainderman, as having paid the debts & legacies not out of capital only, nor out of income only, but with such portion of the capital as, together with the income of that portion for one year, was sufficient for the purpose.

Testator A., having bequeathed legacies, which his estate was amply sufficient to pay, gave the residue of his estate to B. absolutely. B. died within six months after the death of A., having by his will bequeathed legacies, & given the residue of his estate to a tenant for life, with remainder over. B.'s personal estate, other than that bequeathed to him by A., was insignificant in amount:—*Held*: (1) whatever remained of A.'s

one year, was required to pay A.'s debts & legacies, became the property of B.; & the tenant for life was entitled from the death of B. to the income of the residue of B.'s estate, after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay B.'s debts & legacies; (2) he was entitled to the income of such portion of B.'s residue as was in a proper state of investment, *in specie*; & as to the rest, of so much Consols as would have been produced by conversion at B.'s death.

(3) B. gave some legacies to legatees, contingent on their attaining twenty-one:—*Held*: the tenant for life was entitled to the intermediate income of the fund set apart to meet the contingent legacies.—*ALLHUSEN v. WHITTELL* (1867), L. R. 4 Eq. 295; 36 L. J. Ch. 929; 16 L. T. 695.

Annotations.—*As to* (1) **Apld.** *Lambert v. Lambert* (1873), L. R. 16 Eq. 320; *Marshall v. Crowther* (1874), 2 Ch. D. 199. **Distd.** *Re Harrison, Townson v. Harrison* (1889), 43 Ch. D. 55. **Consd.** *Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211. **Apld.** *Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596. **Distd.** *Re Hanbury, Comiskey v. Hanbury* (1909), 101 L. T. 32. **Apld.** *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444. **Expld.** & **Distd.** *Re McEuen, McEuen v. Phelps*, [1913] 2 Ch. 704. **Apld.** *Re Wills, Wills v. Hamilton*, [1915] 1 Ch. 769. **Expld.** *Dr. Barnardo's Homes v. Income Tax Special Purposes Comrs.*, [1921] 2 A. C. 1. **Apld.** *Re Oldham, Oldham v. Myles* (1927), 71 Sol. Jo. 491. *As to* (3) **Consd.** *Re Bacon, Grissel v. Leathes* (1893), 62 L. J. Ch. 445. **Expld.** *Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678. **Refd.** *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226; *Re Hawkins, White v. White*, [1916] 2 Ch. 570.

—[.]—*See* EXECUTORS, Vol. XXIII., pp. 464, 465, Nos. 5358–5363.

1959. **Intermediate income**—Contingent fund to attend inheritance.]—Devise, subject to a term of one thousand years to A. in strict settlement; remainder to B., in strict settlement; & after other limitations in tail remainder upon trust to be sold; the trust of the term was to raise £4,000 to be applied first to debts, legacies, etc.; the rents, profits, & emoluments, arising, growing or received from the real & personal, to be applied to debts & legacies & afterwards to be an aggregate fund, & attend the inheritance; the interest of the £4,000 to be paid out of the rents & profits of the estates in the term; the rents & profits to accumulate,

till one of the devisees should attain twenty-one; then to be paid to him: by codicil testator reciting the trust to sell bequeathed part of the produce; & gave all the residue, & all the residue of his personal estate not disposed of by his will, to his legatees: the residue of the money raised under the term & of the personal is to attend the inheritance; & the interest is payable to the tenant for life; the principal to the first tenant in tail.—*SHELDON v. BARNES* (1794), 2 Ves. 444; 30 E. R. 716.

1960. — **Portions fund.**—*WELLESLEY v. MORNINGTON* (EARL), No. 2136, *post*.

1961. — **Contingent legacy fund.**—(1) Where an annuity for a term of years forms part of a residue, the exors., until they can sell it, must invest the payments, & the interest of the investments will belong to the tenant for life of the residue.

(2) Where sums are set apart to answer contingent legacies, the interest of them, until the contingency happens, is part of the income of the residue.—*CRAWLEY v. CRAWLEY* (1835), 7 Sim 427; 4 L. J. Ch. 265; 58 E. R. 901.

Annotations.—*As to* (1) **Apld.** *Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678. **Distd.** *Re Hollebone, Hollebone v. Hollebone*, [1919] 2 Ch. 93. *As to* (2) **Foldd.** *Alhusen v. Whittell* (1867), 36 L. J. Ch. 929. **Generally, Refd.** *Re Phillips, Phillips v. Levy* (1890), 49 L. J. Ch. 198; *Re Pope, Sharp v. Marshall*, [1901] 1 Ch. 64; *Re Hawkins, White v. White*, [1916] 2 Ch. 570. **Mentd.**

1962. — [.]—*ALLHUSEN v. WHITTELL*, No. 1958, *ante*.

—[.]—*See, generally*, EXECUTORS, Vol. XXIII., pp. 409–412, 466, 467, Nos. 4802–4817, 5367–5371.

Adjustment of liability in respect of annuities.—*See* Nos. 2289–2297, *post*.

G. Investments.

(a) Authorised Investments.

Sec, generally, TRUSTS & TRUSTEES; WILLS.

1963. **Whole income.**—Tenants for life under such a settlement [of personal property] would take the whole of the income of all duly authorised investments, notwithstanding any shrinkage or decrease in their value, & would not be entitled to share in any augmentation in the value of the corpus, however great that might be, or however insignificant in comparison might be the increase of the income (STIRLING, J.).—*VERNER v. GENERAL & COMMERCIAL INVESTMENT TRUST*, [1894] 2 Ch. 239; 63 L. J. Ch. 456; 10 T. L. R. 341; 38 Sol. Jo. 308; *on appeal*, [1894] 2 Ch. p. 200, C. A.

Annotations.—**Mentd.** *Wilmer v. McNamara*, [1895] 2 Ch. 245; *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 331; *Alcoy & Gandia Ry. & Harbour Co. v. Greenhill* (1898), 79 L. T. 257; *Re National Bank of Wales*, [1899] 2 Ch. 629; *Re Barrow Hematite Steel Co.*, [1900] 2 Ch. 846; *Dovey v. Cory*, [1901] A. C. 477; *Foster v. New Trinidad Lake Asphalt Co.*, [1901] 1 Ch. 208; *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353; *Re Crich-ton's Oil Co.*, [1902] 2 Ch. 86; *Re Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87; *Hinds v. Buenos Ayres Grand National Tram. Co.*, [1906] 2 Ch. 654; *Re Spanish Prospecting Co.*, [1911] 1 Ch. 92; *Ammonia Soda Co. v. Chamberlain*, [1918] 1 Ch. 266; *Lawrence v. West Somerset Mineral Ry.*, [1918] 2 Ch. 250; *Wall v. London & Provincial Trust*, [1920] 1 Ch. 45; *Cross v. Imperial Continental Gas Assocn.*, [1923] 2 Ch. 553; *Stapley v. Read* (1924), 131 L. T. 629.

(b) Unauthorised Investments.

See Sub-sect. 3, P., *post*.

H. Leaseholds.

1964. **Compensation**—**Waiver of claim to renewal.**—Tenant for life, with remainders over of a Crown lease for years, applies for a further term; a powerful opponent applies for a grant; the

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tenant for life gives up her pretensions for a sum of money; the money shall be settled, to the same uses as the estate was.—*OWEN v. WILLIAMS* (1773), Amb. 734; 1 Bro. C. C. 199, n.; 27 E. R. 474, L. C.

Annotation:—Consd. *Randall v. Russell* (1817), 3 Mer. 190.

1965. Damages—Breach of covenant.—Devise to trustees & their heirs during the life of A. in trust for A. & after his decease, to B. in fee. The trustees recover, in A.'s lifetime, damages for breach of covenants in a lease granted by testatrix, & still subsisting. A. dies. The damages belong to her estate.—*NOBLE v. CASS* (1828), 2 Sim. 343; 57 E. R. 817.

Annotations:—Distd. *Re Francis, Barrett v. Fisher* (1905), 74 L. J. Ch. 198. *Apprvd.* *Re Lacon's Settlement, Lacon v. Lacon*, [1911] 2 Ch. 17. *Refd.* *Richards v. A.-G. of Jamaica* (1848), 6 Moo. P. C. C. 381.

1966. ———.—Testator by his will devised & bequeathed his residuary real & personal estate to his trustees upon trust for sale & conversion with power to suspend conversion for such period as they should judge expedient, & pending the conversion of his real estate to pay for repairs either out of capital or income, & he provided that for the purposes of enjoyment & transmission under the trusts therein contained his real & personal estate should be considered as money from the time of his decease & that the "rents, dividends & interests & other produce thereof" respectively to accrue due after his decease & until the actual sale, conversion, & getting in thereof should be deemed the annual income thereof. Testator then directed his trustees to hold the proceeds of his residuary estate, after payment thereof of his debts & funeral & testamentary expenses, upon trust to divide the same into certain shares, some of which he settled.

At his death testator was entitled to a freehold theatre which was subject to a lease granted by him. The lease contained certain repairing covenants by the lessee. The lessee did not perform these covenants, & some years after testator's death the trustees brought an action against him for breach of covenant & recovered a certain sum of money by way of damages:—*Held*: the money recovered by the trustees as damages must be treated as corpus of testator's residuary estate.—*Re PYKE, BIRNSTINGL v. BIRNSTINGL*, [1912] 1 Ch. 770; 81 L. J. Ch. 495; 106 L. T. 751; 56 Sol. Jo. 380.

1967. ———. Lease granted under statutory powers.—Premises were devised to trustees upon trust to pay the rents & profits thereof to a person for life with remainder over. The tenant for life granted a lease of the premises by which the lessee covenanted to keep the premises in repair. The lessee having committed a breach of the covenant to repair:—*Held*: the tenant for life, in granting the lease, was by reason of Settled Land Act, 1882 (c. 38), s. 53, in the position of a trustee for all parties entitled under the settlement; the damages were recoverable by the tenant for life as trustee for the trust estate.—*MITCHELL v. ARMSTRONG* (1901), 17 T. L. R. 495.

Annotation:—Dtd. *Re Lacon's Settlement, Lacon v. Lacon*, [1911] 2 Ch. 17.

1968. ———.—A tenant for life, not impeachable for waste, in 1888 granted, with the consent of the trustees of the settlement, a lease of the mansion house comprised in the settlement for twenty-one years, the lessee covenanting to keep the mansion house, which the lessor has put in repair, in good & substantial repair. The

lessor died during the currency of the lease, & on its expiry the succeeding tenant for life, who also was not impeachable for waste, claimed & was paid a sum of money as damages for breach of the covenant:—*Held*: Settled Land Act, 1882 (c. 38), s. 53, had no application as the tenant for life was not exercising any power under Settled Land Acts, but was only asserting his legal right under a covenant which ran with the land, & the money must be taken to represent the damages which he had suffered, & was therefore not payable to the trustees of the settlement as capital money, but could be retained by him for his own benefit.—*Re LACON'S SETTLEMENT, LACON v. LACON*, [1911] 2 Ch. 17; 80 L. J. Ch. 610; 104 L. T. 840; 27 T. L. R. 485; 55 Sol. Jo. 551, C. A.

Annotations:—Distd. *Re Pyke, Birnstingl v. Birnstingl*, [1912] 1 Ch. 770. *Appld.* *Re Dealtry, Davenport v. Dealtry* (1913), 108 L. T. 832; *Re Williams' Settlement, Williams v. Wynn v. Williams*, [1922] 2 Ch. 750.

1969. ———.—By lease dated Feb. 7, 1898, which lease was determined on June 12, 1912, deft. as tenant for life under Settled Land Act, 1882 (c. 38), demised to lessees a quarry, part of the real estate. The lessees covenanted that when part of the quarry was exhausted they would fill it up fit for agricultural purposes "under a penalty to be recovered as rent in arrear or as liquidated damages by the lessor of £150 an acre." The lessees left 2 acres 3 roods 5 poles uncovered in breach of their covenant, & arranged to pay at the rate £150 per acre in respect of this land a sum amounting to £416 6s. 10d., which sum had been paid to deft. On a summons by the trustees asking whether deft. was entitled to retain all or any part of such sum or whether it should be held by them as capital:—*Held*: deft. was entitled to retain such sum.—*Re DEALTRY, DAVENPORT v. DEALTRY* (1913), 108 L. T. 832.

1970. Sale of leaseholds—Without authority—Life tenant surviving term.—(1) Where a term of years is bequeathed to a legatee for life, with remainder over, & the legatee for life, having joined with the exors. in selling & assigning the term to a purchaser for a sum of stock, survives the duration of the term, the legatee for life, & not the legatee in remainder, is entitled to the stock, although the latter was not a party to the sale.

(2) If the legatee in remainder, not being a party to the conversion, sues for a portion of the purchase-money in the lifetime of the tenant for life, *qu.*: whether the ct. will do more than secure the fund, or whether it will apportion the fund according to the value of the respective interests.—*PHILLIPS v. SARJENT* (1848), 7 Hare, 33; 68 E. R. 13.

1971. ———. Remainderman claiming part of purchase-money—In lifetime of life tenant—Functions of court.—*PHILLIPS v. SARJENT*, No. 1970, *ante*.

1972. ———. Life tenant entitled only to amount equal to rent.—During the lifetime of a tenant for life freeholds were sold under the provisions of Settled Land Act, 1882 (c. 38). At the time of the sale the property was subject to a lease for sixty years from 1851 at a rent of £200, which, at the date of the lease, had been a rack rent:—*Held*: the tenant for life was, during the continuance of the term, only entitled to be paid out of the income a yearly sum of £200, the balance of the income must be accumulated for the benefit of the remaindermen.—*COTTRELL v. COTTRELL* (1885), 28 Ch. D. 628; 54 L. J. Ch. 417; 52 L. T. 486; 33 W. R. 361.

Annotations:—Distd. *Re Wix, Hardy v. Lemon*, [1916] 1 Ch. 279. *Appld.* *Re Westminster's S. E., Westminster v. Shaftesbury*, [1921] 1 Ch. 585.

1973. ———.]—*Re BOWYER'S SETTLED ESTATE* (1892), 8 T. L. R. 441; 36 Sol. Jo. 347. *Annotation*:—*Apld. Re Westminster's S. E., Westminster v. Shaftesbury*, [1921] 1 Ch. 585.

1974. ———.]—*Sale by court—No trust for sale.*—*Re LINGARD, LINGARD v. SQUIRRELL*, [1908] W. N. 107.

1975. *Fine on renewal.*—*SIMPSON v. BATHURST, SHEPHERD v. BATHURST*, No. 2552, *post*.

———.]—*See, now*, Law of Property Act, 1922 (c. 10), s. 145, sched. XV. (12); Law of Property (Amendment) Act, 1924 (c. 5), sched. II. (5).

1976. *Consideration for accepting surrender.*—*In the absence of mala fides*, money paid to a legal life tenant as the consideration for accepting the surrender of a lease, granted without recourse to the powers of Settled Land Acts, belongs to him as a casual profit.—*Re HUNLOKE'S SETTLED ESTATES, FITZROY v. HUNLOKE*, [1902] 1 Ch. 941; 71 L. J. Ch. 530; 86 L. T. 829.

Annotations:—*Distd. Re Rodes, Sanders v. Hobson*, [1909] 1 Ch. 815. *Extid. Re Penrhyn's Settlement, Penrhyn v. Pennant*, [1922] 1 Ch. 500.

1977. ———.]—Money paid to an equitable tenant for life by a lessee as consideration for accepting a surrender of a lease, which has been granted by the tenant for life under the powers of the Settled Land Acts, does not belong to him as a casual profit, but must be paid by instalments to him & other persons entitled to the rent.—*Re RODES, SANDERS v. HOBSON*, [1909] 1 Ch. 815; 78 L. J. Ch. 434; 100 L. T. 959.

Annotations:—*Distd. Re Lacon's Settlement, Lacon v. Lacon*, [1911] 2 Ch. 17; *Re Wix, Hardy v. Lemon*, [1916] 1 Ch. 279.

1978. ———.]—Where a legal tenant for life grants a lease under the power conferred upon him by Settled Land Act, 1882 (c. 38), s. 6, money paid as the consideration for accepting the surrender of the lease belongs to him as a casual profit.—*Re PENRHYN'S SETTLEMENT, PENRHYN (LORD) v. PENNANT*, [1922] 1 Ch. 500; 91 L. J. Ch. 490; 126 L. T. 789; 66 Sol. Jo. 315.

1979. *Surrender & grant of fresh lease for longer term—Excess rent for unexpired period of surrendered term.*—Where a tenant for life, in *bond fide* exercise of the powers conferred upon him by Settled Land Act, 1882 (c. 38), s. 13, accepts a surrender of an existing lease of settled land & grants a new lease of the same land for a longer term at an increased rent he is entitled to retain for his own benefit the excess rent during the unexpired period of the surrendered term & no portion of it ought to be retained & capitalised by the trustees.—*Re WIX, HARDY v. LEMON*, [1916] 1 Ch. 279; 85 L. J. Ch. 192; 114 L. T. 455; 32 T. L. R. 257; 60 Sol. Jo. 291.

J. Mines, Minerals and Quarries.

See MINES, Vol. XXXIV., pp. 629–631, 643, 644, Nos. 261–277, 402–417.

PART X. SECT. 4, SUB-SECT. 3. —H.

1975 i. *Fine on renewal.*—By agreement between the tenant for life, & the tenant, & with the sanction of the ct., £800 was paid to the credit of the matter, in full for all renewal fines & interest, in respect of a lease for lives renewable for ever, dated Jan. 2, 1899, & of which no renewal had ever been granted. A condition of sale was inserted on the rental, that the purchaser should execute a renewal to the tenants:—*Held*: as the renewal was the act of the ct., & as what was lost to the inheritance by the renewal was restored by giving it the £800, which was added to the corpus of the fund, the personal representative of a deceased tenant for life was not

entitled to any part of the £800. *Semble*: the personal representatives of parties who have not executed a renewal have no claim for fines upon a subsequent renewal.—*Re TIBBARD'S ESTATE* (1863), 14 I Ch. R. 322; 15 Ir. Jur. 339.—IR.

PART X. SECT. 4, SUB-SECT. 3.—L.

1982 i. *Partnership articles to be regarded—Share of profits retained as additional capital.*—Partnership articles provided that meetings of the partners should be held, & the profits divided annually. The partners, when reduced to two, testator being one of them, met & resolved that the accounts be made up half-yearly, in Mar. & Sept. The meetings were held very irregularly,

K. "Property Not Actually Producing Income."

1980. *Debt due to testator—Realised security insufficient to pay capital.*—*Re HUBBUCK, HART v. STONE*, No. 2328, *post*.

1981. *Mortgage deferring payment of interest.*—Testator by his will devised & bequeathed his residuary real & personal estate to trustees upon trust for sale & conversion & investment, & directed them to pay the income of the investments to his wife for life. The will empowered the trustees to postpone conversion, & provided that the income of unconverted estate should be applied as if it arose from converted estate, & that no property not actually producing income should be treated as producing income or as entitling any person to the receipt of income. Testator died in 1901. Amongst the securities forming part of his estate at his death was a mtge. which recited that the mtgor. was indebted to testator in a certain sum & that it had been agreed that the payment of his debt should be postponed, & the mtgor. thereby covenanted to pay the amount of the debt with simple interest at his death, & if the aggregate amount of such sum & interest was not then paid, to pay interest on such aggregate sum by equal half-yearly payments, the first of such payments to become due six months after his death. The mtgor. died in 1906, in the lifetime of testator's widow, the tenant for life. The widow died shortly afterwards:—*Held*: the interest on the mtge. attributable to the period between the death of testator & the death of the mtgor. belonged to the estate of the widow, & not to that of testator.—*Re LEWIS, DAVIES v. HARRISON*, [1907] 2 Ch. 296; 76 L. J. Ch. 539; 97 L. T. 636; 51 Sol. Jo. 531.

L. Share in Partnership.

1982. *Partnership articles to be regarded—Share of profits retained as additional capital.*—(1) Testator authorised his exors. to enter into a partnership with his brother, on such terms as they should think fit, & leave his capital therein. The exors. did so, & the arts. of partnership stipulated that interest at 5 per cent. should be paid on testator's capital, & that part of the exors.' profits should be left in the concern "as additional capital":—*Held*: the tenant for life was entitled to the interest, but the share of the profits retained as additional capital must, as between the tenant for life & remainderman, be considered as capital & not income.

I am of opinion that the terms of the partnership deed regulate the question as to what is properly to be considered the income & what the capital of the first partnership. It must be determined according to the terms of the arts. of partnership, & I am of opinion that everything paid for interest is income to which the tenant for life is entitled, & that all the profits, which according to the terms of

but when they took place it was the partners practice to examine the accounts & to pass a resolution disposing of the profits, & until the assing of such resolution the profits were not carried to the separate credits. Testator, who died in Aug. 1869, by will declared that from the day of his decease, the annual income arising from his residuary personal estate should belong, in effect, to B. for life, & for that purpose the clear profits arising from his partnership should be considered as annual income & be paid to B. for life. In Dec. 1869, at a meeting of the surviving partner & an exor. of testator, they resolved that the profits for the year ending Mar. 1869, should be divided, & testator's share was carried to the credit

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the deed were what I may call capitalised, & retained as capital in the business, must be treated as capital, the interest of which the tenant for life is intitled to receive (ROMILLY, M.R.).

(2) Trustees, without authority, lent trust moneys at interest at 5 per cent.:—*Held*: the tenant for life was entitled to the whole interest, & the remainderman had no right to insist that the excess of the interest beyond the dividends which would have been produced if the money had been invested in Consols formed capital.—*STROUD v. GWYER* (1860), 28 Beav. 130; 2 L. T. 400; 6 Jur. N. S. 719; 54 E. R. 315.

Annotations:—As to (2) Dtd. Re Hill, Hill v. Hill (1881), 50 L. J. Ch. 551. *Follid. Re Appleby, Walker v. Lever, Re Appleby, Walker v. Nisbet* (1902), 51 W. R. 153. *Apprvd. Slade v. Chaine*, [1908] 1 Ch. 522. *Apld. Re Hoyle, Row v. Jagg* (No. 2), [1912] 1 Ch. 67. *Generally, Refd. Vyse v. Foster* (1872), 8 Ch. App. 309; *Chillingworth v. Chambers*, [1896] 1 Ch. 685.

1983. — Credit balance of profit & loss account.—Testator gave to his wife a life interest in his one-seventh of a colliery in which he was a partner. By the deed of partnership, the majority in value of the partners had power to dispose of the profits by adding them to the capital, or dividing them between the partners, or carrying them to the separate accounts of the partners. For several years profits were made, but retained to the credit of a profit & loss account. Afterwards profits were divided, but at the death of the tenant for life a large sum remained to the credit of the profit & loss account, the greater part of which had been sunk in the works of the colliery:—*Held*: under the circumstances, the share of testator in the sum standing to the credit of the profit & loss account belonged to the persons entitled in remainder, & not to the exor. of the tenant for life.

This case must depend upon the arts. of partnership (LORD HATHERLEY, C.).—*STRAKER v. WILSON* (1871), 6 Ch. App. 503; 40 L. J. Ch. 630; 24 L. T. 763; 19 W. R. 761, L. C.

Annotation:—Refd. Re Bouch, Sproule v. Bouch (1885), 29 Ch. D. 635.

1984. Practice of firm considered—Division of whole of profits.—A trader devised & bequeathed to trustees all his real & personal estate, including his share in the business in which he was a partner, on trust as to one moiety thereof to pay the annual proceeds, including the net profits of the business, to his daughter for her life, for her separate use without power of anticipation, & after her death the moiety was to be held in trust for her children or remote issue. He directed his trustees to carry on the business after his death until the expiration of the partnership term, & authorised them to use, not only such capital as he should have in the business at the time of his death, but also such other part of the trust premises as they should think fit. The partnership deed authorised the partners to dispose of their shares by will; it did not provide how any loss in carrying on the business should be borne. The will contained no provision as to the mode in which any such loss should be borne as between the persons interested in testator's estate. It had been the practice of the firm in prosperous years to divide the whole profit among the partners, & in years in which

there was a loss to write off each partner's proportion of the loss from his share of the capital

with the other partners. Up to the end of 1880 it was carried on at a profit, & half testator's share of that profit was paid by the trustees to the daughter. For the year 1881 there was a loss, & testator's share of the loss was written off from his share of the capital in the books of the firm. For the year 1882 there was a profit:—*Held*: the daughter was entitled to receive half that share of the profits which testator, according to the practice of the firm, would have received if he had been alive, & consequently she was entitled to receive half his share of the profits for the year 1882, without any deduction for the purpose of making good the corpus of the settled share in the interest of the remainderman.—*GOW v. FORSTER* (1884), 26 Ch. D. 672; 51 L. T. 394; 32 W. R. 1019.

1985. ——*J.*—By arts. of partnership it was provided that the partners should carry out certain contracts, & that the partnership should continue until the contracts were completed, but that if either of the partners should die, then that his exors. should be bound by his obligations, & that there should be no division of the profits until the completion of the contracts. One of the partners died, & by his will bequeathed all of his property upon trust, after conversion & investment, for his widow for life, with remainder over. The contracts were not completed until six years after testator's death, when his share of the partnership assets was paid to his trustees:—*Held*: in the administration of his estate, his widow was entitled to interest at 4 per cent. from his death on the value of his share in the partnership assets.—*JACKSON v. JACKSON* (1869), 20 L. T. 354; 17 W. R. 547.

M. Stocks and Shares.

(a) In General.

1986. Provisions of settlement prevail—Bonus.—Stock stood in the names of trustees, upon trust, under a marriage settlement, to pay the dividends "of the said stock, together with such bonuses as should from time to time be allowed thereon, when & as the same should become payable," to A. & his wife, & the survivor, for life:—*Held*: A. was absolutely entitled to a bonus declared pending his life estate.—*Re MITTAM'S SETTLEMENT TRUSTS* (1858), 4 Jur. N. S. 1077.

1987. — Not within terms of settlement.—On the marriage of H. & D., sixteen shares in the P. & O. co. were vested in trustees in trust to pay the interest, dividends, & yearly proceeds to D., the wife, for her life, or such persons as she should direct, to her separate use; & there was a proviso that if any bonus should be declared in respect of the shares, that should be invested in augmentation of the settlement. The co. being their own insurers, carried over 5 per cent. on their floating stock to the insurance fund, & declared a dividend out of the surplus, if any, year by year among the shareholders, & carried forward small sums left out of such surplus to the following year, & so on *de anno in annum*:—*Held*: these additional payments were not bonuses, & the wife

of his account under date Sept. 1869, & it was, in Dec. 1869, paid to his exors. At a meeting of the same two persons in Mar. 1870, they ordered the profits of the half-year ending Sept. 1869, to be divided, & testator's share

was paid to his exors. In taking the account in Chambers a question arose whether these shares of testator should be distinguished as capital or income, & B. presented a petition under 15 & 16 Vict. c. 80, asking the ct.'s opinion:

—*Held*: the profits for the year ending Mar. 1869, were capital, & belonged to testator's estate, & the profits for the half-year ending Sept. 1869, were income, & belonged to B.—*BROWNE v. COLLINS* (1871), 12 L. R. Eq. 586.—*IR.*

was entitled to them for her life.—*HOLLIS v. ALLAN* (1866), 12 Jur. N. S. 638; 14 W. R. 980.
Annotation.—*Reid. Re Bouch, Sproule v. Bouch* (1885), 29 Ch. D. 635.

1988. ————.]—Testatrix, who died in 1917, bequeathed to trustees three hundred ordinary shares in a limited co. upon trust to pay the “dividends, bonuses & income” thereof to R. S. & J. S. his wife during their lives & to the survivor of them during the life of such survivor, & after the death of the survivor the trustees were directed to hold the shares upon trust for the II. infirmly absolutely. The co. had accumulated out of profits a large reserve fund & also had in hand certain undistributed profits not carried to reserve. In 1919 the co. proposed to distribute, by way of bonus, amongst its shareholders the sum of £634,980. The method adopted by the co. was to capitalise that sum, and instead of distributing it in the shape of cash, to distribute it in the shape of fully paid shares. The transaction was carried out by appropriate resolutions & recorded in an agreement between the co. & its shareholders which, after reciting the accumulations & the co.’s proposal to distribute the sum as bonus, provided that the co. would pay the sum by the issue & allotment of fully paid shares, & the shareholders agreed to accept those shares in satisfaction of their respective proportions of that sum. On July 31, 1919, during the lives of the tenants for life, the co. allotted to the trustees nine thousand £1 fully paid bonus shares, the proportion to which they were entitled in respect of the three hundred shares bequeathed to them. A summons was taken out to have it decided whether the bonus shares so allotted to the trustees ought to have been transferred to the tenants for life or were rightly retained by the trustees as capital subject to the trusts of the will. R. S. died after the allotment of the bonus shares to the trustees, leaving his wife surviving him:—*Held*: as a question of fact the issue of the new shares by the company must be regarded as a distribution of capital, & not of income; & in the construction of the will the words “dividends, bonuses & income” did not cover the shares in question so as to pass them to the tenant for life.—*Re SPEIR, HOLT v. SPEIR*, [1924] 1 Ch. 359; 93 L. J. Ch. 225; 130 L. T. 564; 68 Sol. Jo. 251, C. A.

1989. Dividends declared before death—Death of testator.—By the terms of the deed of settlement of the co., their net profits were to be divided rateably to such an amount as should be declared at their half-yearly meeting, & were to be paid within twenty-one days afterwards; & it was provided, that a shareholder was not to receive any dividend after the period at which he ceased to be a proprietor of shares: but the dividends on such shares were to continue in suspense until some other person should have become proprietor of them. A shareholder died sixty-nine days after the half-yearly meeting at which a dividend was declared, but before notice had been given that such dividend was payable, having by his will bequeathed the interest & annual income arising from all his shares to one for life, & then to others:—*Held*: the dividend belonged to the legatee for life, & not to the general personal estate of testator.—*CLIVE v. CLIVE* (1854), Kay, 600; 2 Eq. Rep. 913; 23 L. J. Ch. 981; 24 L. T. O. S. 33; 69 E. R. 255.

Annotations.—*Expld. Wright v. Tuckett* (1860), 1 John. & H. 266. *Consd. Browne v. Collins* (1871), L. R. 12 Eq. 586. *Mentd. Armstrong v. Burnet* (1855), 20 Beav. 424; *Bates v. Mackinley* (1862), 31 Beav. 280; *Re Box* (1863), 1 Hem. & M. 552.

1990. ————.]—In June, 1865, a dividend of 7 per cent. *per annum* on certain shares held by

testatrix was declared payable on July 15, 1865, & Jan. 15, 1866. Testatrix died on Dec. 31, 1865:—*Held*: the January dividend formed part of the corpus of her residuary estate & did not pass under a bequest of the annual income of such residuary personal estate.—*DE GENDRE v. KENT* (1867), L. R. 4 Eq. 283; 16 L. T. 694.

1991. ————. *Death of life tenant.*—Shares being settled on A. for life & then over:—*Held*: a dividend declared before A.’s death, but not payable till afterwards, belonged to A.’s estate.—*WRIGHT v. TUCKETT* (1860), 1 John. & H. 266; 70 E. R. 747.

Annotation.—*Folld. De Gendre v. Kent* (1867), L. R. 1 Eq. 283.

Dividends declared after death—Cumulative preferential dividends.—*See Nos. 2317–2319, post.*
 ————. *See, also, Nos. 2010, 2011, post.*

1992. Directors’ fees received by trustees—Trustees holding shares belonging to trust.—Where trustees hold shares belonging to the trust, & they are appointed directors of the co. in respect of such holding, & there is no provision in the will enabling them to retain their remuneration as such directors for their own benefit, they must account for such remuneration to the trust, & the remuneration is to be treated as capital & will go to the remainderman as an accretion to their shares.—*Re FRANCIS, BARRETT v. FISHER* (1905), 74 L. J. Ch. 198; 92 L. T. 77.

1993. Purchase of stock with capital money—When dividend declared but not paid—Purchase carrying dividend.—*Re PEEL’S (SIR ROBERT) SETTLED ESTATES*, No. 2151, *post*.

1994. Repayment of debentures postponed—Interest until repayment.—*Re PENNINGTON, PENNINGTON v. PENNINGTON*, No. 2329, *post*.

1995. Issue of new debenture stock—Company not able to pay interest on settled stock.—*Re PENNINGTON, STEVENS v. PENNINGTON*, [1915] W. N. 333.

1996. Conversion of preference shares—Compensation to preference shareholders.—The trustees of a will appropriated preference & ordinary shares in a co. to answer a settled legacy. Subsequently the co. converted the preference shares into ordinary shares, & also allotted shares in a Dutch co. to the ordinary shareholders, with the result that the trustees received a payment of £147 in respect of their preference shares & twenty-six shares in the Dutch co. in respect of their ordinary shares:—*Held*: the £147 constituted capital, being a payment made to preference shareholders in consideration of their giving up their preferential rights, but under the circumstances the twenty-six shares must be treated as a bonus, & belonged to the tenant for life.—*Re TEDDIE, HOLT v. CROKER* (1922), 91 L. J. Ch. 346; 126 L. T. 644; 66 Sol. Jo. 250.

1997. ————. *Issue of new shares.*—By her will made in 1920 testatrix bequeathed six hundred 15 per cent. cumulative preferred ordinary shares of £1 each in a co. to trustees upon trust to pay the income to a tenant for life during his life & with a direction that after his death the shares should fall into residue. Subsequently during the lifetime of testatrix the co. reorganised its capital by (*inter alia*) changing its 15 per cent. cumulative preferred ordinary shares into a like number of 8 per cent. cumulative A. preference shares of £1 each & at the same time issuing to a former holder of 15 per cent. cumulative preferred ordinary shares the same number of new 8 per cent. cumulative A. preference shares of £1 each paid for in full out of reserves:—*Held*: the tenant for life was entitled only to the income of the six hundred

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8 per cent. cumulative A. preference shares, which were really the original six hundred 15 per cent. cumulative preferred ordinary shares with an altered name & a reduced right to dividends; & he took no interest in the new six hundred 8 per cent. cumulative A. preference shares which were issued to testatrix by way of compensation for the reduction in the rights attached to her original holding of shares.—*Re KUYPERS, KUYPERS v. KUYPERS*, [1925] 1 Ch. 244; 94 L. J. Ch. 253; 133 L. T. 468; 60 Sol. Jo. 366.

1998. — *Distribution of shares in another company.* — *Re TEDLIE, HOLT v. CROKER*, No. 1996, *ante*.

(b) Dividends out of Profits.

1999. General rule. — Tenant for life of bank stock held entitled to a dividend "of 5 per cent. interest & profits for the half-year." — *BARCLAY v. WAINWRIGHT* (1807), 14 Ves. 66; 33 E. R. 446.

*Annotations:—**Reid, Norris v. Harrison* (1817), 2 Madd. 268; *Hooper v. Rossiter* (1824), M'Cle. 527; *Bouch v. Sproule* (1887), 12 App. Cas. 385.

2000. — *Testator gave his residuary real & personal estate to trustees upon trust for certain persons for life, with remainders over. His estate comprised fully paid shares in the S. co. In each year from 1894 to 1906, the co. returned to its shareholders out of profits available for dividends a part of the capital paid up on their shares, increasing the unpaid capital by the same amount. These returns purported to be made under the Cos. Act, 1880 (c. 19), but no special resolution was passed until 1905. In that year a special resolution was passed that 7s. 6d. per share should be so returned in that year, that all similar returns in past years should be confirmed, & that the directors should be authorised to make similar returns in the future:—Held: the special resolution was invalid so far as it purported to have a retrospective or prospective effect, & valid only so far as concerned the return made in 1905; & a tenant for life is entitled to all payments made out of profits in respect of shares in a co. except such as have been validly capitalised by the co. All the returns except the 7s. 6d. per share in 1905 were therefore payable as income to the tenants for life.* — *Re PIERCY, WHITWHAM v. PIERCY*, [1907] 1 Ch. 289; 76 L. J. Ch. 116; 95 L. T. 808; 51 Sol. Jo. 113; 14 Mans. 23.

2001. Effect of increase of rate of interest. — For several years prior to 1846 an assurance co. declared half-yearly dividends of 2½ per cent. on their stock, but in that year they declared a half-yearly dividend of 12½ per cent.:—*Held: a tenant for life of their stock was entitled to the whole amount of that dividend.* — *PRICE v. ANDERSON* (1847), 15 Sim. 473; 60 E. R. 703.

*Annotation:—**Reid, Bouch v. Sproule* (1887), 12 App. Cas. 385.

2002. Bonus. — Tenant for life of bank stock, held entitled to a bonus of 1 per cent. directed to be made out of the interest & profits on the capital stock of the bank. — *PRESTON v. MELVILLE, MELVILLE v. PRESTON* (1848), 16 Sim. 163; 60 E. R. 835.

*Annotation:—**Reid, Bouch v. Sproule* (1887), 12 App. Cas. 385.

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2002i. Bonus. — A bonus, declared by the Bank of Ireland on their stock, in addition to the annual dividend, is not in the nature of annual profits, but is

an accretion of the capital. — *Re HODGENS, Ex p. HODGENS* (1847), 11 I. Eq. R. 99.—*IR.*

2002 ii. — *Held: a bonus or extraordinary dividend on the shares of the capital stock of a joint stock*

2003. — *Testator who died in 1846, bequeathed his property to trustees, upon trust for A. B. during her life, & after her death for his children. Part of the property consisted of shares in an insurance co., & in 1848 a bonus on these shares was declared:—Held: this bonus was income, & A. B. was entitled to it.* — *JOHNSON v. JOHNSON* (1860), 16 L. T. O. S. 455; 15 Jur. 714.

2004. — *Three bonuses upon certain bank shares having been paid as part of the dividend:—Held: having been made by way of annual payment, they were interest & not capital.* — *HEBERT v. BATEMAN* (1853), 1 W. R. 191.

2005. — *Where a banking co. divided a certain part of the actual profits of the then last half-year among the shareholders, under the names of "dividend" & "bonus," such bonus was held, as between tenant for life, & remainderman, to be income, & not capital.* — *PLUMBE v. NEILD* (1860), 29 L. J. Ch. 618; 2 L. T. 417; 6 Jur. N. S. 529; 8 W. R. 337.

*Annotations:—**Consd. Dale v. Hayes* (1871), 40 L. J. Ch. 244. *Reid, Hollis v. Allan* (1866), 12 Jur. N. S. 638; *Re Bouch, Sproule v. Bouch* (1885), 29 Ch. D. 635.

2006. — *Accruing since testator's death.* — The tenant for life of the income of testator's property is entitled to all bonuses accruing since his death & paid out of profits. — *MURRAY v. GLASSE* (1853), 1 Eq. Rep. 541; 23 L. J. Ch. 126; 17 Jur. 816.

2007. — *Money received in respect of old debt.* — A person who was a shareholder in & manager of a co. bequeathed some of his shares specifically to several persons absolutely, & gave the residue of his property to tenants for life, with remainders over. After his death it was discovered that large sums were due from him as manager to the co., & a compromise was entered into with the sanction of the ct., by which his estate was to pay the co. £220,000, a considerable part of which was attributable to interest accrued during testator's life on the sums due from him. Immediately after the payment the co. disposed of this sum by declaring a bonus on its shares:—*Held: as between the tenants for life & remaindermen, the whole of the bonus on those shares which formed part of the residue belonged to the tenants for life as income.* — *MACLAREN v. STAINTON* (1861), 3 De G. F. & J. 202; 30 L. J. Ch. 723; 4 L. T. 715; 7 Jur. N. S. 691; 9 W. R. 908; 45 E. R. 855, L. J.

*Annotations:—**Reid, Edmondson v. Crosthwaite* (1864), 34 Beav. 30; *De Gendre v. Keat* (1867), L. R. 4 Eq. 283; *Re Bouch, Sproule v. Bouch* (1885), 29 Ch. D. 635.

2008. — *Necessity for considering time when bonus declared.* — For a long series of years the manager of a public co. had fraudulently retained large sums, whereby the dividends declared, from time to time, were much less than they otherwise would have been. After his death, a considerable sum was recovered by the co. from his estate, in respect of his defalcations, & thereupon the co. declared a large bonus:—*Held: as between the tenant for life & remainderman of some shares, the bonus belonged solely to the person entitled to the shares at the time it was declared.* — *EDMONDSON v. CROSTHWAITE* (1864), 34 Beav. 30; 55 E. R. 543.

2009. — *Presumption that bonus provided out of current profits.* — A sum of East & West India

bank, paid in addition to the half-yearly dividend, & out of the net annual profits of the bank for the year, was not an accretion to the capital. — *FRENCH v. CRAIG* (1858), 8 I. Ch. R. 142.—*IR.*

Dock stock was bequeathed to certain persons for life, with remainders over, & bonuses were from time to time declared out of the profits generally in respect of it:—*Held*: in the absence of any evidence that such bonuses arose from profits which did not accrue during the lives of the tenants for life, they were not capital, but income & ought to be treated as such.—*DALE v. HAYES* (1871), 40 L. J. Ch. 244; 24 L. T. 12; 19 W. R. 299.

Annotation:—*Refd.* *Re Bouch, Sproule v. Bouch* (1885), 29 Ch D. 635.

2010. Dividends declared after testator's death.]

—Dividends in a public co., earned before testator's death, but declared afterwards, form income & not corpus.—*BATES v. MACKINLEY* (1862), 31 Beav. 280; 31 L. J. Ch. 389; 6 L. T. 208; 8 Jur. N. S. 299; 10 W. R. 241; 54 E. R. 1146.

Annotation:—*Refd.* *Browne v. Collins* (1871), L. R. 12 Eq. 586.

2011. — Arrears of preference dividends.]

By her will testatrix bequeathed her residuary estate to her trustee upon trust for sale & conversion, but with power to postpone, & directed him to pay the income or annual produce of the trust fund to D. for life, & to apply the next annual produce from the unconverted part of her estate as if it were the income of the proceeds of conversion. Testatrix owned two thousand four hundred fully paid cumulative preference shares in a co., & under the arts. was entitled to be paid out of available profits a cumulative preference dividend of 10s. per share, in addition to a sum of £7 per share. At the death of testatrix, in 1920, there was due to her, on balance, a sum of £3 15s. per share in respect of the £7. The right to that balance was contingent on the co. making a profit & not carrying it to reserve. On Sept. 5, 1922, the directors passed a resolution "to transfer £80,000 from reserve to profit & loss account, & to declare & pay a dividend of £1 17s. 6d. on the preference shares being the equivalent of three & three-quarter years' dividend on account of arrears." In pursuance of the resolution £3,150 was paid to the exors. of testatrix:—*Held*: on the contingency happening the shareholder then entitled to the shares was entitled to the money which was the equivalent of the right which was once contingent but then became absolute, & the £3,150 was income, which became payable for the first time in 1922, & passed to the tenant for life under the terms of the will as "annual produce" of the estate.—*Re MARJORIBANKS, MARJORIBANKS v. DANSEY*, [1923] 2 Ch. 307; 92 L. J. Ch. 609; 129 L. T. 669; 67 Sol. Jo. 659.

2012. "Special dividend."]—A holder of shares in both departments of the Sun Fire & Life Office bequeathed his personal estate to trustees on trust to permit his wife to receive the dividends, interest, & income thereof for her life, remainder over. He died in Dec. 1870. In Jan. 1873, an extraordinary dividend was declared on the life shares for five years previously; & in July, 1873, a "special dividend" was declared on the fire shares for the half-year previous:—*Held*: these dividends were income, & belonged to the tenant for life.—*Re*

HOPKINS' TRUSTS (1874), L. R. 18 Eq. 696; 43 L. J. Ch. 722; 30 L. T. 627; 22 W. R. 687.

Annotations:—*Refd.* *Re Bouch, Sproule v. Bouch* (1885), 29 Ch. D. 635; *Re Piercy, Whitwham v. Piercy*, [1907] 1 Ch. 289.

2013. "Extraordinary dividend."]—*Re HOPKINS' TRUSTS*, No. 2012, *ante*.

(c) Dividends Out of Accumulated Profits.

2014. Issue of new shares.]—*Re PALMER, PALMER v. CASSEL*, No. 2060, *post*.

2015. — Dividend appropriated in taking up shares.]—*Re NORTHAGE, ELLIS v. BARFIELD*, No. 2043, *post*.

2016. — Shares exchanged for more profitable shares.]—C., a working colliery co., had accumulated out of profits a large reserve fund invested in the shares of a trust co. which also held shares in three other working colliery cos. In 1913 a combine co. was incorporated for the purpose of acquiring the shares in all four working cos., the shareholders in which were offered the opportunity of exchanging their shares for shares in the combine on advantageous terms, & practically the whole of the shareholders availed themselves of the offer & deposited their shares under a provisional agreement by which provision was made for the deposit in a bank of the share certificates in the four working cos. & for the allotment in exchange of shares in the combine. The annexed scheme set out the rate of exchange in the case of each of the four working cos., & under the heading dealing with C. added a note that C.'s assets in the trust co., referring to the reserve fund, would be distributed among C.'s ordinary shareholders. Immediately after the adoption of the provisional agreement the directors of the trust co. exchanged all shares held by that co. in the three other working cos. for shares in the combine, & subsequently went into liquidation. Other steps were taken, & a resolution was passed by C. in the distribution of the assets to be received by C. for the liquidation of the trust co., representing the reserve fund, by way of dividend amongst their ordinary shareholders. As the result of these transactions the shares in the combine thus acquired by C. & some cash were distributed among their ordinary shareholders. On a summons taken out by trustees raising the question whether the shares & cash so distributed to them ought as between tenant for life & remaindermen to be treated as capital or income:—*Held*: the scheme proceeded on the footing of a distribution of the reserve fund as undivided profits by way of dividend & not by way of reduction of capital; looking at the real transaction, there was no intention to capitalise the reserve fund; & the shares & cash in the hands of the trustees must be treated as income & not as capital.—*Re THOMAS, ANDREW v. THOMAS*, [1916] 2 Ch. 331; 85 L. J. Ch. 519; 114 L. T. 885; 32 T. L. R. 530; 60 Sol. Jo. 537, C. A.

Annotations:—*Refd.* *I. R. Comrs. v. Blott, I. R. Comrs. v. Greenwood*, [1920] 2 K. B. 657. *Mentid. Pool v. Guardian Investment Trust Co.*, [1922] 1 K. B. 347.

2010 i. Dividends declared after testator's death.]—*Re SIOHLAN'S WILL, TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. SIOHLAN*, [1918] V. L. R. 431.—*AUS.*

2010 ii. ——Where moneys of a testator were at the time of his death invested in shares in a co. whose articles contained a clause empowering the co. to distribute its profits as a dividend or to convert them into

capital:—*Held*: where the co. validly exercised this power, what was paid by the co. as a dividend went to the tenant for life.—*Re ROLLAND, TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. BLACK* (1911), 30 N. Z. L. R. 494.—*N.Z.*

2010 iii. ——When a testator directs or permits part of his estate to remain as shares or stocks in a co.

which has the power either to distribute its profits as dividends or convert them into capital, & the co. validly exercises this power, what is paid by the co. as dividend goes to the life-tenant.—*BLYTH'S TRUSTEES v. MILNE* (1905), 7 F. (Ct. of Sess.) 799.—*SCOT.*

2013 i. "Extraordinary dividend."]—*FRENCH v. CRAIG* (1858), 8 I. Ch. R. 142.—*IR.*

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2017. "Special bonus."—The memorandum & arts. of assocn. of a co. provided for increase of capital. The arts. provided that the directors with the sanction of a meeting of shareholders might declare dividends; that, before recommending a dividend, they might set aside, out of profits, a reserve fund for contingencies, equalising dividends & other specified objects & that they might declare & pay interim dividends. Shares in the co. were settled by will. At the death of testator, in 1884, there stood in the accounts of the co., to the credit of a reserve fund £3,000. By the date of the annual meeting of the co. in Oct. 1888, the reserve fund had risen to £9,000. Up to Oct. 1888, the shareholders had received each year, partly as "dividend," partly as "bonus," sums of various amounts; in 1888 equal to £2 10s. a share. In Apr. 1889, the directors resolved to divide £15,000, £25 a share, as "special bonus"; & this amount was paid as "interim dividend" in Apr. 1889. About £5,000 of extraordinary expenses were incurred, & a further dividend of £10 a share was paid in Nov. of that year. The reserve fund was by that time reduced to £2,000:—*Held*: the tenant for life of the settled shares was entitled to the whole of the amount divided.—*Re ALSBURY, SUGDEN v. ALSBURY* (1890), 45 Ch. D. 237; 60 L. J. Ch. 29; 63 L. T. 576; 39 W. R. 136; 2 Meg. 346.

2018. "Bonus dividend."—*Re NORTHAGE, ELLIS v. BARFIELD*, No. 2043, *post*.

2019. "Special dividend."—*Re DESPARD, HANCOCK v. DESPARD* (1901), 17 T. L. R. 478.

(d) Capitalisation.

i. In General.

2020. Question of fact.—*BOUCH v. SPROULE*, No. 2035, *post*.

2021.—In these cases, the decision of the co. acting within the scope of its constitution binds the persons interested in succession to testator's shares, & determines what is capital & what is income (*CHITTY, J.*).—*Re PAGET (LORD), LISTOWEL v. PAGET* (1892), 9 T. L. R. 88.

2022.—*Re MALAM, MALAM v. HITCHENS*, No. 2050, *post*.

2023.—*Re EVANS, JONES v. EVANS*, No. 2037, *post*.

2024.—*Re THOMAS, ANDREW v. THOMAS*, No. 2016, *ante*.

2025.—*Re SPEIR, HOLT v. SPEIR*, No. 1988, *ante*.

2026.—*Re TAYLOR, WATERS v. TAYLOR*, No. 2045, *post*.

ii. Company without Power to Increase Capital.

2027. Distribution of profits.—The 5 per cent. annuities of 1797 created upon the subscription of the Bank for the public service & in pursuance of a resolution of the Bank divided among the proprietors of bank stock *pro rata* are considered as an accretion to the capital; & therefore a person entitled for life can have the benefit of it by way of dividend only.

The same thing in effect has been done, when the Bank has increased the dividend; the ground of which has been, that there has been a gradual saving; of which they give the benefit to the

proprietor, not by payment of a sum of money, but by additional dividend. It would be a neater way to convert it into bank stock. They could not do that without an Act of Parliament (*LORD LOUGHBOROUGH, C.*).—*BRANDER v. BRANDER* (1799), 4 Ves. 800; 31 E. R. 414, L. C.

Annotations:—*Consd. Barclay v. Wainwright* (1807), 14 Ves. 66. *Appl. Cuming v. Boswell* (1857), 28 L. T. O. S. 344. *Consd. Bouch v. Sproule* (1887), 12 App. Cas. 385. *Refd. Re Alsbury, Sugden v. Alsbury* (1890), 45 Ch. D. 237.

2028.—An extraordinary division of profit by the Bank of England among the proprietors of bank stock considered as capital.—*CLAYTON v. GRESHAM* (1804), 10 Ves. 288; 32 E. R. 855, L. C.

Annotations:—*Refd. Hooper v. Rossiter* (1824), M'Cle. 527; *Bouch v. Sproule* (1887), 12 App. Cas. 385. *Mentd. Tullett v. Armstrong* (1838), 1 Beav. 1.

2029.—By a marriage settlement some shares in the London Assurance co. were settled on the husband & wife for their lives, & after their deaths on their children; & it was provided that if any bonus should be given by way of increase of capital of the trust funds it should be added to the capital: but, if it should be given by way of interest or dividend, it should be paid to the person entitled to receive the dividends of the trust funds for the time being. At a meeting of the co. the usual dividend of £1 per share was voted; & it was resolved that a certain sum should be taken out of the profits of the co. & divided amongst the proprietors in proportion to their shares:—*Held*: the addition made in pursuance of the resolution was to be considered as part of the capital of the trust fund.—*WARD v. COMBE* (1836), 7 Sim. 634; 58 E. R. 981.

Annotation:—*Consd. Bouch v. Sproule* (1887), 12 App. Cas. 385.

2030.—In money.—An extraordinary division of a sum of money by the Bank of England among the proprietors of bank stock, beyond the usual dividend, considered as capital; & therefore not the absolute property of the tenant for life.—*PARIS v. PARIS* (1804), 10 Ves. 185; 32 E. R. 815, L. C.

Annotations:—*Consd. Barclay v. Wainwright* (1807), 14 Ves. 66; *Hooper v. Rossiter* (1824), M'Cle. 527. *Appl. Re Barton's Trust* (1868), L. R. 5 Eq. 238. *Distd. Re*

Cuming v. Boswell & Dickson, Boswell v. Cuming & Dickson (1856), 2 Jur. N. S. 1005; *Straker v. Wilson* (1871), 6 Ch. App. 506, n.; *Re Hopkins' Trusts* (1874), 43 L. J. Ch. 722; *Bouch v. Sproule* (1887), 12 App. Cas. 385; *Re Alsbury, Sugden v. Alsbury* (1890), 45 Ch. D. 237. *Mentd. Baring v. Ashburton*, (1868) 17 L. T. 557.

2031.—As bonus.—Distribution by the bank of extraordinary profit, beyond the regular dividend, not by way of increased dividend, but as a bonus, taken as capital; & the manner, in which it is given, makes no difference.—*WITTS v. STEERE* (1807), 13 Ves. 363; 33 E. R. 330, L. C.

Annotations:—*Distd. Barclay v. Wainwright* (1807), 14 Ves. 66. *Refd. Cuming v. Boswell & Dickson, Boswell v. Cuming & Dickson* (1856), 2 Jur. N. S. 1005; *Bouch v. Sproule* (1887), 12 App. Cas. 385.

Power to increase capital, generally.—*See, now, Companies Consolidation Act, 1908 (c. 69), s. 41 (1).*

iii. Company with Power to Increase Capital.

2032. Authorisation by special statute—Distribution of additional stock.—Tenant for life of the interest, dividends, profits & proceeds of bank stock & residuary legatee of testator's estate, not entitled to the principal sum, but only to the

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M. (c).

20217. "Special bonus."—*Re CAR-*

SON, *CARSON v. CARSON*, [1915] 1 I. R. 321.—IR.

20191. "Special dividend."—*Re HASSELL, KNOWLES v. BALLARAT TRUSTEES*,

EXECUTORS & AGENCY CO., LTD., *HASLEM v. BALLARAT TRUSTEES, EXECUTORS & AGENCY CO., LTD.*, [1916] V. L. R. 594.—AUS.

dividends, of the increase of stock apportioned amongst the proprietors at the rate of 25 per cent. in pursuance of the resolution of the general ct. of May 24, 1816, & 56 Geo. 3, c. 96, out of the capital of £2,910,000 added to the former capital of the bank stock. Defts., representatives of the tenant for life, charged with the costs of the suit transferring the additional stock to the rever-sioners, allowed the expense of taking out administration, *de bonis non* to testator, they having saved plffs. that charge.—*HOOPER v. ROSSITER* (1824), *M'Cle.* 527; 13 *Price*, 774; 147 *E. R.* 1151.

Annotation :—*Refd.* *Re Bouch, Sproule v. Bouch* (1885), 29 *Ch. D.* 635.

2033. Allotment of new shares.—Five shares in a joint stock co. were settled upon trust for A. for life, with remainder to her children. During the life of A. in pursuance of resolutions passed by general meetings of the co., the capital of the co. was on several occasions increased by converting into shares a portion of the half-yearly profits of the co., & distributing such shares among the shareholders rateably according to the number of their shares. In this manner several new shares were allotted to the trustees of the settlement. After A.'s death, these new shares were claimed by her personal representative:—*Held*: the new shares formed part of the capital of the settlement fund.—*Re BARTON'S TRUST* (1868), *L. R.* 5 *Eq.* 238; 37 *L. J. Ch.* 194; 17 *L. T.* 594; 16 *W. R.* 392.

Annotations :—*Foll.* *Baring v. Ashburton* (1868), 16 *W. R.* 452. *Distd.* *Re Hopkins' Trusts* (1874), *L. R.* 18 *Eq.* 696. *Apld.* *Bouch v. Sproule* (1887), 12 *App. Cas.* 385. *Refd.* *Browne v. Collins* (1871), *L. R.* 12 *Eq.* 586; *Re Alsbury, Sugden v. Alsbury* (1890), 45 *Ch. D.* 237.

2034. —.—]—When a co. divides its profits by allotting extra shares in its capital to its shareholders, the shares so allotted are capital as against tenant for life & tenant in remainder.—*BARING v. ASHBURTON (LADY)* (1868), 17 *L. T.* 557; 16 *W. R.* 452.

Annotation :—*Apld.* *Straker v. Wilson* (1870), 39 *L. J. Ch.* 463.

2035. — Bonus dividend as payment therefor.—Testator bequeathed his residuary personal estate to his exor. T. in trust for testator's wife for her life & after her death to T. Part of the residuary estate consisted of shares in a co. whose directors had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserved fund, for meeting contingencies, equalising dividends or repairing or maintaining the works. After testator's death the directors of the co. proposed to distribute certain accumulated profits, which had been temporarily capitalised, as a bonus dividend, to allot new shares partly paid up, to each shareholder, & to apply the bonus dividend in part payment of the new shares. This proposal was carried out, & with T.'s consent new shares were allotted to him & registered in his name, the bonus dividend on testator's old shares being applied in part payment of the new shares:—*Held*: look-

ing at all the circumstances the real nature of the transaction was that the co. did not pay or intend to pay any sum as dividend, but intended to & did appropriate the undivided profits as an increase of the capital stock; the bonus dividend was therefore capital of testator's estate, & the life tenant was not entitled to the bonus or the new shares.

I come now to the question whether the co. did in the present case distribute the accumulated profits as dividend or convert them into capital. . . . I think we must look both at the substance & form of the transaction (*LORD HERSCHELL*).—*BOUCH v. SPROULE* (1887), 12 *App. Cas.* 385; 56 *L. J. Ch.* 1037; 57 *L. T.* 345; 36 *W. R.* 193, *H. L.*; *revers.* *S. C. sub nom. Re BOUCH, SPROULE v. BOUCH* (1885), 29 *Ch. D.* 635, *C. A.*

Annotations :—*Distd.* *Re Alsbury, Sugden v. Alsbury* (1890), 45 *Ch. D.* 237. *Consd.* *Re Paget, Listowel v. Paget* (1892), 9 *T. L. R.* 88; *Re Armitage, Armitage v. Garnett*, [1893] 3 *Ch.* 337. *Apld.* *Re Eastern & Australian S.S. Co.* (1893), 68 *L. T.* 321; *Re Malam, Malam v. Hitchens*, [1894] 3 *Ch.* 578. *Distd.* *Re Despard, Hancock v. Despard* (1901), 17 *T. L. R.* 478; *Re Hume Nisbet's Settltmt.* (1911), 27 *T. L. R.* 461. *Apld.* *Re Palmer, Palmer v. Cassel* (1912), 28 *T. L. R.* 301; *Re Evans, Jones v. Evans*, [1913] 1 *Ch.* 23; *Re Thomas, Andrew v. Thomas*, [1916] 2 *Ch.* 331; *Re Ogilvie, Ogilvie v. Ogilvie* (1919), 88 *L. J. Ch.* 159; 1 *R. Comrs. v. Blott, I. R. Comrs. v. Greenwood*, [1921] 2 *A. C.* 171; *Re Speir, Holt v. Speir*, [1924] 1 *Ch.* 359. *Consd.* *I. R. Comrs. v. Fisher's Exors.*, [1926] *A. C.* 395. *Foll.* *Re Taylor, Waters v. Taylor*, [1926] *Ch.* 923. *Apld.* *I. R. Comrs. v. Wright*, [1927] 1 *K. B.* 333. *Refd.* *Re Bromley, Sanders v. Bromley* (1886), 55 *L. T.* 145; *Re Bridgewater Navigation Co.*, [1891] 2 *Ch.* 317; *Re Northage, Ellis v. Barfield* (1891), 60 *L. J. Ch.* 488; *Re Piercy, Whitwham v. Piercy*, [1907] 1 *Ch.* 289; *Pool v. Guardian Investment Trust Co.*, [1922] 1 *K. B.* 347; 1 *R. Comrs. v. Burrell*, [1924] 2 *K. B.* 52; 1 *R. Comrs. v. Doncaster* (1924), 93 *L. J. K. B.* 338; *Re Railways Act*, 1921 & Standard Charges Schedule (1925), 94 *L. J. K. B.* 361.

2036. — — — — —]—*Re TINDAL* (1892), 9 *T. L. R.* 21.

Annotation :—*Refd.* *Re Malam, Malam v. Hitchens*, [1894] 3 *Ch.* 578.

2037. — — — — —]—The capital of a co. was divided into 10,000 shares of £10 each, of which 3,728 shares only had been issued & were fully paid up. The co. was very prosperous & the market value of its shares was £30 each. In Feb. 1912, the reserve fund of the co. exceeded £50,000, & the directors proposed a scheme for distributing part of the reserve fund, representing accumulated undivided profits, amongst the shareholders, so that every shareholder would get a bonus of one new fully paid £10 share for every existing share held by him. Accordingly, resolutions were passed by the co. empowering the directors to declare a bonus dividend out of the reserve fund, & sanctioning the distribution of a bonus dividend of £10 per share out of the reserve fund, authorising the further issue of 3,728 shares of £10 each out of the unissued capital of the co. to be allotted *pro rata* amongst the existing shareholders, & directing that such new shares be paid up in full forthwith. The directors then sent a circular letter to every shareholder with a warrant for the bonus dividend on his shares, informing

PART X. SECT. 4, SUB-SECT. 3.— M. (d) iii.

**2035 i. Allotment of new shares—
Bonus dividend as payment therefor.**—Where a co. increases its capital by issuing new shares which are offered to shareholders, & at the same time distributes accumulated profits in the form of a dividend or bonus with which payment may be made for the new shares so offered, the amount of a dividend or bonus in respect of shares held by trustees which is applied in payment for new shares offered to & accepted by them is, as between tenant

for life & remaindermen, income of the estate & not capital, unless the ordinary instincts of human self-interest of a reasonably prudent man would naturally & instantly lead him to apply the dividend or bonus in payment of the new shares notwithstanding that acceptance of the shares is legally refuseable.—*MITCHELL v. HART* (1914), 19 *C. L. R.* 33.—*AUS.*

2035 ii. — — — — —]—*Re HAWKINS, HAWKINS v. HAWKINS* (1915), 15 *S. R. N. S. W.* 199; 33 *N. S. W. W. N.* 47.—*AUS.*

2035 iii. — — — — —]—*PERPETUAL*

TRUSTEE Co. v. COHEN (1916), 16 *S. R. N. S. W.* 242; 33 *N. S. W. W. N.* 77.—*AUS.*

2035 iv. — — — — —]—Testator, by his will, settled shares in a co. Some years after testator's death the co., which had obtained the necessary powers to increase its capital, paid a bonus of 50 per cent. to its stockholders out of accumulated profits, the payment being made in the form of a 40 per cent. dividend payable in stock, & a 10 per cent. cash dividend:—*Held*: the trustees of the will should deal with the 40 per cent. stock dividend as an

Sect. 4.—Right to income: Sub-sect. 3, M. (d) iii., (e) & (f).]

him of an allotment to him of his proportion of the new shares & giving him an option to accept or refuse the allotment, & stating that if he accepted the allotment, he was to indorse & return the dividend warrant to the co. to be applied in payment of the new shares. Trustees of testator's will held 200 shares of the co., & on receipt of the circular letter, accepted their allotment of 200 new shares, indorsed & returned their bonus dividend warrant for £2,000 & afterwards sold the new shares at a profit. The question then arose whether, as between the tenants for life & remainderman under the will, the bonus dividend was capital or income:—*Held*: on the evidence, the co. intended to capitalise the reserve fund & not to distribute it as a bonus dividend, & therefore the whole of the bonus dividend was capital of testator's estate.

In my opinion it is a question of fact, & the decision must turn on what was the intention of the co. (NEVILLE, J.).—*Re EVANS, JONES v. EVANS*, [1913] 1 Ch. 23; 82 L. J. (Ch. 12; 107 L. T. 604; 57 Sol. Jo. 60; 19 Mans. 397.

Annotations:—*Ald.* *Re Thomas, Andrew v. Thomas*, [1916] 2 Ch. 331. *Fold.* *Re Taylor, Waters v. Taylor*, [1926] Ch. 923. *Refd.* *I. R. Comrs. v. Blott, Same v. Greenwood*, [1920] 2 K. B. 657.

2038. ———.]—Part of the estate settled by testator consisted of shares in a limited co., & in Mar. 1918, a resolution was passed by the co., pursuant to powers contained in the arts. of assocn., which provided that for the purpose of capitalising the sum of £558,594, being part of the undivided profits of the co. standing to the credit of the general reserve fund, a dividend of 6s. 8d. should be declared on each of the ordinary shares, & that the directors should be authorised to satisfy such dividend by the allotment to the shareholders of one £1 ordinary share credited as fully paid in respect of every three ordinary shares held by them:—*Held*: the shares allotted in pursuance of this resolution to the trustee of testator's will must be treated & dealt with by him as being capital of testator's residuary estate.—*Re OGILVIE, OGILVIE v. OGILVIE* (1919), 88 L. J. Ch. 159; 120 L. T. 436; 35 T. L. R. 218; 63 Sol. Jo. 246.

2039. ———.]—*Re SPEIR, HOIT v. SPEIR*, No. 1988, *ante*.

2040. Redemption of shares.—Distribution of additional sums out of profits.—*Re PAGET (LORD), LISTOWEL v. PAGET* (1892), 9 T. L. R. 88.

2041. Effect of invalid exercise of power.—*Re PIERCY, WHITWHAM v. PIERCY*, No. 2000, *ante*.

2042. Calls on partly paid up shares.—Bonus equal in amount.—Trustees under the powers given them by the will of their testator retained, as part of his residuary trust estate, 300 shares of £10 each, with £2 10s. per share paid up, in a prosperous Australian co. In Nov. 1912, the co. held its annual, general meeting & paid a large dividend, & issued new shares which were offered rateably to the shareholders, & the trustees took up 51 shares, their proportion of the new shares,

& paid up £2 10s. per share thereon out of the capital of testator's estate.

In Feb. 1913, the directors issued a circular to the shareholders stating that they had made a call of 10s. per share & had declared a bonus of 10s. per share, both payable on the same date, & that unless advised by the shareholders to the contrary before that date the bonus would be applied in payment of the call. The circular reached the trustees too late for them to reply to it, & the bonus was applied in payment of the call. On the question whether the bonus was to be treated as capital or income of testator's estate:—*Held*: the co. intended to capitalise its profits to the extent of 10s. per share, by utilising the bonus to pay the call, & therefore the tenant for life was not entitled to the bonus.—*Re HATTON, HOCKIN v. HATTON*, [1917] 1 Ch. 357; 86 L. J. Ch. 375; 116 L. T. 281; 61 Sol. Jo. 253.

(e) Option given to Shareholder.

2043. Effect of.]—N. left his residuary estate upon trust after the death of his daughter to pay the income of one moiety to her husband for life, & subject thereto upon trust for her children. Part of the estate consisted of shares in the E. co., whose directors had power to set aside out of the profits of the co. depreciation or redemption funds for various purposes, some such as are usually provided for out of capital, & others such as are usually provided for out of income. After testator's death the directors resolved to distribute among the shareholders the sum of £250,000 out of moneys standing to the depreciation & redemption fund. The capital of the co. then consisted of three classes of shares, all of £10, but with £10, £7 10s. & £5 paid up respectively. The co., after making some necessary alterations in their arts. of assocn., passed resolutions: (a) That the sum of £250,545 cash standing to the credit of the depreciation & redemption account, should be distributed among the shareholders by way of bonus divided, such dividend being at the option of any shareholder applicable to the payment of the amounts due in respect of any new shares or of calls. (b) That a number of new shares of £10 each should be issued & offered to the shareholders on terms of immediate payment at par in the proportion of one new share to every two with £10 paid up, & one to every eight with £7 10s. paid up. At the same time a call was made of £2 10s. per share on the shares of £7 10s. & £5 paid up. The scheme was carried out by sending round to all the shareholders a dividend warrant for a sum equal to 50 per cent. on the amount paid up on their shares, with a form for the shareholders' signature requesting that the amount might be applied in payment for the new shares & calls on the old. At the same time notices of allotment & forms for acceptance of the new shares were sent. The trustees accepted the new shares, & immediately sold them at a profit. This was a summons to determine the question whether the proceeds were income or capital of the trust estate:—*Held*: the trans-

accretion to the capital of testator's estate, & with the 10 per cent. cash dividend as income arising from the estate.—*Re CARSON, CARSON v. CARSON* [1915] 1 I. R. 321.—*IR.*

m. Power to divide profits as dividend or convert into capital.—Where moneys of a testator were at the time of his death invested in shares in a co. whose articles contained a clause empowering the co. to distribute

its profits as a dividend or to convert them into capital:—*Held*: where the co. validly exercised this power, what was appropriated as an increase of the capital was for the benefit of all those interested in the capital.—*Re ROLAND, TRUSTEES, EXECUTORS & AGENCY CO. LTD. v. BLACK* (1911), 30 N. Z. L. R. 494.—*N.Z.*

n. ———.]—Where a testator directs or permits part of his estate to remain

as shares or stocks in a co. which has the power either to distribute its profits as dividends or convert them into capital, & the co. validly exercises this power, what is paid by the co. to the shareholders as capital or appropriated as an increase to the capital stock of the concern enures to the benefit of all who are interested in the capital.—*BLYTH'S TRUSTEES v. MILNE* (1905), 7 F. (Ct. of Sess.) 799.—*SCOT.*

action was in fact a distribution of surplus profits by way of dividend, with an option for the shareholders to invest in new capital, not an appropriation by the co. of the accumulated profits as an increase of capital, & the tenant for life was entitled to the bonus dividend, but the profit made by taking up the shares belonged to the capital of the trust estate.—*Re NORTHAGE, ELLIS v. BARFIELD* (1891), 60 L. J. Ch. 488; 64 L. T. 925; 7 T. L. R. 464.

Annotations:—*Follid. Re Hume Nisbet's Settlement*. (1911), 27 T. L. R. 461. *Refd. Re Malam, Malam v. Hitchens*, [1894] 3 Ch. 578.

2044. ———.]—*Re EVANS, JONES v. EVANS*, No. 2037, *ante*.

2045. ———.]—Where, on a distribution of bonus shares by a co. to the shareholders, there is a doubt whether such shares are to be considered as capital or income, as between the tenant for life & remainderman under a will, the principle to be followed is that it is the intention of the co. that is to be regarded. If the co. intend to capitalise it is capital; if there is no such intention, it is not capital.

Therefore in determining such a question reference must be had to substance & not merely to form, & where it is found that the transaction is in form one in which an option is given to the shareholder, that is not necessarily a factor which determines that it is income & not capital.

The option would be immaterial if, from the other documents & facts, it appeared reasonably clear that the co., notwithstanding the form, intended to capitalise.—*Re TAYLOR, WATERS v. TAYLOR*, [1926] Ch. 923; 96 L. J. Ch. 17; 137 L. T. 17.

2046. Option exercised by trustees.—On behalf of all beneficiaries.]—*Re TINDAL* (1892), 9 T. L. R. 24. *Annotation*:—*Refd. Re Malam, Malam v. Hitchens*, [1894] 3 Ch. 578.

2047. ———.]—*Re MALAM, MALAM v. HITCHENS*, No. 2050, *post*.

2048. ———.]—*Re COLVILLE, COLVILLE v. COLVILLE* (1918), 144 L. T. Jo. 327.

2049. Company not intending to increase capital—Dividend appropriated in taking up shares—Balance of value of shares.]—*Re NORTHAGE, ELLIS v. BARFIELD*, No. 2043, *ante*.

2050. ———.]—Testator who died in 1889, gave his residuary estate to trustees upon trust for his widow for life, & after her death, for division amongst others; & gave his trustees power to postpone conversion of any part of his property for so long as they should think fit. At the date of his death testator was possessed of shares in a co. In 1893 the co., by special resolution, resolved to increase its capital by the issue of new shares, & empowered the directors to offer such new shares to the existing shareholders in payment or part payment of any dividend for the time being. A dividend was afterwards declared out of profits, which the co. was in a position to pay in cash. Half of such dividend was paid in cash, & in respect of the balance an allotment of

new shares was offered to the shareholders, & such as did not accept the offer received the remainder of the dividend in cash. The trustees of the will accepted the allotment, & allowed the new shares to be allotted to the tenant for life:—*Held*: (1) upon the evidence, the co. intended to distribute its profits as dividend, & not to capitalise them.

The general principle applicable is . . . stated in *Bouch v. Sproule*, No. 2035, *ante*, . . . it was laid down that in considering whether a co. has distributed its accumulated profits as dividends or converted them into capital regard must be paid both to the form & the substance of the transaction. . . . The principle of law laid down is binding on me; the decision on the question of fact is not, unless indeed the facts be substantially the same (*STIRLING, J.*).—*Re MALAM, MALAM v. HITCHENS*, [1894] 3 Ch. 578; 63 L. J. Ch. 797; 71 L. T. 655; 38 Sol. Jo. 708; 13 R. 38.

Annotations:—As to (1) *Refd. Re Ogilvie, Ogilvie v. Ogilvie* (1919), 88 L. J. Ch. 159. As to (2) *Consd. Re Palmer, Palmer v. Cassel* (1912), 28 T. L. R. 301. *Generally, Refd. Re Thomas, Andrew v. Thomas*, [1916] 1 Ch. 383.

2051. ———.]—A co. resolved to pay a bonus dividend to its shareholders, & gave them the option of taking new shares fully paid instead of the dividend in cash. The trustees of a settlement, who were registered shareholders, exercised the option & took new shares, which were of greater value than the dividend:—*Held*: the tenant for life was entitled to the cash dividend, but the value of the shares in excess of that sum was capital.—*Re HUME NISBET'S SETTLEMENT* (1911), 27 T. L. R. 461; 55 Sol. Jo. 536.

2052. ———.]—*Re COLVILLE, COLVILLE v. COLVILLE* (1918), 144 L. T. Jo. 327.

(f) Proceeds of Sale.

2053. New shares allotted in respect of settled shares.—Stock purchased with proceeds of sale.]—Where the calls on new shares, allotted to trustees of a marriage settlement, in respect of original railway shares, held by them upon the trusts of the settlement, had been paid out of the wife's separate income:—*Held*: stock, purchased with the proceeds of the sale of such new shares, was subject to the trusts of the settlement as corpus, & the wife had a lien for the amount so paid for calls, by analogy to the case of tenant for life advancing money for fines payable on renewal of leaseholds.—*ROWLEY v. UNWIN* (1855), 2 K. & J. 138; 69 E. R. 726.

Annotations:—*Apld. Re Malam, Malam v. Hitchens*, [1894] 3 Ch. 578. *Refd. Edward v. Cheyne* (No. 2) (1888), 13 App. Cas. 385; *Hood Barrs v. Heriot*, [1896] A. C. 174.

2054. ———.]—Profits received upon trust investments by the sale of allotment scrip distributed to shareholders, are the proceeds of an accretion to the shares, & must be treated as capital.—*Re CURTIS, HAWES v. CURTIS* (1885), 1 T. L. R. 332.

2055. Stock sold before dividend due.—Appportionment from last dividend day to day of sale.]—*BULKELEY v. STEPHENS*, No. 2148, *post*.

PART X. SECT. 4, SUB-SECT. 3.—M. (e).

2049 i. Option exercised by trustees—On behalf of all beneficiaries.]—*Held*: from a business standpoint a full & free option was left to shareholders to accept or refuse new shares, & therefore that as between tenant for life & remaindermen, although new shares accepted by trustees were capital of the estate, the tenant for life was entitled to a charge on them for the amount of the bonus.—*MITCHELL v. HART* (1914), 19 C. L. R. 33.—*AUS.*

2046 ii. ———.]—*Re HAWKINS, HAWKINS v. HAWKINS* (1915), 15 S. R. N. S. W. 199; 33 N. S. W. W. N. 47.—*AUS.*

2046 iii. ———.]—*BLYTH'S TRUSTEES v. MILNE* (1905), 7 F. (Ct. of Sess.) 799.—*SCOT.*

PART X. SECT. 4, SUB-SECT. 3.—M. (f).

2055 i. Stock sold before dividend due—Apportionment from last dividend day to day of sale.]—Trustees, in July, sold the shares of a co., the dividend on which was annually declared in

Oct., & conveyed to the purchaser the right to all dividends accruing after the sale:—*Held*: the liferentrix was entitled to such a proportion of the price obtained for these shares as might be ascertained to be the value of the dividend accruing to the shares between the payment of the last dividend & the date of the sale.—*DONALDSON v. DONALDSON'S TRUSTEES* (1851), 14 Dunl. (Ct. of Sess.) 165; 24 So. Jur. 173; 1 Stuart, 147.—*SCOT.*

2055 ii. ———.]—In a question between a liferenter & heir:—*Held*:

Sect. 4.—Right to income: Sub-sect. 3, M. (f) & (g), N. & O.]

2056. New stock issued in respect of settled stock.]

—Testator, who died in 1843, by his will dated in 1841 bequeathed (*inter alia*) thirty-five shares in a gas co. to trustees upon trust for his wife for life, & subject thereto he directed that the same should form part of his residuary estate. After the death of testator the gas co. resolved to increase its capital by the issue of fresh stock, which it offered to its shareholders. J., acting under a power of attorney on behalf of the surviving trustee of the will, who was resident abroad, availed himself of the offer, & took up with his own moneys & in his own name some of the new stock. An action for administration of testator's estate having been instituted an order was made on the extrix. of J. who had died, under which the new stock was sold & the balance of the proceeds of sale, after repayment of the amount paid for the stock & interest, & deducting therefrom the dividends received by J., was paid into ct. to the credit of the action. On the further consideration of the action, a question arose whether testator's widow, as tenant for life of the thirty-five original shares, was entitled to this balance or whether the same formed part of his residuary estate:—*Held*: the trust relating to the thirty-five shares must be treated as if it stood alone, it being in respect of that particular trust that J. had obtained the power of which he had availed himself; & the benefit arising therefrom must be treated as belonging to that trust alone; the balance in ct. represented capital, & the widow was entitled to the income thereof for life.

It seems impossible to consider the whole amount of money obtained by the sale as profit belonging to the tenant for life (KAY, J.).—*Re BROMLEY, SANDERS v. BROMLEY* (1886), 55 L. T. 145.

2057. Option to take up new stock.]—By a marriage settlement made in 1902 it was declared that the trustees thereof should hold certain investments, which had been transferred by the husband into their joint names, upon trust either to allow the same "to remain in the present state of investment thereof" or, with specified consents to sell the same, & invest the proceeds in investments therein mentioned & pay the annual income thereof to the husband for life, & after his death to his wife for life, & after the death of both, to hold the investments upon the usual trusts for the children of the marriage, with an ultimate trust, in the event of there being no children, in favour of the husband absolutely. By clause 11 of the settlement the trustees were authorised to exercise any preferential right that might be offered to them to subscribe for new or other shares in any co. in which they held shares or stock, & to dispose of the same, & every premium or profit arising therefrom was to be applied by them as if the same were income. One of the investments so transferred to the trustees consisted of one hundred & nine shares in an American financial co. called the Northern Securities co., which was formed to acquire & hold shares in other corps., & held a large number of shares in, & controlled the policy of, two American ry. cos., the Great Northern Ry. co. & the Northern Pacific Ry. co. In 1904 the capital stock of the Northern Securities co. was cancelled to the extent of 99 per cent., & in lieu of their one hundred & nine shares in that co. the

trustees of the settlement received thirty-two fully paid up shares & a fractional share in the capital stock of the Great Northern Ry. co., forty-two fully paid up shares & a fractional share in the capital stock of the Northern Pacific Ry. co., & one fully paid up share & a fractional share in the Northern Securities co. In 1905 & 1906 the trustees received three options to take up new stock in respect of the thirty-two shares in the Great Northern Ry. co. & of the forty-two shares in the Northern Pacific Ry. co., & in exercise of these options they paid certain instalments, & in one instance sold the right of option. The husband having died & there being no children of the marriage, the wife claimed the proceeds of the options as income under clause 11 of the settlement, subject to repaying the trustees what had been paid in respect of the new shares:—*Held*: the shares in the two railway cos. were not the same shares which were transferred to the trustees at the date of the settlement, & therefore the trustees were not authorised by the terms of the settlement to retain them; the accretions to the shares, by reason of the exercise of the options, belonged to the capital of the trust estate, & could not be treated as income under clause 11 of the settlement.—*Re ANSON'S SETTLEMENT, LOVEFACE (EARL) v. ANSON*, [1907] 2 Ch. 424; 76 L. J. Ch. 641; 97 L. T. 472; 51 Sol. Jo. 686.

Annotation:—*Reid. Re Whitfield* (1920), 125 L. T. 61.

(g) Effect of Dissolution of Company.

2058. Surplus assets—Distribution on dissolution —Surplus arising from reserve dividend fund.]

An insurance co. by their deed of settlement were directed to create a reserve fund, & pay no dividend till a specified amount was realised. This provision was departed from by the consent of the majority of the shareholders, & a bonus was distributed every three years. The co. then amalgamated with another, & it was agreed that £50 per share should be paid upon all shares, & also a proportionate part of the surplus assets. *Pltf.*, who was tenant for life of ten shares in the co., claimed the share of surplus assets which had been paid over to her trustee as part of her annual income:—*Held*: these surplus assets, which must be considered as the reserve fund, were capital, & not income.—*NICHOLSON v. NICHOLSON* (1861), 30 L. J. Ch. 617; 9 W. R. 676.

Annotation:—*Reid. Re Bouch, Sproule v. Bouch* (1885), 29 Ch. D. 635.

2059. — — — — —.]—Testator gave his residuary estate in trust for his daughter for life & then in trust for his son. Part of the residue consisted of shares in a limited co., the arts. of which provided for the formation of a reserve dividend fund out of the annual profits above 10 per cent. to be applied in supplementing the dividend when the annual profits fell below 5 per cent. After testator's death the co. went into voluntary liquidation & transferred its business to a new co. The amount distributable among the shareholders in the winding up was sufficient to provide a surplus over & above the amount of capital paid up on each share. This surplus arose from a sum of £20,000 representing the reserve dividend fund & a further sum of £17,000 representing undivided profits:—*Held*: as between tenant for life & remainderman the whole of the surplus ought to be treated as capital.—*Re ARMITAGE, ARMITAGE v. GARNETT*, [1893] 3 Ch.

the price of shares sold in the interval between two dividends fell to be divided between capital & revenue on

the basis of the dividend admitted by the parties to have been expected at the date of sale, & not of the dividend

ultimately paid.—*CAMERON'S FACTOR v. CAMERON* (1873), 1 R. (Ct. of Sess.) 21; 11 Sc. L. R. 1.

337; 63 L. J. Ch. 110; 69 L. T. 619; 9 T. L. R. 630; 7 R. 290, C. A.

Annotations:—Consd. *Re* Sale, Nisbet v. Philp, [1913] 2 Ch. 697; *Re* Thomas, Andrew v. Thomas, [1916] 1 Ch. 383. *Reid.* *Re* Grundy, Grundy v. Holme (1917), 117 L. T. 470; *Re* Ogilvie, Ogilvie v. Ogilvie (1919), 88 L. J. Ch. 159. *Mentd.* *I. R.* Comrs. v. Burrell, [1924] 2 K. B. 52.

2060. — Distribution down to dissolution.]—Testator at the date of his death held certain shares in the A. co. In 1905 that co. sold & transferred its assets to the C. co.; & in 1909 it was resolved at an extraordinary general meeting to wind up the A. co., & the liquidation was still proceeding. Since testator's death the trustees of his will had received various sums & various distributions of shares of the C. co. in respect of the shares of the A. co. held by the trustees. The A. co. had power to distribute excess of capital as dividends:—*Held*: all distributions down to the winding-up of the A. co. were income & all payments received since the liquidation were capital.—*Re* PALMER, PALMER v. CASSEL (1912), 28 T. L. R. 301; 56 Sol. Jo. 363.

2061. — Distribution after dissolution.]—Re PALMER, PALMER v. CASSEL, No. 2060, *ante*.

N. Trees and Timber.

See, generally, AGRICULTURE, Vol. II., pp. 79–87, 103, 104, Nos. 585–681, 838–840, 842, 844, 846–849.

2062. Sale of timber—Interest on proceeds.]—LEWIS v. CRAY (1798), cited 19 Ves. at p. 423; 34 E. R. 574.

Annotations:—Apld. Wickham v. Wickham (1815), 19 Ves. 419; Tooker v. Annesley (1832), 5 Sim. 235. *Reid.* Dashwood v. Magniac, [1891] 3 Ch. 306.

2063. —.]—OSBORNE v. OSBORNE (1814), cited 19 Ves. at p. 423; 34 E. R. 574, L. C.

Annotations:—Foldd. Wickham v. Wickham (1815), Coop. G. 288. *Apld.* Tooker v. Annesley (1832), 5 Sim. 235.

2064. —.]—By a will which came into operation subsequently to the passing of Apportionment Act, 1834 (c. 22), real estate was devised to A. for life, subject to impeachment for waste, with remainder to B. for life without impeachment for waste, with remainders over. With the sanction of the ct. timber on the estate was cut down & sold, & the proceeds of sale invested; & the dividends were ordered to be paid to A. during his life.—*JODRELL v. JODRELL* (1869), L. R. 7 Eq. 461; 38 L. J. Ch. 507; 20 L. T. 349; 17 W. R. 602.

O. Trust for Sale.

2065. Investment of proceeds of sale—Purchase of lands—Income until investment.]—Testator devised real estates to trustees upon trust for A. during his life, with remainder over; & he gave the residue of his personal estate to the same trustees, upon trust, with all convenient speed, to purchase lands to be conveyed to the same uses as the devised estates, & until the purchases be made, upon trust to lay out the money on securities, & pay the dividends to those, who, if lands had been bought, would have been entitled to the rents:—*Held*: the tenant for life is entitled to the dividends accruing upon the clear residue of the personal estate within the year after testator's death.—*ANGERSTEIN v. MARTIN* (1823), Turn. & R. 232; 2 L. J. O. S. Ch. 88; 37 E. R. 1087, L. C.

Annotations:—Consd. Howitt v. Morris (1824), Turn. & R. 241; Stair v. MacGill (1827), 1 Bl. N. S. 662; Douglas

v. Congreve (1836), 1 Keen. 410; Taylor v. Clark (1841), Hare, 161. *Apld.* Macpherson v. Macpherson (1852), 19 L. T. O. S. 221; Bulkeley v. Stephens (1863), 3 New Rep. 105. *Consd.* Allhusen v. Whittell (1867), L. R. 4 Eq. 295. *Reid.* Caldecott v. Caldecott (1842), 1 Y. & C. Ch. Cas. 312; Morgan v. Morgan (1851), 14 Beav. 72; Morley v. Mendham (1856), 2 Jur. N. S. 998.

2066. —.]—Testator directed his residuary estate to be laid out in the purchase of land, as soon as a convenient purchase could be found, in the county of York, which, upon a fair letting, would produce a yearly rent equal to 3½ per cent. upon the amount of the purchase-money, & in the meantime, the interest of his residuary estate to be accumulated. The tenant for life will be entitled to the interest of the residuary estate, from the end of one year after testator's death, until it is laid out as directed.—*KILINGTON v. GRAY* (1825), 2 Sim. & St. 396; 4 L. J. O. S. Ch. 80; 57 E. R. 397.

Annotation:—Consd. Clifton v. Cockburn (1834), 3 My. & K. 76.

2067. —.]—Testator after directing the payment of his debts, gave certain sums to his exors. in trust for certain charities, & then after making a specific bequest, he gave all the residue of his real & personal estate to his exors. in trust to invest all such moneys as should be uninvested at his death, & also all his mtges., shares in the Liverpool Gas Light, & other cos., etc., that could be immediately sold without disadvantage, & otherwise as soon as may be in such manner, whether in the purchase of lands as they shall judge most advantageous, & convenient to the estates "I already possess"; & he directed his exors. to receive the interest, rents, & profits from all his real & personal, until converted into real, estate, & after deducting expenses to pay over the residue to P. for life, & after her decease, etc. The pure personality was not sufficient to pay all the legacies, & there was a delay of four or five years in converting the personality:—*Held*: P. the tenant for life, was entitled to the income of the residuary estate *in specie*, till conversion.—*SPARLING v. PARKER* (1846), 9 Beav. 524; 16 L. J. Ch. 57; 7 L. T. O. S. 465; 10 Jur. 448; 50 E. R. 446.

2068. — Authorised securities—Income until investment—Whether income of unproductive property included.]—Devise & bequest of residuary real & personal estate to trustees, upon trust, with all convenient speed to sell the real estate, & such part of the personal estate as was in its nature saleable, but the mode & time of sale & of settling & adjusting accounts & of requiring payment of what should be due to testator to be left entirely to the discretion of the trustees, until such sale, & the final adjustment of his co-partnership accounts, the rents & income of the real & personal estate remaining unsold, & the interest on any debt or debts owing to testator, to be paid to the same persons & in the manner directed with respect to the income of the estate when invested. Testator gave the produce of his real & personal estate to his two daughters for their lives, with remainder over; & he recommended each of his two daughters to pay £25 a year out of her moiety of the income of his estate for the education & maintenance of his nephew, until the nephew attained twenty-one years:—*Held*: there being no improper delay in the conversion of the estate, the daughters of

PART X. SECT. 4, SUB-SECT. 3.—N.

O. Sale of timber.]—ANNESLEY v. ANNESLEY (1918), 52 L. L. T. 189.—*IR.*

p. —.]—The rule as to the profits of open mines & quarries cannot be applied by analogy to bush land;

& a tenant for life impeachable for waste is therefore not entitled to the proceeds from the sale of timber obtained from bush land forming part of the estate. The royalties received as purchase-money in respect of such sale form part of the capital of the trust estate. Such lands are not,

because of such royalties, "income-producing property," & the tenants for life are not entitled, while such lands remain unconverted, to an allowance out of such royalties on the capital value of such property.—*Goss v. Suckling* (1910), 50 N. Z. L. R. 543.—*N.Z.*

Sect. 4.—Right to income: Sub-sect. 3, O.]

testator, as tenants for life, were entitled to the income actually produced by the residuary estate during the interval before the sale or realisation of the whole of such estate, & the investment thereof according to the directions in the will; but they were not entitled, during the interval, to any interest upon such parts of the residuary property, or on the value of such parts thereof as were unproductive.—*MACKIE v. MACKIE* (1845), 5 Hare, 70; 9 Jur. 753; 67 E. R. 831.

*Annotations:—**Apld.* *Rowls v. Bebb, Re Rowls, Walters v. Treasury Solicitor*, [1900] 2 Ch. 107. *Reid.* *Johnston v. Moore* (1858), 31 L. T. O. S. 353; *Lean v. Lean* (1875), 32 L. T. 305; *Re Sherry, Sherry v. Sherry*, [1913] 2 Ch. 508.

2069. Sale postponed by court—Residue comprising life annuities & policies securing capital value of annuities.—Part of a residuary estate, settled on one for life, with remainder to her issue, consisted of life annuities & policies on the lives for securing the principal money. The ct. seeing it for the benefit of all parties, refrained from ordering a sale, but directed the policies to be kept up, so as to secure the principal, & that the surplus annuities should be paid to the tenant for life.—*GLENGALL v. BARNARD* (1842), 5 Beav. 245; 49 E. R. 571; *on appeal, sub nom. THYNNE (LADY) v. GLENGALL (EARL)* (1848), 2 H. L. Cas. 131.

*Annotations:—**Reid.* *Beckton v. Barton* (1859), 27 Beav. 99; *Montefiore v. Guedalla* (1859), 1 De G. F. & J. 93; *Coventry v. Chichester* (1864), 3 Hem. & M. 149; *Chichester v. Coventry* (1867), L. R. 2 H. L. 71; *Dawson v. Dawson* (1867), L. R. 4 Eq. 504; *Nevin v. Drysdale* (1867), L. R. 4 Eq. 517; *Russell v. St. Aubyn* (1876), 2 Ch. D. 398; *Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch. D. 363; *Re Blundell, Blundell v. Blundell*, [1906] 2 Ch. 222; *Re Heather, Pumfrey v. Fryer*, [1906] 2 Ch. 230. *Mentd.* *Warden v. Jones* (1857), 23 Beav. 487; *Campbell v. Campbell* (1866), L. R. 1 Eq. 383; *Murphy v. Boese* (1875), L. R. 10 Exch. 126; *Crichton v. Crichton*, [1895] 2 Ch. 853; *Bell v. Balls*, [1897] 1 Ch. 663.

2070. Discretionary power of sale—Part of estate unproductive—Income until sale.—(1) Testator devised estates in trust for his wife for life, & he gave the trustees a discretionary power of sale. Part of his estate consisted of unproductive building ground, which remained unsold for some years:—*Held*: the tenant for life was only entitled to the actual rents of the property until sold; but she would have been entitled to interest on the value, if the trust for sale had been absolute.

(2) The periodical payments of an annuity, for which testator was liable held payable by the tenant for life & remainderman under his will, in proportion to the values of their respective interests in the estate, the property having, for some years, been unproductive.—*YATES v. YATES* (1860), 28 Beav. 637; 29 L. J. Ch. 872; 3 L. T. 9; 6 Jur. N. S. 1023; 54 E. R. 511.

*Annotations:—**As to* (2) *Consd.* *Re Muffett, Jones v. Mason* (1888), 39 Ch. D. 534. *Foll.* *Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211. *Generally, Reid.* *Re Bacon, Grisel v. Leathes* (1893), 62 L. J. Ch. 445; *Re Searle, Searle v. Baker*, [1900] 2 Ch. 829.

2071. Absolute trust for sale—Part of estate unproductive—Interest on value.—*YATES v. YATES*, No. 2070, *ante*.

2072. Power to postpone conversion—Income to be applied in same manner as proceeds of conversion—Unauthorised & hazardous investments.—Testator directed his trustees to get in & convert all his residue with all convenient speed, & invest in certain permanent securities, & pay the income to one for life, with remainder over; & then gave power to his trustees to suspend the conversion & sale as long as they should think proper, & directed that in case of any such suspension, the income of his estate in its actual investment should go as he had directed concerning the income of

the estate got in & held in trust. The trustees had not up to the time of filing the bill, a period of more than two years, sold any part of testator's estate, which consisted in large part of leaseholds & other terminable securities:—*Held*: the tenant for life was entitled to the actual income produced, & not to the amount which the estate, if converted, would have produced, there being no suggestion of any fraudulent favour shown by the trustees to the tenant for life at the expense of the remainderman.—*MORLEY v. MENDHAM* (1856), 2 Jur. N. S. 998.

2073. ————*WATERS v. WATERS* (1875), 32 L. T. 306, n.

2074. ————*Testator left his real & residuary personalty to his trustees & exors. on trust to sell "if they should think proper," & invest the proceeds as directed, & hold the trust funds on trust for his wife for life, with remainder to his daughter; the income till conversion to be applied in the same manner as the income of the purchase-money. The trustees were authorised to postpone such sale for such period as they "in their free discretion should think fit."*

Part of testator's estate consisted of shares in a bank of unlimited liability, & of foreign bonds.

Testator carried on the business of a chemist, which business was, shortly after his death, purchased by one of his exors. at a valuation, the judge held that the sale must be set aside, & the exor. account for profits with just allowances, but no salary; & the tenant for life was only entitled to the income of the fund arising from the profits.

On appeal, by a compromise, the sale was confirmed, but the ct. intimated that in such a case if the sale were confirmed the exor. would take the profits; but if it were set aside, the tenant for life would be entitled to them as income.—*Re NORRINGTON, BRINDLEY v. PARTRIDGE* (1879), 13 Ch. D. 654; 28 W. R. 711, C. A.

*Annotations:—**Consd.* *Re Crowther, Midgley v. Crowther* (1895), 64 L. J. Ch. 537. *Reid.* *Re Irwin, Barton v. Irwin* (1895), 39 Sol. Jo. 253.

2075. — No direction as to income—Unauthorised & hazardous investments.—Testator gave the residue of his personal estate to trustees, directing them to convert it into money, & invest the proceeds in govt. or real securities, of which they were to stand possessed, upon trust for A. during her life, & after her death, for B. The trustees permitted a share, which testator had in an Indian loan, bearing interest at 10 per cent., to remain for several years on that security, during which time they paid to A. the interest at 10 per cent., which it yielded annually; & the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater, than if the conversion had taken place at the end of a year from testator's death:—*Held*: the tenant for life was not entitled to the actual interest, which the money yielded, while it remained on the Indian security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from testator's death.—*DIMES v. SCOTT* (1828), 4 Russ. 195; 38 E. R. 778, L. C.

*Annotations:—**Consd.* *Douglas v. Congreve* (1836), 1 Keen, 410; *Taylor v. Clark* (1841), 1 Hare, 161; *Sutherland v. Cooke* (1844), 1 Coll. 498. *Foll.* *Morgan v. Morgan* (1851), 14 Beav. 72. *Consd.* *Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221. *Dist.* *Morley v. Mendham* (1856), 2 Jur. N. S. 998. *Consd.* *Holgate v. Jonnings* (1857), 24 Beav. 623; *Stroud v. Gwyer* (1860), 28 Beav. 130; *Yates v. Yates* (1860), 28 Beav. 637; *Scholefield v. Redfern* (1863), 32 L. J. Ch. 627. *Dist.* *Bulkeley v. Stephens* (1863), 3 New Rep. 105. *Apld.* *Brown v. Gellatly* (1867), 2 Ch. App. 751. *Reid.* *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Wastell v.*

Leslie, Carter v. Leslie (1844), 13 L. J. Ch. 205; *Band v. Fardell* (1855), 7 De G. M. & G. 628; *Re Llewellyn's Trust* (1861), 29 Beav. 171; *Anderson v. Read* (1874), 22 W. R. 527; *Re Chaytor, Chaytor v. Horn* (1904), 92 L. T. 290; *Slade v. Chaine*, [1908] 1 Ch. 522; *Re McEuen, McEuen v. Phelps*, [1913] 2 Ch. 704.

2076. — [With consent of tenant for life.]—R. by will gave all his residuary estate to the Public Trustee upon trust with the consent of his wife to sell & convert with power with the like consent to postpone sale & conversion for such time as he should think fit & to hold the proceeds upon trust with such consent as aforesaid to invest the same upon specified investments & to pay the income to his wife during her life. Testator's estate comprised investments not authorised by his will which produced a larger income than 4 per cent.:—*Held*: as both conversion & postponement of conversion were subject to the wife's consent her position was the same as if conversion was postponed by the will until after her death & she was entitled to the income in specie.—*Re ROGERS, PUBLIC TRUSTEE v. ROGERS*, [1915] 2 Ch. 437; 84 L. J. Ch. 837; 113 L. T. 916; 60 Sol. Jo. 27.

— *Interest until conversion.*—*See EQUITY*, Vol. XX., pp. 368–370, Nos. 1062–1074.

2077. *Postponement without Impropriety—Income until sale.*—Where by a will or settlement property is directed to be sold & converted & the proceeds held in trust for one for life & then for others, &, either in exercise of a power of postponement or without any impropriety, the sale is postponed, the person entitled to the life interest in the proceeds is, as regards real estate, entitled to the rents & profits thereof until sale, & is consequently to be deemed to be the tenant for life thereof within Settled Land Act, 1882 (c. 38), s. 63.—*Re SEARLE, SEARLE v. BAKER*, [1900] 2 Ch. 829; 69 L. J. Ch. 712; 83 L. T. 364; 49 W. R. 44; 44 Sol. Jo. 716.

Annotations:—*Folld. Re Darnley, Clifton v. Darnley*, [1907] 1 Ch. 159; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74.

2078. — — — — —.]—D., who died on Oct. 31, 1900, by his will, dated Jan. 26, 1899, left all his residuary real & personal estate upon trust for sale &, in the event of his dying leaving issue, which event happened, to invest & pay the income of his wife for life, & after her death for his children at twenty-one or marriage.

By lease dated in the year 1897 he had demised to W. (*inter alia*) all the strata of chalk lying under certain lands at G. for the term of twenty-one years from Sept. 29, 1895, determinable at the end of the seventh or fourteenth year, with power to W. during the demise to require to have additional chalk land on notice, which further pieces of chalk land were from time to time to be allotted to W. on his paying by way of consideration for the purchase of the chalk & other materials £900 per acre until the whole of the same should be dug out.

The trustees under testator's will having received various sums for chalk land pursuant to the lease, asked by a summons, to which testator's infant daughter, by her next friend, & his widow were parties, the directions of the ct. whether the sums so received should be treated by them as capital or income:—*Held*: the sale having been postponed without any impropriety, the rents & profits of real estate until sale were payable to the person who would be entitled to the income of the proceeds of sale.—*Re DARNLEY (EARL), CLIFTON v. DARNLEY*, [1907] 1 Ch. 159; 76 L. J. Ch. 58; 95 L. T. 706; 23 T. L. R. 93; 51 Sol. Jo. 82.

Annotation:—*Folld. Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74.

2079. — — — — —.]—When by a will real &

personal estate are directed to be sold & converted & the proceeds held in trust for one for life & then for others & without any impropriety the sale is postponed, the tenant for life of the proceeds is entitled to the rents & profits of the real estate until sale.—*Re OLIVER, WILSON v. OLIVER*, [1908] 2 Ch. 74; 77 L. J. Ch. 547; 99 L. T. 241.

2080. *Power to retain investments—No direction as to income.*—*GREEN v. BRITEN* (1863), 1 De G. J. & Sm. 649; 46 E. R. 257, L. JJ.; *subsequent proceedings* (1867), 16 L. T. 825.

Annotations:—*Distd. Brown v. Gellatly* (1867), 2 Ch. App. 751. *Consd. Cooper v. Laroche* (1869), 38 L. J. Ch. 591; *Lambert v. Lambert* (1872), 27 L. T. 59. *Apld. Re Lambert, Lambert v. Lambert* (1892), 36 Sol. Jo. 327. *Refd. Lewis v. Mathews* (1866), L. R. 2 Eq. 177; *Massy v. Rowen* (1869), L. R. 4 H. L. 288; *Lean v. Lean* (1875), 23 W. R. 484; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Gow v. Forster* (1884), 26 Ch. D. 672; *Re Thomas, Wood v. Thomas*, [1891] 3 Ch. 482.

2081. — — — — — *Unauthorised investments—Not of wasting nature.*—Testator empowered his trustees at their discretion to continue all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or otherwise to convert the same, & to invest the proceeds in the names of the trustees in certain specified securities. At the death of testator part of his personal estate consisted of securities not of a wasting nature & not specifically authorised. In an action for the administration of the estate the chief clerk found that some of these securities were proper to be continued, & that others were proper to be called in:—*Held*: the tenants for life under the will were entitled to receive in specie the income of those unauthorised securities which were retained, & which were not of a wasting nature.—*Re SHELDON, NIXON v. SHELDON* (1888), 39 Ch. D. 50; 58 L. J. Ch. 25; 59 L. T. 133; 37 W. R. 26.

Annotations:—*Consd. Re Thomas, Wood v. Thomas*, [1891] 3 Ch. 482; *Re Bates, Hodgson v. Bates*, [1907] 1 Ch. 22. *Folld. Re Wilson, Moore v. Wilson*, [1907] 1 Ch. 394. *Consd. Re Nicholson, Eade v. Nicholson* (1909), 78 L. J. Ch. 516.

2082. — — — — —.]—Testator, by will, gave his residuary personal estate & effects to trustees, upon trust to convert the same & invest the proceeds of sale as therein mentioned, with power in their absolute discretion to retain any existing securities or property at the time of his death unconverted for such period as they should think fit; & declared that his trustees should stand possessed of the "stocks, funds, shares, & securities for the time being constituting or representing the residuary personal estate & effects hereinbefore bequeathed, & the income thereof," in trust to pay the income to certain tenants for life, with remainders over. At testator's death part of his personal estate consisted of American railroad bonds repayable at par at a fixed date, but bearing a high rate of interest, & now commanding a considerable premium in the market. These were not authorised investments by the investment clause, but had been retained unconverted by the trustees under the power to retain existing securities:—*Held*: the tenants for life were entitled to the net income of the unconverted property.—*Re THOMAS, WOOD v. THOMAS*, [1891] 3 Ch. 482; 60 L. J. Ch. 781; 65 L. T. 142; 40 W. R. 75.

Annotations:—*Consd. Hope v. D'Hedouville*, [1893] 2 Ch. 361; *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233. *Folld. Re Godfree, Godfree v. Godfree*, [1914] 2 Ch. 110. *Refd. Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678; *Re Bates, Hodgson v. Bates*, [1907] 1 Ch. 22.

2083. — — — — —.]—*Re LYNCH BLOSSE, RICHARDS v. LYNCH BLOSSE* (1899), 43 Sol. Jo. 297.

Annotation:—*Folld. Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4.

Sect. 4.—Right to income: Sub-sect. 3, O. & P. (a).]

2084. ———— **Continuation of estate in business—With consent of tenant for life**—*Re LAMBERT, LAMBERT v. LAMBERT* (1892), 36 Sol. Jo. 327.

2085. ———— **Direction as to income.**—*SCHOLEFIELD v. REDFERN*, No. 2143, *post*.

2086. Unconverted reversionary interest—Not sold until falling into possession.—Bequest of a residue, including a reversionary interest in stock expectant on lives, to trustees, upon trust to convert when they in their discretion should think fit; & to apply so much as they should think fit of the income in the maintenance of tenant for life during minority; & then to pay the whole income to him, with a gift over of the principal. The trustees, in the proper exercise of their discretion, did not sell the reversionary interest, which fell in nineteen years after testator's death, & fourteen years after the majority of the tenant for life:—*Held*: the rights of the tenant for life were not affected by the fact of no sale having been made; & he was entitled to the income on the value of the stock a year after testator's death, calculated on the actual duration & not on the then probability of the duration of the lives on which the reversion was expectant.—*WILKINSON v. DUNCAN* (1857), 23 Beav. 469; 26 L. J. Ch. 495; 29 L. T. O. S. 35; 3 Jur. N. S. 530; 5 W. R. 398; 53 E. R. 184.

Annotations.—*Apld.* *Beavan v. Beavan* (1869), 24 Ch. D. 649, n.; *Re Hollebone*, *Hollebone v. Hollebone*, [1919] 2 Ch. 93.

2087. ———— *BEAVAN v. BEAVAN* (1869), 24 Ch. D. 649, n.; 52 L. J. Ch. 961, n.; 49 L. T. 263, n.; 32 W. R. 363, n.

Annotations.—*Fold.* *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643. *Apld.* *Re Hobson*, *Walker v. Appach* (1885), 55 L. J. Ch. 422; *Re Hollebone*, *Hollebone v. Hollebone*, [1919] 2 Ch. 93. *Refd.* *Re Woods*, *Gabellini v. Woods*, [1904] 2 Ch. 4; *Re Evans' Will Trusts*, *Pickering v. Evans*, [1921] 2 Ch. 309.

2088. ———— *Where reversionary property is allowed to remain unsold until it falls into possession, the estate of a tenant for life of the property under a will who dies before it falls into possession is entitled to have paid to it, in respect of interest, out of the property, 4 per cent. upon the value of the reversion, commencing at the end of a year from testator's death, & calculated upon the assumption that it was to fall in on the day when it actually did fall in.*—*WRIGHT v. LAMBERT* (1877), 6 Ch. D. 649; 26 W. R. 206.

Annotation.—*Refd.* *Re Flower*, *Matheson v. Goodwyn* (1890), 62 L. T. 216.

2089. Trust for sale at life tenant's death.—Testator having, a few days before the date of his will executed a deed of partnership, whereby certain "annual sums," "rents" & "royalties" were payable to him out of the partnership property, by his will gave all the residue of his real & personal estate to trustees upon trust to receive "the rents dividends interest & annual proceeds thereof," & pay the same to his wife for life. After the wife's death the residuary estate was to be sold; & there was a subsequent proviso giving the trustees a discretionary power of conversion in her lifetime:—*Held*: the widow was entitled in specie to the annual income of testator's estate as it existed at the time of his death.—*GREAVES v. SMITH* (1874), 29 L. T. 798; 22 W. R. 388.

Trust for sale of lands—Mesne rents.—*See EQUITY*, Vol. XX., pp. 376, 377, Nos. 1134–1142b.

P. Wasting Property and Unauthorised Investments.

(a) *In General.*

Duty of trustee to convert generally.—*See TRUSTS & TRUSTEES; WILLS.*

2090. Necessity for conversion into permanent securities—Settlement by will.—General rule, that where personal property is bequeathed for life with remainders over, & not specifically, it is to be converted into the 3 per cents. subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; & the tenant for life is entitled only upon that principle.

There is a general rule, that these perishable funds are to be converted in such a way as to produce capital, bearing interest . . . & the advantage, if any, ought not to accrue to the tenant for life (*LORD ELDON, C.*)—*HOWE v. DARTMOUTH (EARL)*, *HOWE v. AYLESBURY (COUNTESS)* (1802), 7 Ves. 137; 32 E. R. 56, L. C.

Annotations.—*Distd.* *Holland v. Hughes* (1809), 16 Ves. 111. *Apld.* *Dimes v. Scott* (1828), 4 Russ. 195; *Alcock v. Sloper* (1833), 2 My. & K. 699; *Mills v. Mills* (1835), 7 Sim. 501. *Distd.* *Pickering v. Pickering* (1839), 4 My. & Cr. 289. *Apld.* *Hinves v. Hinves* (1844), 3 Hare, 609. *Distd.* *Cafe v. Bent* (1845), 5 Hare, 24. *Apld.* *Chambers v. Chambers* (1846), 15 Sim. 183; *Pickup v. Atkinson* (1846), 4 Hare, 624. *Distd.* *House v. Way* (1848), 18 L. J. Ch. 22; *Milne v. Parker* (1848), 17 L. J. Ch. 194. *Consd.* *Cotton v. Cotton* (1850), 14 Jur. 950; *Morgan v. Morgan* (1851), 14 Beav. 72. *Apld.* *Blann v. Bell* (1852), 2 De G. M. & G. 775; *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723. *Distd.* *Bate v. Hooper* (1855), 5 De G. M. & G. 338; *Baud v. Pardell* (1855), 7 De G. M. & G. 628; *Hope v. Hope* (1855), 1 Jur. N. S. 770. *Apld.* *Gurney v. Gurney* (1855), 3 W. R. 353. *Consd.* *Cranley v. Dixon* (1857), 23 Beav. 512. *Distd.* *Slipson v. Lester* (1858), 33 L. T. O. S. 6. *Consd.* *Craig v. Wheeler* (1860), 29 L. J. Ch. 374; *Stroud v. Gwyer* (1860), 28 Beav. 130; *Bulkeley v. Stephens* (1863), 10 L. T. 225. *Apld.* *Pidgeon v. Spencer* (1867), 16 L. T. 83. *Distd.* *Re Sewell's Estate* (1870), L. R. 11 Eq. 80; *Greaves v. Smith* (1874), 29 L. T. 798. *Apld.* *Tickner v. Old* (1874), L. R. 18 Eq. 422. *Distd.* *Lean v. Lean* (1875), 32 L. T. 305; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Waters v. Waters* (1875), 32 L. T. 306, n. *Apld.* *Macdonald v. Irvine* (1878), 8 Ch. D. 101; *Re Smith's Estate*, *Clifford v. Washington* (1879), 48 L. J. Ch. 205. *Distd.* *Gray v. Siggers* (1880), 15 Ch. D. 74; *Re Leonard*, *Theobald v. King* (1880), 43 L. T. 664; *Re Pitcairn*, *Brandroth v. Colvin*, [1896] 2 Ch. 199. *Apld.* *Re Game*, *Game v. Young*, [1897] 1 Ch. 881. *Consd.* *Re Bland*, *Miller v. Bland*, [1899] 2 Ch. 336. *Distd.* *Re Hammersley*, *Heasman v. Hammersley* (1899), 81 L. T. 150. *Apld.* *Pardoe v. Pardoe* (1900), 82 L. T. 547. *Distd.* *Re Van Straubenzee*, *Boustead v. Cooper*, [1901] 2 Ch. 779; *Stanier v. Hodgkinson* (1903), 73 L. J. Ch. 179. *Consd.* *Re Woods*, *Gabellini v. Woods*, [1904] 2 Ch. 4. *Distd.* *Re Benthams*, *Pearce v. Benthams* (1906), 94 L. T. 307; *Re Bates*, *Hodgson v. Bates*, [1907] 1 Ch. 22; *Re Nicholson*, *Eade v. Nicholson*, [1909] 2 Ch. 111. *Apld.* *Re Wareham*, *Wareham v. Brewin*, [1912] 2 Ch. 312. *Distd.* *Re Charteris*, *Charteris v. Biddulph*, [1917] 2 Ch. 379; *Re Evans' Will Trusts*, *Pickering v. Evans*, [1921] 2 Ch. 309; *Re Corelli* (1925), 69 Sol. Jo. 525. *N.F.* *Re Brooker*, *Brooker v. Brooker* (1926), 70 Sol. Jo. 526. *Apld.* *Re Trollope's Will Trusts*, *Public Trustee v. Trollope*, [1927] 1 Ch. 596. *Refd.* *Spong v. Spong* (1827), 1 Y. & J. 300; *Clough v. Bond* (1838), 3 My. & Cr. 490; *Sutherland v. Cooke* (1844), 1 Coll. 498; *Simpson v. Earles* (1847), 11 Jur. 921; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Johnston v. Moore* (1858), 27 L. J. Ch. 453; *Morres v. Hodges* (1860), 27 Beav. 625; *Ibbotson v. Elam* (1865), L. R. 1 Eq. 188; *Craven v. Craddock* (1869), 20 L. T. 638; *Re Bagshaw's Trusts* (1877), 46 L. J. Ch. 567; *Re Chancellor*, *Chancellor v. Brown* (1884), 53 L. J. Ch. 443; *Re Thomas*, *Wood v. Thomas*, [1891] 3 Ch. 482; *Re Armitage*, *Armitage v. Garnett*, [1893] 3 Ch. 337; *Re Gasquoine*, *Gasquoine v. Gasquoine*, [1894] 1 Ch. 470; *Re Whitehead*, *Peacock v. Lucas*, [1894] 1 Ch. 678; *Re Nicholson*, *Nicholson v. Nicholson*, [1895] W. N. 106; *Re Hubbuck*, *Hart v. Stone*, [1896] 1 Ch. 754; *Rowlls v. Bebb*, *Re Rowlls*, *Walters v. Treasury Solicitor*, [1900] 2 Ch. 107; *Re Chaytor*, *Chaytor v. Horn*, [1905] 1 Ch. 233; *Slade v. Chaine*, [1908] 1 Ch. 522; *Re Tedlie*, *Holt v. Croker* (1922), 91 L. J. Ch. 346; *Re Barratt*, *National Provincial Bank v. Barratt*, [1925] Ch. 550. *Mentd.* *Robertson v. Broadbent* (1883), 8 App. Cas. 812; *I. R. Comrs. v. Blott*, *I. R. Comrs. v. Greenwood*, [1921] 2 A. C. 171.

— — — — — *See WILLS.*

2091. — Settlement by deed.—Husband & wife covenanted to vest in the trustees of their settlement, upon the trusts thereof, "all property which should come to her absolutely, & not bound by any trust or provision, otherwise than for her absolute use":—*Held*: (1) property bequeathed to her "for her separate use absolutely" was

bound by the covenant; (2) leaseholds & chattels bound by the covenant were to be enjoyed in specie & unconverted.—*MILFORD v. PEILE* (1854), 17 Beav. 602; 2 W. R. 181; 51 E. R. 1169.

Annotations.—As to (1) *Reid*, *Ramsden v. Smith* (1854), 2 Drew. 298. As to (2) *Reid*, *Re Van Straubenzee*, *Boustead v. Cooper*, [1901] 2 Ch. 779.

2092. ———.]—A settlement contained the usual covenant by the husband & wife to assign after-acquired property of the wife to trustees with a proviso that it should be lawful for the trustees, at the request of the husband & wife during their joint lives, & of the survivor during his or her life, & afterwards at the discretion of the trustees, to sell & dispose of such property & invest the proceeds upon the trusts of the settlement. The wife afterwards became entitled to leaseholds & specific personal chattels:—*Held*: the trustees were not for the present to convert these things without the request in writing of the husband & wife.

I am not aware of any case in which the principle of *Howe v. Dartmouth* (Earl), *Howe v. Aylesbury* (Countess), No. 2090, *ante*, has been applied to a settlement which is a contract between the parties (KINDERSLEY, V.-C.).—*HOPE v. HOPE* (1855), 1 Jur. N. S. 770; 3 W. R. 617.

Annotation.—*Consd.* *Re Van Straubenzee*, *Boustead v. Cooper*, [1901] 2 Ch. 779.

2093. ———.]—The rule in *Howe v. Dartmouth* (Earl), *Howe v. Aylesbury* (Countess), No. 2090, *ante*, & the corollary established in *Re Chesterfield's* (Earl) *Trusts*, No. 2238, *post*, respecting the apportionment between tenant for life & those absolutely entitled in remainder of a reversionary fund which falls into possession, has no application where the fund is subject to the trusts of a marriage settlement.—*Re VAN STRAUBENZEE*, *BOUSTEAD v. COOPER*, [1901] 2 Ch. 779; 70 L. J. (Ch. 825; 85 L. T. 511; 17 T. L. R. 755; 45 Sol. Jo. 738.

Annotation.—*Reid*, *Re Nicholson*, *Kade v. Nicholson*, [1909] 2 Ch. 111.

Power to postpone conversion—Direction as to application of income.—*See* Nos. 2072–2074, *ante*.

—**No direction as to application of income.**—*See* No. 2075, *ante*, No. 2145, *post*.

Power to retain investments.—*See* Nos. 2081–2083, *ante*.

2094. Income exceeding income obtainable on authorised investments—Right of remainderman.—*STROUD v. GWYER*, No. 1982, *ante*.

2095. ———.]—A trustee who has paid the whole of the incomes arising from unauthorised investments of a trust fund to the tenant for life cannot, where no loss has resulted to the fund, be called upon to repay to the estate as part of the capital of the fund so much of the income as exceeded the amount which would have arisen if the fund had been properly invested.—*Re APPLEBY*, *WALKER v. LEVER*, *Re APPLEBY*, *WALKER v. NISBET* (1902), 51 W. R. 153; *on appeal*, [1903] 1 Ch. 565, C. A.

Annotation.—*Consd.* *Slade v. Chaine*, [1908] 1 Ch. 522.

2096. ———.]—The sole trustee of a marriage settlement realised a sum of Consols which had fallen into possession & formed part of the settled funds, & in breach of trust applied the proceeds in paying off a private debt which bore interest at 5 per cent. Subsequently he restored the capital in full to the trust estate, & it was assumed that he had paid interest thereon at the rate of 5 per cent. to the tenant for life under the settlement, who made no claim against him:—*Held*: the persons entitled under the settlement to the fund in remainder were not entitled, as against the tenant for life, to attribute to capital

the excess of interest over the amount which would have been produced if the fund had been invested in authorised securities.—*SLADE v. CHAINE*, [1908] 1 Ch. 522; 77 L. J. Ch. 377; 98 L. T. 352; 52 Sol. Jo. 240, C. A.

Annotation.—*Reid*, *Re Hoyles*, *Row v. Jagg* (No. 2), [1912] 1 Ch. 67.

2097. ———.]—Where a trustee has invested a settled fund in unauthorised investments & the tenant for life has thereby received a larger income, but the capital is intact, the persons entitled in remainder cannot claim to recover from the tenant for life, the excess of income which has been paid to him. This rule applies to a case where the same person is trustee & tenant for life & has herself retained the excess of income.—*Re HOYLES*, *Row v. Jagg* (No. 2), [1912] 1 Ch. 67; 81 L. J. Ch. 163; 105 L. T. 603; 56 Sol. Jo. 110.

2098. Fund left in business without authority—Life tenant allowed 4 per cent. on capital—Balance of profits capital.—*Pltf.* was tenant for life under the settlement executed on her marriage, part of the settled property consisting of a sum of £15,500. This sum was allowed to remain in the hands of *pltf.*'s father, who employed it in trade, he covenanting at his death to pay it to the trustees. Upon the death of the father £10,000, part of the £15,500, was allowed to remain in the business, such investment being unauthorised by the settlement. Large profits accrued to the £10,000, some of which, with *pltf.*'s consent, had been paid to her husband:—*Held*: *pltf.* was entitled in respect of income to 4 per cent. on the original £10,000, & upon all accretions of profits retained & employed in the business, & the rest of the profits must be regarded as capital subject to the trusts of the settlement, & must be made good out of the husband's estate, so far as he had received any part thereof.—*Re HILL*, *HILL v. HILL* (1881), 50 L. J. Ch. 551; 45 L. T. 126.

Annotations.—*Consd.* *Slade v. Chaine*, [1908] 1 Ch. 522. *Reid*, *Re Hobson*, *Walker v. Appack* (1886), 53 L. T. 627.

2099. Effect of Law of Property Act, 1925 (c. 20) — Leaseholds settled on trust for sale.—Having regard to above Act, s. 28 (2) & (5) & s. 205 (1) (9), the principle of *Howe v. Dartmouth* (Earl), *Howe v. Aylesbury* (Countess), No. 2090, *ante*, is no longer applicable to cases of leaseholds settled on trust for sale.—*Re BROOKER*, *BROOKER v. BROOKER* (1926), 70 Sol. Jo. 526.

Annotation.—*Reid*, *Re Trollope's Trusts*, *Public Trustee v. Trollope*, [1927] 1 Ch. 596.

2100. Effect of Administration of Estates Act, 1925 (c. 23)—Power to postpone conversion.—The expression "personal representatives" in above Act, s. 39, does not include trustees in the ordinary sense even when the personal representatives themselves become trustees upon an assent. The introductory words of above Act, s. 39, conferring powers on personal representatives "during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives" are explained by the fact that under the new law of intestate succession the existence of an infant beneficiary or of a beneficiary, such as a widow, entitled to a life interest only may postpone distribution, & that in these cases above Act, s. 33, places the personal representatives substantially in the position of trustees.

The provision in above Act, s. 39 (1) (2), conferring on personal representatives "all the powers, discretions & duties conferred or imposed by law on trustees holding land upon an effectual trust for sale" does not operate referentially to

Sect. 4.—Right to income: Sub-sect. 3, P. (a) & (b).]

make Law of Property Act, 1925 (c. 20), s. 28 (2), applicable to pure personality.

Where under the will of testator unauthorised investments are retained under a power to postpone conversion, the rule laid down in *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)*, No. 2090, *ante*, still remains applicable in regard to the income payable to a tenant for life.—*Re Trollope's Will Trusts, Public Trustee v. Trollope*, [1927] 1 Ch. 596; 96 L. J. Ch. 340; 137 L. T. 375; 71 Sol. Jo. 310.

(b) Interest until Conversion.

2101. Whether interest equal to interest on authorised investments—On value of property—Value taken one year from testator's death.]—*Dimes v. Scott*, No. 2075, *ante*.

2102. ————.]—Testator directed his real & personal estate to be converted, got in & invested in Govt. or real securities & the interest, dividends & annual produce to be paid to his wife for her life. The greater part of testator's property at his death consisted of capital in a partnership business abroad to be withdrawn by instalments in the course of three or five years at the discretion of his exors. & bearing interest at five per cent. in the meantime:—*Held*: the tenant for life would be entitled to the income actually produced by such of the property of testator, as was invested according to his will from the time of such investment; but she was not entitled during the first year after testator's death to a larger income, in respect of such part of testator's property as was not so invested, than the property would have produced if invested according to the will.—*Taylor v. Clark* (1841), 1 Hare, 161; 11 L. J. Ch. 189; 6 Jur. 76; 66 E. R. 990.

Annotations:—Apprvd. Macpherson v. Macpherson (1852), 19 L. T. O. S. 221. *Reid.* Caldecott v. Caldecott (1842), 1 Y. & C. Ch. Cas. 312; Morgan v. Morgan (1851), 11 Beav. 72; Brown v. Gollaty (1867), 2 Ch. App. 751; Anderson v. Read (1874), 22 W. R. 527.

2103. ————.]—Testator bequeathed all his money, securities for money, money in the funds, household furniture, cattle, & all other his personal estate & effects unto two trustees, upon trust to pay his debts & legacies, & subject to the payment of a legacy, to stand possessed upon the trusts after mentioned. He then devised his freehold estates to trustees, upon trust to permit his wife to reside at his house, & to use the household furniture, plate, linen & china therein for her life, & to "pay the rents & profits of his real estate," & "the interest, dividends, & proceeds to arise from his money, & securities for money, money in the funds, & personal estate thereinbefore bequeathed" to her for life, & after her decease, to sell his real estate, & divide & pay the purchase-moneys; "& pay, assign, or transfer his money & securities for money, money in the funds, & personal estate" unto his children. Testator possessed long annuities & leaseholds:—*Held*: (1) they ought to be converted unto 3 per cents., & the widow was merely entitled to the dividends thereon; (2) a tenant for life of a residue was entitled, during the first year, to the dividends on so much 3 per cents. as would have been produced by the conversion of the property at the end of that year.—*Morgan v. Morgan* (1851), 14 Beav. 72; 51 E. R. 214.

Annotations:—Distd. Wearing v. Wearing (1856), 23 Beav. 99. *Consd.* Holgate v. Jennings (1857), 24 Beav. 623; Craig v. Wheeler (1860), 29 L. J. Ch. 374. *Appld.* Rowe v. Rowe (1861), 29 Beav. 276. *Consd.* Thursby v. Thursby

(1875), L. R. 19 Eq. 395; *Re Pitcairn, Brandroth v. Colvin*, [1896] 2 Ch. 199. *Reid.* Morley v. Mendham (1856), 2 Jur. N. S. 998; Yates v. Yates (1860), 28 Beav. 637; *Re Llewellyn's Trust* (1861), 29 Beav. 171; Macdonald v. Irvine (1878), 8 Ch. D. 101; *Re Game, Game v. Young*, [1897] 1 Ch. 881; *Re McEuen, McEuen v. Phelps*, [1913] 2 Ch. 704.

2104. ————.]—Testator specifically bequeathed to trustees certain railway & other shares, upon trust to convert the same at their absolute discretion, & to pay the income arising from the proceeds to his daughter for life, with remainders over. Testator's property had become the subject of an administration suit, in which a decree had been made about two years previously. Some of the shares had not been converted, & the dividends thereon had, since testator's death, been paid to the tenant for life:—*Held*: the tenant for life was only entitled to the income that would have been derived from so much consols as the moneys arising from the sale of the shares one year after testator's death would have purchased at that date, & she must account for what moneys she had received in excess of that sum.—*Anderson v. Read* (1874), 22 W. R. 527.

2105. ———— Value taken at testator's death.]—*Hume v. Richardson*, No. 2237, *post*.

2106. 4 per cent on value—Value taken one year from testator's death.]—Where a will contains an implied but no specific direction for conversion of the property, & by an innocent mistake it has been left upon the original security & the income enjoyed by the tenant for life in specie, the ct. upon the mistake being rectified will, at its discretion, allow the tenant for life interest at the rate of 4 per cent. *per annum* upon the value of the property as taken at the expiration of one year from testator's death.—*Sutherland v. Cooke* (1845), 1 Coll. 503; 5 L. T. O. S. 20; 9 Jur. 224; 63 E. R. 519.

2107. ————.]—Trustees under a will had an option to invest testator's estate in 3 per cents. or on real security, but neglected to do so, leaving the fund in some other state of investment. The trustees having this option to invest either in 3 per cents. or on real security:—*Held*: the tenant for life was entitled to interest for one year after the death of testator at 4 per cent. on the money the property would have produced if sold at the end of that year, until the produce was invested in the 3 per cents. not exceeding the amount of interest actually received.—*Robinson v. Robinson* (1851), 1 De G. M. & G. 247; 21 L. J. Ch. 111; 18 L. T. O. S. 293; 16 Jur. 255; 42 E. R. 547. L. J.J.

Annotations:—Consd. *Re Campbell, Campbell v. Campbell*, [1893] 3 Ch. 468. *Reid.* Morgan v. Morgan (1851), 14 Beav. 72; Knott v. Cottee (1852), 16 Beav. 77; Aspland v. Watte (1855), 20 Beav. 474; Mortimore v. Mortimore (1859), 4 De G. & J. 472; Bradley v. Cartwright (1867), L. R. 2 C. P. 511; Fisher v. Gilpin (1869), 38 L. J. Ch. 230; De Cordova v. De Cordova (1879), 4 App. Cas. 692; *Re Massingberd's Settlement, Re Clark's Settlement, Clark v. Trelawny* (1889), 59 L. J. Ch. 107; Mellingham v. Taylor, [1895] 1 Ch. 53; *Re Godwin's Settlement, Godwin v. Godwin* (1918), 87 L. J. Ch. 645. *Mentd.* Cavendish v. Cavendish (1885), 30 Ch. D. 227; *Re Christmas, Martin v. Lacon* (1885), 30 Ch. D. 544.

2108. ————.]—*Re Nash, Sweet v. Nash* (1894), 38 Sol. Jo. 478.

2109. ———— Value taken at testator's death.]—Part of testator's estate consisted of a contingent reversionary interest in £3,000 which was sold by the trustees seven years after testator's death:—*Held*: the reversion must be valued as at the time of testator's death, & interest on the valuation at 4 per cent. from testator's death paid to the tenant for life.—*Gibbs v. Gibbs* (1872), 26 L. T. 865. *Annotation:—Reid.* *Re Hawkins, White v. White*, [1916] 2 Ch. 570.

2110. ———.]—As between tenant for life & remainderman interested under a will directing the conversion of residuary estate with a power of postponement the tenant for life will be entitled to interest at 4 per cent. upon the capital value, ascertained at testator's death, of unauthorised income producing investments.

In my opinion, in view of the present financial position, it is time to revert to the old rule, & to hold that as between tenant for life & remainderman the tenant for life is entitled to 4 per cent. interest (EVE, J.).—*Re BEECH, SAINT v. BEECH*, [1920] 1 Ch. 40; 89 L. J. Ch. 9; 122 L. T. 117; 63 Sol. Jo. 801.

Annotation.—*Refd. Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271.

2111. ———.]—**Calculation on aggregate value of unauthorised securities.**—*Re OWEN, SLATER v. OWEN*, No. 2335, *post*.

2112. ———.]—*Re NICHOLSON, NICHOLSON v. NICHOLSON*, [1895] W. N. 106.

Annotation.—*Refd. Re Goodenough, Marland v. Williams* (1895), 65 L. J. Ch. 71.

2113. ———.]—By a marriage settlement certain funds were settled upon trust to invest & pay the annual produce during the joint lives of the husband & wife as therein mentioned, & after the death of one of them to the survivor for life, & after the death of the survivor to distribute among the children of the marriage as the husband & wife should jointly appoint, & in default thereof as the survivor should by deed or will appoint. The husband died without exercising the joint power of appointment, & the wife made several successive appointments in favour of certain of her children, & appointed the residue in favour of another child. The wife having died, & an action having been brought for the administration of the trusts of the settlement, & it appearing that the appointees had assigned, in some cases to two or three persons, & incumbered their shares:—*Held*: interest was payable in respect of the several appointments at the rate of 4 per cent. *per annum* as from the death of the tenant for life.—*Re HILL'S SETTLEMENT TRUSTS, HILL v. EQUITABLE REVERSIONARY INVESTMENT SOCIETY, LTD.* (1896), 75 L. T. 477; 41 Sol. Jo. 142.

2114. ———.]—**Unconverted ships earning freights.**—Testator directed his trustees to allow his estate to remain invested as it might be at his decease, if they should think fit, & subject to such direction, to convert it & pay the income to his widow for her life, remainder over. The trustees proceeded to realise his estate as soon as possible after his death, but in the interval certain ships in which he was interested as partner earned freight, & dividends were paid on certain shares held by testator in partnership; on the sale of these ships & shares a considerable profit was also realised:—*Held*: the tenant for life was not entitled to the freight or dividends or to the profits on the sales as income, but they formed part of the capital, & she was entitled to interest thereon from the death of testator.

In this case strictly 4 per cent. only would have been allowed; but 5 per cent. has been given in chambers & has not been objected to, & will therefore stand (MALINS, V.-C.).—*COOPER v. LAROCHE* (1869), 38 L. J. Ch. 591.

2115. ———.]—**For period to one year of testator's death.**—*Re LYNCH BLOSSE, RICHARDS v. LYNCH BLOSSE* (1899), 43 Sol. Jo. 297.

Annotation.—*Fold. Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4.

2116. ———.]—In applying the rule in *Re Chester-*

field's (Earl) Trusts, No. 2238, *post*, as to the apportionment between capital & income of the amount of an unconverted reversionary interest which has fallen in, interest at 4 per cent. ought now to be adopted as the basis of calculation.—*Re BAKER, BAKER v. PUBLIC TRUSTEE*, [1924] 2 Ch. 271; 93 L. J. Ch. 599; 131 L. T. 763; 68 Sol. Jo. 645.

2117. **Five per cent.**—*COOPER v. LAROCHE*, No. 2114, *ante*.

2118. **Three per cent. on value.**—In future, in applying the rule in *Re Chesterfield's (Earl) Trusts*, No. 2238, *post*, as to the apportionment as between capital & income of the amount of an unconverted reversionary interest which has fallen in, interest at 3, instead of at 4 per cent. ought to be adopted as the basis of calculation. So held in a case where the reversion in question formed part of the estate of a testator who died in 1854.—*Re GOODENOUGH, MARLAND v. WILLIAMS*, [1895] 2 Ch. 537; 65 L. J. Ch. 71; 73 L. T. 152; 44 W. R. 44; 39 Sol. Jo. 656; 13 R. 454.

Annotations.—*N.F. Re Hill's Settlement, Trusts, Hill v. Equitable Reversionary Interest Soc.* (1896), 41 Sol. Jo. 142. *Fold. Re Lynch Blossse, Richards v. Lynch Blossse* (1899), 43 Sol. Jo. 297. *Expld. Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271. *Refd. Rowles v. Bebb, Re Rowles, Walters v. Treasury Solicitor*, [1900] 2 Ch. 107; *Re Hargreaves, Hargreaves v. Hargreaves* (1902), 86 L. T. 43; *Re Whiteford, Ingils v. Whiteford*, [1903] 1 Ch. 889; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4.

2119. ———.]—*Re CLEVELAND'S (DUKE) ESTATE, HAY v. WOLMER*, No. 2126, *post*.

2120. ———.]—*Re WOODS, GABELLINI v. WOODS*, No. 1951, *ante*.

2121. ———.]—Testator devised & bequeathed all his real & personal estate not by his will otherwise disposed of to trustees upon trust to sell & convert same, with power to postpone conversion as long as the trustees thought proper & to retain any investments subsisting at his death, whether of the kind thereafter authorised or not, & out of the proceeds to pay debts & legacies, & at the discretion of the trustees to invest the residue & to stand possessed of the residuary trust moneys & the investments for the time being representing same, thereafter called "the residuary trust funds," in trust to pay the income thereof to his wife during her life. At the time of his death testator was possessed of preference & ordinary shares in a coal mining co. The ordinary shares, although not of a wasting character, were not authorised by the investment clause in the will. The trustees therefore sold some of them, & proposed to sell more on a favourable opportunity. They declined to pay to the widow in the meantime the full dividends on the ordinary shares thus retained:—*Held*: in the absence of any express or implied gift of the income pending conversion, the widow was entitled only to interest at 3 per cent. on the value of the ordinary shares at testator's death, & the rest of those dividends must be invested. This rule was well settled, & applied to unauthorised securities whether they were of a wasting character or not.—*Re CHAYTOR, CHAYTOR v. HORN*, [1905] 1 Ch. 233; 74 L. J. Ch. 106; 92 L. T. 290; 53 W. R. 251.

Annotations.—*Distd. Re Wilson, Moore v. Wilson*, [1907] 1 Ch. 394; *Re Inman, Inman v. Inman*, [1915] 1 Ch. 187; *Re Beech, Saint v. Beech*, [1920] 1 Ch. 40. *Refd. Re Bates, Hodgson v. Bates* (1906), 23 T. L. R. 15.

2122. ———.]—**Value taken one year from testator's death.**—*Re LYNCH BLOSSE, RICHARDS v. LYNCH BLOSSE* (1899), 43 Sol. Jo. 297.

Annotation.—*Fold. Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4.

Effect of provision for postponement of conversion.—*See EQUITY*, Vol. XX., pp. 368–370, Nos. 1062–1074.

Sect. 4.—Right to income: Sub-sect. 3, Q. Sect. 5: Sub-sects. 1, 2 & 3, A. (a).]

Q. Other Cases.

2123. Debt owed to testator—Part recovered less than principal.]—TURNER v. NEWPORT, No. 2332, *post*.

2124. Trust of income of one-third of settled funds—To be made up to certain sum from remaining thirds—Right to whole income of one-third.]—By a marriage settlement, a sum of £30,000 Irish currency was vested in trustees, upon trust, out of the interest & dividends of two equal third parts of it, together with the interest & dividends of the remaining third part, to make up the annual sum of £500, & pay such annual sum to the husband & wife during the life of A. :—*Held*: the husband & wife were entitled during the life of A. to the income of the remaining third part, whether it did or did not exceed £500 *per annum*.—DAVIS v. MORIER (1845), 2 Coll. 303; 63 E. R. 745.

Annotation:—Consd. Rogers v. Ingham (1876), 3 Ch. D. 351.

2125. Sum directed to be set apart—Sum not set apart—Interest from testator's death.]—BULKELEY v. STEPHENS, No. 2148, *post*.

2126. Money paid under order of court—Repaid on appeal without interest.]—Where money forming part of the residuary estate of testator was paid away under an erroneous order of the ct., & subsequently, on the order being varied on appeal, was recovered, but without interest:—*Held*: (1) the money so recovered ought not to be treated as consisting of capital only, but a fair proportion of it ought to be paid to the tenant for life of the residue as income, according to the principle of *Turner v. Newport*, No. 2332, *post*; (2) in applying that principle interest ought to be calculated at the rate of 3 per cent., instead of 4, as being more agreeable to the facts of present experience.—*Re* CLEVELAND'S (DUKE) ESTATE, HAY v. WOLMER, [1895] 2 Ch. 542; 65 L. J. Ch. 29; 73 L. T. 313; 13 R. 715.

2127. Mortgage for term—Repayment accelerated—Sum as additional interest.]—A fund settled by will on a person for life, with remainder to others in fee, was invested by the trustees on mtge. with a covenant that it should remain on the security for ten years. Afterwards an agreement was made under which it was repaid with interest in about eighteen months from the date of the agreement, with an additional sum representing in amount interest for a further year at the old rate:—*Held*: the additional sum was capital, not income, & belonged wholly to those entitled in remainder to the fund.—*Re* SEARANCE, SIMONDS v. HUNTINGTON (1896), 74 L. T. 339.

2128. Tenant for life becoming lunatic—Annuities paid to remainderman for twenty years—Payments erroneously continued beyond period.]—A tenant for life became lunatic & by orders in the lunacy made in 1867 and 1868 annuities were directed to be paid to a remainderman, upon proper security for repayment, out of the income of the settled estates for twenty years. The payments were through some unexplained cause continued beyond this period, & in the meantime the remainderman mortgaged his interest in the estates, & subsequently became bkpt. On the death of the tenant for life, his personal representative claimed to retain out of the share of personal estate, to

which the remainderman then became entitled, the amount of the excessive payments beyond the period of twenty years, in priority to the remainderman & all persons claiming under him, together with interest thereon:—*Held*: the personal representative was entitled so to retain these amounts together with interest, & the fact of the estate of the remainderman being in mtge. made no difference.—*Re* LANGHAM, OTWAY v. LANGHAM (1896), 74 L. T. 611.

2129. Sale under special statute—Bonus paid to vendor—Irish Land Purchase Acts.]—Where trustees of lands, held after a life tenancy for charitable purposes, sell the lands under above Acts, 1903 & 1904, the percentage bonus received by them under sect. 48 of the Act of 1903 is to be applied upon the trusts of the settlement but is capital, not income, & is to be paid over as capital to the official trustee with the rest of the purchase-money.—*Re* THORNGATE'S SETTLEMENT, CHURCHER v. A.-G. (1915), 84 L. J. Ch. 561; 113 L. T. 483.

2130. Loan of securities to Treasury—Bonus paid by Treasury.]—Trustees deposited trust securities with the Treasury by way of loan for a term of years under a scheme of the Treasury, known as Scheme B., which provided that while the securities were on deposit with the Treasury the lenders would receive from the Treasury all interest & dividends paid in respect of them & also, by way of consideration for the loan, a payment at the rate of one-half of 1 per cent. *per annum* calculated on the face value of the securities; that at the end of the period of loan the Treasury would either return to the lender the securities or, at their option, pay to him the deposit value, as defined by the scheme, of the securities with an addition of 5 per cent. on that value; & that the interest & dividends on all deposited securities, together with the additional payment at the rate of one-half of 1 per cent. *per annum*, would be paid to the holder for the time being on the Treasury Register, & for convenience of payment, in cases where interest or dividends were payable half-yearly, a full half-year's additional payment, namely, $\frac{1}{2}$ per cent., would be added to the first dividend payment, & on the termination of the loan the amount due from the actual date of deposit to the date of return would be calculated, & any overpayment or underpayment would be adjusted. Questions having arisen whether the one-half of 1 per cent. *per annum* paid as consideration for the loan & the additional 5 per cent. on the deposit value of the securities at the termination of the loan were capital or income of the trust estate, & how the full half-year's additional $\frac{1}{2}$ per cent. added to the first dividend payment was to be dealt with on the death of a tenant for life:—*Held*: (1) the one-half of 1 per cent. *per annum* was to be treated as income & the 5 per cent. was to be treated as capital of the trust estate; (2) the trustees ought to deduct from the first full half-year's payment, in advance, of the additional interest at the rate of $\frac{1}{2}$ per cent. *per annum* & to retain for the purpose of ultimate adjustment, if necessary, so much of such payment as exceeds the amount of such interest at the rate aforesaid for the period between the date of the deposit & the date at which such first payment may be made.—*Re* OPPENHEIM, OPPENHEIM v. OPPENHEIM, [1917] 1 Ch. 274; 86 L. J. Ch. 193; 116 L. T. 7; 33 T. L. R. 119.

PART X. SECT. 4, SUB-SECT. 3.—Q.

*a. Profits from business carried on by tenant for life.]—*WAKEFIELD v. WAKEFIELD (1900), 20 C. L. T. 255; 32 O. R. 36; *affd.* 2 O. L. R. 33.—**CAN.**

*r. Royalties & profits from sale of literary works.]—*In a question between liferenter & heir:—*Held*: royalties & profits derived from sales, subsequent to testator's death, of literary works, published by him during

his lifetime, were part of the income of his estate, those from sales of works published by the trustees after his death were capital.—*DAVIDSON'S TRUSTEES v. OGILVIE*, [1910] S. C. 294.—**SCOT.**

2131. Abortive sale of land—Forfeited deposit.]

A forfeited deposit upon an abortive sale of a mansion house & grounds by the tenant for life of a settled estate constitutes capital money within Settled Land Act, 1882 (c. 38), s. 21, & is applicable as such & not to any other purposes.—*Re FOSTER'S SETTLED ESTATES*, [1922] 1 Ch. 348; 91 L. J. Ch. 365; 126 L. T. 689; 66 Sol. Jo. 299.

SECT. 5.—APPORTIONMENT.**SUB-SECT. 1.—IN GENERAL.**

See Apportionment Act, 1870 (c. 35); & generally, EQUITY, Vol. XX., pp. 280–285.

2132. Every species of income apportionable—

On death of tenant for life after Apportionment Act, 1870 (c. 35).]—Above Act applies to every kind of income, whether made payable under an instrument in writing or otherwise, to which a person may be entitled who dies subsequently to the passing of above Act.

By an order of the court made in 1855, an annuity of £100 was directed to be paid to W. during her life. W. died in 1872:—*Held*: the annuity was apportionable to the day of her death.—*Re THACKER'S TRUSTS* (1873), 28 L. T. 56; 21 W. R. 285.

Annotation:—*Reid*. Patching v. Barnett (1880), 43 L. T. 50.

2133. — Nature of instrument immaterial.]

Re THACKER'S TRUSTS, No. 2132, *ante*.

2134. — — —.]—*Re CLINE'S ESTATE*, No.

2139, *post*.

Exclusion of apportionment.]—*See* Sub-sect. 2, *post*.

SUB-SECT. 2.—EXCLUSION OF APPORTIONMENT.

See Apportionment Act, 1870 (c. 35), s. 7; & generally, EQUITY, Vol. XX., pp. 282, 283, Nos. 411–417.

2135. What amounts to—Trust for sale with power of postponement—Direction for application of income pending sale—To be applied as income from testator's death.]—Apportionment Act, 1870 (c. 35), is not excluded by a power to postpone a trust for sale coupled with a direction that pending sale “the whole of the income of property actually producing income” shall be applied as from testator's death as income.—*Re EDWARDS, NEWBURY v. EDWARDS*, [1918] 1 Ch. 142; 87 L. J. Ch. 248; 118 L. T. 17; 34 T. L. R. 135; 62 Sol. Jo. 191.

— **In relation to dividends.]—***See* COMPANIES, Vol. IX., p. 594, Nos. 3967–3969.

SUB-SECT. 3.—PARTICULAR INSTANCES.**A. Dividends.****(a) In General.**

See Apportionment Act, 1870 (c. 35), & generally, COMPANIES, Vol. IX., pp. 593, 594, Nos. 3963–3969.

2136. Whether dividends apportionable—Sum invested for payment of portions on death of tenant for life—Income payable to tenant for life.]—Upon a sale in the Incumbered Estates Ct. of

Irish property, charged with portions for younger children raisable at death of tenant for life, £25,000 was set apart by the comrs. to answer these portions, & invested in consols. The dividends were received from them by the tenant for life, who died on July 1, 1857:—*Held*: the portioners were only entitled to that portion of the half-year's dividend due upon July 5, which had accrued since July 1, the tenant for life being entitled under Incumbered Estates Act to receive the income upon the fund set apart for portions, & not distributable during his lifetime, or if it had remained unconverted.—*WELLESLEY v. MORNINGTON (EARL)* (1857), 27 L. J. Ch. 150; 6 W. R. 177; *sub nom.* MORNINGTON v. WELLESLEY, 4 Jur. N. S. 6.

2137. — Interest on debentures.]—Testator bequeathed certain railway debentures to trustees to pay the interest to his children for life, & afterwards the capital to go to his grandchildren. Testator died in Feb., & the next half-year's payment of dividend upon the debentures was received in the following July:—*Held*: debentures being in the nature of mtges. upon which the interest accrued *de die in diem*, the portion of the half-year's dividend due up to testator's death was to be considered as capital & not income, as between the tenants for life & remaindermen.—*Re ROGERS' TRUSTS* (1860), 1 Drew. & Sm. 338; 30 L. J. Ch. 153; 3 L. T. 397; 6 Jur. N. S. 1363; 9 W. R. 64; 62 E. R. 408.

2138. — Interests arising under power created before Apportionment Act, 1870 (c. 35).]—There must be an apportionment of dividends between the representatives of a tenant for life & the remainderman, where the interests of the different parties arise under a power of appointment exercised since, though created before, the passing of above Act.—*WARDROPER v. CUTFIELD* (1861), 3 New Rep. 410; 33 L. J. Ch. 605; 9 L. T. 753; 10 Jur. N. S. 194; 12 W. R. 458.

Annotations:—*Mentd.* Scarborough v. Scarborough (1888), 58 L. T. 851; *Re* Tredwell, Jeffray v. Tredwell, [1891] 2 Ch. 610.

2139. — Dividends on fund in court.]—(1) Apportionment Act, 1870 (c. 35), applies to all instruments, whether coming into operation before or not till after the passing of the Act.

(2) Dividends on a fund in ct. representing real estate of testator who died in 1827:—*Held*: apportionable as between successive tenants for life.—*Re CLINE'S ESTATE* (1871), L. R. 18 Eq. 213; 30 L. T. 249; 22 W. R. 512.

Annotations:—*As to* (1) *Consd.* Patching v. Barnett (1880), 43 L. T. 50; Lawrence v. Lawrence (1881), 26 Ch. D. 795. *Generally, Reid. Re* Meredith, Stone v. Meredith (1898), 78 L. T. 492.

2140. — — —.]—Request of stock in a canal co. to trustees to pay the dividends to testator's wife for life & afterwards to fall into the residue:—*Held*: the dividends were apportionable.—*POLLOCK v. POLLOCK* (1874), L. R. 18 Eq. 329; 44 L. J. Ch. 168; 30 L. T. 779; 22 W. R. 724.

Annotation:—*Reid. Re* Meredith, Stone v. Meredith (1898), 67 L. J. Ch. 409.

Compulsory acquisition of land.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 244, 272, Nos. 1412, 1995.

2141. What are dividends—Profits in private partnership.]—Profits in a private trading partnership, carried on under a deed by which it was

PART X. SECT. 5, SUB-SECT. 3.—A. (a).

t. Finality of apportionment—Unexpected increase in capital value—Right to re-apportion.]—For a number of years after testator's death the

trustees, treating certain shares in steamships as wasting securities, apportioned the annual dividends from these shares between income & capital, the amounts determined to be income being paid by them to the life-tenants of these shares, & the amounts deter-

mined to be capital being carried to the capital account of the trust. In 1917, when the shares were ultimately realised, the sum obtained for them, owing to the effect of the war, largely exceeded their value at the date of testator's death. In a question

Sect. 5.—Apportionment: Sub-sect. 3, A. (a), (b) & (c), B., C. & D.]

provided that such dividends should be made from time to time amongst the partners, as the managing partners should direct, are not dividends or other periodical payments in the nature of income within the meaning of Apportionment Act, 1870 (c. 35), & are not apportionable as between tenants for life & residuary legatees under that Act.—*JONES v. OGLE* (1872), 8 Ch. App. 192; 42 L. J. Ch. 334; 28 L. T. 245; 21 W. R. 236, L. C. & L. JJ.

Annotations:—*Distd.* Capron v. Capron (1874), L. R. 17 Eq. 288. **Consd.** *Re Cox's Trusts* (1878), 9 Ch. D. 159; *Patching v. Barnett* (1880), 43 L. T. 50. **Refd.** *Hasluck v. Pedley* (1874), 23 W. R. 155; *Constable v. Constable* (1879), 40 L. T. 516; *Re Griffith, Carr v. Griffith* (1879), 12 Ch. D. 655; *Re Lawrence, Lawrence v. Lawrence* (1884), 53 L. J. Ch. 982. **Mentd.** *Re March, Mander v. Harris* (1884), 27 Ch. D. 166; *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297; *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685.

—*See, also*, COMPANIES, Vol. IX., p. 593, No. 3965.

Exclusion of apportionment.]—*See* Sub-sect. 2, ante.

(b) Sale of Investments.

See Apportionment Act, 1834 (c. 22); Apportionment Act, 1870 (c. 35).

2142. General rule — No apportionment.]—A life estate in realty was created by a deed in 1787. The estate was sold & invested in 1821 in Consols. The tenant for life died on Dec. 9, 1841:—*Held*: her exors. were not entitled to an apportionment of the dividends under Apportionment Act, 1834 (c. 22).—*MICHELL v. MICHELL* (1842), 4 Beav. 549; 7 Jur. 887; 49 E. R. 452.

2143. ———.]—(1) Testator leaving property invested in a variety of securities, giving large time to realise & ample powers to his trustees:—*Held*: he intended, as between tenants for life & remaindermen, that the tenants for life should at once have the income both of the converted & unconverted property in specie as to that which was unconverted, & the actual income of that which was converted.

(2) The ct. will not make any apportionment of income, as between tenants for life & remainderman, with reference to the increase or decrease of price arising out of the nearness or remoteness of a period of investment to or from the day when dividends are payable.—*SCHOLEFIELD v. REDFERN* (1863), 2 Drew. & Sm. 173; 1 New Rep. 465; 32 L. J. Ch. 627; 8 L. T. 487; 9 Jur. N. S. 485; 11 W. R. 453; 62 E. R. 587.

Annotations:—*As to* (2) **Apld.** *Freman v. Whitbread* (1865), L. R. 1 Eq. 266. **Consd.** *Bulkeley v. Stephens*, [1896] 2 Ch. 241. **Distd.** *Re Peel's S. E.*, [1910] 1 Ch. 389. **Generally, Mentd.** *Re Hawkins, White v. White*, [1916] 2 Ch. 570; *A-G v. Coole*, [1921] 3 K. B. 607.

2144. ———.]—The ct. will not, as a general rule, as between tenant for life & remainderman, allow compensation by way of apportionment for loss of income occasioned by the sale of stock, sold to complete a purchase under a power to invest in real estate, being delayed beyond the time fixed for completion by the contract for purchase; even although such delay may have been unavoidable.

Where a tenant for life petitioned to have recouped out of corpus the loss of dividends sustained by her by reason of delay in completion & selling out of stock for that purpose, occasioned by difficulties arising on the title of the estate purchased, the ct. refused to allow such com-

pensation.—*FREMAN v. WHITBREAD* (1865), L. R. 1 Eq. 266; *sub nom. FREEMAN v. WHITBREAD*, 35 L. J. Ch. 137; 13 L. T. 550; 14 W. R. 188.

Annotations:—**Consd.** *Bulkeley v. Stephens*, [1896] 2 Ch. 241. **Distd.** *Re Peel's S. E.*, [1910] 1 Ch. 389.

2145. ———.]—Stock in a public co. forming part of testator's residuary estate was settled upon trust for A. for life, & after her death "to pay transfer & assign my residuary estate & the stocks funds & securities upon which the same shall be invested unto & amongst" certain beneficiaries. After the death of the tenant for life the stock was sold "cum dividend" under an order of the ct. for the purpose of distribution. This order was made in the absence of the legal personal representatives of the tenant for life. After the sale a dividend was declared & received by the purchaser in respect of profits, a portion of which had been earned prior to the death of the tenant for life:—*Held*: the estate of the tenant for life was not entitled under Apportionment Act, 1870 (c. 33), to be paid out of the purchase-money of the stock anything in respect of the dividend; but, inasmuch as if the trust had been strictly carried out in accordance with the terms of the will, by transferring the investments to the beneficiaries, the representatives of the tenant for life would have been in a position, either directly, or through the trustees, to obtain payment of an apportioned part of the dividend, their claim ought under the special circumstances of the case to be acceded to.—*BULKELEY v. STEPHENS*, [1896] 2 Ch. 241; 65 L. J. Ch. 597; 74 L. T. 409; 44 W. R. 490; 12 T. L. R. 350; 40 Sol. Jo. 458.

Annotations:—**Distd.** *Re Peel's S. E.*, [1910] 1 Ch. 389; *Re Sale, Nisbet v. Philp*, [1913] 2 Ch. 697.

2146. ———.]—*Re SHAW'S SETTLEMENT, SHAW v. SHAW* (1919), 147 L. T. Jo. 234.

2147. Exceptions to rule—Special circumstances —Sale of stock for investment in real property—Sale before time for completion.]—Ptfl. was tenant for life of Consols, which were subject to a trust to be invested in real estates. The trustees, in Nov., entered into a contract for the purchase of a large real estate, to be completed on Jan. 6, from which time the purchasers were entitled to the rents. In consequence of the bank books being closed between Dec. 14 & Jan. 16, the trustees, to enable them to complete, sold the Consols on Nov. 26, to be delivered on Dec. 12:—*Held*: the tenant for life was entitled to be paid, as income on the Consols, the difference between the price obtained & the value exclusive of the next dividend.—*LONDESBOROUGH (LORD) v. SOMERVILLE* (1854), 19 Beav. 295; 23 L. J. Ch. 646; 23 L. T. O. S. 291; 52 E. R. 363.

Annotations:—**N.F.** *Scholefield v. Redfern* (1863), 2 Drew. & Sm. 173. **Consd.** *Freman v. Whitbread* (1865), L. R. 1 Eq. 266. **Refd.** *Bulkeley v. Stephens*, [1896] 2 Ch. 241.

2148. ———. Sale of stock for investment in mortgage—Sale with consent of tenant for life.]—A sum of foreign stock, with the current dividend, having been sold by the trustees, with the consent of the tenant for life, & the proceeds of sale of the stock, exclusive of the dividend, having been invested in mtge. for her benefit, the tenant for life was held entitled to an apportioned part of the proceeds of the sale of the dividend.—*BULKELEY v. STEPHENS* (1863), 3 New Rep. 105; 10 L. T. 225.

Annotations:—**Expld.** *Freman v. Whitbread* (1865), L. R. 1 Eq. 266. **Refd.** *Bulkeley v. Stephens*, [1896] 2 Ch. 241; *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233.

between the liferenters & the heirs:—*Held*: the shares were "wasting securities" within the meaning of the settlement; the allocations of the

dividends between income & capital were final, & could not be reconsidered by the trustees with the object of making further payments to the

liferenters out of the portions of the dividends which had been credited to capital.—*WARRACK'S TRUSTEES v. WARRACK*, [1919] S. C. 522.—SCOT.

2149. — Sale under order of court to facilitate distribution.]—*BULKELEY v. STEPHENS*, No. 2145, *ante*.

(c) *Purchase of Investments.*

See Apportionment Act, 1870 (c. 35).

2150. Tenant for life entitled to whole income of sum invested.]—Testator after Apportionment Act, 1870 (c. 35), bequeathed a sum of money to trustees with interest thereon at $4\frac{1}{2}$ per cent. until same should be paid or appropriated, upon trust, with the consent of his wife, to invest same in certain specified securities, & to pay the annual income of the legacy & the investments thereof, including in such income the interest payable in respect of such legacy to his wife for life, with remainders over. Interest was paid to the widow up to the day when, pursuant to an order of the ct. the bequeathed sum was invested in stocks on some of which five months' dividend had been accrued:—*Held*: Apportionment Acts did not apply & the widow was entitled to the whole of the dividends when received upon the purchased stocks.—*Re CLARKE, BARKER v. PEROWNE* (1881), 18 Ch. D. 160; 50 L. J. Ch. 733; 44 L. T. 736; 29 W. R. 730.

2151. Purchase of stocks on which dividends earned or declared.]—Where upon a direction by a tenant for life trustees have invested capital moneys in their lands in the purchase of stocks on which at the date of purchase dividends have been earned & declared but not paid the tenant for life is not entitled to such dividends.—*Re PEEL'S (SIR ROBERT) SETTLED ESTATES*, [1910] 1 Ch. 389; 79 L. J. Ch. 233; 102 L. T. 67; 20 T. L. R. 227; 54 Sol. Jo. 214.

B. Rent.

See LANDLORD & TENANT, Vol. XXXI., pp. 261, 262, Nos. 4023-4033.

C. Rentcharges and Annuities.

See, generally, RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 168-172.

D. Other Cases.

See Apportionment Act, 1834 (c. 22): Apportionment Act, 1870 (c. 35).

2152. Trust for accumulation.]—Where testator directed that if any person, upon becoming beneficially entitled, either as tenant for life or in tail, to estates devised by him to trustees, should be a minor, the trustees should enter into possession, & after providing for the maintenance of the minor out of the rents, should invest & accumulate the surplus until the minor attained twenty-one, & should then apply the accumulations to the same trusts as directed concerning the body of his estate; & an infant tenant for life attained the age of twenty-one between the days on which the rents became payable:—*Held*: to be a case within Apportionment Act, 1834 (c. 22), & the rents were accordingly apportionable.—*SHIR-*

PERDSON v. TOWER (1844), 3 L. T. O. S. 199; 8 Jur. 485.

Annotations:—*Fold*. *Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635; *Clive v. Clive* (1872), 7 Ch. App. 433. *Reid*. *St. Aubyn v. St. Aubyn* (1861), 1 Drew. & Sm. 611; *Wheeler v. Tootel* (1867), L. R. 3 Eq. 571.

2153. —.]—(1) Testator directed that, for twenty-one years next after his death, his trustees should receive & accumulate the rents & profits of his real estate, & apply them towards payment of his debts & legacies, & subject to that term, he gave the beneficial interest in the income of his estate to pltf. for life:—*Held*: under Apportionment Act, 1834 (c. 22), the rent which fell due after the expiration of the twenty-one years must be apportioned between those beneficially interested in the accumulations, & the tenant for life who was entitled on the expiration of the term.

(2) A portion of the income was derived from royalties payable under mining sets or leases, when the ore should be obtained:—*Held*: the rent not becoming due at fixed periods, it did not come within Apportionment Act, 1834 (c. 22).—*ST. AUBYN v. ST. AUBYN* (1861), 1 Drew. & Sm. 611; 30 L. J. Ch. 917; 5 L. T. 519; 9 W. R. 922; 62 E. R. 512.

Annotations:—*As to* (1) *Fold*. *Wheeler v. Tootel* (1867), L. R. 3 Eq. 571; *Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635. *As to* (2) *Consd*. *Llewellyn v. Rows* (1866), L. R. 2 Eq. 27.

2154. —.]—Testator gave the residue of his real & personal estate to trustees, upon trust to receive & accumulate the rents & profits till his nephew should attain twenty-one, when he was to be put into possession of the estate for his life:—*Held*: there must be an apportionment of the rents up to the period of the tenant for life attaining twenty-one.—*WHEELER v. TOOTEL* (1867), L. R. 3 Eq. 571; 36 L. J. Ch. 221; 15 L. T. 529; 15 W. R. 382.

Annotation:—*Reid*. *Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635.

2155. —.]—A settlor, by deed, assigned securities to trustees upon trust after his, the settlor's death, during the minority of A. to pay such portion of the income as they should think proper, for the maintenance & education of A.; & when A. should have attained the age of twenty-one, & thenceforth until he should attain thirty, & upon further trust, when & so soon as A. should have attained thirty, "to stand possessed of the funds & the annual produce thereof, upon trust that they & he shall pay unto & permit" A. " & his assigns to receive & take the whole of the dividends, interest, & annual produce of same, during his life, for his & their own use & benefit," with limitations over. Upon A. attaining thirty:—*Held*: there must be an apportionment of the current dividends.—*DONALDSON v. DONALDSON* (1870), L. R. 10 Eq. 635; 40 L. J. Ch. 64; 23 L. T. 550; 18 W. R. 1101.

2156. Profits from business carried on by trustees.]—Testatrix bequeathed a newspaper to trustees upon trust to continue the publication thereof as long as they thought fit, & to pay one-fourth share of the net profits to J. during his life, & after his death to his widow during her

PART X. SECT. 5, SUB-SECT. 3.—D.

2156 i. Profits from business carried on by trustees.]—*ANDREW'S TRUSTEES v. HALLETT*, [1926] S. C. 1087.—*SCOT*.

u. Proceeds of realisation of investment—Sale of settled leaseholds.]—*Held*: the most equitable apportionment of the purchase-money of the sale of settled leaseholds was to give the tenant for life the interest arising from the investment together with a

half-yearly sum out of the principal, such sum to be half the quotient obtained by dividing the principal moneys by the number of years that the lease would have to run at each division.—*BUSBY v. BUSBY* (1893), 14 N. S. W. Eq. 42; 9 N. S. W. W. N. 124.—*AUS*.

x. — Sale of mortgaged property.]—Money was invested under a settlement on mtgo.; the income was payable to the tenant for life, the corpus to go to the remainderman. The

interest fell into arrear, the mtgee. entered into possession, & after some years sold the property, the proceeds of the sale being less than the capital invested. The income payable to the tenant for life was also very much in arrear:—*Held*: the sum realised by the sale must be apportioned between the tenant for life & the person entitled to it in remainder in the proportions which the arrears of interest due to the tenant for life bore to the original principal sum invested.—*EQUITY*

for purpose of rebuilding.]—A sum of £96 paid to guardian of an infant tenant in tail for rebuilding a copyhold tenement that had been burnt down, but which never had been so applied during the infant's life :—*Held* : to belong to the succeeding remainderman in tail, subject to a deduction of interest upon a larger sum at which the loss was computed.—*ROOK v. WORTH* (1750), 1 Ves. Sen. 460 ; 27 E. R. 1142, L. C.

Annotation :—*Consd.* *Warwick v. Bretnall* (1882), 23 Ch. D. 188.

2163. — Intention of tenant for life to benefit estate.]—J. tenant for life, remainder to W. for life remainder to J. in fee. During life of J. houses on the estate insured by him were burnt down, & insurance money paid to J. which was placed in the funds in his name. J. by his will devised the estate to R. in fee, & his personal estate to W. W. applied part of the insurance money in repairing a house upon the estate. The insurance money unapplied remained standing in J.'s name. W. by his will, stated the circumstances, as to the fund so standing in his brother's name, & bequeathed the residue of his personal property :—*Held* : the insurance money unapplied was subject to the uses of the settlement, & passed to R. the devisee of J.—*NORMIS v. HARRISON* (1817), 2 Madd. 268 ; 50 E. R. 333.

Annotations :—*Expld.* *Rayner v. Preston* (1881), 18 Ch. D. 1. *Refd.* *Noble v. Cass* (1828), 2 Sim. 343 ; *Simpson v. Mountain* (1835), 4 L. J. Ch. 221 ; *Warwick v. Bretnall* (1882), 23 Ch. D. 188. *Mentd.* *Roberts v. Edwards* (1863), 33 L. J. Ch. 369.

2164. — What amounts to expression of intention—Moneys invested in name of trustees.]—The fact that, pending a decision by the tenant for life as to whether he will expend the insurance fund in rebuilding the premises, the money had been invested in the names of the trustees of the settlement during a period of fourteen years :—*Held* : not, under the circumstances, to amount to an abandonment of the life tenant's right to the fund or a gift of it by him to the trustees for the benefit of the corpus of the settlement fund.—*GAUSSEN v. WHATMAN* (1905), 93 L. T. 101.

Annotation :—*Distd.* *Re Quicke's Trusts, Poltimore v. Quicke* (1907), 77 L. J. Ch. 523.

2165. ——The remainderman is entitled to the benefit of a policy effected by the tenant for life.—*GARDEN v. INGRAM* (1852), 23 L. J. Ch. 478 ; 20 L. T. O. S. 17, L. C.

Annotations :—*Refd.* *Rayner v. Preston* (1881), 18 Ch. D. 1. *Mentd.* *Lees v. Whiteley* (1866), L. R. 2 Eq. 143.

2166. ——By the decree in the cause it had been declared that L. was tenant in tail in possession of certain real estates in the pleadings mentioned. A receiver of these estates had been appointed by the ct., with a direction to pay certain fire insurances on the mansion house, stables, & other buildings, & he had also been directed to pay the surplus moneys arising from the rents, etc. to the account of L. A portion of the buildings having been burnt down :—*Held* : the tenant in tail was entitled to the moneys arising from the insurances on them.—*SEYMOUR v. VERNON* (1852), 21 L. J. Ch. 433 ; 19 L. T. O. S. 244 ; 16 Jur. 189.

Annotations :—*Folld.* *Warwick v. Bretnall* (1882), 23 Ch. D. 188 ; *Gausson v. Whatman* (1905), 93 L. T. 101. *Refd.* *Re Quicke's Trusts, Poltimore v. Quicke*, [1908] 1 Ch. 887.

2167. ——During the infancy of a tenant in tail of freehold estates devised in strict settlement, part of which consisted of a corn mill let on lease, the rents were received by his mother on his behalf, & she thereout paid the premiums necessary for keeping up a policy which had been effected in her name for insuring the mill against fire. The

will contained no provision for fire insurance. The mill having been burnt down, & it not being considered for the benefit of any person interested in the settled estates that it should be rebuilt :—*Held* : the insurance moneys belonged to the infant tenant in tail as his personal estate & were not to be treated as real estate for the benefit of all persons interested in the settled estates.—*WARWICK v. BRETNALL* (1882), 23 Ch. D. 188 ; 31 W. R. 520.

Annotations :—*Consd.* *Gausson v. Whatman* (1905), 93 L. T. 101. *Refd.* *Re Quicke's Trusts, Poltimore v. Quicke*, [1908] 1 Ch. 887.

2168. — Insurance of settled chattels.]—During the minority of a life tenant of settled estates in D., the trustees, acting under the powers of Conveyancing & Law of Property Act, 1881 (c. 41), s. 42, & Trustee Act, 1893 (c. 11), s. 18, insured (a) the mansion house & (b) certain settled chattels & furniture against fire. The policies were taken in the names of the trustees, & the premiums were paid out of income. The house & chattels were for the most part destroyed by fire, & the trustees recovered £7,000 on the house policy & £1,244 on the chattel policy. The trustees, the infant life tenant, aged twenty, & the remaindermen all desired the house to be rebuilt & refurnished, but the infant life tenant, who was not bound to insure, claimed that, as the premiums had been paid out of his income, the policy moneys in the hands of the trustees were his, & he was entitled to a charge for any amount expended :—*Held* : (1) under Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, the remaindermen were entitled to have the £7,000 recovered on the house policy applied in rebuilding, & the infant life tenant was not entitled to a charge ; (2) the infant life tenant was entitled to the £1,244 recovered on the chattel policy, to which Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, did not apply.—*Re QUICKE'S TRUSTS, POLTIMORE v. QUICKE*, [1908] 1 Ch. 887 ; 77 L. J. Ch. 523 ; 98 L. T. 616 ; 24 T. L. R. 23.

2169. ——“When a life tenant is under an obligation to insure or trustees have power to insure, whether the insurance is of real estate or chattels, I think that if there are successive interests in the property the insurance is for the benefit of the persons successively entitled & does not belong to any one of them.” In the case of a voluntary insurance to a tenant for life, apart from Fires Prevention (Metropolis) Act, 1774 (c. 78), I think the tenant for life is also entitled to the proceeds of insurance against fire, & that would also be so in the case of chattels (NEVILLE, J.).—*Re BLADON, DANDO v. PORTER*, [1911] 2 Ch. 350 ; 105 L. T. 367 ; *on appeal*, [1912] 1 Ch. 45, C. A.

Annotation :—*Mentd.* *Re Williams' Settlement, Williams v. Wynn v. Williams*, [1922] 2 Ch. 750.

2170. — Effect of Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83.]—*Re QUICKE'S TRUSTS, POLTIMORE v. QUICKE*, No. 2168, *ante*.

2171. — Tenant for life under obligation to insure.]—*Re BLADON, DANDO v. PORTER*, No. 2169, *ante*.

SECT. 7.—ADJUSTMENT OF BURDENS BETWEEN CAPITAL AND INCOME.

SUB-SECT. 1.—OUTGOINGS AND EXPENSES.

A. Charge on Income.

2172. Rent—Quit rent.]—Land tax, quit rent, etc., not apportioned as between tenant for life & the remainder.—*SUTTON v. CHAPLIN* (1804), 10 Ves. 66 ; 32 E. R. 768.

Sect. 7.—Adjustment of burdens between capital and income: Sub-sect. 1, A.]

2173. — *Settled leaseholds.*—*Re* BARING, JEUNE *v.* BARING, No. 1897, *ante*.

2174. — *—*—*Re* REDDING, THOMPSON *v.* REDDING, No. 1899, *ante*.

2175. — *—*—*Re* BETTY, BETTY *v.* A.-G., No. 1900, *ante*.

2176. — *—*—*Re* GJERS, COOPER *v.* GJERS, No. 1901, *ante*.

2177. Abatements of rent.—A married woman was entitled, under a deed dated in 1867, to the surplus rents & profits of certain estates for her life for her separate use without power of anticipation, but subject to a proviso that if she should succeed to an income in her own right of £8,000 or more *per annum* for her separate use, then her life interest in the estate should absolutely cease & determine, & the property should be held upon trust for her husband:—*Held*: in estimating the income, the amount coming to the married woman for her own benefit, after payment of all proper charges, must be ascertained as fairly as possible; the tithes, rentcharges & reasonable abatements of rent were properly deducted; the occupation rent of unlet farms & the mansion house in which the married woman lived could not be regarded as income; & it had not been shown that she had succeeded to an income in her own right of £8,000, or more *per annum*.—BATEMAN (LADY) *v.* FABER (1900), 83 L. T. 9; 48 W. R. 925; 44 Sol. Jo. 590, C. A.

2178. Deductions from rent under Licensing Act, 1904 (c. 23).—The deductions which under Licensing Act, 1904 (c. 23), a licence holder is allowed to make from his rent in respect of charges imposed by quarter sessions to form a compensation fund for non-renewal of licences under that Act are a charge upon the rent. In cases where the reversion is settled a tenant for life has no right in the absence of special directions in the will or settlement to have any part of these deductions paid out of capital.—*Re* SMITH, SMITH *v.* DODSWORTH, [1906] 1 Ch. 799; 75 L. J. Ch. 442; 94 L. T. 643; 70 J. P. 169; 54 W. R. 449; 22 T. L. R. 412; 50 Sol. Jo. 376.

2179. Rentcharges.—BATEMAN (LADY) *v.* FABER, No. 2177, *ante*.

2180. Tithes.—BATEMAN (LADY) *v.* FABER, No. 2177, *ante*.

2181. Land tax.—SUTTON *v.* CHAPLIN, No. 2172, *ante*.

2182. Repairs.—Where the rents of real estate devised in strict settlement were directed to be accumulated during the minority of any person

who should become tenant for life, & the accumulated fund & interest thereon were from time to time to be invested in the purchase of other lands to be settled to the same uses:—*Held*: no part of such accumulated fund could be applied, at the instance of a tenant for life in necessary repairs & improvements on the estate.—BRUNSKILL *v.* CAIRD (1873), L. R. 16 Eq. 493; 43 L. J. Ch. 163; 29 L. T. 365; 21 W. R. 943, L. C.

Annotation:—Mentd. Re Nether Stowey Vicarage (1873), L. R. 17 Eq. 156.

2183. — *Re* COURTIER, COLES *v.* COURTIER, COURTIER *v.* COLES, No. 1896, *ante*.

2184. — *Re* BARING, JEUNE *v.* BARING, No. 1897, *ante*.

2185. — *Re* REDDING, THOMPSON *v.* REDDING, No. 1899, *ante*.

2186. — *Re* TOMLINSON, TOMLINSON *v.* ANDREW, No. 1898, *ante*.

2187. — *Re* BETTY, BETTY *v.* A.-G., No. 1900, *ante*.

2188. Improvements.—Trustees allowed a tenant for life to enter into possession, & she paid the interest of incumbrances & expended money on improvements. The trustees did not call for any account of the rents, & the evidence, both as to the income being insufficient to keep down the incumbrances, & as to the improved value of the estate, was unsatisfactory. The tenant for life purchased the property, & the trustees allowed her to deduct from the purchase-money the money expended in paying interest & in improvements:—*Held*: she ought not to have been allowed those sums.—DIXON *v.* PEACOCK (1855), 3 Drew. 288; 61 E. R. 913.

2189. Insurance.—*Re* BARING, JEUNE *v.* BARING, No. 1897, *ante*.

2190. Management expenses — Incurred in settlor's life.—Testator devised estates to uses in settlement, & bequeathed to the person who should at his death become entitled to possession, all arrears of rent which might be due to his estate at his death, & all proportions to become due to his estate after his death, of rents accruing due at but payable after his death, "but so, nevertheless, that all outgoings of the said hereditaments properly chargeable against such arrears & proportions, & not discharged in my lifetime, shall be paid out of such arrears & proportions":—*Held*: the outgoings properly chargeable against the arrears & proportions of rent included all such expenses due & remaining unpaid at testator's death, as in the ordinary course of management as carried on by him, would, at his death, come into charge against such arrears & proportions.—*Re* CLEVELAND'S (DUKE) ESTATE, WOLMER (VISCOUNT) *v.*

PART X. SECT. 7, SUB-SECT. 1.—A.

2173 i. Rent — Settled leaseholds.—Testator directed his exors. & trustees to allow his wife, if she pleased to occupy his house during her life, with the use of the furniture, & after her death the same might be sold & the proceeds divided among testator's children:—*Held*: the widow was liable to pay all headrent & taxes payable in respect of the period during which she occupied the premises, & to keep them in such repair as a tenant would be liable for in the absence of express contract.—*Re* KINGHAM (DECEASED), KINGHAM *v.* KINGHAM, [1897] 1 I. R. 170.—IR.

2182 i. Repairs.—The cost of effecting ordinary recurring repairs, which last only a short time, such as painting & papering, is to be borne by income. The cost of structural repairs of such a character that both the life tenant & the remainderman will derive substantial benefit therefrom are to be

apportioned between income & corpus in such a manner as the trustees in their discretion think fit.—WILKIE *v.* EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD., [1909] V. L. R. 277.—AUS.

2182 ii. — *—*—The repairs of a tenant for life, however substantial & lasting, are his own voluntary act, & do not arise from any obligation, & he cannot charge the inheritance with them.—*Re* SMITH'S TRUSTS (1854), 4 O. R. 518.—CAN.

2182 iii. — *Re* WOODS (Ont.), [1927] 1 D. L. R. 63.—CAN.

2182 iv. — *Re* KINGHAM (DECEASED), KINGHAM *v.* KINGHAM, [1897] 1 I. R. 170.—IR.

2182 v. — *—*—Trustees executed improvements & repairs on settled property consisting of (a) new work, (b) work of reconstruction, (c) new fixtures or fittings in substitution for old, (d) painting necessitated by constructional alterations, (e) painting not

so necessitated. The money to meet this expenditure was borrowed on the security of other heritage belonging to the trust, & the interest on the sum so borrowed was paid out of the revenue of the whole trust estate:—*Held*: the expenditure on items (a) (b) & (d) was chargeable against capital, but the costs of items (c) & (e) fell to be charged against the revenue of the trust estate.—SHAW'S TRUSTEES *v.* BRUCE, [1917] S. C. 169.—SCOT.

2188 i. Improvements.—Where a life-renter expends money in improving the subject of his life-rent, he is presumed to do so with a view to enhancing his own benefit as life-renter of the estate, but the presumption may be rebutted by facts & circumstances.—MORRISONS *v.* ALLAN (1886), 13 R. (Cl. of Sess.) 1156; 23 Sc. L. R. 846.—SCOT.

2189 i. Insurance.—*Re* WOODS (Ont.), [1927] 1 D. L. R. 63.—CAN.

a. Taxes.—*Semble*: a tenant for life of the whole estate of the testator,

FORESTER, [1894] 1 Ch. 164; 63 L. J. Ch. 115; 69 L. T. 807; 10 T. L. R. 118; 38 Sol. Jo. 96; 7 R. 328, C. A.

Annotation.—*Distd. Re Ford, Myers v. Molesworth*, [1911] 1 Ch. 455.

2191. —.—[By a settlement of freehold property contained in testator's will a power of management was given to the trustees, with power to pay the costs of management out of rents & profits. The property consisted of six hundred & fifty houses let on repairing leases for ninety-nine years at very small ground rents. The trustees employed a surveyor to report on the state of the property, & as a result served notices to repair on a large number of the tenants. The costs of so doing amounted to about half the annual income of the settled estate:—*Held*: these expenses were costs of management, & payable therefore out of income under the provision in the will, but the ct. had power under Settled Land Act, 1882 (c. 38), s. 36, to direct their payment out of capital, if it thought fit, & in the special circumstances of the case it would do so.—*Re TUBBS, DYKES v. TUBBS*, [1915] 2 Ch. 137; 84 L. J. Ch. 539; 113 L. T. 395; 59 Sol. Jo. 508, C. A.

Annotation.—*Apld. Re Stamford & Warrington, Payne v. Grey*, [1916] 1 Ch. 404.

2192. Expenses of receiver.—(1) A. was sole legatee & exor. of testator's personal estate, & tenant for life of his real estate, with remainder to his son. At the death of testator, he was largely indebted, & his personal estate was outstanding, owing, as to the greater part, to his having advanced large sums to a bank, of which his son was a partner, & which failed & became bkpt. For a long period, about eleven years, the tenant for life kept down the interest of the debts out of his life estate, which was wholly or nearly absorbed by such payment. Ultimately, enough personality was got in to pay a large portion of the debts, & was so applied; & then the real estate was sold:—*Held*: no portion of the money representing the corpus of the real estate could be applied in recouping the tenant for life the interest he had paid.

(2) A receiver had been appointed both of the real & personal estate:—*Held*: the tenant for life must bear the receiver's poundage.—*SHORE v. SHORE* (1859), 4 Drew. 501; 28 L. J. Ch. 940; 7 W. R. 390; 62 E. R. 192.

2193. Private Act authorising sale—Costs of obtaining.—Where an estate was settled on legal limitations in favour of one for life, with remainder to an infant tenant in tail, the ct. declined to order that the costs of an application to Parliament for a private Act to carry into effect a proposed sale which was beneficial to the estate should be borne by the estate whether such application were or were not successful. But the tenant for life consenting, the ct., being of opinion that the proposed application to Parliament would be for the benefit of the infant, sanctioned the application on the terms that the costs were to be borne by the tenant for life, unless an Act of Parliament was obtained otherwise directing.—*STANFORD v. ROBERTS* (1882), 52 L. J. Ch. 50; 48 L. T. 262.

2194. Settlement of ships—Expenses of fitting out & repairing.—Testator, a shipowner, gave to his sister for life the interest of an investment to be made of certain parts of his residuary personal estate, & which should arise under the following direction in his will; he directed that his exors.

should not sell any of his ships, or private shares in ships, for a period of seven years from the time of his death, unless the keeping of them should cause loss to or diminution of his estate, & in such case he gave his said exors. a discretionary power to sell same; but, subject as aforesaid, he directed them to retain his said ships & shares of ships for the period of seven years at the least, upon trust to superintend & manage same. At the time of testator's death many of his ships were employed in various voyages, all of which turned out profitably. Some of the other ships in which he had shares incurred losses:—*Held*: the whole must be considered as one general mercantile adventure, & that the amount of the necessary outfits, repairs, alterations, permanent improvements, & general expenses incurred before & subsequently to his death, should be deducted from the profits made & received after his death. The tenant for life entitled to the interest of the balances invested.—*GREEN v. BRITTEN* (1867), 16 L. T. 825; 2 Mar. L. C. 564.

2195. Depreciation of machinery in business settled.—Testator gave his trustees authority to carry on his business & bequeathed to his widow during her life "the profits arising from my business":—*Held*: the trustees had properly charged against the profits before paying them to the widow a yearly sum for depreciation of the machinery used in the business in addition to the cost of repairs.—*Re CRABTREE, THOMAS v. CRABTREE* (1911), 106 L. T. 49, C. A.

2196. Drainage works—Ordered by local authority.—C., by will, bequeathed a leasehold house in London to trustees in trust, after payment of all ordinary outgoings for ground rent, repairs, taxes, expenses of insurance or otherwise, to pay the rents to his wife for life, with remainders over. The local authority ordered certain drains to be made, under Metropolis Local Management Act, 1855 (c. 120), s. 73. The trustees paid all the expenses of their construction out of the rents. The tenant for life took out a summons to have them paid out of the corpus of testator's estate:—*Held*: upon the construction of C.'s will, this was one of the expenses to be paid out of the rents before the income was paid to the tenant for life, *semble*, in no case would any part of similar expenses under the Act be thrown upon the remainderman in favour of the tenant for life.—*Re CRAWLEY, ACTON v. CRAWLEY* (1885), 28 Ch. D. 431; 54 L. J. Ch. 652; 52 L. T. 460; 49 J. P. 598; 33 W. R. 611.

Annotation.—*Apld. Re Smith, Smith v. Dodsworth*, [1906] 1 Ch. 799.

2197. Compensation for unexhausted improvements by tenant.—Under a parol agreement for a lease of a farm for a term of years the tenant went into possession. The lease was to contain a covenant by the landlord to pay the tenant for unexhausted improvements at the expiration of the term, but it was never executed. During the term the landlord died, having devised the farm to pltf. for life, with remainders over. On the expiration of the term the tenant gave up possession & pltf. went into possession. The question then arose, who was to pay the tenant for the valuation of the unexhausted improvements:—*Held*: the obligation to pay for unexhausted improvements was in the nature of a covenant running with the land; &, consequently, the valuation was payable

consisting of an improved farm, & of wild lands, is bound to keep down the taxes on the whole.—*BISCOE v. VAN BEARLE* (1858), 6 Gr. 438.—*CAN.*

b. Rates.—The tenant for life of

settled property is liable for the payment of road board, county & municipal rates, water & otherwise.—*Re HUDSON, COOPER v. HUDSON* (1906), 25 N. Z. L. R. 626.—*N.Z.*

c. —.—[*CLARK* (1871), 9 Macph. (Ct. of Sess.) 435; 43 Sc. Jur. 213.—*SCOT.*
d. —.—[*RODGER'S TRUSTEES v. RODGER* (1875), 2 R. (Ct. of Sess.) 294; 12 Sc. L. R. 204.—*SCOT.*

Sect. 7.—Adjustment of burdens between capital and income: Sub-sect. 1, A. & B.]

not out of testator's estate, but by pltf. as landlord for the time being.—*MANSEL v. NORTON* (1883), 22 Ch. D. 769; 52 L. J. Ch. 357; 48 L. T. 654; 31 W. R. 325, C. A.

Annotations:—*Reid. Eccles v. Mills*, [1898] A. C. 360; *Bath v. Bowles* (1905), 93 L. T. 801; *Re Hughes, Ellis v. Hughes*, [1913] 2 Ch. 491.

Fines & expenses of renewal.—*See LANDLORD & TENANT*, Vol. XXXI., pp. 84–87, Nos. 2278–2306.

B. Charge on Capital.

2198. Repairs.—Testator gave the residue of his real & personal estate upon trust to permit his wife to receive the rents, issues & profits, interest, dividends, & annual proceeds, after paying all outgoings; & after the decease of his wife, as to all the residuary real & personal estate, of which she was to have the clear yearly income for her life, subject as aforesaid, upon trust for his son absolutely. Testator had freeholds & leaseholds; the leaseholds being dilapidated at the death of testator, the wife repaired them under notice from the superior landlord.—*Held*: the amount expended in repairs might be charged on the estate.—*HARRIS v. POYNER* (1852), 1 Drew. 174; 21 L. J. Ch. 915; 16 Jur. 880; 61 E. R. 418.

Annotations:—*Apld. Pinfold v. Shillingford* (1877), 25 W. R. 425. *Reid. Macdonald v. Irvine* (1878), 8 Ch. D. 101; *Re Game, Game v. Young*, [1897] 1 Ch. 881; *Re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312.

2199. —.—Repairs & permanent improvements to a large amount upon an estate of which a lunatic was tenant in tail in possession were found to be expedient. There was in ct. a sufficient fund of personalty to which the lunatic was absolutely entitled, & his income was much more than sufficient for his requirements. The amount required for repairs & improvements was ordered to be raised by mtge. or charge of the settled estate.—*Re GIST (A PERSON OF UNSOUND MIND)* (1877), 5 Ch. D. 881; 26 W. R. 22, C. A.

Annotations:—*Consd. Re Gist*, [1904] 1 Ch. 398.

2200. —.—Testator devised a freehold mansion house to the use of trustees in trust for his sister for life, "subject to the condition that she shall keep the premises in the state of repair in which she finds them at my death," with remainder in trust for his nephews successively for life subject to the same condition, with remainders over, & he bequeathed personal estate upon trusts corresponding to those of the mansion house. The will did not impose on the trustees any trusts whatever for the management, maintenance, or repairs of the mansion house. At testator's death the house was in general disrepair. Upon the application by the trustees as to whether they could apply capital moneys in their hands in putting the house into good repair.—*Held*: as the evidence did not show the case to be one of "salvage," the ct. could not, either under the Settled Land Acts, which admittedly did not apply, or its general jurisdiction, authorise the proposed expenditure.—*Re WILLIS, WILLIS v. WILLIS*, [1902] 1 Ch. 15;

71 L. J. Ch. 73; 85 L. T. 436; 50 W. R. 70; 40 Sol. Jo. 49, C. A.

Annotation:—*Reid. Re Foster's S. E.*, [1922] 1 Ch. 318.

2201. — Expenses of compelling tenants to repair.—The expenses incurred by trustees in compelling tenants of the settled property to fulfil their obligations to repairs, such as costs of survey & of serving notices on the tenants, must be borne in fair proportion by the tenant for life & remainderman & that can be effected by raising the amount on a mtge. of the property. Such expenses are not "outgoings."—*Re McCLURE'S TRUSTS, Carr v. Commercial Union Insurance Co.* (1906), 76 L. J. Ch. 52; 95 L. T. 704; 23 T. L. R. 42; 51 Sol. Jo. 67.

2202. Drainage works.—By the will of testator, who died in 1840, certain freehold messuages were devised to trustees, their heirs & assigns, upon trust to permit A. & B. during their joint lives, & the survivor of them during his life, to hold, occupy, & enjoy the same, & to receive & take the rents thereof, & after the death of the survivor, upon trust for the first & other sons of B. successively in strict settlement. During the life of one of the equitable tenants for life, the trustees applied certain capital moneys held by them upon similar trusts in payment of expenses incurred for drainage works in respect of the devised messuages, which were without such sufficient drains as specified in Public Health Act, 1848 (c. 63), s. 49:—*Held*: (1) as the trustees had the legal estate in the messuages, & were the persons entitled for the time being to receive the rack rents thereof, although in trust for the beneficiaries, they were "owners" within the definition of that term in Public Health Act, 1848 (c. 63), s. 2, had rightly paid the drainage expenses in question out of the capital moneys in their hands, but as between the tenant for life & the remainderman the capital moneys so applied must be treated as a charge upon the messuages.

(2) By a clause in his will testator declared that the parties beneficially entitled to the rents & profits "of any of his houses" should keep the same in good & absolute repair:—*Held*: these drainage works were not "repairs" within the meaning of that clause.—*Re BARNEY, HARRISON v. BARNEY*, [1894] 3 Ch. 562; 63 L. J. Ch. 676; 71 L. T. 180; 43 W. R. 105; 8 R. 159.

Annotations:—*As to (2) Dissd. Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319. *Generally, Reid. Re Farnham's Settlement*, Law Union & Crown Insec. v. Hartopp, [1904] 2 Ch. 561.

2203. Sanitary works.—The cost of sanitary works executed under the Public Health (London) Act, 1891 (c. 76), upon leasehold houses forming part of a residuary bequest to trustees upon trust for tenant for life & remaindermen:—*Held*: payable out of the capital of the residuary estate.—*Re LEVER, CORDWELL v. LEVER*, [1897] 1 Ch. 32; 66 L. J. Ch. 66; 75 L. T. 383; 45 W. R. 172; 41 Sol. Jo. 98; *on appeal*, 76 L. T. 71, C. A.

Annotations:—*Distd. Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319. *Consd. Re Farnham's Settlement*, Law Union & Crown Insec. v. Hartopp, [1904] 2 Ch. 561.

PART X. SECT. 7, SUB-SECT. 1.—B.

2198 i. Repairs—Sums properly expended by trustees for repairs to & caretaking of the trust property to preserve it from deterioration are payable out of corpus.—*Re Tong's Estate, Tong v. Trustees, Executors & Agency Co., Ltd.*, [1907] V. L. R. 338.—*AUS.*

2198 ii. —.—The cost of structural repairs of such a character that both the life tenant & the remainderman will derive substantial benefit therefrom are to be apportioned between income & corpus in such a manner as the

trustees in their discretion think fit. The cost of structural repairs of such a character that the remainderman alone will derive substantial benefit therefrom are to be borne wholly by corpus.—*WILKIE v. EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD.*, [1909] V. L. R. 277.—*AUS.*

2198 iii. —.—*Re Woods* (Ont.), [1927] 1 D. L. R. 63.—*CAN.*

2198 iv. —.—A general jurisdiction exists in the ct. to preserve trust property that extends in a proper case to a recognition of the propriety of expending money in preserving it after

the expenditure has been incurred, & in certain cases, in which the *onus* is obviously on the person claiming, what may be referred to as a salvage claim may be recognised where the expenditure has been incurred by a tenant for life in preserving the property.—*O'NEILL v. PUBLIC TRUSTEE* (1915), 34 N. Z. L. R. 723.—*N.Z.*

2198 v. —.—*ELLIS v. ELLIS'S TRUSTEES* (1895), 22 R. (Ct. of Sess.) 764; 32 Sc. L. R. 611; 3 S. L. T. 64.—*SCOT.*

2198 vi. —.—*SHAW'S TRUSTEES v. BRUCE*, [1917] S. C. 169.—*SCOT.*

2204. —.]—Where a settled trust fund was invested under the powers of the settlement in the purchase of freehold houses in the city & the trustees were required by the corp'n. under Public Health (London) Act, 1891 (c. 76), to do certain repairs on the property, & the equitable tenant for life, having by arrangement with the trustees done the repairs, applied to the ct. for a charge on the corpus for the cost of the repairs, but ultimately waived his claim except as to so much of the expenditure as should be found to have been incurred in respect of repairs in the nature of permanent improvements:—*Held*: he was entitled by subrogation to the rights of the trustees to a charge on the corpus for that amount: *semble*: where the trustees of a settled estate apply to the ct. to be indemnified out of the estate for the cost of repairs done by them on the property in answer to a demand by a sanitary authority, it is competent to the ct. to determine according to the circumstances of the case how the cost shall be borne as between tenant for life & remainderman.—*Re FARNHAM'S SETTLEMENT, LAW UNION & CROWN INSURANCE CO. v. HARTOPP*, [1904] 2 Ch. 561; 73 L. J. Ch. 667; 91 L. T. 780; 48 Sol. Jo. 604; 2 L. G. R. 1050, C. A.

2205. Making up road.—By the leases in 1875 & 1877 of two houses abutting on a private road, the lessee covenanted to pay all rates & taxes & to keep up the road. In 1882 the lessee executed a deed of gift of the two houses to his son upon trust for the father for life he paying "all outgoing & performing the covenants in the leases" & after his death upon trust for the son absolutely. In July, 1884, the local board served notices on the father under Public Health Act, 1875 (c. 55), s. 150, requiring him to make up the portions of the road on which the houses abutted; but the notice was not complied with & the board themselves did the work, which was completed in Feb. 1885. In June, 1885, the father died & the son entered into possession of the houses. In Sept. 1886, the son was served by the board with notices assessing a sum on each house for the proportion of expenses of making up the road & in Feb. 1887, he was served with demands & orders for payment of the assessed amounts by instalments with

interest. In an action by the son claiming payment of the assessed expenses out of the father's estate:—*Held*: (1) the expenses were not a debt due from the father's estate inasmuch as the relation of debtor & creditor was not created by Public Health Act, 1875 (c. 55), between the board & an owner of property for expenses incurred by the board; (2) the charge of the expenses under sect. 257 could not be recovered by the son against the estate of the tenant for life.—*Re BOOR, BOOR v. HOPKINS* (1889), 40 Ch. D. 572; 58 L. J. Ch. 285; 60 L. T. 412; 53 J. P. 467; 37 W. R. 349.

Annotations:—*As to* (1) *Distd.* *Tubbs v. Wynne*, [1897] 1 Q. B. 74. *Reid*. *Hornsey L. B. v. Monarch Investment Bldg. Soc.* (1889), 23 Q. B. D. 149. *Generally*. *Mentd.* *Stock v. Meakin*, [1899] 2 Ch. 496; *Re Waterhouse's Contract* (1900), 44 Sol. Jo. 645; *Re Allen & Driscoll's Contract*, [1904] 2 Ch. 226.

2206. Premiums on insurance policies.—Testator devised & bequeathed his residuary real & personal estate to trustees upon trust to sell & convert & to pay the income of the proceeds to his wife for life or during widowhood & after her death or remarriage to divide his estate into six equal parts which he settled upon his six children for life with remainder to their respective children absolutely, with power for his trustees to retain his estate in its then state of investment, unless directed by his wife to sell, & with a proviso that until such sale the income of his estate should be paid to the persons to whom the income of the proceeds of his residuary estate would for the time being be payable. Testator's estate included an estate *pur autre vie* in certain funds which produced about £244 a year & two policies of assurance for £1,000, & £750 respectively, the annual premiums on which amounted to about £60. The *cestui que vie* had disappeared some years ago & his whereabouts was not known:—*Held*: the trustees were entitled to postpone the sale both of the life interest & the policies, & the premiums on the policies were payable out of capital.—*Re SHERRY, SHERRY v. SHERRY*, [1913] 2 Ch. 508; 83 L. J. Ch. 126; 109 L. T. 471.

2207. Capital left in business—Expenses of yearly audit & stocktaking.—*Re BENNETT, JONES v. BENNETT*, No. 2158, *ante*.

2208 i. Premiums on insurance policies.—The ct. authorised the payment out of capital moneys of the premium on an insurance of a mansion house against damage or fire arising out of riot or civil commotion, the subject-matter of the trust, situated in a disturbed district.—*Re KINAHAN'S TRUSTS, HAMILTON & BOWLES v. HUDSON-KINAHAN*, [1921] 1 I. R. 210.—*IR*.

6. Improvements—To prevent forfeiture of license.—Where settled estate comprises a licensed public house, the ct. has jurisdiction to raise money out of the estate & apply it in making improvements & additions to the licensed premises, where such are necessary to prevent the forfeiture of the license.—*Re DONNELLY, DONNELLY v. DONNELLY* (1901), 1 S. R. N. S. W. (Eq.) 150; 18 N. S. W. N. 277.—*AUS*.

f. —.—.]—*WILSON v. GRAHAM* (1887), 13 O. R. 601.—*CAN*.

g. —.—.]—*OUCHTERLONY v. OUCHTERLONY* (1888), 1 L. R. 11 Mad. 360.—*IND*.

h. —.—.]—To entitle a tenant for life to recoupment out of capital moneys of sums expended by him on improvements, such expenditure must be in the nature of salvage payments,

necessarily made to save the estate from actual danger of destruction, e.g. money expended to prevent an immediate breach in a sea-wall & consequent flooding. Money spent on ordinary improvements or current maintenance does not come within the rule; & it is immaterial that the estates comrs. insist on such improvements as a condition precedent to a sale under the Land Purchase Acts.—*Re COBLEN'S ESTATE*, [1923] 1 I. R. 1.—*IR*.

k. —.—.]—*BAYLEY v. GAISFORD*, [1920] N. Z. L. R. 369.—*N.Z.*

l. Fencing.—The cost of fencing land, part of the settled estate, may be ordered to be paid out of capital, & a sinking fund established out of income or repayment of the amount to capital in fifteen years.—*Re STAUGHTON'S SETTLED ESTATE*, [1909] V. L. R. 174.—*AUS*.

m. —.—.]—*To utilise land for farming purposes.*—*Re POTTER (DECEASED)* (1915), 34 N. Z. L. R. 646.—*N.Z.*

n. Taxes.—A devisee of a life estate in all a testator's property is bound to keep down the annual taxes on the land, & they form a first charge on the testator's interest.—*GRAY v. HATCH* (1871), 18 Gr. 72.—*CAN*.

o. Erection of retaining wall.—*Held*: the erection of the retaining wall was an act of salvage, which was necessary for the preservation of the settled property; the cost of the work should therefore be paid out of the corpus.—*LYRE v. O'RORKE* (1905), 25 N. Z. L. R. 182.—*N.Z.*

p. Putting down burned area in grass—Prevention of growth of noxious weeds.—*Re POTTER (DECEASED)* (1915), 34 N. Z. L. R. 646.—*N.Z.*

q. Payment of commission on sale of settled property.—*Held*: payment of commission on sale of property was an outgoing properly chargeable against the estate.—*BAYLEY v. GAISFORD*, [1920] N. Z. L. R. 369.—*N.Z.*

r. Expenses of examination of & changes in investments.—*Held*: all expenses connected with the examination of investments from time to time & changes in them fell to be paid out of the capital.—*SMITH v. BENNIE* (1890), 18 R. (Cl. of Sess.) 441; 28 Sc. L. R. 32.—*SCOT*.

t. Composition.—*Held*: a taxed composition, eligible every fifteen years, free to be paid out of the capital of the trust estate.—*EDGAR'S TRUSTEES v. EDGEWARE*, [1915] S. C. 174; 52 Sc. L. R. 135; [1914] 2 S. L. T. 361.—*SCOT*.

Sect. 7.—Adjustment of burdens between capital and income: Sub-sect. 2, A. (a) & (b).]

SUB-SECT. 2.—COSTS OF LEGAL PROCEEDINGS.

A. Applications to Court.

(a) By Tenant for Life.

2208. Whether payable out of income or capital—Costs of application for payment of income—Of fund in court.]—The costs of a petition by tenant for life under 10 & 11 Vict. c. 96, cannot be ordered to be paid out of the capital of the fund in the absence of the persons entitled to such capital.—*Ex p. FLETCHER* (1818), 17 L. J. Ch. 169; 11 L. T. O. S. 218; 12 Jur. 619.

2209. ————.]—The costs of all parties of & incident to an application by the tenant for life for the payment to her of the income of a trust fund, which has been paid into ct. under Trustee Relief Act, will be ordered to be paid out of the corpus of the fund, notwithstanding the parties entitled in remainder oppose such payment.—*Re FIELD'S TRUST* (1852), 16 Beav. 146; 19 L. T. O. S. 253; 16 Jur. 770; 51 E. R. 733.

Annotation:—Consd. Re Turnley's Trusts (1866), 35 L. J. Ch. 313.

2210. ————.]—Costs of the application for payment of the dividends of a fund in ct., to the tenant for life, are payable out of income.—*Re INGRAM* (1854), 18 Jur. 811; 2 W. R. 679.

2211. ————.]—Where a tenant for life petitions the ct. under Trustee Relief Act, the costs of petitioner ought to be borne by himself, & those of the trustees by the corpus of the fund.—*Re WHITLING'S SETTLEMENT* (1861), 30 L. J. Ch. 862; 4 L. T. 739; 7 Jur. N. S. 754; 9 W. R. 830.

Annotation:—Distd. Eady v. Watson (1861), 10 Jur. N. S. 982.

2212. ————.]—Costs of a petition by a tenant for life to obtain the income of a fund, paid into ct. under Trustee Relief Act, ordered to be paid out of the corpus.—*Re LEAKE'S TRUSTS* (1863), 32 Beav. 135; 1 New Rep. 417; 7 L. T. 816; 9 Jur. N. S. 453; 11 W. R. 352; 55 E. R. 53.

Annotations:—Distd. Eady v. Watson (1864), 10 L. T. 285.

Consd. Re Turnley's Trusts (1866), 35 L. J. Ch. 313.

2213. ————.]—Upon a petition in an administration suit for the payment of the income to the tenant for life, the costs of all parties must be paid out of the income. *EADY v. WATSON* (1864), 33 Beav. 481; 10 L. T. 285; 10 Jur. N. S. 982; 12 W. R. 682; 55 E. R. 454.

Annotation:—Consd. Re Turnley's Trusts (1866), 35 L. J. Ch. 313.

2214. ————.]—Where money is paid into ct. under Trustee Relief Act, & an application is made for payment of the dividends to a tenant for life, the trustees only are entitled to their costs out of corpus, the other costs must be paid out of income.—*Re TCHITCHAGOFF'S WILL* (1864), 10 L. T. 860; 12 W. R. 1100.

2215. ————.]—Where a trust fund has been paid into ct. under Trustee Relief Act, the costs of a petition by the tenant for life for payment to him of the dividends will be payable out of the income.—*Re MARNER'S TRUSTS* (1866), L. R. 3 Eq. 432; 36 L. J. Ch. 58; 15 L. T. 237; 12 Jur. N. S. 959; 15 W. R. 99.

Annotations:—Distd. Re Gordon's Trusts (1868), L. R. 6 Eq. 335.

Apld. Re Evans' Trusts (1872), 7 Ch. App. 609.

2216. ————.]—On July 25, 1864, an order was made for the payment of the dividends on a sum of stock paid into ct. under 10 & 11 Vict.

c. 96, to the person entitled thereto for life. On June 12, 1866, the ct., on the application of the tenant for life, made an alteration in the order of July 25, 1864, by directing the costs of petitioner to be paid out of the corpus.—*Re TANNER'S TRUSTS* (1866), 35 L. J. Ch. 689; 14 L. T. 589.

2217. ————.]—The costs of all parties on a petition for payment to a tenant for life of the dividends of a fund paid in under 10 & 11 Vict. c. 96, are payable out of the corpus of the fund.—*Re TURNLEY* (1866), 1 Ch. App. 152; 35 L. J. Ch. 313; 13 L. T. 662; 12 Jur. N. S. 305; 14 W. R. 322, L. C.

Annotations:—N.F. Re Marner's Trusts (1866), L. R. 3 Eq. 432.

Distd. Pratt v. Jenner, Ex p. Jenner (1866), 35 L. J. Ch. 682.

N.F. Re Evans' Trusts (1872), 7 Ch. App. 609.

2218. ————.]—On a petition by a tenant for life of a fund transferred into ct. under Trustee Relief Act, the costs of the trustee are chargeable on the corpus.—*Re KNIGHT'S TRUSTS* (1868), 37 L. J. Ch. 409.

2219. ————.]—(1) Where a fund has been paid into ct. by a trustee under Trustee Relief Act, his costs, charges & expenses properly incurred in, about, & preliminary to the payment into ct., are payable out of the capital of the fund.

(2) His costs of appearance on a petition for payment of dividends are payable out of income.—*Re WHITTON'S TRUSTS* (1869), L. R. 8 Eq. 352.

Annotations:—As to (2) Follid. Re Munton's Trusts (1870), 39 L. J. Ch. 764; *Re Smith's Trusts* (1870), L. R. 9 Eq. 374; *Re Evans' Trusts* (1872), 41 L. J. Ch. 512.

2220. ————.]—Where testator has given a fund to trustees upon trust for investment in land which is to be settled to the use of several persons successively for their lives, & the fund is paid into ct. in an administration suit, & has not been invested in land, the costs of a petition, by the tenant for life for payment of the dividends to him are payable out of corpus.—*SCRIVENER v. SMITH* (1869), L. R. 8 Eq. 310.

2221. ————.]—Upon a petition by a tenant for life for payment of the income of a fund paid into ct. under Trustee Relief Act, the costs of the trustees are payable out of the income & not out of the corpus of the fund.—*Re SMITH'S TRUSTS* (1870), L. R. 9 Eq. 374; 22 L. T. 220; 18 W. R. 513.

Annotations:—Follid. Re Munton's Trusts (1870), 39 L. J. Ch. 764; *Re Evans' Trusts* (1872), 41 L. J. Ch. 512.

2222. ————.]—*Re WOOD'S ESTATE*, No. 2311, *post*.

2223. ————.]—Where a fund had been paid into ct. by trustees under Trustee Relief Act, & a petition was presented by the tenant for life for payment of the income, & the costs of the trustees & of the petition were ordered to be paid out of income & not corpus.—*Re MUNTON'S TRUSTS* (1870), 39 L. J. Ch. 764; 22 L. T. 293.

Annotation:—N.F. Re Wood's Trusts (1870), 40 L. J. Ch. 179.

2224. ————.]—Upon a petition by a tenant for life for the payment to her of the income of a fund in ct. under an administration suit, the costs of all parties were ordered to be paid out of corpus.—*LONGUET v. HOCKLEY* (1870), 22 L. T. 198.

2225. ————.]—The costs of trustees appearing upon a petition by a tenant for life for payment of the dividends of a fund in ct., are payable out of the income of the fund.—*Re MASON'S TRUSTS, Ex p. SMITHETT* (1871), L. R. 12 Eq. 111; 24 L. T. 860; 19 W. R. 1025.

PART X. SECT. 7, SUB-SECT. 2.—
A. (a).

2208 i. Whether payable out of income

*or capital—Costs of application for payment of income—Of fund in court.]—*When the ct. pays out the dividends of a fund to the tenant for life of the

fund the costs of the petition will be paid out of the dividends & not out of the corpus.—*Re CAMERON'S TRUSTS* (1867), 15 W. R. 861.—**IR.**

2226. — — — —.]—Where a trust fund has been transferred into ct. under Trustee Relief Act, & a petition is presented for payment of the income to the tenant for life, the costs of the trustees, as well as of all other necessary parties, will be paid out of the income.—*Re EVANS' TRUSTS* (1872), 7 Ch. App. 609; 41 L. J. Ch. 512; 26 L. T. 815; 20 W. R. 695, L. J.

Annotation:—Consd. Re Battell's Trusts (1872), 21 W. R. 138.

2227. — — — —.]—Upon a petition by tenant for life of a sum of stock which had been paid into ct. under Trustee Relief Act for payment out of the dividends, the trustee, who appears on the petition after notice from petitioner's solr. not to do so, upon the ground that the petition relates to the income only, will not be allowed his costs of the appearance out of the funds representing income.—*Re BATTELL'S TRUSTS* (1872), 21 W. R. 138.

2228. — — — —.]—*Costs of application for possession.*—*Re BAGOT'S SETTLEMENT, BAGOT v. KITTOE*, No. 1793, ante.

2229. — — — —.]—*Re NEWEN, NEWEN v. BARNES*, [1894] 2 Ch. 297; 63 L. J. Ch. 763; 70 L. T. 653; 58 J. P. 767; 43 W. R. 58; 8 R. 309.

Annotations:—N.F. Re Hunt, Pollard v. Geake (1900), 44 Sol. Jo. 314. *Reid. Montefiore v. Guedella*, [1903] 2 Ch. 723; *Wheeler v. Tootell* (1903), 17 Sol. Jo. 710; *Re Sampson, Sampson v. Sampson*, [1906] 1 Ch. 435; *Re Stamford & Warrington, Payne v. Grey*, [1925] 94 L. J. Ch. 294.

2230. — — — —.]—*Re HUNT, POLLARD v. GREAKE* (1901), 45 Sol. Jo. 652, C. A.

2231. — — — —.]—*Costs of application for change of investment.*—A trust fund ordered to be invested in Bank Stock & East India Stock, on the application of a tenant for life, herself the settlor, the reversioners who opposed being volunteers.

As the change of investment is a clear loss to the reversion, the costs must come out of the income (PAGE WOOD, V.-C.).—*EQUITABLE REVERSIONARY INTEREST SOCIETY v. FULLER* (1861), 1 John. & H. 379; 30 L. J. Ch. 497; 4 L. T. 50; 7 Jur. N. S. 307; 9 W. R. 400; 70 E. R. 794; on appeal, 30 L. J. Ch. 848, L. J.

Annotation:—Reid. Bishop v. Bishop (1861), 30 L. J. Ch. 624.

2232. — — — —.]—Under special circumstances the ct., upon the petition of a tenant for life, sanctioned a change of investment from New 3 per cents. to Bank Stock, but refused to allow any part of the fund to be invested in East India Stock; & the fund being in ct. the costs of the tenant for life were directed to be paid out of the income, & those of resps. out of the corpus.—*Re LANGFORD'S TRUSTS* (1861), 2 John. & H. 458; 31 L. J. Ch. 334; 5 L. T. 579; 8 Jur. N. S. 114; 10 W. R. 121; 70 E. R. 1138.

2233. — — — —.]—By an order dated Feb. 15, 1878, certain estates settled by the will of C. were ordered to be sold, & two trustees were appointed to receive the purchase-moneys & directed to apply same, after paying off certain incumbrances to some one or more of the purposes mentioned in Settled Estates Act, 1877 (c. 18), s. 34, without any further application to the ct., & it was ordered that until same could be so applied the trustees should from time to time invest same in Consols, & apply the dividends upon the trusts by the will declared of the rents of the lands ordered to be sold. A summons was taken out by the tenant for life asking that the Consols might be sold out & the proceeds invested in the debentures stocks of four leading railway cos. in accordance with

Settled Land Act, 1882 (c. 39), s. 21. On Jan. 17, 1889, the judge made an order in chambers refusing the application on the ground that he had no power to alter the specific directions of the former order. On motion now made to discharge this order:—*Held*: since, if the money were invested in land, it might immediately be sold again by the tenant for life, & the purchase-money invested as asked, the ct. would direct the investment to be made at once. Order made accordingly. The costs of the application were ordered to be paid by the tenant for life.—*Re TENNANT* (1889), 40 Ch. D. 594; 58 L. J. Ch. 457; 60 L. T. 488; 37 W. R. 542; 5 T. L. R. 316.

Annotation:—Reid. Re Mundy's S. E., [1891] 1 Ch. 399.

(b) By Trustees.

2234. For directions as to application of income.—*Costs out of income.*—Where testator directed the whole income of a trust fund to be paid to his widow, if she was capable of managing her own affairs, but a smaller annual sum, if she was legally declared incapable, the expenses of a reference to the master to inquire as to the propriety of issuing a commission in lunacy respecting her, on which the master decided in her favour, were directed to be paid out of the dividends of the trust fund, & not out of the corpus.—*WINTHROP v. WINTHROP* (1816), as reported in 15 L. J. Ch. 403, L. C.

2235. — — — —.]—The property of S. upon her marriage vested in trustees upon trusts for her for life for her separate use, with a life interest to her husband, if he survived her, with remainder to the children of the marriage. There were four children & the wife became of unsound mind, though not so found by inquisition. The income of the trust funds amounted to £115 & the husband's expenses by reason of the lunacy were £84 12s. yearly. Under these circumstances, on a petition presented by the trustees, their lordships expressed the opinion that the whole income should be paid to the husband, he undertaking to apply it for the support of his wife & children, & an order to that effect was made, but it was ordered that the income should bear the costs of the petition.—*Re SPILLER* (1860), 2 L. T. 71; 6 Jur. N. S. 386; *sub nom. Re* — (A LUNATIC), 8 W. R. 333, L. J.

2236. — — — —.]—Trustees petitioning under Trustee Relief Act, 1859 (c. 35), s. 30, for the advice of the ct. as to the application of income to which a married woman of unsound mind not so found was entitled for her separate use, were directed to pay the whole of it to her husband on his undertaking to apply it for her maintenance, her consent in writing, which, under two of the instruments, was necessary for any investments by the trustees, being dispensed with. Costs out of the income.—*Re T*—(1880), 15 Ch. D. 78; 29 W. R. 42.

2237. — — — —.]—*Costs out of capital.*—Q. by his will, dated Aug. 30, 1844, gave all his real & personal estate to trustees, upon trust to convert such part thereof as should not consist of money, or securities for money in govt. securities, into money, & to invest the same in the public stocks or funds of Great Britain & to stand possessed thereof, & to lay out & invest same in the purchase of freehold lands of inheritance in Ireland, either in one purchase or from time to time, as eligible purchases might offer; the said estates, when

22281. — — — —.]—*Costs of application for possession.*—The ct. has jurisdiction to make the costs of proceedings instituted or carried on by a tenant for

life for the recovery or protection of a settled estate a charge upon the estate, & to order an immediate sale of a sufficient portion of the estate

for the purpose of defraying such costs. *O'NEIL v. HART* (No. 3) [1905] V. L. R. 306.—AUS.

Sect. 7.—Adjustment of burdens between capital and income: Sub-sect. 2, A. (b), B. & C.; sub-sect. 3, A. (a).]

purchased, to be vested in the trustees, to the use of C. for life, & after her death to W. for life, with limitations over in favour of the sons of W. in tail; & testator directed that until such time as his residuary estate should be laid out in the purchase of lands as aforesaid, his trustees should pay & apply the dividends, interest, & annual produce thereof, or of such part thereof as should remain so uninvested in the purchase of lands, to & for the use of such persons, & for such estates & interest, as he or they would be entitled to in the hereditaments directed to be purchased, or as near thereto, as the law would permit. Testator died in 1858, & at the same time of his death a considerable portion of his estate was invested in English & Irish Bank Stock, & in East India Stock. Upon a special case submitted for the opinion of the ct., whether the trustees were justified in retaining such part of the estate as was so invested in the English & Irish Bank Stock & East India Stock until eligible purchases of land could be obtained, & also for the direction of the ct. as to the proper mode of paying the income & accumulations of it, & as to future investments, & the costs of the special case:—*Held*: (1) according to the terms of the will, Bank & East India Stock were not securities for money in govt. securities; Law of Property Amendment Act, 1860 (c. 38), s. 12, which made Law of Property Amendment Act, 1859 (c. 35), s. 32, retrospective, made it so only as to instruments on which Law of Property Amendment Act, 1859 (c. 35), s. 32, did not previously operate, but did not alter rights which had then actually accrued & arisen; & the tenant for life was entitled to no more than the stock would have produced if placed in the state of investment which testator intended—that was to say, the income of so much 3 per cent. Consols as would have been produced if the Bank Stock & India Stock has been converted into those funds at the death of testator; (2) the costs of the special case must be paid out of the surplus income, which was to be treated as capital.—*HUME v. RICHARDSON* (1862), 4 De G. F. & J. 29; 31 L. J. Ch. 713; 6 L. T. 624; 8 Jur. N. S. 686; 10 W. R. 528; 45 E. R. 1093, L. J. J. *Annotation*:—*Generally, Mentd. Re Wainwright, Wainwright v. Martineau* (1889), 5 T. L. R. 301.

2238. — *Apportionment of costs.* — *Re CHESTERFIELD'S (EARL) TRUSTS* (1883), 24 Ch. D. 643; 52 L. J. Ch. 958; 49 L. T. 261; 32 W. R. 361.

Annotations: — *Mentd. Re Hobson, Walker v. Appach* (1885), 55 L. J. Ch. 422; *Re Flower, Matheson v. Goodwyn* (1890), 62 T. L. 216; *Re Godden, Teague v. Fox*, [1893] 1 Ch. 292; *Re Nash, Sweet v. Nash* (1894), 38 Sol. Jo. 478; *Re Cleveland's Estate, Hay v. Wolmer* (1895), 13 R. 715; *Re Goodenough, Marland v. Williams*, [1895] 2 Ch. 537; *Re Morley, Morley v. Haig*, [1895] 2 Ch. 738; *Re Hubbuck, Hart v. Stone* (1896), 73 L. T. 738; *Re Searle, Searle v. Baker*, [1900] 2 Ch. 829; *Re Whitford, Inglis v. Whitford*, [1903] 1 Ch. 889; *Re Woods, Gabelini v. Woods*, [1904] 2 Ch. 4; *Re Davy, Hollingsworth v. Davy*, [1908] 1 Ch. 61; *Re Hollebone, Hollebone v. Hollebone*, [1919] 2 Ch. 93; *Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271.

2239. For directions as to investment of funds—*Costs out of capital.*—*BEAUCLEERK v. ASHBURNHAM* (1845), 8 Beav. 322; 14 L. J. Ch. 241; 4 L. T. O. S. 431, 490; 9 Jur. 146; 50 E. R. 126.

Annotation: — *Mentd. Cadogan v. Essex* (1854), 2 Drew. 227.

2240. — — — — — *HUME v. RICHARDSON*, No. 2237, *ante*.

B. Payment into Court.

2241. Costs out of capital.—Where a fund, in which successive beneficial interests exist, is transferred into ct. under Trustee Relief Act, the costs incurred by the trustees in proceeding under the statute are payable out of the corpus, not out of the income, of the fund.—*Re STAPLES' SETTLEMENT* (1849), 13 Jur. 273.

Annotation: — *Reid. Re Bartholomew's Will* (1849), 13 Jur. 380.

2242. — — — — — *Re WHITTON'S TRUSTS*, No. 2219, *ante*.

C. Other Proceedings concerning Estate.

2243. Costs out of capital.—Proceedings for protection of estate—By trustees.—The trustees of a freehold estate of which pltf. was equitable tenant for life under a will, brought actions under the advice of counsel against two persons for interfering with the property, & compromised them for trial. Pltf. had no notice of the proceedings, but had some time previously warned the trustees, on the occasion of an injury done by persons other than defts. to these actions, that he should hold them liable if they did not take all necessary steps to protect the property. In Dec. 1881, pltf. applied to the trustees for the rents accrued since May, 1880. The trustees' solr. answered stating the amount of the rents received, & saying that it was less than the costs incurred by the trustees in the action, & that they were out of pocket. A correspondence ensued, in the course of which the trustees expressed their willingness to concur in any arrangement for raising the costs out of the estate, but pltf. insisted on having the rents paid to him irrespective of any arrangement for raising the costs, & brought his action to enforce payment. The Vice-Chancellor of the Lancaster Ct. made an order declaring that as the actions were brought without the knowledge or consent of pltf., the costs were not chargeable against the income. & the ct. "being of opinion that the actions were commenced under the advice of the counsel," ordered the trustees' costs of them to be raised & paid out of the estate, but ordered the trustees to pay pltf. his costs of the present action up to the hearing. Pltf. appealed against the direction to raise the costs of the former actions out of the estate, & the trustees from the order as to the costs of the present action:—*Held*: (1) the direction to raise the costs of the trustees of the old actions out of the estate ought to be affirmed, for the actions appeared to have been brought *bonâ fide* & to have been beneficial to the estate, but the reason given to the decree for allowing them ought to be varied, as that result did not necessarily follow from their having been commenced under the advice of counsel, but (2) the order on the trustees to pay costs must be reversed, & directions given for raising their costs of this action out of the estate, for the costs of trustees properly incurred in the administration of the trust are a first charge on both the capital & income of the trust estate, & the trustees were not bound to part with the income till their costs had been otherwise provided for, & they therefore had been guilty of no misconduct.—*STOTT v. MILNE* (1881), 25 Ch. D. 710; 50 L. T. 742, C. A.

Annotations: — *As to* (1) *Appld. Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674. *Reid. Re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547. *As to* (2) *Consd. Re Owen, Frisby, Dyke v. Owen* (1892), 66 L. T. 718; *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271. *Reid. Leeds Corp'n. v. Sugden* (1911), 105 L. T. 489; *Baker v. Archer-Shee*, [1927] A. C. 844.

2244. — By committee of lunatic tenant for life—*Opposition to Bill in Parliament.*—The Lords Justices sitting in Lunacy have jurisdiction to order the costs, charges, & expenses incurred in relation to an unsuccessful opposition to a Bill in Parliament, affecting the estate of a lunatic tenant for life of settled land, to be paid out of the corpus of the property subject to the settlement.—*Re BLAKE (A LUNATIC)* (1895), 72 L. T. 280; 39 Sol. Jo. 330, L. J.J.

—*Proceedings by tenant for life of mortgaged property—Redemption action.*—See MORTGAGE, Vol. XXXV., p. 686, No. 4286.

2245. — Settlement of action for foreclosure.—A. was tenant for life on the L. estate, & his eldest son, B., an infant of sixteen years of age, was the first tenant in tail in remainder thereof. The L. estate was subject to four legal mtges., the different mtges. being on different portions of the estate; to one equitable mtge. over the whole of the estate; & to a charge for a portion over the whole estate. Under three of the legal mtges. the rate of interest was 5 per cent. *per annum*, reducible to 3 per cent.; & the rate of interest on the other legal mtge. & the portion charge was 4 per cent. *per annum*. One of the legal mtges. commenced a foreclosure action, & the L. estate was in danger of being broken up & foreclosed, when, at A.'s request, C. & D. paid off pltf. mtgee. & took a transfer of his security & also of the equitable mtge. The foreclosure action was stayed, & A. paid to pltf. mtgee. his costs of the foreclosure action & of the transfer of his security. A. incurred & was liable for certain costs in the foreclosure action & in connection with the transfers to C. & D. The other three legal mtgees. then demanded repayment, & threatened to foreclose the estate. A. then negotiated with S. to advance such a sum as would enable A. to pay off all the above-mentioned incumbrances on the L. estate, & procure a transfer of the said incumbrances to C. & D. for a term of five years, at 3½ per cent., & also to advance to A. a further sum sufficient to pay the costs, charges, & expenses already incurred by A. as above-mentioned, & also the costs, charges, & expenses of & incident to the transfer of the several mtges. A. then commenced an action against B., stating the above facts & verifying them by affidavit, & A. claimed to be entitled to charge the inheritance with such costs, charges, & expenses as he has incurred, with interest for the same:—*Held*: A. was entitled to (1) a declaration that he was entitled to a charge on the part of the L. estate comprised in the legal mtge. in respect of which the foreclosure action was brought for the costs, charges, & expenses paid or incurred by A. in relation to the foreclosure action, & of the transfers to C. & D., with interest at 4 per cent.; (2) a declaration that A. would be entitled to a charge upon the several portions of the L. estate comprised in the other three legal mtges. & in the equitable mtge., & the portion charge for the costs, charges, & expenses to be incurred by A. & the mtgees. & transferees thereof in relation to the proposed transfers of the last-mentioned securities, or for any other costs properly incurred by pltf. in protecting the L. estate from the claims of the mtgees. thereof, with interest at 4 per cent.; & (3) if necessary, the

above-mentioned costs, charges, & expenses & the costs of this action might be raised by a proper mtge. of the L. estate.—*MORE v. MORE* (1889), 60 L. T. 626; 37 W. R. 414.

2246. Costs out of income—Action by tenant for life against trustees—Abortive action for breach of trusts—Trustees' costs.—Property was settled to the separate & inalienable use of a married woman for life, & the trustees were authorised, out of the moneys which should come to their hands, to reimburse themselves all expenses to be incurred in or about the execution of the trusts or any matter relating to the settlement. A bill filed by her by her next friend, complaining of a breach of trust, & to remove the trustees, was dismissed, with costs, but, by consent, new trustees were to be appointed, & a receiver to get in the income. Before new trustees had been appointed & the costs paid by the next friend, he became insolvent:—*Held*: the income in the hands of the receiver was applicable to the payment of the trustees' costs.—*D'OECISNER v. SCOTT* (1857), 24 Beav. 239; 53 E. R. 319.

Annotations:—*Refd.* *Re Glanville, Ellis v. Johnson* (1886), 31 Ch. D. 532; *Cox v. Bennett* (No. 2) (1891), 39 W. R. 401. *Mentd.* *McCann v. Borradaile* (1867), 37 L. J. Ch. 124.

2247. Settled legacy appropriated by executors—Action by remainderman against executors—Costs out of legacy.—A stock legacy bequeathed to several in succession, was appropriated by the exors., & the residue paid over. In a suit between the remainderman & the exors. alone, the legacy was transferred into ct., & the costs of suit were paid thereout. The tenant for life afterwards filed a claim to have the amount of costs recouped out of the residue. It was dismissed with costs.—*RICHARDSON v. RUSBRIDGER* (1855), 20 Beav. 136; 52 E. R. 554.

SUB-SECT. 3.—DUTY TO KEEP DOWN INTEREST.

A. Duty of Tenant for Life.

(a) In General.

2248. Tenant for life must keep down.—One seised in fee, & indebted by bond in which his heirs are bound, devises his lands to A. for life, remainder to his first, etc., son in tail, remainder over. In a bill brought by the bond creditors, the ct. will not decree the devisee for life to account for the profits, but only to keep down the interest.—*MANATON v. MANATON* (1721), 2 P. Wms. 231; 24 E. R. 711, L. C.

Annotation:—*Refd.* *Roddam v. Morley* (1857), 1 De G. & J. 1.

2249. —.]—*NEWLING v. ABBOT* (1715), 2 Eq. Cas. Abr. 596; 22 E. R. 501, L. C.

2250. —.]—Husband of tenant in tail takes in a mortgage, & is in receipt of the rents & profits on a bill to redeem by reversioner after the wife's death; husband not allowed interest on the mtge. in life of his wife.

If there is a tenant for years or life subject to a mtge., they must keep down the interest during that time. But there is a particular estate, called an estate tail, which is distinguishable: & therefore it is true that in general cases, if there is tenant

PART X. SECT. 7, SUB-SECT. 3.—A. (a).

2248 i. *Tenant for life must keep down.*—*PEMBERTON v. O'NEIL* (1851), 2 Gr. 263.—CAN.

2248 ii. —.]—The general rule as between a tenant for life & the

remainderman in respect of a charge upon an estate, is, that the tenant for life must keep down the interest on such charge, & the duty of the remainderman is to pay the principal.—*REID v. REID* (1881), 29 Gr. 372.—CAN.

2248 iii. —.]—*COOTE v. MILLTOWN (LORD)* (1844), 1 Jo. & Lat. 501.—IR.

2248 iv. —.]—*KIRKWOOD v. LLOYD* (1849), 11 I. Eq. R. 561; *varied on appeal* (1850), 12 I. Eq. R. 585.—IR.

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in tail remainder over, subject to a preceding mtge. or incumbrance: & tenant in tail is in possession & receipt of the rents & profits the mtge. in hands of mtgee.: & he lets the interest run in arrear without applying to keep it down: neither the issue in tail nor the remainderman can come against that tenant in tail to compel the keeping down of interest. . . . Where there is tenant in tail of full age, cts. of law as well as equity, consider the reversioner or remainder as in the power of that tenant in tail (LORD HARDWICKE, C.).—*AMESBURY v. BROWN* (1750), 1 Ves. Sen. 477; 27 E. R. 1152, L. C.

*Annotations:—*Refd. *Jones v. Morgan* (1783), 1 Bro. C. C. 206; *Burges v. Mawbey* (1823), Turn. & R. 167; *Davies v. Ashford* (1845), 15 Sim. 42.

2251. —.]—A. created a trust for the payment of incumbrances out of the rents & profits of his real estate, part of which being subject to the arrears of a rentcharge to the Crown, was discharged by a privy seal, provided £5,000 be paid to B. & C., for securing which a term was created by Act of Parliament.—*Held*: this was a debt affecting the estate, & not within the trusts of the deed, & therefore the tenants for life must keep down the interest.—*PETERBOROUGH (EARL) v. MORDAUNT* (1760), 1 Eden, 474; 28 E. R. 769.

2252. —.]—*KINNOUL (EARL) v. MONEY* (1767), 3 Swan. 202, n.; 36 E. R. 830, L. C.

*Annotations:—*Refd. *Clinton v. Hooper* (1791), 3 Bro. C. C. 201; *Hall v. Hall*, [1911] 1 Ch. 487. *Mentd.* *Hudson v. Carmichael* (1854), Kay, 613; *Paget v. Paget*, [1898] 1 Ch. 470.

2253. —.]—*SHREWSBURY (COUNTESS) v. SHREWSBURY (EARL)*, No. 2298, *post*.

2254. —.]—An infant tenant in tail is bound to keep down the interest of debts charged upon the entailed estates. A tenant for life was also held to have been liable to keep down the interest of the debts, although, having the ultimate remainder in fee, he had consented to an Act of Parliament, by which the estates were vested in trustees for the payment of the debts.—*BURGES v. MAWBEY* (1823), Turn. & R. 167; 37 E. R. 1060. *Annotation:—*Consd. *Havelock v. Havelock, Re Allan* (1881), 17 Ch. D. 807.

2255. —.]—The testator, by his will, charged his debts & legacies upon his real & personal estate, & gave such real & personal estate to trustees upon trust for his nephew for life, to whom also he gave a legacy, with remainder to the first & other sons of the nephew successively in tail male, with remainder to the second & every other son of testator's brother successively in tail male, remainder to testator's own right heirs; & added: " & upon this last-mentioned contingency, failing heirs male of my brother, & of my estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject & make liable my estate with the payment of the sum of £5,000 to my niece." Testator died in 1775, leaving his brother his heir-at-law. The nephew entered into possession of the real estate, which consisted of a plantation in Jamaica, subject to a mtge. created by testator in 1765. The brother afterwards died, leaving the nephew, his only son, & then heir-at-law of testator; the nephew died in 1822 without issue male. The bill was filed in 1837 against the mtgees. & the devisees of the nephew to obtain payment of the niece's legacy of £5,000:—*Held*: the nephew was only bound in his lifetime to keep down the interest of the debts & legacies; & he was entitled to keep on foot, as subsisting charges against the real estate, the principal of the debts & legacies paid off by him, &

also his own legacy.—*FAULKNER v. DANIEL* (1843), as reported in 3 Hare, 199; 67 E. R. 355.

*Annotations:—*Refd. *Byam v. Sutton* (1854), 19 Beav. 556. *Mentd.* *Davis v. Chanter* (1848), 2 Ph. 545; *Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294.

2256. —.]—Testator directed his real estate to be sold, "immediately or as soon as conveniently might be," & applied in aid of his personal estate, in payment of his debts; but until the settlement should be made as after directed, the rents were to be applied in keeping down the mtges. & the residue to be paid to the persons entitled under the settlement. He then directed the unsold hereditaments to be settled on A. for life, with remainder over. Testator was greatly indebted, on bonds, & his personal estate was largely deficient. More than a year elapsed before the sale of the real estates:—*Held*: the interest on all the debts for the first year was payable out of the corpus of the real estate, but the tenant for life was bound to keep down the subsequent interest.—*GREISLEY v. CHESTERFIELD (EARL)* (1851), 13 Beav. 288; 51 E. R. 111.

2257. —.]—Now it is well known that the rule with regard to how much of the burden of a charge upon an estate the tenant for life should bear has varied. Originally, a portion of the principal was thrown on the tenant for life; that was subsequently altered, & now the tenant for life is charged only with the burden of keeping down the interest & the capital, as I have before stated, is charged upon the inheritance; that is done upon the ground of the presumed intention of the grantor, to which I have referred, & as the best mode of carrying that intention into effect (LORD TRURO, C.).—*KEKEWICH v. MARKER* (1851), 3 Mac. & G. 311; 21 L. J. Ch. 182; 17 L. T. O. S. 193; 15 Jur. 687; 42 E. R. 280, L. C.; *previous proceedings, sub nom. MARKER v. KEKEWICH* (1850), 8 Hare, 291.

*Annotations:—*Refd. *Briggs v. Oxford* (1851), 5 De G. & Sm. 156; *Dashwood v. Magniac* (1891), 60 L. J. Ch. 809.

2258. —.]—*DIXON v. PEACOCK*, No. 2188, *ante*.

2259. —.]—Where an estate, charged as a further security for a mtge. debt was devised to tenant for life & remainderman in fee; & the interest was for many years paid by the remainderman & his assignee, the tenant for life paying nothing:—*Held*: the tenant for life was bound to keep down the interest during his life.—*LONG v. HARRIS* (1855), 24 L. T. O. S. 297; 1 Jur. N. S. 913.

2260. —.]—Where the trustees of a settlement, having power to raise a sum of given amount out of the rents & profits, or by assignment or other disposition of the settled estates, as a provision for the fines & expenses payable on the renewal of leases comprised in the settlement, exercised that power by mtge., & also paid further sums for renewals out of the rents of the settled estates, it was held, that the tenant for life under the settlement was bound to keep down, out of the rents & profits, the interest only of the sum raised by mtge.; but that the further sums paid for renewals must be apportioned between the tenant for life & the remaindermen, according to the ordinary rule of the ct. in such cases.—*PLUMTRE v. OXENDEN* (1855), 25 L. J. Ch. 19; 26 L. T. O. S. 55; 1 Jur. N. S. 1037; 4 W. R. 29.

2261. —.]—As between tenant for life & remainderman, the interest on testator's debts must be borne by the income, as from the day of his death.—*BARNES v. BOND* (1863), 32 Beav. 653; 55 E. R. 256.

*Annotations:—*Apld. *Marshall v. Crowther* (1874), 2 Ch. D. 199. *Refd.* *Re McEwen, McEwen v. Phelps*, [1913] 2 Ch. 704.

2262. —.]—The obligation of the tenant for life of an estate subject to incumbrances, to keep down interest on the incumbrances, exists only as between him & the remainderman, & not as between him & the incumbrancers.

Testator devised real estate to trustees for term of 500 years upon trust to raise a sum of £9,000, with interest, for his younger children, & subject thereto to his son F. for life, with remainders over. One moiety of the charge of £9,000 became vested in testator's daughter, M. No part of the charge was ever raised; & F., who had been let into possession, failed to keep down the interest. M. died in the lifetime of F., having by her will left him a legacy to be paid out of her moiety of the £9,000:—*Held*: the legacy could not be retained by the exors. of M. in satisfaction of the arrears of interest due to her.—*Re MORLEY, MORLEY v. SAUNDERS* (1869), L. R. 8 Eq. 594; 38 L. J. Ch. 552; 21 L. T. 132; 17 W. R. 959.

2263. —.]—A tenant for life of real estate upon which the debts of testator have been ascertained to be a charge, must keep down all the interest which accrues due.—*MARSHALL v. CROWTHER* (1874), 2 Ch. D. 199; 23 W. R. 210.

2264. —.]—Testator devised all his real estate, except two specified estates, to trustees, upon trust for his son for life, with remainder in strict settlement, & he devised the two specified estates upon similar trusts in favour of his two daughters respectively for life, with remainders to their respective issue. By a deed executed on the marriage of his son, testator covenanted to pay to the son or his wife during their joint lives an annuity of £700. Testator's personal estate proved insufficient to provide for the annuity:—*Held*: the three real estates ought to contribute towards payment of the annuity rateably according to their respective values; & each tenant for life would have a charge upon the corpus of the estate in respect of the proportion of the annuity paid by him, or her, but would have to keep down the interest on the amount so charged.—*Re HARRISON, TOWNSON v. HARRISON* (1889), 43 Ch. D. 55; 59 L. J. Ch. 169; 61 L. T. 762; 38 W. R. 265.

Annotations:—*Consd. Re Bacon, Grissel v. Leathes* (1893), 62 L. J. Ch. 445; *Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596.

2265. — *Though rents & profits insufficient.* —*REVEL v. WATKINSON*, No. 2283, *post*.

2266. — —.]—*TRACY v. HEREFORD*, No. 2271, *post*.

2267. — —.]—*SHORE v. SHORE*, No. 2192, *ante*.

2268. — —.]—A tenant for life in possession having power to charge the inheritance with £20,000 & interest for his own benefit, executed the power, & assigned the charge as part security for a mtge. of a greater sum. The rents received from the estate were insufficient to pay the interest, & the tenant for life paid to the assignees of the charge this interest out of other money of his own; but did so without giving any notice whatever to the remainderman of his intention to make the deficiency a charge on the inheritance. After the death of the tenant for life the remainderman claimed to redeem, & the assignees of the charge sought, as against the inheritance, to charge it with the amount of the deficiencies:—*Held*: they were not entitled to do so.—*KENSINGTON (LORD) v. BOUVERIE* (1859), 7 H. L. Cas. 557; 29 L. J. Ch. 537; 34 L. T. O. S. 16; 6 Jur. N. S. 105; 11 E. R. 222, H. L.

Annotations:—*Reid, Howlin v. Sheppard* (1870), 19 W. R. 253. *Mentl. Mayer v. Murray* (1878), 8 Ch. D. 424; *Noyes v. Pollock* (1886), 32 Ch. D. 53.

2269. — —.]—(1) Apart from any question

arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent & out of the rents & profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during the life of the tenant for life are applicable to liquidate arrears accruing during the same life tenancy.

(2) Where several estates are included in the same settlement, the tenant for life is bound, out of the whole rents & profits, to keep down the interest on charges on all the estates.

(3) Upon principle, therefore, a tenant for life of several estates included in the same devise is liable, as between himself, & the remaindermen, to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of part of the property.—*HONYWOOD v. HONYWOOD*, [1902] 1 Ch. 347; 71 L. J. Ch. 174; 86 L. T. 214.

2270. Tenant for life with absolute power of appointment.—Tenant for life with an absolute power of appointment, bound to keep down the interest on charges created by himself.—*WHITBREAD v. SMITH* (1854), as reported in 3 De G. M. & G. 727, 741; 43 E. R. 286, 292, L. C. & L. J. *Annotations*:—*Reid, Sharshaw v. Gibbs* (1854), Kay, 333; *Heather v. O'Neil* (1858), 2 De G. & J. 399.

Rentcharges & annuities.—See RENTCHARGES & ANNUITIES, Vol. XXXIV., pp. 172-174, Nos. 625-639.

Interest on unpaid estate duty.—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 43, No. 277.

(b) Several Estates in One Settlement.

2271. Charges on parts of estates—Must keep down interest out of profits of all.—An estate being settled to A. for life, then as to part to B. for life, remainder as to the whole to uses under which debt. takes as tenant for life, with powers to A. to charge, but not to encumber B.'s estate for life, the estate given in remainder falls in during B.'s life, & the interest of the charges exhausts the rents & profits. Upon B.'s life estate falling in, the first rents & profits of that portion of the estate shall be applied in discharge of the arrear, which shall not be a charge upon the inheritance.—*TRACY v. HEREFORD* (1786), 2 Bro. C. C. 128; 29 E. R. 75, L. C.

Annotations:—*Consd. Penthyn v. Hughes* (1799), 5 Ves. 99; *Kensington v. Bouverie* (1859), 7 H. L. Cas. 557. *Reid, Burges v. Mawbey* (1823), Turn. & R. 167; *Playfair v. Cooper* (1853), 1 Eq. Rep. 137; *Sharshaw v. Gibbs* (1854), Kay, 333; *Honywood v. Honynwood*, [1902] 1 Ch. 347.

2272. — —.]—Three estates, when put into settlement, were subject two of them to two mtges. amounting to £2,400 & the third to a third for £3,000. The husband being tenant for life, became insolvent in 1841. In 1840 a judgment was recovered against him & duly registered. From 1841 the interest on the £3,000 fell into arrear, whilst the mtgees. of the £2,400 entered & received rents in excess of interest:—*Held*: the tenant for life was not entitled to have the benefit of the excess on the one estate until he had kept down the interest on the other.—*SCHOLEFIELD v. LOCKWOOD* (1863), 4 De G. J. & Sm. 22; 3 New Rep. 177; 33 L. J. Ch. 106; 9 L. T. 400; 9 Jur. N. S. 1258; 12 W. R. 114; 46 E. R. 822, L. C.

2273. — —.]—*Re HOTCHKYS, FREKE v. 'ALMADY*, No. 1869, *ante*.

Sect. 7.—Adjustment of burdens between capital and income: Sub-sect. 3, A. (b), B. & C.; sub-sect. 4.]

2274. ———.]—A tenant for life of estates settled by will:—*Held*: bound to keep down interest in respect of charges on the several parts of the estates out of the income of the whole.—*FREWEN v. LAW LIFE ASSURANCE SOCIETY*, [1896] 2 Ch. 511; 65 L. J. Ch. 787; 75 L. T. 17; 44 W. R. 682; 40 Sol. Jo. 621.

Annotations:—Folld. Honeywood v. Honeywood, [1902] 1 Ch. 347. *Apld. Re Kensington, Longford v. Kensington*, [1902] 1 Ch. 203. *Distd. Re Holt, Holt v. Holt* (1918), 85 L. J. Ch. 779. *Reid. Re Lysons, Beck v. Lysons* (1912), 107 L. T. 146.

2275. ———.]—*HONEYWOOD v. HONEYWOOD*, No. 2269, *ante*.

2276. ———.]—*Though charge cleared by sale of part of land.*—*HONEYWOOD v. HONEYWOOD*, No. 2269, *ante*.

B. Duty of Other Persons.

2277. Owner in fee—Contingent charge on estate.—By a settlement made in 1862 certain property, subject to a prior mtgee., was settled upon A. in fee, with a contingent charge in favour of B. upon his attaining twenty-one:—*Held*: A. during his life, & his estate after his death, was bound to keep down the interest on the mtgee., so that the property might remain a security intact for the benefit of B.—*BUTCHER v. SIMMONDS* (1876), 35 L. T. 304; *sub nom. BUTCHER v. SIMMONDS, Re WILSON*, 21 W. R. 781.

2278. Infant tenant in tail.—Had there been an application to the ct. in the infant's life, by his guardian, the ct. would have directed the interest of this £2,000 to be kept down out of the rents & profits of his estate, & not out of his personal estate: Suppose an infant, tenant in tail, remainder in fee, had nothing to support him but the rents & profits of real estate, & would starve if they were to be applied to keep down interest, I should not, in that case, have directed them to be so applied; but here there is a large personal estate, besides the rents & profits of the real estate, which makes the difference (*LORD HARDWICKE, C.*)—*SERGESON v. SEALEY* (1742), 2 Atk. 412; 9 Mod. Rep. 390; 26 E. R. 648, L. C.

Annotations:—Folld. Burges v. Mawbey (1823), Turn. & R. 167. *Reid. Revel v. Watkinson* (1748), Belt's Sup. 66; *Amesbury v. Brown* (1750), 1 Ves. Sen. 477; *Oxenden v. Compton* (1793), 4 Bro. C. C. 231; *Cole v. Stutely* (1842), 6 Jur. 314. *Mentd. Moodie v. Reid* (1816), 1 Madd. 516; *Re Walden, Ex p. Bradbury* (1839), 4 Deac. 202; *Price v. Berrington* (1851), 3 Mac. & G. 486; *Jacobs v. Richards* (1854), 23 L. J. Ch. 557; *Elliot v. Ince* (1857), 7 De G. M. & G. 475; *Hull v. Clifford, Clifford v. Timms, Clifford v. Phillips*, [1907] 2 Ch. 236; *Bird v. Keop*, [1918] 2 K. B. 692; *York Glass Co. v. Jubb* (1925), 134 L. T. 36.

2279. ———.]—*BURGES v. MAWBEY*, No. 2254, *ante*.

2280. Adult tenant in tail.—*AMESBURY v. BROWN*, No. 2250, *ante*.

2281. Assignee of life interest—Mortgagee.—Mtgee., having permitted the tenant for life to run in arrear for the interest, purchases the estate for life, & takes possession under that purchase:

PART X. SECT. 7, SUB-SECT. 3.—B.

2280 i. Adult tenant in tail.—A tenant in tail is not bound to keep down interest on charges.—*KENNEDY v. DALEY* (1858), 7 L. Ch. R. 445.—*IR.*

b. Assignee of life interest.—*HILL v. BROWNE* (1844), *Drury temp. Sug.* 426.—*IR.*

PART X. SECT. 7, SUB-SECT. 3.—C.

2283 i. Future income liable.—*BALDWIN v. BALDWIN* (1856), 6 L. Ch. R. 156.—*IR.*

2283 ii. ———.]—Where a tenant for life has permitted arrears of charges to accumulate, the claim of a remainderman for compensation out of the life estate, for the increased burden thus cast upon the inheritance, has priority over charges on the life estate created by the tenant for life, & secured by a demise of a legal term without notice of the facts constituting the remainderman's equity.—*FITZMAURICE v. MURPHY* (1859), 8 L. Ch. R. 363.—*IR.*

2283 iii. ———.]—*KILWORTH (LORD)*

he is bound to apply the surplus rents & profits beyond the current interest in discharge of the arrear; & in the account under a bill of foreclosure was charged accordingly.

The rents & profits during the estate for life must be applied to the reduction of any interest accrued prior as well as subsequent to the commencement of that estate. . . . But it must always be remembered, that both the tenant for life & the incumbrances have a right to have the estate sold: & if so, that the tenant for life will have his interest in what remains of the money produced by the sale (*LORD ALVANLEY, M.R.*)—*PENRHYN (LORD) v. HUGHES* (1799), 5 Ves. 99; 31 E. R. 492.

Annotations:—Consd. Sharshaw v. Gibbs (1854), Kay, 333. *Reid. Burges v. Mawbey* (1823), Turn. & R. 167.

2282. ———.]—If the mtgee. enters, not in his character of mtgee. only, but as purchaser of the equity of redemption, he must look to the title of his vendor, & the validity of the conveyance he takes, & if the conveyance be such as gives him only the estate of a tenant for life, he is bound, having united in himself the characters of mtgor. & mtgee., to keep down the interest of the mtgee. for the benefit of the person or persons entitled in remainder.—*RAFFETY v. KING* (1836), 1 Keen, 601; 6 L. J. Ch. 87; 48 E. R. 439.

Annotations:—Mentd. Davies v. Quarterman (1840), 4 Y. & C. Ex. 257; *Wicks v. Scrivens* (1860), 1 John. & H. 215.

C. Arrears.

2283. Future income liable.—Devise, subject to pay debts & legacies, to a daughter in strict settlement, remainder over, the estate not sufficient to keep down the interest during the life of a jointress by a prior settlement, though more than sufficient afterwards, the jointress living two years & for life, arrear accrued:—*Held*: (1) the whole profits during the daughter's estate L. should be applied to keep down the interest; (2) the surplus arising on death of the jointress being accrued to the same trust estate, must be applied to answer the former deficiency, & not to let it charge the remainder.—*REVEL v. WATKINSON* (1748), 1 Ves. Sen. 93; 27 E. R. 912, L. C.

Annotations:—As to (1) Reid. Burges v. Mawbey (1823), Turn. & R. 167; *Re Hotchkys, Freke v. Calmady* (1886), 55 L. T. 110. *As to (2) Reid. Playfair v. Cooper* (1853), 1 Eq. Rep. 137. *Honywood v. Honeywood*, [1902] 1 Ch. 347. *Generally, Mentd. Havelock v. Havelock, Re Allau* (1881), 17 Ch. D. 807; *Re Collins, Collins v. Collins* (1886), 32 Ch. D. 229; *Re Walker, Walker v. Duncombe*, [1901] 1 Ch. 879.

2284. ———.]—*TRACY v. HEREFORD*, No. 2271, *ante*.

2285. ———.]—The estate of a tenant for life was charged with a sum of £25,000 & interest from the time that the life estate commenced, & it was provided that the £25,000 should not be raised until the expiration of two years from the commencement of the life estate. The tenant for life failed to keep down the interest of the £25,000, & there was raised on the estate by the trustees of

v. MOUNTCASHELL (EARL) (1864), 15 L. Ch. R. 565.—*IR.*

2283 iv. ———.]—*Re FITZGERALD'S ESTATE* (1867), 1 L. R. Eq. 453.—*IR.*

2283 v. ———.]—A remainderman paying arrears of interest on charges which the tenant for life was bound to keep down, is entitled to be recouped out of the produce of the life estate.—*HOWLIN v. SHEPPARD* (1870), 19 W. R. 253.—*IR.*

2283 vi. ———.]—*Re GORE* (1874), 9 L. R. Eq. 83.—*IR.*

the term created for the purpose of the charge, a sum considerably exceeding the £25,000. The persons entitled in remainder after the life estate, have an equity to recoup out of the future income which shall accrue to the tenant for life, the excess raised beyond the £25,000, & the tenant for life having taken the benefit of Insolvent Debtors Act, his assignees are affected by the same equity.—*WARING v. COVENTRY* (1834), 2 My. & K. 406; 39 E. R. 999.

Annotations.—*Apld.* *Makings v. Makings* (1860), 1 De G. F. & J. 355. *Refd.* *Houlditch v. Wallace* (1838), 5 Cl. & Fin. 629; *Fox v. Buckley* (1876), 3 Ch. D. 509, n.

2286. —.]—Testator gave all his real & personal estate to his wife for life, & after her decease to his son absolutely, chargeable with the payment of a legacy of £200 to testator's daughter, within six months after his decease, & with the payment of testator's debts & funeral & testamentary expenses. There was no personal estate:—*Held*: the legacy was charged on the life interest as well as on the remainder of the real estate, & ought, with the arrears of interest for six years, to be raised by mtge. of the property, & the remainderman ought to be recouped out of the rents & profits to the full amount of the arrears of interest raised out of the estate.—*MAKINGS v. MAKINGS* (1860), 1 De G. F. & J. 355; 45 E. R. 396, L. C.

2287. —.]—*HONYWOOD v. HONYWOOD*, No. 2269, *ante*.

2288. Subsequent tenant for life not liable—Charge on inheritance.—A tenant for life of an estate subject to a mtge. is not liable, as between himself & the remainderman or reversioner in fee, to pay out of the rents & profits of the estate arrears of interest on the mtge., which accrued due during the life of a preceding tenant for life who died insolvent; but such arrears are primarily a charge upon the inheritance.—*SHARSHAW v. GIBBS* (1854), Kay, 333; 2 Eq. Rep. 314; 23 L. J. Ch. 451; 23 L. T. O. S. 37; 18 Jur. 330; 69 E. R. 141.

SUB-SECT. 4.—ANNUITIES.

Whether charge on corpus or income.—*See RENTCHARGES & ANNUITIES*, Vol. XXXIX., pp. 148, 151, 159, 172–174, Nos. 418, 440, 517, 625–639.

2289. Apportionment between capital & income.—*YATES v. YATES*, No. 2070, *ante*.

2290. —.]—Hereditaments were granted to trustees to the use that the grantor & his wife should receive thereout a yearly rentcharge during their lives & the life of the survivor, & subject thereto to the use of M. absolutely; & M. entered into a covenant to pay the annuity or rentcharge:

2288 i. Subsequent tenant for life not liable—Charge on inheritance.—*CAULFIELD v. MAGUIRE* (1845), 2 Jo. & Lat. 141.—*IR.*

2288 ii. —.]—The obligation of a tenant for life to keep down the interest on a charge only extends to interest which accrues due during his life estate. Where there are successive life estates, if a subsequent tenant for life is compelled to pay arrears of interest upon a charge affecting the inheritance which had accrued due during a prior life estate, he is entitled to repayment of that sum out of the inheritance.—*KIRWAN v. KENNEDY* (1870), 4 I. R. Eq. 499.—*IR.*

c. —.]—A tenant for life is not bound to pay interest accrued during the life of a former tenant for life.—*KENNEDY v. DALEY* (1858), 7 I. Ch. R. 445.—*IR.*

d. Right of set-off against charges vested in tenant for life at decease.—Arrears of interest permitted by a tenant for life to accrue due upon charges affecting the inheritance may, after his decease, be set off against the charges affecting the inheritance, which, at the time of his decease were vested in him.—*RE WHYTE* (1857), 7 I. Ch. R. 61, n.—*IR.*

e. —.]—*HOWLIN v. SHEPPARD* (1872), 6 I. R. Eq. 497.—*IR.*

f. No specific lien on arrears of rent.—Where a tenant for life of incumbered land has permitted arrears of interest to accumulate during the continuance of his life estate & dies leaving arrears of rent due to him, the remainderman has not any lien upon such arrears of rent, nor any right to require them to be applied specifically, by the personal representative of the

—*Held*: as between the persons entitled under M.'s will for life & in remainder to his estate, the annuity must be capitalised, & the burden borne in proportion to the values of their respective interests.—*Re MUFFETT, JONES v. MASON* (1888), 39 Ch. D. 534; 57 L. J. Ch. 1017; 59 L. T. 499; 37 W. R. 9; 4 T. L. R. 738.

Annotations.—*Follid.* *Re Bacon, Grissel v. Leathes* (1893), 62 L. J. Ch. 445. *Consd.* *Re Henry, Gordon v. Gordon*, [1907] 1 Ch. 30. *Refd.* *Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211; *Re Popham, Buller v. Popham* (1911), 58 Sol. Jo. 673.

2291. —.]—*Re HARRISON, TOWNSON v. HARRISON*, No. 2264, *ante*.

2292. —.]—Testatrix by will gave her residuary estate, which was subject to the payment of certain life annuities secured by bonds, in trust to pay the income to one for life, with remainders over. The question being raised how the annuities ought to be provided for as between tenant for life & remainderman:—*Held*: any sums paid to the annuitants, out of the income of testatrix's estate, & all future payments, or the sums necessary to purchase the annuities, ought to be raised or provided by a sale or mtge. of a sufficient part of testatrix's estate, & the respective interests of tenant for life & remainderman worked out on this footing.—*Re BACON, GRISSSEL v. LEATHES* (1893), 62 L. J. Ch. 445; 68 L. T. 522; 41 W. R. 478; 37 Sol. Jo. 310; 3 R. 459.

Annotations.—*Follid.* *Re Henry, Gordon v. Gordon*, [1907] 1 Ch. 30. *Consd.* *Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596; *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444.

2293. —.]—Testator gave property, subject to an annuity, to his daughter for life with remainder to her children. The annuitant agreed to take a fixed sum of £3,500 for the annuity, which sum the daughter paid out of her own moneys:—*Held*: the daughter was entitled to be repaid the £3,500 out of the estate, & it ought to be raised by sale or mtge. so as to throw a fair proportion of the burden on the tenant for life & remaindermen.—*Re HENRY, GORDON v. GORDON*, [1907] 1 Ch. 30; 76 L. J. Ch. 74; 95 L. T. 776.

Annotation.—*Consd.* *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444.

2294. —.]—Testator who had covenanted to pay life annuities bequeathed the proceeds of sale to his residuary real & personal estate upon successive trusts for a life tenant & remainderman:—*Held*: the successive instalments of the annuities must be borne by income & capital in proportion to the actuarial values of the life estate & reversion at testator's death.—*Re DAWSON, ARATHOON v. DAWSON*, [1906] 2 Ch. 211; 75 L. J. Ch. 604; 94 L. T. 817; 54 W. R. 556.

Annotations.—*Follid.* *Re Perkins, Brown v. Perkins* (1907), 77 L. J. Ch. 16; *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444. *Refd.* *Re Henry, Gordon v. Gordon*, [1907] 1 Ch. 30.

tenant for life, in discharge of the arrears of interest.—*DILLON v. DILLON* (1853), 4 I. Ch. R. 102.—*IR.*

PART X. SECT. 7, SUB-SECT. 4.

2289 i. Apportionment between capital & income.—Periodical payments of an annuity must be treated partly as interest which the tenant for life has to pay, & partly as principal for which he will have a charge on the inheritance, in the proportion which the value of the life estate bears to the value of the reversion.—*WHITESSELL v. REEVE & PAYNE* (1902), 23 C. L. T. 107; 5 O. L. R. 352; 2 O. W. R. 160.—*CAN.*

g. Arrears of annuity raised by sale of settled land—Right of remainderman to be recouped out of produce of life estate.—A tenant for life having suffered an annuity to run in arrear, the arrears were raised by a sale of

Sect. 7.—Adjustment of burdens between capital and income: Sub-sects. 4 & 5.]

2295. —.]—Testator who had covenanted to pay a life annuity gave half his residue to trustees upon trust for his daughter for life if & when she attained twenty-five with remainders over. Until the daughter attained twenty-five the income, subject to maintenance up to a specified amount, was to be added to capital. The daughter attained twenty-five on Oct. 8, 1907. The residue was earning 3 per cent. interest:—*Held*: each future instalment of the moiety of the annuity payable out of the daughter's share must as it accrued be apportioned between capital & income as follows: viz., calculate what sum with 3 per cent. simple interest from Oct. 8, 1907, to the day of payment would have met the particular instalment. Charge that sum to capital, the balance to income.—*Re PERKINS, BROWN v. PERKINS*, [1907] 2 Ch. 596; 77 L. J. Ch. 16; 97 L. T. 706.

Annotations:—*Fold*. *Re Thompson, Thompson v. Watkins*, [1908] W. N. 195; *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444. *Re Popham, Buller v. Popham* (1914), 58 Sol. Jo. 673.

2296. —.]—*Re THOMPSON, THOMPSON v. WATKINS*, [1908] W. N. 195.

Annotations:—*Fold*. *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444. *Re Popham, Buller v. Popham* (1914), 58 Sol. Jo. 673.

2297. —.]—J. by his will left his residuary real & personal estate to trustees upon trust for sale & conversion & to pay debts & legacies & then for his eight children, of whom one was to have one-fifteenth & the others two-fifteenths each, & he settled all the shares wholly, or partially upon trust for the son or daughter for life with remainders over. By a settlement made on the marriage of one of his sons before the date of his will testator had covenanted to pay to that son an annuity of £250 a year. Testator died in 1901, leaving a very large estate. His widow & all his children were living, & owing to a mistaken view of the construction of the will the son's annuity had not been paid. The trustees had sufficient funds, representing capital, in hand to pay the arrears, but the question was raised whether, as between the tenants for life & remaindermen of the settled shares, part of the burden of paying the past & future instalments of the annuity ought not to be borne by the tenants for life:—*Held*: each instalment of the annuity must be apportioned between capital & income by calculating what sum if set aside at testator's death would, with simple interest at 3½ per cent. to the day of payment, have met the particular instalment; & the sum so ascertained ought to be chargeable to capital & the balance to income, having regard to the number of shares into which the estate was divisible.—*Re POYSER, LANDON v. POYSER*, [1910] 2 Ch. 444; 79 L. J. Ch. 748; 103 L. T. 134.

SUB-SECT. 5.—DISCHARGE OF INCUMBRANCES BY TENANT FOR LIFE.

2298. Tenant for life entitled to retain charge.]

—(1) Tenant in tail restrained as to alienation, but with powers of leasing & jointuring as in

case of tenant for life, considered as tenant for life, & therefore his personal representative a creditor for a charge on the estate paid by him, intent to the contrary not appearing, though the subsequent remainders were exactly of the same nature, & the term having been very short, little more than forty years remained.

(2) Tenant for life is only to keep down the interest of an incumbrance, but not to be charged with any part of the principal.—*SHREWSBURY (COUNTESS) v. SHREWSBURY (EARL)* (1790), 1 Ves. 227; 3 Bro. C. C. 120; 30 E. R. 314, L. C.

Annotations:—*As to* (1) *Apld. Re Pride, Shackell v. Colnett*, [1891] 2 Ch. 135. *Refd. Ware v. Polhill* (1805), 11 Ves. 257; *Buckinghamshire v. Hobart* (1818), 3 Swan. 186. *Generally, Mentd. Allan v. Backhouse* (1813), 2 Ves. & B. 65; *Re Smyth, Ex p. Smyth* (1818), 1 Swan. 337.

2299. —.]—M. by his will gave two leasehold estates, each of which was subject to a distinct mtge., & all the residue of his estate, subject to the payment of his debts, to trustees for his wife E., for life, with remainder as she should appoint. E. paid off both mtges., & took an assignment of each to a trustee "to the end & intent that the same might be kept on foot for her benefit." She afterwards executed her power of appointment over both estates; over the one by a deed poll, by which she annexed to his gift a condition that her appointees should release a certain claim which might have been enforced against the estate; & over the other by her will, by which, after reciting her power of appointment over the premises, describing them, she appointed the same to trustees, upon trust to pay the rents, etc., to certain of her children:—*Held*: it was E.'s intention to keep these charges on foot, & therefore, his appointees took subject to them.—*COLE v. STUTELY* (1842), 6 Jur. 314.

2300. Benefit of tenant for life.]—FAULKNER v. DANIEL, No. 2255, *ante*.

2301. —.]—On his father's death in 1904, pltf. became entitled as tenant in tail to the family estates, which were subject to charges & incumbrances. With a view to the reduction of mtges. out of savings of income, & in order to meet the wishes of his older relatives in that respect, pltf. went to reside abroad giving powers of attorney for the management of his estates to one of the trustees, & with pltf.'s assent a considerable proportion of income was applied in reduction of mtges. on the estates. In Feb. 1909, pltf. attained twenty-one, & in Oct. 1909, disentailed & resettled the estates, becoming the first tenant for life. The same course as to payment of incumbrances out of income was continued. Pltf. claimed a charge on the settled estates for sums paid out of income in further reduction of these incumbrances between the date of the resettlement & 1912. His evidence was that all the payments were to be for his own benefit, & he regarded the incumbrances as *pro tanto* paid off altogether:—*Held*: pltf.'s intention throughout was to benefit himself alone, the presumption in favour of a limited owner who pays off incumbrances was not rebutted & pltf. was entitled to a charge on the inheritance for the amount paid out of income in discharging incumbrances.—*WILLIAMS v. WILLIAMS-WYNN* (1915), 84 L. J. Ch. 801; 113 L. T. 849.

part of the settled lands:—*Held*: remainderman had an equity against the tenant for life, & against his assignee under the Insolvent Act, to be recouped the arrears so levied, out of the produce of the life estate.—*COOTE v. O'REILLY* (1844), 1 Jo. & Lat. 455; 7 I. Eq. R. 350.—*IR*.

PART X. SECT. 7, SUB-SECT. 5.

2298 i. Tenant for life entitled to retain charge.]—DAY v. DAY (1903), 4 S. R. N. S. W. 21; 21 N. S. W. W. N. 1.—*AUS*.

2298 ii. —.]—*FLOOD v. DIGBY & JOHNSON* (1835), 1 Jo. Ex. Ir. 520.—*IR*.

2298 iii. —.]—*Held*: the tenant for life had by the payment off of an incumbrance become entitled to a charge upon the inheritance to that amount, & that was a valid set-off against the remainderman's claim on foot of interest left unpaid.—*HOWLIN v. SHEPPARD* (1872), 6 I. R. Eq. 497.—*IR*.

2302. — Where no intention to exonerate estate.—Evidence of intention.]—Where tenant for life pays off an incumbrance upon the estate, he shall be considered as a creditor for the money so paid; but where tenant in tail pays, it is in exoneration of the estate of which he may make himself absolute owner.

A tenant for life, in general, paying off a charge, without taking an assignment, is a creditor for the sum so paid, but the smallest demonstration that he meant to pay it off will prevent his representative from coming for the money (LORD THURLOW, C.).—JONES v. MORGAN (1783), 1 Bro. C. C. 206; 28 E. R. 1086, L. C.

*Annotations:—*Consd. Kensington v. Bouverie (1859), 7 H. L. Cas. 557. *Reid.* Dodson v. Hay (1791), 3 Bro. C. C. 405; Burgess v. Mawbey (1823), Turn. & R. 167; Astley v. Milles (1827), 1 Sim. 298; Cole v. Stutely (1812), 6 Jur. 314. *Mentd.* Goodtitle d. Sweet v. Herring (1801), 1 East, 264; Wykham v. Wykham (1811), 18 Ves. 395; Roe d. Thong v. Bedford (1815), 4 M. & S. 362; Jervoise v. Northumberland (1820), 1 Jac. & W. 559; Mellish v. Mellish (1824) 2 L. J. O. S. K. B. 45; Doe d. Bagnall v. Harvey (1825), 7 Dow. & Ry. K. B. 78; Fetherston v. Fetherston (1835), 3 Cl. & Fin. 67; Douglas v. Congreve (1838), 1 Beav. 59; Eno v. Eno (1847), 6 Hare, 171; Evans v. Evans, [1892] 2 Ch. 173; Van Grutten v. Foxwell, Foxwell v. Van Grutten, [1897] A. C. 658; Foxwell v. Van Grutten (1900), 82 L. T. 272; Re Hobbs, Hobbs v. Hobbs, [1917] 1 Ch. 569.

2303. — — — — —.]—If a tenant for life pays off a charge on the inheritance, he is *primâ facie* entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence, the presumption is, that he pays the charge for his own benefit, & not for the benefit of the persons entitled in remainder; but evidence may show the contrary conclusion to be true.—BURRELL v. EGREMONT (EARL) (1844), 7 Beav. 205; 13 L. J. Ch. 309; 8 Jur. 587; 49 E. R. 1043; *sub nom.* BARRELL v. EGREMONT (EARL), 3 L. T. O. S. 72.

*Annotations:—*Consd. Patten v. Bond (1889), 60 L. T. 583. *Apd.* Re Harvey, Harvey v. Hobday, [1896] 1 Ch. 137. *Fold.* Gifford v. Fitzhardinge, [1899] 2 Ch. 32. *Reid.* Ryan v. Sutton (1854), 19 Beav. 556; Roddam v. Morley (1856), 2 K. & J. 336; Kensington v. Bouverie (1859), 7 H. L. Cas. 557; Re Allen, Bassett v. Allen, [1898] 2 Ch. 499; Whiteley v. Deane, [1914] A. C. 132; Re Welch, Mitchell v. Willders, [1916] 1 Ch. 375. *Mentd.* Spicknornell v. Hotham (1851), Kay, 669; Knight v. Bowyer (1857), 23 Beav. 609; Burrows v. Gore (1858), 6 H. L. Cas. 907; Topham v. Booth (1887), 35 Ch. D. 607; Re England, Steward v. England (1895), 65 L. J. Ch. 21.

2304. — — — — —.]—In 1824, A. purchased an estate, & he mortgaged it to raise part of the purchase-money. In Feb. 1840, the mtge. was paid off & transferred to B., who in Apr. 1840, executed a declaration of trust in favour of A. A. died in 1848.—*Held:* the charge had merged.

What the ct. is to look at is, to see what was the

intention of the person who paid off the charge. That intention, in the absence of any circumstances, is to be gathered from what it was his interest to do; but if there be any circumstances affecting the matter, they also are to be regarded (ROMILLY, M.R.).—PITT v. PITT (1856), 22 Beav. 294; 27 L. T. O. S. 257; 2 Jur. N. S. 1010; 52 E. R. 1121.

2305. — — — — —.]—KENSINGTON (LORD) v. BOUVERIE, No. 2268, *ante*.

2306. — — — — —.]—CUDDON v. CUDDON (1876), 4 Ch. D. 583; 46 L. J. Ch. 257; 25 W. R. 311. *Annotation:—*Mentd. A.-G. v. Aberdare, [1892] 2 Q. B. 681.

2307. — — — — —.]—When a tenant for life pays off a mtge. on the estate, the fact that he is the parent of those entitled in remainder is not of itself sufficient to rebut the presumption that he intends to keep the charge alive for his own benefit.—*Re HARVEY, HARVEY v. HOBDDAY*, [1896] 1 Ch. 137; 65 L. J. Ch. 370; 73 L. T. 613; 44 W. R. 242; 40 Sol. Jo. 157, C. A.

2308. — — — — —.]—A reversionary interest in trust funds was mortgaged by the reversioner. He afterwards on his marriage assigned the same interest, subject to the mtge., to trustees, on trust for his wife for her life, with remainder to himself for his life, with remainders over. After the marriage he paid off the mtge. debt out of his own moneys, & the mtgee. executed a deed which purported to reconvey the mtged. property to him "absolutely discharged from" the mtge. debt & all claims under the mtge. deed. The solis. who prepared the reconveyance were ignorant of the existence of the settlement.

In an action by the reversioner, claiming to have the reconveyance set aside or rectified, he gave evidence that he did not intend to pay off the mtge. debt for the benefit of the settlement, but that he intended to keep the charge alive for his own benefit.—*Held:* notwithstanding the form of the reconveyance, plff. was entitled to have the charge kept alive for his own benefit, & the sum secured by the mtge. constituted a charge on the property having priority over the settlement, & a declaration was made to that effect.—GIFFORD (LORD) v. FITZARDINGE (LORD), [1899] 2 Ch. 32; 68 L. J. Ch. 529; 81 L. T. 106; 47 W. R. 618.

2309. Payment of bond debts insufficient.]—A tenant for life discharging an incumbrance upon the estate is presumed to have intended to keep the charge alive, against the inheritance for his own benefit, & the absence of an assignment will not conclude him; but a similar presumption does not arise from the payment by a tenant for life

2302i. — Where no intention to exonerate estate.—Evidence of intention.]—After an express declaration of the tenant for life to charge, it cannot, from the debts being paid by him, from no assignment of the securities being taken, or from length of time, be presumed he intended to exonerate the estate.—REDINGTON v. REDINGTON (1809), 1 Ball & B. 131.—IR.

2302ii. — — — — —.]—A tenant for life paid off incumbrances & by his will declared his intention to have been not to exonerate the inheritance:—*Held:* this declaration of intention was sufficient.—LYSAGHT v. LYSAGHT (1851), 4 Ir. Jur. 110.—IR.

2302iii. — — — — —.]—*Re LLOYD'S ESTATE*, [1903] 1 I. R. 144.—IR.

2302iv. — — — — —.]—A tenant for life of real estate paid off a charge on the fee, & took an absolute release of his estate in the lands, with the intention of extinguishing the charge, under an erroneous belief that he was

owner in fee of the lands. He subsequently became aware that he was only tenant-for-life, & he consulted his solicitors, with the view, if possible, of keeping the charge alive for his own benefit, & a case was sent to counsel in reference to the matter, who advised proceedings in Chancery, which, however, the tenant for life declined to bring. He made no mention of the charge in his will. There was conflicting evidence as to various expressions of his intention, made subsequent to the payment off of the charge. After his death his execs. brought an action to raise the charge as portion of his assets.—*Held:* notwithstanding the release of the lands & the other circumstances of the case, the tenant for life was entitled, on discovering his error, to keep the charge alive against the inheritance, & his subsequent acts & declarations sufficiently evidenced that intention.—CONOLLY v. BARTER, [1904] 1 I. R. 130.—IR.

h. Discharge by successive tenants for life.—Repayment ratably in proportion to payments made.]—Testator devised certain lands, subject to an instalment mtge., to his wife for life, remainder to his children for life, remainder over. After testator's death his widow paid several instalments on foot of the mtge. She died intestate, & further instalments were then paid by the other tenants for life. The lands were sold, & the balance of the mtge. paid off out of the proceeds. The remaining surplus of the purchase-money proving insufficient to repay the tenants for life in full:—*Held:* the several tenants for life were entitled to be repaid ratably, the first tenant for life having no right to be repaid the sums expended by her on foot of the mtge., in priority to the other tenants for life.—*Re NEPEAN'S SETTLED ESTATE*, [1900] 1 I. R. 298.—IR.

—*Re GORE & BOOTH'S ESTATE*, [1910] 1 I. R. 139.—IR.

Sect. 7.—Adjustment of burdens between capital and income: Sub-sect. 5. Sect. 8: Sub-sect. 1, A. & B.]

of bond debts, which, even if assigned, only place him in the same position as any other bond creditor.—*MORLEY v. MORLEY, HARLAND v. MORLEY* (1855), 5 De G. M. & G. 610; 25 L. J. Ch. 1; 1 Jur. N. S. 1097; 4 W. R. 75; 43 E. R. 1007, L. C.

Annotations:—Consd. Re Tasker, Hoare v. Tasker, [1905] 2 Ch. 587. *Refd. Lawton v. Ford* (1866), L. R. 2 Eq. 1. *Mentd. Langhorne v. Harland* (1856), 2 Jur. N. S. 87. *Roddam v. Morley* (1856), 2 K. & J. 336.

SECT. 8.—ADJUSTMENT OF LOSSES.

SUB-SECT. 1.—AUTHORISED INVESTMENTS.

A. In General.

2310. Tenant for life not entitled to recoupment out of capital—Bequest of stock to produce certain income—Dividends on stock reduced.]—Testator bequeathed so much of his personal estate as when invested in stock would produce £125 a year, to trustees, upon trust to pay the dividends of such stock to A. for life, with a direction that the capital stock should, at A.'s death, fall into the residue of his, testator's, estate, & a provision, that, if the stock should, before the trusts were fully performed, be paid off or reduced, by which any loss or deficiency might arise, the persons respectively interested therein should bear & sustain such loss or deficiency out of their respective interests, upon their becoming entitled thereto. The dividends on the stock were reduced during the life of A.:—*Held*: A. was not entitled to have the reduced dividends made up to £125 a year by a sale of a portion of the capital of the stock.—*BAGUE v. DUMERGUE* (1853), 10 Hare, 462; 20 L. T. O. S. 322; 1 W. R. 197; 68 E. R. 1008.

2311. — Sale of leaseholds—Income from investment of proceeds less than rents.]—Leaseholds under a dean & chapter, renewable by custom, were held by trustees upon trust for a tenant for life, with remainder over; & the trustees were directed, "two years or sooner before the time for renewal," to bring a part of the rental into a fund until a sufficient sum was raised for the renewal, "so that the estates may be always kept renewed . . . for ever." In June, 1865, & Feb. 1866, notices to treat for parts of the leaseholds, then having about thirteen & five years respectively to run, were given by a railway co. At Lady Day, 1866, the dean & chapter ceased to renew leases; & about the same date their property was taken over by the Ecclesiastical Comrs. The values of the two properties having been assessed at amounts which, when paid, & invested in 3 per cent. stock, gave a diminished income to the tenant for life:—*Held*: the tenant for life was not entitled to be recouped the deficiency of income out of the corpus of the fund.—*Re Wood's Estate* (1870), L. R. 10 Eq. 572; 40 L. J. Ch. 59; 23 L. T. 430; 19 W. R. 59.

Annotations:—Apprvd. Maddy v. Hale (1876), 3 Ch. D. 327. *Apld. Re Barber's S. R.* (1881), 18 Ch. D. 624. *Consd. Re Ranelagh's Will* (1884), 26 Ch. D. 590.

2312. — — — — —]—Under an order of the ct. in a partition action, leasehold property settled upon trust for A. for life with remainders over was sold, & the proceeds paid into ct., & invested in Consols, the dividends of which were much less in amount than the yearly rents received from the leaseholds:—*Held*: A. was not entitled to any allowance out of the corpus to make up the deficiency in her annual income.—*LANGMEAD v. COCKERTON* (1877), 25 W. R. 315.

Annotation:—Refd. Re Metropolitan & District Railways Act, Ex p. St. John Baptist College, Oxford (1882), 48 L. T. 331.

2313. — Trustees entering into possession of mortgaged leaseholds—Rents received less than interest on mortgages.]—Where trustees, under a power in a will, have invested trust funds on the security of mtges. on leasehold properties, & have, on the bkpy. of the mtgor., foreclosed, the effect of Conveyancing Act, 1911 (c. 37), s. 9, is to place the property which has been foreclosed so far as practicable in the same position as if it had originally formed part of the estate of testator.

Trustees, acting under a power in a will, invested trust money on the security of nine mtges. on nine leasehold properties. The mtgor. having become bkpt., the trustees foreclosed. Four of the properties were sold, leaving five unsold. In the case of two, the net rent exceeded the amount of the interest on the mtge. In the case of two others the net rent was about equal to the former interest, & in the case of the remaining property, the net rent was less than the former interest:—*Held*: the tenant for life was entitled to the whole of the net rents, pending the sale of the properties; but if during that period the net rents amounted to less than the amounts he would have received by way of interest on the mtges., he would not be entitled to claim any part of the proceeds of sale.—*Re HORN'S ESTATE, PUBLIC TRUSTEE v. GARNETT*, [1921] 2 Ch. 222; 93 L. J. Ch. 490; 131 L. T. 286; 68 Sol. Jo. 577.

2314. Misappropriation by trustee—Loss borne by life tenant.]—A trustee, whose duty it was to renew leaseholds out of the rents, applied them to his own use:—*Held*: the tenant for life, & not those in remainder, must bear the loss.—*SOLLEY v. WOOD* (1861), 29 Beav. 482; 30 L. J. Ch. 813; 7 Jur. N. S. 1225; 54 E. R. 714.

Annotation:—Refd. Bradford v. Brownjohn (1868), 3 Ch App. 711.

2315. — — — Money recovered from estate of defaulting trustees attributed to capital—Future income payable to tenant for life.]—Where a trustee made away with a trust fund, & after his death new trustees proved against his estate in an administration suit for the aggregate amount of the principal trust fund & the arrears of interest thereon, & recovered a sum less in amount than the principal of the trust fund:—*Held*: the moneys recovered from the estate were to be attributed to capital, but the future income thereof ought to be paid to the tenant for life.—*Re GRABOWSKI'S SETTLEMENT* (1868), L. R. 6 Eq. 12; 37 L. J. Ch. 926.

Annotations:—Dbtd. Cox v. Cox (1869), 38 L. J. Ch. 569. *Refd. Re Chesterhold's Trusts* (1883), 24 Ch. D. 643.

2316. Tenant for life entitled to whole income of depreciated investments—Not entitled to share in increase of capital value.]—*VERNER v. GENERAL & COMMERCIAL INVESTMENT TRUST*, No. 1963, *ante*.

2317. Securities bearing interest—Tenant for life receiving deficient or no interest—Death of tenant for life—Right of representative to have arrears made good.]—Second mtge. 6 per cent. gold bonds of a Mexican railway co. contained a promise by the co. to pay the principal secured in 1917, & interest thereon, "accumulative, at the rate of 6 per cent. *per annum*" on Mar. 1 & Sept. 1 in each year, "upon surrender of the annexed coupons, as & when earned, out of any net earnings of any year remaining after interest" on the co.'s first mtge. bonds had been paid for such year, & provided as follows: "If in any year the net earnings so remaining available for payment of interest upon the "second mtge. bonds "shall not be sufficient to pay such interest in full, there shall be paid any part thereof earned & available, & any deficiency shall not be waived, but shall be

paid to the holder hereof out of the net earnings of any subsequent year or years, as & when there shall be any net earnings available for such purpose."

By a settlement made in May, 1899, some of the second mtge. bonds were settled upon trust to pay the income to M. for life, & after her death to her husband, T., for life, & after the death of the survivor, if T. survived her, in trust for the next of kin, excluding T., of M.

Interest less than 6 per cent. *per annum* was paid on the bonds down to 1901, & no deficiency of any year was ever made up out of the earnings of any subsequent year or otherwise.

In Mar. 1902, the bonds, with the coupons, were sold by the trustees for £2,700, & in May, 1902, M. died leaving T. surviving her, & he was her legal personal representative:—*Held*: T. was not entitled to any part of the £2,700 as representing the apportioned amount in respect of any deficiency of interest in M.'s lifetime, but the whole of the £2,700 went to M.'s next of kin.—*Re TAYLOR'S TRUSTS, MATHESON v. TAYLOR*, [1905] 1 Ch. 734; 74 L. J. Ch. 419; 92 L. T. 558; 53 W. R. 441; 49 Sol. Jo. 418.

Annotations:—*Apld. Re Sale, Nisbet v. Philp*, [1913] 2 Ch. 697; *Re Grundy, Grundy v. Holme* (1917), 117 L. T. 470. *Apprvd. Re Wakley, Wakley v. Vachell*, [1920] 2 Ch. 205.

2318. —————.]—Where preference shares carrying a fixed cumulative preferential dividend are bequeathed in trust for a life tenant & remaindermen, & no dividend is declared or paid for the financial years including the life tenancy, the life tenant's exors. are not entitled to have the arrears made good out of future preferential dividends.—*Re SALE, NISBET v. PHILP*, [1913] 2 Ch. 697; 83 L. J. Ch. 180; 109 L. T. 707; 58 Sol. Jo. 220.

Annotations:—*Apld. Re Grundy, Grundy v. Holme* (1917), 117 L. T. 470. *Apprvd. Re Wakley, Wakley v. Vachell*, [1920] 2 Ch. 205.

2319. —————.]—Testatrix, who died on July 15, 1915, was entitled under the will of testator, who died in 1901, to a life interest in the residue of his estate, which included fully-paid preference shares conferring a right to a fixed cumulative preference dividend at the rate of 7 per cent. *per annum*, the co.'s arts. providing that the co. in general meeting, on the directors' recommendation, should declare the dividend to be paid. For the year 1906 a reduced dividend of 4 per cent. was paid, & no further dividend was declared until 1915. On Nov. 29, 1915, a dividend of 10 per cent. was declared, "being 3 per cent. in respect of arrears for the year ending Sept. 1906, & 7 per cent. in respect of arrears for the year 1907." In 1916 the dividend paid was 14 per cent., being 7 per cent. for the years 1908 & 1909 respectively:—*Held*: the case was covered by the judgment in *Re Sale, Nisbet v. Philp*, No. 2318, *ante*, & the estate of testatrix, the tenant for life, was not entitled to the dividends on the preference shares declared since her death, except an apportioned part of the dividend declared in the year 1915 down to the

date of her death.—*Re GRUNDY, GRUNDY v. HOLME* (1917), 117 L. T. 470.

Annotation:—*Apprvd. Re Wakley, Wakley v. Vachell*, [1920] 2 Ch. 205.

B. Securities for Principal and Interest.

2320. Interest falling into arrear—Deficiency on realisation of security—Ratio of apportionment of proceeds.—A sum of £8,000, held upon trust for A. for life, with remainders over, was invested upon a mtge. The investment proved unsatisfactory, & shortly after the death of A. the mtge. was realised for £7,900 only. At A.'s death there was due to him £536 in respect of arrears of interest. It was proposed to ascertain what capital sum, if received at the date of the first default in payment of interest, would, with compound interest at 4 per cent. *per annum*, have produced at the date of realisation of the mtge. the sum of £7,900, & that the capital sum so ascertained should be paid to the remaindermen as capital, & the residue of the £7,900 paid to A.'s estate in respect of his claim for interest:—*Held*: on the contrary, the £7,900 must be divided into two parts, in the proportion of £8,000 & £536, the former to be paid to the remaindermen, the latter to A.'s representatives.—*Re MOORE, MOORE v. JOHNSON* (1885), 54 L. J. Ch. 432; 52 L. T. 510; 33 W. R. 447.

Annotations:—*Foll'd. Re Barker, Barker v. Barker*, [1897] W. N. 154; *Re Alston, Alston v. Houston*, [1901] 2 Ch. 584. *Dist'd. Re Bird, Re Evans, Dodd v. Evans*, [1901] 1 Ch. 916; *Re Phillimore, Phillimore v. Herbert*, [1903] 1 Ch. 942. *Apprvd. Re Atkinson, Barbers' Co. v. Grose-Smith*, [1904] 2 Ch. 160. *Refd. Re Cleveland's Estate, Hay v. Wolmer* (1895), 13 R. 715.

2321. —————.]—*Re BARKER, BARKER v. BARKER*, [1897] W. N. 154.

Annotations:—*Cons'd. Re Alston, Alston v. Houston*, [1901] 2 Ch. 584. *Apprvd. Re Atkinson, Barbers' Co. v. Grose-Smith*, [1904] 2 Ch. 160.

2322. —————.]—*LYON v. MITCHELL*, [1899] W. N. 27.

Annotations:—*Apprvd. Re Atkinson, Barbers' Co. v. Grose-Smith*, [1904] 2 Ch. 160. *Refd. Re Alston, Alston v. Houston*, [1901] 2 Ch. 584.

2323. —————.]—Funds subject to the trusts of a settlement comprised a mtge. security which, pursuant to the trusts, was transferred to the trustees. The interest was irregularly paid, & ultimately the security was realised at a considerable loss:—*Held*: the sum realised ought to be apportioned between the tenant for life & remaindermen under the settlement in proportion to the amounts due at the date when it was recovered in respect of arrears of interest & in respect of principal.—*Re ALSTON, ALSTON v. HOUSTON*, [1901] 2 Ch. 584; 70 L. J. Ch. 869.

Annotations:—*Apprvd. Re Atkinson, Barbers' Co. v. Grose-Smith*, [1904] 2 Ch. 160. *Refd. Re Phillimore, Phillimore v. Herbert*, [1903] 1 Ch. 942.

2324. —————.]—Where a fund is settled upon tenant for life & remaindermen, & is invested in accordance with the powers of the settlement upon a mtge. which proves to be insufficient for the payment of principal & interest in full, the sum realised by the security ought to be apportioned between the tenant for life & the remaindermen in the proportion which the amount due for arrears of

PART X. SECT. 8, SUB-SECT. 1.—B.

2320 i. Interest falling into arrear—Deficiency on realisation of security—Ratio of apportionment of proceeds.—Funds held under a will in trust for A. for life, remainder for B. for life, with remainder over for certain persons, were invested in 1875 on the security of a mtge. of real estate then of sufficient value. The estate due on the mtge. fell into arrear, & in 1880 a petition for sale & the appointment

of a receiver was presented by the trustees of the will & a receiver was appointed in the same year. In 1898 A., the first tenant for life, died. At her death considerable arrears of income were due to her, a portion of which was afterwards paid to her exors. In 1901 the lands subject to the mtge. were sold under Land Purchase Acts, & did not realise the amount of the mtge. security. Prior to the sale nothing had been paid to B., the present tenant for life, in re-

spect of interest:—*Held*: the date of the sale of mortgaged lands must be taken to be the period at which the deficiency of the security was first ascertained; & the sum realised by the sale should be apportioned, in proportion to the amounts due at that date, between the exors. of the first tenant for life, the present tenant for life, & the trustees of the will as representing the persons entitled to the corpus of the fund.—*STEWART v. KINGSFATTE*, [1902] 1 I. R. 496.—*IR.*

Sect. 8.—Adjustment of losses: Sub-sect. 1, B.; sub-sect. 2.]

interest bears to the amount due in respect of the capital debt.—*Re ATKINSON, BARBERS' Co. v. GROSE-SMITH*, [1904] 2 Ch. 160; 73 L. J. Ch. 585; 90 L. T. 825; 53 W. R. 7, C. A.

Annotations:—*Apld. Re Pennington, Pennington v. Pennington* (1913), as reported in 109 L. T. 814. **Distd. Re Pennington, Pennington v. Pennington, [1914] 1 Ch. 203. **Consd. Re Horn's Estate, Public Trustee v. Garnett**, [1924] 2 Ch. 222.**

2325. ————— Income received brought into hotchpot.]—Testator gave his residuary estate to trustees in trust for his widow for life, with remainder to certain persons absolutely. After his death the trustees invested £7,535, part of his residuary estate, on mtge. of freehold property at 5 per cent. The trustees afterwards entered into possession & paid the rents to the widow, the tenant for life, but such rents were insufficient to keep down the interest, the arrears of which amounted at her death to £3,400. Shortly after her death the trustees sold the mtged. property; but it realised £7,005 only, that is, less than the principal of the mtged. debt:—**Held:** the £7,005 should be apportioned between the exors. of the tenant for life & the remaindermen, the residuary legatees, upon the basis of the following calculation; add to the £7,005 the amount of income actually received by the tenant for life; divide the total between the remaindermen & the exors. of the tenant for life in the proportion which the original principal, £7,535, plus interest thereon at 5 per cent. from the death of the tenant for life to date of sale, would bear to the aggregate amount of mtge. interest, less income tax, which the tenant for life would have received during her life had it been regularly paid, the exors. of the tenant for life giving credit for the amount of income she actually received.—*Re FOSTER, LLOYD v. CARR* (1890), 45 Ch. D. 629; 60 L. J. Ch. 175; 63 L. T. 443; 39 W. R. 31.

Annotations:—**Expld. Re Barker, Barker v. Barker, [1897] W. N. 154. **N.F. Re Alston, Alston v. Houston, [1901] 2 Ch. 584. **Apld. Re Bird, Re Evans, Dodd v. Evans, [1901] 1 Ch. 916. **Consd. Re Phillimore, Phillimore v. Herbert, [1903] 1 Ch. 942. **Re Atkinson, Barbers' Co. v. Grose-Smith, [1904] 2 Ch. 160. **Refd. Re Godden, Tenque v. Fox (1892), 41 W. R. 282; *Re Cleveland's Estate, Hay v. Wolmer* (1895), 13 It. 715.************

2326. —————.]—Where an authorised security becomes insufficient & there is a partial loss of capital & income, the account necessary to apportion the amount realised between life tenant & remainderman must be taken from the date when it was first ascertained that the security was insufficient up to the date of realisation, the life tenant bringing all income received during that period into hotchpot.—*Re PHILLIMORE, PHILLIMORE v. HERBERT*, [1903] 1 Ch. 942; 72 L. J. Ch. 591; 88 L. T. 765.

Annotation:—**Overd. Re Atkinson, Barbers' Co. v. Grose-Smith, [1904] 2 Ch. 160.**

2327. —————.]—A trust legacy was invested on mtge. which proved to be insufficient, & at the death of the tenant for life there were large arrears of interest. By an order the rents were apportioned in the proportion of the arrears due to the tenant for life at her death & the arrears since due to the remaindermen without prejudice to any re-adjustment when the security was realised. The security was subsequently realised, & the purchase-money was placed on deposit:—**Held:** the rents paid under the order must be brought into hotchpot, & the aggregate

of those rents & the purchase-money should be distributed between the representatives of the tenant for life & the remaindermen in the proportion which the arrears of rent due at the death of the tenant for life bore to the aggregate of the principal money & arrears due to the remaindermen of rent due at the death of the tenant for life bore to the aggregate of the principal money & arrears due to the remaindermen.—*Re SOUTHWELL, CARTER v. HUNGERFORD* (1915), 85 L. J. Ch. 70; 113 L. T. 311.

2328. ————— Clause disentitling life tenant to property not producing income.]—The will of testator contained the ordinary clause empowering his trustees to postpone the sale & conversion of his estate & declaring that the income thereof, previous to the conversion, should be applied as if it were income arising under investments authorised by the will. Then followed this proviso: "But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income." There was a debt, due to testator at the time of his death, which could not be got in, & the trustees took from debtor as security for it a third mtge. upon certain policies of insurance on his life. Debtor died in the lifetime of a lady who was tenant for life under the will, & the trustees who had received neither principal nor interest in respect of the debt, realised their security with the result that after payment of the prior charges, they received a sum which was less than the amount due by all the interest & some of the capital:—**Held:** (1) according to the rule of the ct. this sum represented the arrears of interest as well as the capital & (2) it must be treated as property actually producing income within the meaning of the proviso & must be apportioned between the tenant for life & the remainderman in the proportion that the interest due from the date of the mtge. bore to the capital thereby secured.—*Re HUBBUCK, HART v. STONE*, [1896] 1 Ch. 754; 65 L. J. Ch. 271; 73 L. T. 738; 44 W. R. 289; 40 Sol. Jo. 257, C. A.

Annotation:—**Generally, Refd. Re Lewis, Davies v. Harrison**, [1907] 2 Ch. 296.

2329. ————— Clause applying proceeds in payment of interest.]—Where on the realisation of certain debentures which formed part of the residuary estate of testator & were settled by his will upon tenants for life & remaindermen the proceeds proved to be insufficient for the payment of principal & interest in full, it was held that the same ought to be apportioned as between the tenants for life & remaindermen according to the principle enunciated in *Re Atkinson, Barbers' Co. v. Grose-Smith*, No. 2324, *post*, notwithstanding the provisions of a clause in the trust deed whereby the debentures were secured to the effect that the proceeds of realisation were to be applied first in satisfaction of all arrears of interest & next in satisfaction of principal.—*Re PENNINGTON, PENNINGTON v. PENNINGTON* (1913), as reported in 109 L. T. 814.

2330. — Mortgagee in possession—Apportionment of receipts.]—On Dec. 10, 1884, a mtge. of £18,000 on farm A. was settled on successive trusts for two life tenants & a remainderman without making any provision for some three years' arrears of interest then owing to one settlor who became first life tenant thereunder. The first life tenant died on July 8, 1893, & the second life tenant on Jan. 22, 1903. From Oct. 11, 1881, to Oct. 11,

2330 i. — Mortgagee in possession—Apportionment of receipts.]—Money in settlement was invested by the trustee

on a mtge. The interest fell into arrear, & a receiver was appointed over the lands, pending sale. The security

was likely to prove deficient. The tenant for life having died:—**Held:** the money brought in by the receiver

1902, the mtgor. had worked farm A. together with farm B. under an arrangement by which he was to pay the net incomes to mtgees. of farm A. & farm B. respectively to the extent of the interest due to them. The net incomes were not nearly sufficient to keep down the interest in either case, but owing to errors in the apportionment of working expenses during the joint working the mtgees. of farm B. had altogether been paid £1,028 in excess of the income properly attributable to their farm. On Aug. 11, 1905, the trustees recovered the £1,028, representing income earned from Oct. 11, 1881, to Oct. 11, 1902, from the mtgees. of farm B. From Oct. 11, 1902, to Oct. 11, 1906, the mtgor. continued to work farm A. as manager to the trustees. On Oct. 11, 1906, the trustees let farm A. at a rent of £515, & on Nov. 29, 1906, they received £2,368 in respect of the sale of farm stock provided out of & representing income earned from Oct. 11, 1881, to Oct. 11, 1906. The interest was now heavily in arrear, & the security was greatly depreciated. Foreclosure proceedings had been commenced, but no order had yet been made:—*Held*: the first life tenant's representative could not as against the other beneficiaries claim any arrears of interest owing at the date of the settlement, but subject to this exception the two sums of £1,028 & £2,368, & every sum of accruing rent received up to the time of foreclosure absolute, must be treated as a payment on account of all arrears of interest owing at the date of payment, & must be apportioned between the estates of the two life tenants & the remainderman in proportion to the amounts owing to them for arrears of interest at the date when the particular sum was received.—*Re BROADWOOD'S SETTLEMENTS, BROADWOOD v. BROADWOOD*, [1908] 1 Ch. 115; 77 L. J. Ch. 18; 98 L. T. 217.

Annotation:—*Distd. Re Southwell, Carter v. Hungerford* (1915), 85 L. J. Ch. 70.

2331. ———.—]—Testator gave his residuary real & personal estate to trustees upon trust to sell, with power to postpone, & to divide into shares, each share being settled. Testator's assets included several mtge. debts the interest on which was in arrear at his death. Testator had entered into & remained in receipt of the rents of the mtgd. properties up to his death & the trustees had continued in such receipt. The securities being deficient, the question arose between the tenants for life & the remaindermen as to the application of these rents:—*Held*: the trustees must first apply each instalment of rent received since testator's death from each mtgd. property in satisfaction of the arrears of interest which at testator's death were due in respect of the mtge., & then distribute the balance as income up to but not exceeding the interest accrued since testator's death on the mtge., & apply any excess as capital.—*Re COAKS, COAKS v. BAYLEY*, [1911] 1 Ch. 171; 80 L. J. Ch. 136; 103 L. T. 799.

Annotation:—*Expld. Re Horn's Estate, Public Trustee v. Garnett*, [1924] 2 Ch. 222.

SUB-SECT. 2.—UNAUTHORISED AND RETAINED INVESTMENTS.

2332. Deficiency on realisation—Calculation of sum to be treated as capital—Rate of interest.—Part of testator's residuary estate consisted of a bond debt, which, owing to the insolvency of

debtor's estate, was not recovered until many years after testator's death, when the gross sum recovered in respect of principal & interest did not equal the amount of the original debt:—*Held*: as between the tenant for life of the residue & those in remainder, the former was not entitled to receive what had actually been recovered in respect of interest, but only the amount of interest at 4 per cent. on the sum which the bond would have realised if debtor's estate had been administered at the end of a year after testator's death.—*TURNER v. NEWPORT* (1846), 2 Ph. 14; 1 Coop. temp. Cott. 147; 9 L. T. O. S. 213; 41 E. R. 846, L. C.

Annotations:—*Consd. Maclaren v. Stainton* (1871), L. R. 11 Eq. 382. *Fold. Re Cleveland's Estate, Hay v. Wolmer*, [1895] 2 Ch. 542. *Consd. Re Alston, Alston v. Houston*, [1901] 2 Ch. 584. *Reid. Cox v. Cox* (1869), L. R. 8 Eq. 343; *Re Phillimore, Phillimore v. Herbert*, [1903] 1 Ch. 942; *Re Atkinson, Barbers' Co. v. Grose-Smith*, [1904] 2 Ch. 160; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4.

2333. ———.—]—An obligor covenanted & became bound to pay, three months after his decease, a fund to trustees, upon trust for a tenant for life & remainderman, with interest from the date of his death until payment. Several years after the obligor's death assets were recovered, which were insufficient to fulfil the covenant & bond:—*Held*: a calculation must be made of what principal would, at 4 per cent. interest from the obligor's death, amount to the sum recovered, & the difference paid to the tenant for life.—*Cox v. Cox* (1869), L. R. 8 Eq. 343; 38 L. J. Ch. 569; 17 W. R. 790.

Annotations:—*Consd. Maclaren v. Stainton* (1871), L. R. 11 Eq. 382. *Appld. Re Bird, Re Evans, Dodd v. Evans*, [1901] 1 Ch. 916. *Reid. Re Chesterfield's Trusts* (1883), 52 L. J. Ch. 958; *Re Godden, Teague v. Fox* (1892), 41 W. R. 282; *Re Hubbuck, Hart v. Stone* (1896), 73 L. T. 732; *Re Phillimore, Phillimore v. Herbert*, [1903] 1 Ch. 942; *Re Atkinson, Barbers' Co. v. Grose-Smith*, [1904] 2 Ch. 160; *Slade v. Chaine* (1908) 77 L. J. Ch. 377.

2334. ———.—]—Testator gave his residue to trustees to convert, with power to postpone conversion, & to pay the income to tenants for life. Part of testator's estate at his death consisted of a mtge. debt secured on a colliery in his possession: interest was in arrear. After testator's death his trustees foreclosed. Proceeds of working the colliery come to the hands of a receiver in the foreclosure action were transferred to the credit of an action to administer testator's estate:—*Held*: the funds in ct. were apportionable between capital & income, on the principle that so much as would, if invested at testator's death at 4 per cent. with annual rests, have amounted to the sum transferred at the date of transfer should be treated as capital & the rest as income.—*Re GODDEN, TEAGUE v. FOX*, [1893] 1 Ch. 292; 62 L. J. Ch. 469; 68 L. T. 116; 41 W. R. 282; 3 R. 67.

Annotation:—*Reid. Re Coaks, Coaks v. Bayley*, [1911] 1 Ch. 171.

2335. ———.—]—A tenant for life was entitled to three-fifths of the income of testator's estate, & under the powers of the will, unauthorised securities, some productive, others non-productive, were retained for a favourable opportunity for realisation. A leasehold forming part of the estate was sub-let at an annual loss:—*Held*: (1) the unauthorised securities must be aggregated, & the income therefrom must be taken as being at the rate of 4 per cent. on the aggregate estimated value; (2) the loss on the leasehold was an outgoing of the estate & chargeable against the income.—*Re OWEN, SLATER v. OWEN*, [1912] 1

should be apportioned between the representatives of the tenant for life of the settled money & the persons entitled in remainder, in the propor-

tion which the arrears of interest, at the death of the tenant for life, & the amount due for principal & interest on the mtge. since his death bore to

one another.—*Re ANCKETILL'S ESTATE, Ex p. SCOTTISH PROVIDENT INSTITUTION* (1891), 27 L. R. Ir. 331.—IR.

Sect. 8.—Adjustment of losses: Sub-sects. 2 & 3.
Part XI. Sects. 1 & 2: Sub-sects. 1 & 2.]

Ch. 519; 81 L. J. Ch. 337; 106 L. T. 671; 50 Sol. Jo. 381.

Annotation:—As to (1) Follid. Re Beech, Saint v. Beech, [1920] 1 Ch. 40.

2336. ————— Deduction of income tax.]

—Testator directed that the residue of his estates should be converted on a given day, or as soon after as conveniently might be, & that a share should be held upon trust for one for life with remainders over. When the day arrived, it appeared that a leasehold property forming part of the residue could not be advantageously sold, & that it would be for the benefit of all persons interested that it should be retained by the trustees of the will & managed by them, although at a probable annual loss:—*Held*: the annual loss or profit, if any, ought to be apportioned between capital & income by calculating the sum which, put out at interest at 4 per cent. *per annum* on the given day & accumulating at compound interest at the like rate with yearly rests, would, together with such interest & accumulations, after deducting income tax, be equivalent at the end of each year to the amount of the loss or profit sustained or made during that year & then charging the sum so ascertained against, or crediting it to, capital, & charging the rest of the loss against, or crediting the rest of the profit to, income.—*Re HENGLER, FROWDE v. HENGLER*, [1893] 1 Ch. 586; 62 L. J. Ch. 383; 68 L. T. 84; 41 W. R. 491; 3 R. 207.

Annotation:—Reid. Re Morley, Morley v. Haig, [1895] 2 Ch. 738.

2337. ——— Trustees selling authorised investment & investing in unauthorised one—Apportionment of amount realised.]—Where a trustee, without the knowledge of the tenant for life or remainderman, sells out an authorised investment & places the proceeds on an unauthorised investment which results in a partial loss of income & capital, the tenant for life is entitled to such a proportion of the amount realised by the unauthorised investment plus the income he received therefrom during its continuance, as the dividends he would have received from the authorised investment in the same period bear to the capital value of the authorised investment plus those dividends the tenant for life being liable to bring into account all income he received from the unauthorised investment, although not liable to refund.—*Re BIRD, Re EVANS, DODD v. EVANS*, [1901] 1 Ch. 916; 70 L. J. Ch. 514; 84 L. T. 294; 49 W. R. 599; 45 Sol. Jo. 327.

Annotations:—Reid. Re Alston, Alston v. Houston, [1901] 2 Ch. 584; Re Phillimore, Phillimore v. Herbert, [1903] 1 Ch. 942; Re Atkinson, Barbers' Co. v. Grose-Smith, [1904] 2 Ch. 160.

Effect of postponement of conversion.]—See EQUITY, Vol. XX., pp. 368–371, Nos. 1062–1074.

SUB-SECT. 3.—SETTLEMENT OF BUSINESS.

2338. Business carried on by receiver—Loss during first life tenancy to be recouped out of sub-

sequent profits—Not out of capital.]—In an action to execute the trusts of a settlement, by which (*inter alia*) a business was assigned to trustees on trust for successive tenants for life & remainderman, a receiver & manager was appointed to carry on the business. During the life of the first tenant for life the business was carried on by the receiver at a loss; during the life of the second tenant for life profits were earned:—*Held*: the loss must be made good out of the subsequent profits, & not out of capital.—*UPRON v. BROWN* (1884), 26 Ch. D. 588; 54 L. J. Ch. 614; 51 L. T. 591; 32 W. R. 679.

Annotation:—Reid. Gow v. Forster (1884), 26 Ch. D. 672.

2339. Share in partnership business—Custom of firm to write off losses out of capital—Tenant for life not liable to recoup capital—Out of subsequent profits.]—*Gow v. FORSTER*, No. 1984, *ante*.

2340. Direction in will that losses should be defrayed out of estate—Loss borne by capital.]—A. gave all his real & personal estate to trustees upon trust for sale, conversion, & investment, & to pay the income of one-fifth part to his wife for life, & subject thereto to divide the whole into four parts, & pay the income of one such part to each of his four daughters for life, & after her death to hold such part in trust for her children equally; & he empowered his trustees to carry on any business carried on by him, & directed that the net profits of any business so carried on should, except such parts thereof as the trustees should in their discretion reserve for the purpose of increasing the capital in such business, be treated as income of his trust estate; & he directed that, should any losses, not being the result of neglect, fall on his trustees in consequence of his carrying on such business, the same should be defrayed out of his estate. Testator left property employed in business, & other property. The trustees carried on the business, & duly invested the other property. For some years the business was successful, & the profits were duly divided among the tenants for life. In a subsequent year losses were incurred, & the trustees claimed that they should be recouped out of the income of the trust estate generally:—*Held*: the losses must be borne by the capital of testator's estate, & not by the tenants for life.—*Re MILLICAMP, GOODALE & BULLOCK* (1885), 52 L. T. 758.

2341. Shares in ships—Losses on some ships & profits on others—Tenant for life entitled to net income—After settling off losses against profits.]—The rights of a tenant for life & remainderman adjusted where the owner of several ships or shares in ships had died & his business had been carried on under his will & profits had resulted from some of the ships & losses from others.

All losses incurred & all profits made prior to the death of testator must be borne by or belong to his general estate & all losses on the various steamers incurred after testator's death must be set off in account against the profits earned generally by the steamers since his death & the balance would be income belonging to widow as tenant for life (*KAY, J.*).—*Re CLAPHAM, RUTTER v. CLAPHAM* (1886), 2 T. L. R. 424.

Part XI.—Custody of Title Deeds.

SECT. 1.—IN GENERAL.

Sec. generally, REAL PROPERTY, Vol. XXXVIII., p. 709, Nos. 532–537.

2342. Pending suit—Custody most convenient to court.—Testator devised his real estate in strict settlement, giving to trustees a power of sale & exchange, to be exercised with the consent of the person entitled in possession, if of full age; & he bequeathed his residuary personalty to the trustees upon the trusts declared concerning the moneys to arise from sales under the power. Shortly after the death of testator a decree was made at the suit of the first tenant for life, then an infant, for the execution of the trusts of the will. Parts of the estates were sold under the power, & the money paid into ct., & a large fund was there applicable to the purchase of real estates. After the tenant for life came of age inquiries were directed as to the investment of part of the funds in real estate, & as to the propriety of applying to Parliament for a private estate Act, which inquiries were still being prosecuted. Shortly after this the tenant for life applied to the ct. that the trustees might be ordered to deliver to her the title deeds of the estates, subject to the limitations of the will, which application was refused:—*Held*: as a suit affecting the estates was being prosecuted, the custody of the deeds did not depend on the question who had the legal right to them, but on the question what custody was most convenient for the purposes of the suit; & the Ct. of Appeal would not interfere with the discretion of the Vice-Chancellor on the subject.—*STANFORD v. ROBERTS* (1871), 6 Ch. App. 307; 19 W. R. 552, L. JJ.

Annotations:—*Consd.* *Leathes v. Leathes* (1877), 5 Ch. D. 221; *Re Ind, Coope, Fisher v. The Co.* (1909), 26 T. L. R. 11.

SECT. 2.—TENANT FOR LIFE.

SUB-SECT. 1.—IN GENERAL.

2343. Whether deeds ordered to be deposited in court.—Every remainderman has a right to come into this ct., & pray the aid thereof to compel persons to bring in the deeds & evidences relating to the estate (*LORD MACCLESFIELD, C.*)—*REEVES v. REEVES* (1724), 9 Mod. Rep. 128; 88 E. R. 358, L. C.

2344. —.]—His lordship refused to direct the deeds & writings to be deposited in ct., because plff.'s interest in the real estate was too remote to warrant it, & is never done but in the case of a remainderman, whose interest is expectant on a mere tenancy for life.—*IVIE v. IVIE* (1738), 1 Atk. 429; 26 E. R. 274, L. C.

2345. —.]—A remainderman in tail or a reversioner in fee may come into this ct. to have the title deeds secured for their benefit though an estate for life is standing out.—*SMITH v. COOKE* (1746), 3 Atk. 378; 26 E. R. 1018, L. C.

Annotations:—*Refd.* *Hony v. Honv* (1824), 1 Sim. & St. 568. *Mentd.* *Parrott v. Palmer* (1834), 3 My. & K. 632.

2346. —.]—A son, remainderman in tail under a settlement made by a grandfather in which the father is tenant for life, without impeachment of waste, prefers a bill to have the title deeds brought into ct. Lord Hardwicke refused to direct it, & said some third person, & secure place, agreed upon by the parties, would be a much

properer depository than a master.—*PYNCENT v. PYNCENT* (1747), 3 Atk. 571; 26 E. R. 1129, L. C. *Annotation*:—*Dbtd.* *Leathes v. Leathes* (1877), 3 Ch. D. 221.

2347. —.]—Testator charged annuities exclusively on his real estate, the legal estate of which he devised to trustees, upon trust to pay the rents to or permit the same to be received by one for life, with remainders over. On testator's death, the tenant for life took possession of the estate & title deeds, & he kept down the annuities, but cut some timber. The trustees acquiesced for four years, but afterwards proceeded by action to recover the deeds & to receive the rents. The ct. by motion, restrained the proceedings, on the tenant for life undertaking to keep down the annuities, not to grant leases or cut timber without the consent of the trustees, & bringing the deeds into ct.—*DENTON v. DENTON* (1844), 7 Beav. 388; 3 L. T. O. S. 98; 8 Jur. 388; 49 E. R. 1115.

Annotation:—*Refd.* *Powys v. Blagrave* (1854), Kay, 495.

2348. Where deeds deposited in court—Right of tenant for life to delivery out.—*WEBB v. WEBB*, No. 2356, *post*.

2349. —.]—*HICKS v. HICKS* (1785), 2 Dick. 650; 21 E. R. 425.

2350. —.]—Title deeds delivered out of ct. upon the application of the trustees & the tenant for life.—*DUNCOMBE v. MAYER* (1803), 8 Ves. 320; 32 E. R. 377, L. C.

2351. —.]—Deeds brought into ct. by the exor. under the common order for production of documents made in a creditor's suit, will, after the debts are paid, be ordered to be delivered out to the party by whom they were deposited; & the ct. refused to order such deeds to be delivered to plff. in the cause, although he was the tenant for life of the estate comprised in the deeds.—*PLUNKETT v. LEWIS* (1847), 6 Harc. 65; 67 E. R. 1081.

2352. —.]—(1) The ct. will not interfere in cases of permissive waste by tenant for life.

(2) The rule of the ct. is settled that as between father & son the ct. never interferes with regard to the possession of title deeds but leaves them to the father as tenant for life. But with regard to strangers tenant for life & remaindermen the ct. interferes to have the title deeds secured. Here the case is much stronger than the ordinary case. The deeds are in ct. & it is asked that they should be delivered out. The reversioner has no connection with the person who is tenant for life & the conclusion I have come to is that the title deeds will remain in ct. (*WOOD, V.-C.*)—*WARREN v. RUDALL, Ex p. GODFREY* (1860), 1 John. & H. 1; 29 L. J. Ch. 543; 2 L. T. 693; 6 Jur. N. S. 395; 8 W. R. 331; 70 E. R. 637.

Annotations:—*As to* (2) *Consd.* *Taylor v. Sparrow* (1863), 4 Giff. 703. *Dbtd.* *Leathes v. Leathes* (1877), 3 Ch. D. 221. *Refd.* *Re Cowin, Cowin v. Gravett* (1886), 33 Ch. D. 179. *Generally, Mentd.* *Green v. Britten* (1872), 42 L. J. Ch. 187; *Aston v. Wood* (1874), 43 L. J. Ch. 715.

2353. As against jointress.—*FORD v. PEERING*, No. 2357, *post*.

SUB-SECT. 2.—AS AGAINST REMAINDERMAN.

2354. Tenant for life entitled to custody.—If tenant for life have a deed, whereby the reversion & inheritance is in another, he may at law detain the deed against the reversioner (*LORD NOTTING-*

Sect. 2.—Tenant for life: Sub-sects. 2, 3 & 4. Sects. 3, 4 & 5.]

HAM, C.).—*BANBURY v. BRISCOE* (1680), 2 Cas. in Ch. 42; 22 E. R. 837, L. C.

2355. —.]—Equity will oblige tenant for life to deliver deeds to the heir confirming the life estate; but if there are any mesne remainders in tail, as long as there is a possibility of issue the ct. will not order them to be taken out of the hands of the tenant for life.—*JOY v. JOY* (undated), 2 Eq. Cas. Abr. 284; 22 E. R. 239.

2356. —.]—By the decree, the estates, or a sufficient part, were directed to be sold, & all deeds & writings relating to the estates, to be produced before the master; the deeds were accordingly left with the master: part of the estates were afterwards sold, & the incumbrances being discharged, the tenant for life of the estates, applied the above day to have the deeds & writings delivered to him, which, upon hearing an affidavit of notice read, the Lords Comrs. ordered.—*WEBB v. WEBB* (1757), 1 Dick. 298; 21 E. R. 283; *subsequent proceedings, sub nom. WEBB v. LYMINGTON (LORD), WEBB v. WEBB*, 1 Eden, 8.

2357. —.]—*Prima facie* title deeds are property in the custody of tenant for life. May be taken from a jointress upon her jointure being confirmed.—*FORD v. PEERING* (1789), 1 Ves. 72; 30 E. R. 230, L. C.

Annotation:—Mentd. Barrs v. Fewkes (1864), 12 W. R. 666.

2358. —.]—Title deeds are incident to the possession under a freehold title.—*STRODE v. BLACKBURNE* (1796), 3 Ves. 222; 30 E. R. 979, L. C.

Annotation:—Mentd. Ogilvie v. Jeaffreson (1860), 2 Giff. 353.

2359. —.]—The legal tenant for life is entitled to the custody of the title deeds, & they will not be ordered to be deposited in ct., merely because the tenant for life is heir-at-law, & claims the immediate reversion against the residuary devisee.—*GARNER v. HANNYNGTON* (1856), 22 Beav. 627; 52 E. R. 1250.

Annotation:—Apld. Leathes v. Leathes (1877), 5 Ch. D. 221.

2360. —.]—(1) The general rule of law is, that the party who is entitled to the land is entitled to the possession of the deeds (*CHANNELL, B.*).

(2) If a tenant for life had parted with the title deeds, professing to convey the entire estate, the right of the remainderman to the deeds would attach when his right to the land attached (*CHANNELL, B.*).—*PLANT v. COTTEHILL* (1860), 5 H. & N. 430; 29 L. J. Ex. 198; 2 L. T. 20; 8 W. R. 281; 157 E. R. 1249.

2361. —.]—Deft. who claims under a contingent remainderman, is not entitled to the possession of title deeds, as against pltf. who is tenant for life in possession.—*ALLWOOD v. HEYWOOD* (1863), 1 H. & C. 745; 1 New Rep. 289; 32 L. J. Ex. 153; 7 L. T. 640; 9 Jur. N. S. 108; 11 W. R. 291; 158 E. R. 1084.

Annotation:—Apld. Leathes v. Leathes (1877), 5 Ch. D. 221.

2362. —.]—A legal tenant for life of freeholds is entitled to the custody of the title deeds, & the t. will not interfere as between a tenant for life & remainderman, except where there is danger to the safety of the deeds if left in the hands of the tenant for life, or where the ct. requires the deeds for the purpose of carrying out trusts relating to the property. On an application by a tenant for life in remainder of settled estates for the title deeds to be deposited in ct.:—*Held*: the tenant for life in possession was entitled to their custody.—*LEATHES v. LEATHES* (1877), 5 Ch. D. 221; 46 L. J. Ch. 562; 36 L. T. 646; 25 W. R. 402.

2363. —.]—*Re BEDDOE, DOWNES v. COTTAM*,

[1893] 1 Ch. 547; 62 L. J. Ch. 233; 68 L. T. 595; 41 W. R. 177; 37 Sol. Jo. 99; 2 R. 223, C. A.

Annotations:—Refd. Re England's Settltmt. Trusts, Dobb v. England, [1918] 1 Ch. 24. *Mentd. Re Jones, Christmas v. Jones* (1897), 45 W. R. 598; *In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

2364. When court will interfere—*Danger to safety of deeds.*—*LEATHES v. LEATHES*, No. 2362, *ante*.

2365. — *Trusts to be carried out.*—*LEATHES v. LEATHES*, No. 2362, *ante*.

Right as against trustees.—*See Sect. 3, post.*
Discovery of title deeds.—*See DISCOVERY*, Vol. XVIII., pp. 152–157, Nos. 1031–1090.

SUB-SECT. 3.—AS AGAINST TRUSTEE.

2366. Whether tenant for life entitled to possession.—Testator devised the residue of his real estate to pltf. & their heirs, upon trust to permit & suffer his sisters-in-law S. & M. to receive & take the rents & profits for life, without power of anticipation, & in case either should die or marry, then the one surviving & remaining unmarried to receive the whole income; but in case both should marry, then upon trust to sell & distribute the proceeds in manner thereafter mentioned, as if they had both died; & from & after the decease of them, S. & M., or both of them marrying, then testator directed pltf. to stand possessed of the trust funds, upon trust to divide same amongst his nephews & nieces equally. The tenants for life were empowered to renew leases for terms of years in the names of the trustees. S. died in the lifetime of testator.—*Held*: M., the legal tenant for life, having possession of the title deeds, was entitled to retain them as against pltf. the trustees.—*TAYLOR v. SPARROW* (1863), 4 Giff. 703; 9 L. T. 438; 9 Jur. N. S. 1226; 66 E. R. 889.

2367. Where estate charged—*Right of tenant for life to custody*—*Subject to undertaking for safe custody & production.*—An equitable tenant for life of a settled estate declared entitled to the custody of the title deeds upon undertaking not to part with them without the consent of the trustees, & to produce them to the trustees upon all reasonable occasions.—*Re BUENABY'S SETTLED ESTATES* (1889), 42 Ch. D. 621; 58 L. J. Ch. 664; 61 L. T. 22.

Annotation:—Apld. Re Wythes, West v. Wythes, [1893] 2 Ch. 369.

2368. — — — —.]—An equitable tenant for life who was absolutely entitled to the property, subject only to a jointure in favour of his mother:—*Held*: entitled to have the documents of title handed over to him by the trustees, on his giving an undertaking not to part with them pending the settlement of the duties payable on the decease of deceased tenant for life, which duties he was the person ultimately liable to pay.—*Re DODD, DODD v. DODD* (1918), 62 Sol. Jo. 451.

2369. — — — —.]—*Form of order.*—*Re WYTHES, WEST v. WYTHES*, No. 1804, *ante*.

2370. — — — —.]—*Re PADDON, STAINCLIFFE v. ADLAM*, [1909] W. N. 162.

2371. — — — —.]—*Subject to undertaking to account for rents.*—*Re MONEY KYRLE'S SETTLEMENT, MONEY KYRLE v. MONEY KYRLE*, No. 1801, *ante*.

2372. — *Right of trustees to custody.*—*Re NEWEN, NEWEN v. BARNES*, No. 1811, *ante*.

SUB-SECT. 4.—AS AGAINST MORTGAGEE.

See, generally, MORTGAGE, Vol. XXXV., pp. 321, 322, 410–417, Nos. 662, 663, 1500–1575.

2373. Mortgagee in possession of deeds—Not obliged to deliver them up.]—Mtgee. gets a settlement into his hands by indirect means, yet shall not be obliged to deliver it up.—*SIDON v. CHARNELLS* (1731), Bumb. 298; 145 E. R. 680.

2374. Deeds brought into court by tenant for life—Not delivered out without consent of mortgagee—Deeds previously taken out of jurisdiction.]—A suit was instituted for raising portions out of a settled estate. Pending the suit the tenant for life took a number of the leases to Paris. He afterwards, under an order of the ct., brought the whole of the title deeds & leases into ct. for the purposes of the suit. The purposes of the suit having been satisfied, & the portions raised by mtgee., he applied to have the title deeds & leases given up to him, which application was opposed by the mtgees.:—*Held*: as the tenant for life had, on a former occasion, taken some of the deeds abroad, the delivery of them to him ought not to be ordered without the consent of the mtgees.—*JENNER v. MORRIS* (1866), 1 Ch. App. 603; 14 W. R. 1003, 1. J.J.

Annotation:—*Consd. Leathes v. Leathes* (1877), 5 Ch. D. 221.

SECT. 3.—TRUSTEES.

See, generally, REAL PROPERTY, Vol. XXXVIII., p. 709, Nos. 532–537; TRUSTEES.

Right as against tenant for life.]—*See* Sub-sect. 1, *ante*.

2375. Right as against heir.]—Pltf., as heir-at-law of C., sued deft. to recover possession of a title deed under the following circumstances: By a conveyance of Nov. 12, 1862, certain freehold property was conveyed to C. in fee. On July 13, 1865, C., by an ante-nuptial settlement of that date, in consideration of his intended marriage with deft.'s sister, charged the property with the payment, after his death, of a year annuity of £12 to her during her life, & secured same by a grant of the property to deft., as trustee for his sister, for a term of one hundred years, with the usual powers of distress & entry, etc., in case of the quarterly payments of the annuity being in arrear. Upon the execution of the settlement C. handed the deed of conveyance of Nov. 12, 1862, to deft., & said to him, "You shall have the deed of the house to hold in your own possession for the safety of your sister," & at the same time a written acknowledgment of the receipt of the conveyance, & an undertaking to deliver it up to C. or his assigns, on the fulfilment of the trusts of the settlement, was signed by the deft.

The marriage took place, & on C.'s subsequent death, in Dec. 1875, pltf., as his eldest son & heir-at-law, brought an action in the county ct. against deft. to recover possession of the conveyance of Nov. 12, 1862:—*Held*: deft., as trustee of the settlement, was entitled to retain possession of the deed of conveyance in question during the continuance of the trusts of the settlement on the ground that it was delivered to him by C., the settlor, as a further security for the payment of the annuity, & the possession of it enabled him the better to perform the trusts of the settlement with the execution of which he was charged.—*CORIN v. THOMAS* (1881), 46 L. T. 916, D. C.

2376. Right as against co-trustee.]—In the absence of special circumstances, a trustee is not entitled to have title deeds & non-negotiable securities removed from the custody of a co-trustee & placed at a bank, in a box accessible only to the trustees jointly.—*Re Sisson's Settlement*,

JONES v. TRAPPES, [1903] 1 Ch. 262; 72 L. J. Ch. 212; 87 L. T. 743; 51 W. R. 411.

2377. Trustees entitled to lien on land.]—Testator gave real & personal property in trust to accumulate rents & profits during the minority of H. who was to be, & in fact was, let into possession on attaining twenty-one as tenant for life. A private Act authorised land to be purchased by the ct. at the instance of a tenant for life of full age, & to be paid for out of the personalty. The moneys so paid were to be deemed a debt from the real to the personal estate, which debt was to be held by the trustees as part of the personalty & secured by a lien on the purchased land. Subject to such lien the purchased land was to be settled on the trusts of the will:—*Held*: as to land so purchased, the trustees, so long as their lien existed, were entitled to the custody of the title deeds.—*WHEELER v. TOOTELL* (1903), 51 W. R. 693; 47 Sol. Jo. 710.

2378. After trust exhausted.]—By an ante-nuptial settlement lands of the wife were released to the use of the relessees to uses & their heirs during the joint lives of the husband & wife, & the life of the survivor, on certain trusts, with a limitation to the use of the wife in fee, in the event, which happened, of there being no issue of the marriage. After the death of the husband, who survived the wife, the surviving relessee to uses, with a tenant in possession of the land under a lease from the husband, made a feoffment, & levied a fine to the use of himself in fee:—*Held*: a ct. of equity might entertain a suit instituted by the heir-at-law of the wife against the relessee to uses to recover possession of the land & the title deeds.

Semble: the surviving relessee to uses after the determination of his own legal estate had no rightful title to the custody of the title deeds, & could not be considered as holding them as a trustee for the reversioner.—*RELICE v. TRYE* (1847), 1 De G. & Sm. 273; 12 Jur. 689; 63 E. R. 1065.

2379. Order to deliver up draft.]—A judge at chambers having made an order requiring an attorney to deliver up to the husband, who had paid for it, the draft of a marriage settlement under which he, the attorney, was a trustee. The ct. refused to set aside the order.—*Ex p. HILDENBURY* (1838), 4 Bing. N. C. 386; 6 Scott, 170; 1 Arn. 189; 7 L. J. C. P. 225; 132 E. R. 836.

Where infant tenant in tail in possession.]—*See* INFANTS, Vol. XXVIII., p. 205, No. 643.

SECT. 4.—REMAINDERMAN AND REVERSIONER.

Right as against tenant for life.]—*See* Sect. 2, sub-sect. 2, *ante*.

2380. Remainderman—When right attaches.]—*PLANT v. COTTERILL*, No. 2360, *ante*.

2381. Reversioner—Lands leased by tenant for life—Right to deeds on death of tenant for life.]—A tenant for life leases under a power, & the lessee mortgages the land. On the death of the tenant for life, the reversioner is entitled to the title deeds of the estate.—*EASTON v. LONDON* (1863), 33 L. J. Ex. 34; 9 L. T. 843, n.; 12 W. R. 53.

SECT. 5.—OTHER CASES.

2382. Right of tenant in tail to possession—As against trustees of a term to raise portions.]—*F. & W.*, as solrs. for the tenant for life, held the

Sect. 5.—Other cases. Part XII. Sect. 1: Sub-sects. 1, 2 & 3.]

title deeds which afterwards passed into the possession of W. & C., their successors. The tenant for life died, & the estate then stood limited, first, to F. & W. for five hundred years to secure a sum of £2,000, with remainder to trustees for six hundred years to secure a jointure & portions, with remainder to A. in tail. A. being an infant, a suit was instituted on his behalf, in which the £2,000 was raised on the security of the term. Upon that occasion F. & W. covenanted with the mtgees. to produce the title deeds from time to time, & not to part with them; but they were relievable from the covenant on certain terms. A receiver was appointed in the suit, & the ct. directed the costs of the solrs. of the suit to remain charges upon the estate at interest. W. & C. were solrs. in the suit for A. A. upon coming of age, presented a petition for the delivery of the title deeds:—*Held*: (1) independently of the covenant W. & C. held the deeds for A. & not for the termors, but the covenant having been entered into for the benefit of the infant, F. & W. were not bound to part with the deeds, until released from their covenant; (2) W. was not entitled to hold the deeds for the trustees of the term of six hundred years, or for any costs other than those of seeing himself properly released from the covenant, & he had no right to require them to be delivered to the receiver in the cause.—*HOTHAM v. SOMERVILLE* (1842), 5 Beav. 360; 6 Jur. 801; 49 E. F. 617.

2383. Deeds relating to two estates—In custody

of solicitors of former owner of both—*Claim by owner of one—Deeds deposited in court.*—The owner in fee of an estate gave her title deeds into the possession of her solrs. She afterwards settled the estate, & under the limitations of the settlement part of the estate became vested, after her death, in plffs., & the remainder in the heir-at-law of the settlor. The heir-at-law could not be found. The solrs. refused to deliver up the deeds to plffs.:—*Held*: plffs. could not recover possession of the deeds from the solrs. without the concurrence of the heir; but the deeds must be deposited in ct., plffs. having liberty to inspect & make copies of them.—*WRIGHT v. ROBOTHAM* (1886), 33 Ch. D. 106; 55 L. J. Ch. 791; 55 L. T. 241; 34 W. R. 668, C. A.

2384. Gift to class on attaining twenty-one—Right of member attaining twenty-one.—Testator devised freehold premises upon trust after his daughter's decease for her children attaining twenty-one or marrying in equal shares. At the death of testator's daughter one child had attained twenty-one & three were infants:—*Held*: the child who had attained twenty-one had the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58 (1) (ii), as having an estate in fee simple in possession with an executory limitation or disposition over in the event of other members of the class obtaining vested interests in the shares of the premises which had not for the time being vested in the other children of testator's daughter & was entitled to the possession of the title deeds.—*Re WALMSLEY'S SETTLED ESTATES* (1911), 105 L. T. 332; 55 Sol. Jo. 600.

Part XII.—Express Powers in Instruments.

SECT. 1.—POWERS OF SALE.

SUB-SECT. 1.—IN GENERAL.

2385. Exercise of power—Purposes foreign to object of settlement.—Purchaser not compelled to take a doubtful title; viz. by executing a power of sale, introduced under a direction by a decree, establishing a will, to the master to approve a proper settlement: the will not authorising the insertion of such a power; nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, & the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object: & though purchasers are not put to exercise a very nice & critical judgment with regard to the purposes, for which powers are created, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition by the will of the owner of the fee; to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, & enable those, whom he had made only tenants for life, to dispose of the estate.—*WHEATE v. HALL* (1809), 17 Ves. 80; 34 E. R. 31.

Annotations:—*Consd.* *Browster v. Angell* (1820), 1 Jac. & W. 625; *Wolley v. Jenkins* (1857), 3 Jur. N. S. 321. *Distd.* *Wise v. Piper* (1880), 13 Ch. D. 848. *Refd.* *Horne v. Barton* (1822), Jac. 437; *Topham v. Portland* (1862), 31 Beav. 525.

2386. ———. ———. *POWERS OF SALE & EXCHANGE* in settlements are only given to trustees for the benefit, & to be exercised with the consent, of the persons entitled to the estate under & by virtue of the settlement containing the power; & the devisees of the ultimate remainder in fee of the settlor, which was his own reversion, cannot be said to claim under the settlement.

Upon the marriage of A. & B., A.'s estate was settled upon him for life; remainder to the use, that if B. should survive she should have a jointure of £600 *per annum*; remainder to trustees for 500 years, to secure the arrears of jointure; remainder to trustees for two thousand years, to raise portions for younger children; & subject thereto, the estate was limited to the issue of the marriage, with an ultimate remainder to A. in fee. The settlement contained a power to B., at any time after the marriage, to charge the sum of £2,000 on the property, to be raised after her decease, & for the benefit of her personal estate; & for the purpose of raising that sum, she had power to create a term. There was in the settlement a power of sale & exchange given to trustees, to be exercised with the consent of A., & after his decease, within twenty-one years from thence, with the consent of the persons for the time being entitled to the rents & profits. There was no issue of the marriage, & A. died, living B., having devised, amongst other things, the estate in question to trustees, upon trust to sell, & apply the proceeds

PART XII. SECT. 1, SUB-SECT. 1.

k. Extinguishment of power—By death of donee.—*BEARNS v. NOAD* (1854), 4 Nfld. L. R. 33.—*NFLD.*

as therein directed. It being desirable now to sell a portion of the estate comprised in the settlement, free from the jointure & the power of B. to charge with £2,000, the trustees of the settlement entered into a contract to sell:—*Held*: under the circumstances, the power of sale in the settlement, could not now be exercised.—*WOLLEY v. JENKINS* (1857), 28 L. T. O. S. 362; 3 Jur. N. S. 321; 5 W. R. 281, L. C.

Annotations:—*Consd. Taite v. Swinstead* (1859), 26 Beav. 525; *Vine v. Raleigh* (1883), 24 Ch. D. 238. *Distd. Re Kaye & Hoyle's Contract* (1909), 53 Sol. Jo. 520. *Reid. Wise v. Piper* (1880), 41 L. T. 794.

2387. — By party not authorised—Whether set aside.—*HOPE v. LIDDELL, LIDDELL v. NORTON*, No. 2400, *post*.

2388. Covenant to settle after-acquired property—Power of sale in subsequent settlement.—*WILLIAMS v. CARTER* (1818), Sugden on Powers, 8th ed. App. 945.

Annotations:—*Refd. Horne v. Barton* (1822), Jac. 437; *Hill v. Hill* (1834), 6 Sim. 136.

2389. — — — — ——*A settlement of personal estate contained a power to alter & vary, & a covenant to settle future acquired real & personal estate on similar trusts:—Held*: a power of sale might be introduced into a settlement of subsequently acquired real estate.—*ELTON v. ELTON* (No. 2) (1860), 27 Beav. 634; 54 E. R. 252.

Effect of statutory power.—*See* Part XIII., Sect. 1, sub-sect. 5, A.

SUB-SECT. 2.—POWER OF TENANT FOR LIFE.

2390. Tenant for life without impeachment of waste—Exercise of power—Tenant not entitled to produce of timber.—(1) A tenant for life without impeachment for waste, with power to sell, if he sells, is not entitled to the produce of the timber on the estate.

(2) Trustees, whose consent was required to the exercise of a power of sale by tenants for life, submitting to act under the direction of the ct., on a bill for specific performance of a contract to sell, an inquiry into the propriety of the contract was ordered.—*DORAN v. WILTSHIRE* (1792), 3 Swan. 699; 36 E. R. 1027.

Annotation:—*As to* (1) *Refd. Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317.

2391. Power of sale with consent of trustees—Action for specific performance—Trustees submitting to act under direction of court—Inquiry into propriety of sale.—*DORAN v. WILTSHIRE*, No. 2390, *ante*.

2392. Power directing purchase & settlement of other lands—Death of tenant for life before settling—Purchase presumed made under direction in power.—Where a tenant for life sells part of the settled estate under the authority of an Act of Parliament which directs him to lay out the consideration money in the purchase of other lands, & to settle them to the same uses, & he afterwards purchases lands in fee simple, to nearly the amount, but dies without having settled them accordingly, leaving them to descend upon his heir-at-law, who was also the first tenant in tail in remainder under the settlement, a ct. of equity will intend

that the purchase was made in performance of the obligation imposed by the Act, & will not permit the remainderman to recover the value of the lands sold against the personal estate of the tenant for life.—*TUBBS v. BROADWOOD* (1831), 2 Russ. & M. 487; 39 E. R. 479.

2393. Power to sell land if required for public undertaking—Cemetery company incorporated under Act—Sale to cemetery company good under power.—By a settlement, executed on the marriage of pltf.'s eldest son, it was provided, that pltf., who was tenant for life of the lands comprised in the settlement, should have power to contract with any person or persons for the sale of any part of those lands, in case the same should, by virtue of any Act of Parliament, be wanted or required for the purposes of any canal, railway, or other undertaking. By an Act of Parliament, passed subsequently to the date of the settlement, certain incorporated persons were empowered to purchase part of the lands comprised in the settlement, but there was no clause in the Act empowering them to compel the sale & conveyance of the lands in question:—*Held*: pltf. was entitled to compel a specific performance against the persons incorporated, of a contract entered into by him with them for the sale of part of the lands comprised in the settlement.—*KENSINGTON (LORD) v. WEST LONDON CEMETERY CO.* (1838), 8 L. J. Ch. 81; 2 Jur. 959, L. C.

Covenants for title by tenant for life.—*See* SALE OF LAND, pp. 282, 283, Nos. 2451-2453, *ante*.

SUB-SECT. 3.—POWER OF TRUSTEES.

2394. Power to sell with consent of tenant for life—Sale or mortgage by tenant for life—Power of consenting not extinguished.—Under his marriage settlement A. was tenant for life; & a power was given to trustees, with A.'s consent, to sell the property. A., by lease & release, conveyed his life estate by way of mtge.:—*Held*: his power of consenting was not thereby destroyed, & it might be exercised either by the mtgee. reconveying the estate, or joining in the conveyance to the purchaser.—*WALMESLEY v. BUTTERWORTH* (1835), 4 L. J. Ch. 253.

Annotations:—*Fold. Holdsworth v. Goose* (1861), 29 Beav. 111. *Consd. Alexander v. Mills* (1870), 39 L. J. Ch. 407. *Apld. Re Bedingfeld & Herring's Contract*, [1893] 2 Ch. 332.

2395. — — — — ——The trustees of a marriage settlement were empowered to invest the trust funds in land, & afterwards to resell the lands, with the consent of the tenant for life. After the trustees had invested part of the funds in land, the tenant for life conveyed his interest under the settlement to a purchaser, by the description of all his life & other estate & interest in all the moneys, stocks, funds & securities, & messuages, lands, tenements & hereditaments into which the moneys, stocks, funds & securities were, or, at any time thereafter, might be converted & changed:—*Held*: the tenant for life's power to consent to a resale of the lands was not destroyed by the alienation of his interest under the settlement.—*WARBURTON v. FARN* (1849), 16

BAR (1853), 1 W. R. 374.—*SCOT*.

PART XII. SECT. 1, SUB-SECT. 3.

m. Power to sell with consent of tenant for life.—Where there was a settlement on a person for life with remainder over & power is given to the trustees to sell the settled property in their uncontrolled discretion

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PART XII. SECT. 1, SUB-SECT. 2.

1. Power to sell "if necessary for support"—Exercise of power.—A. & B., spouses, executed a deed of conveyance, of heritage belonging in fee to B. the wife, to trustees to convey to C. after the death of the survivor of A. & B., with power to either of A. & B. during their lifetime, "if neces-

sary for our support," to sell. B. & C., as well as all the trustees, predeceased A., the husband, who conveyed the property to certain persons "in gratitude for their past services, as well to secure a continuance of their care & attention to him in time to come, & to provide for their comfort & maintenance after his death." The ct. reduced the deed.—*BOYCE v. DUN-*

Sect. 1.—Powers of sale: Sub-sect. 3. Sect. 2: Sub-sect. 1.]

Sim. 625; 18 L. J. Ch. 312; 13 Jur. 528; 60 E. R. 1016.

Annotations :—*Consd. Alexander v. Mills* (1870), 6 Ch. App. 124; *Hardaker v. Moorhouse* (1884), 26 Ch. D. 417.
Refd. *Re Bedingfield & Herring's Contract*, [1893] 2 Ch. 332.

2396. — — — —.]—The trustees of settled estates had a power of sale, to be exercised at the request & direction of H., the tenant for life, who was also entitled to the ultimate reversion in fee. H. made an absolute conveyance of all his interest to A. for value. Subsequently the trustees, by the direction of H., purported to exercise the power of sale by conveying the estates to A.:—*Held*: H.'s power to consent was not extinguished by the absolute alienation of his life estate, & could still be exercised with the concurrence of the alienee.—**ALEXANDER v. MILLS** (1870), 6 Ch. App. 124; 40 L. J. Ch. 73; 24 L. T. 200; 19 W. R. 310, L. J.J.

Annotations.—**Consd.** *Re* Cooper, Cooper v. Slight (1884), 27 Ch. D. 585; *Hardaker v. Moorhouse* (1884), 26 Ch. D. 49. **Refd.** *Re* Roffey, Roffey v. Mills (1871), 41 L. J. Ch. 19; *Cruikshank v. Duffin* (1872), 42 L. R. 3 Eq. 555; *Bel v. Holtby* (1873), 28 D. J. 9; *Collier v. Walters* (1873), L. R. 17 Eq. 252; *Leclerc v. Baudry* (1873), L. Ch. 362; *Re Cooper & Harlech* (1876), 46 L. J. Ch. 333; *Osborne v. Rowlett* (1880), 13 Ch. D. 774; *Re Wright to Marshall* (1884), 54 L. J. Ch. 60; *Burnaby v. Equitable Reversionary Interest Soc.* (1885), 54 L. J. Ch. 466; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *Re Bedingfield & Herring's Contract*, [1893] 2 Ch. 332; *Lonsdale v. Lowther*, [1900] 2 Ch. 687; *A.-G. v. Selborne*, [1902] 1 K. B. 388; *Re Constable's S. E.*, [1919] 1 Ch. 178. **Mentd.** *Forster v. Abraham* (1874), L. R. 17 Eq. 351; *Palmer v. Locke* (1881), 18 Ch. D. 381; *Re Tanqueray-Williamne & Landau* (1882), 20 Ch. D. 465; *Re Thackwray & Young's Contract* (1888), 40 Ch. D. 34; *Smith v. Colbourne*, [1914] 2 Ch. 533; *Re Courcier & Harrold's Contract*, [1923] 1 Ch. 565; *Parr v. A.-G.*, [1926] A. C. 239.

2397. ————— Bankruptcy of tenant for life.]—A settlement of real estate contained a power of sale by the trustees with the consent of the tenant for life. The tenant for life incumbered his life estate & was adjudicated a bkpt. & the trustees afterwards entered into a contract to sell the land :—*Held* : the consent of the tenant for life to the sale could still & must be given ; but a good title could not be made without the concurrence also of the incumbancers & of the trustee in bkpy.—*Re BEDINGFIELD & HERRING'S CONTRACT*, [1893] 2 Ch. 332 ; 62 L. J. Ch. 430 ; 68 L. T. 634 ; 41 W. R. 413 ; 9 T. L. R. 354 ; 37 Sol. Jo. 355 ; 3 R. 483.

2398. — Trustees claiming specific performance
—Necessity to show consent.]—Where by the terms of a devise or settlement of real estates the consent of the tenant for life is necessary to enable the trustees to sell the estates, upon a bill filed by the trustees to compel the specific performance of a contract for sale *plfis.* in order to obtain a decree for specific performance at the hearing, must prove that the requisite consent to the contract was given before the filing of the bill. It is not sufficient for the purpose of obtaining an immediate decree to prove that such consent was given before the hearing.—**ADAMS v. BROKE** (1842), 1 Y. & C. Ch. Cas. 627; 62 E. R. 1046.

2399. Power to sell at request of tenant for life—
Bankruptcy of tenant for life—Power of sale not
extinguished.]—A power of sale over a settled
estate was given to trustees at the request & by

the direction of the tenant for life. The tenant for life became bkpt.:—*Held*: the power was not extinguished, but that with the assent of the tenant for life & his assignees a perfect title could be made under the power.—*HOLDSWORTH v. GOOSE* (1861), 29 Beav. 111; 30 L. J. Ch. 188; 4 L. T. 196; 7 Jur. N. S. 301; 9 W. R. 443; 54 E. R. 569.

Annotations :— **Apprvd.** *Alexander v. Mills* (1870), 6 Ch.
124. **Consd.** *Re Cooper, Cooper v. Slight* (1884), 27 Ch.
565. **Expld.** *Hardaker v. Moorhouse* (1884), 26 Ch. D.
417. **Distd.** *Re Beddingfeld & Herring's Contract*, [1893]
2 Ch. 332. **Refd.** *Parr v. A.-G.*, [1926] A. C. 239.

2400. Sale by tenant for life—Adoption by trustee—Validity of sale.]—(1) A sale made of settled estates under a power by a party having no authority to sell was, under the circumstances, refused to be set aside by the ct. the sale having been made *bonâ fide*, & the money being obtainable from the parties who received it, or their estates.

(2) A sale made by a tenant for life, & adopted by a trustee acting under a power to sell, will be supported in equity against tenants in tail in remainder, although the contract was made in consideration of payments to be made to the tenant for life at long & indefinite periods, but for which the trustee gave a receipt at the time, though the money was not then paid.—*HOPE v. LIDDELL, LIDDELL v. NORTON* (1855), 21 Beav. 183; 25 L. J. Ch. 90; 26 L. T. O. S. 305; 2 Jur. N. S. 105; 4 W. R. 145; 52 E. R. 829.

Annotations:—As to (1) **Consd. Re** Bellamy & Metropolitan Board of Works (1883), 24 Ch. D. 387. **Generally, Reqd.** Nawab Sidhee Nuyur Ally Khan v. Rajah Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540; *Re Bellis's Trusts* (1877), 5 Ch. D. 504.

2401. Tenant for life sole surviving trustee—No objection to sale.]—The circumstance of the tenant for life of real estate being the sole surviving trustee in whom the power of sale was vested, held to be no objection to a sale under the power.—**FORSTER v. ABRAHAM** (1874), L. R. 17 Eq. 351; 43 L. J. Ch. 199; 22 W. R. 386.

Annotations:—*Reed*, Hickley v. Hickley (1876), 2 Ch. D. 190; *Re Kemp's S. E.* (1883), 24 Ch. D. 485; *Re Stamford*, Payne v. Stamford, [1896] 1 Ch. 288; *Montefiore v. Guedalla* (No. 2) (1903), 73 L. J. Ch. 13.

SECT. 2.—POWERS OF LEASING.

SUB-SECT. 1.—IN GENERAL.

2402. Nature of express power—Different from power usually accessory to life estate.]—HELE v. GREENE (1651), 2 Roll. Abr. 201.

2408. Lease in reversion — Power to lease generally.—A power to make leases generally, extends only to leases in possession, & not to leases in reversion or *futuro*.—*SHECOMB v. HAWKINS* (1613), Cro. Jac. 318; 79 E. R. 273; *sub nom.* *SLOCOMB v. HAWKINS*, Yelv. 222.

Annotations:—*Reid*, *Berry v. White* (1662), O. Bridg. 82; *Mun v. Baylles* (1673), *Freem. K. B.* 340; *Winter v. Loveday* (1696), 1 Com. 37.

2404. Lease to commence after death of tenant in tail without issue.]—Feoffment to the use of B. in tail, remainder to C. in tail, etc., provided that on failure of B.'s estate tail, D. shall have a rent out of the land. B. creates a term of a thousand years, &, after levying a fine & suffering a recovery, dies without issue:—*Held*: the rent is barred by the recovery, & is not preserved during the term.—*BENSON v. HUDSON* (1674), 1 Freem. K. B. 362; T. Raym. 236; 1 Mod. Rep. 108;

PART XII. SECT. 2, SUB-SECT. 1.

n. Lease not in conformity with power.]—GRAY v. KNOX (1825), 5 I. Eq. R. 465.—IR.

but during the life of the life tenant only with his consent, *prima facie* the provision requiring the consent of the life tenant to be given during his life time will be regarded as inserted solely in the interest of the

tenant for life. In such a case the power is not fiduciary & the tenant for life may consent by his duly appointed attorney.—*Re CALLEN* (1918), 18 S. R. N. S. W. 219; 35 N. S. W. W. N. 65.—**AUS.**

3 Keb. 292; 89 E. R. 269; *sub nom.* HUDSON v. BENSON & BARON, 2 Lev. 28.

Annotations.—*Consd.* Ratcliffe's Case (1719), 1 Stra. 267; Martin d. Tregonwell v. Strachan (1744), Willes. 444. *Refd.* Page v. Hayward (1704), 2 Salk. 570.

2405. Recovery of rent reserved—Action by remainderman—Necessity to show authority of tenant for life—To make lease.—SANDS v. LEDGER, No. 2465, *post*.

2406. Object of power—Mutual advantage of possessor & successor.—(1) The limitation of estates by virtue of powers must be strictly pursued.

(2) Of all kinds of powers, the most frequent is, that "to make leases." For the encouragement of farmers, to occupy, stock, & improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage, during his own time; & they who come after, must suffer, by the land being un-tenanted, out of repair, & in a bad condition.

(3) The plan of this power is for the mutual advantage of possessor & successor. The execution thereof is checked with many conditions, to guard the successor; that the annual revenue shall not be diminished; nor those in succession or remainder, at all prejudiced in point of remedy, or other circumstance of full & ample enjoyment (LORD MANSFIELD).—TAYLOR d. ATKYNS v. HORDE (1757), 1 Burr. 60; 1 Keny. 143; 97 E. R. 190; *on appeal* (1758), 6 Bro. Parl. Cas. 633, II. L.

Annotations.—*As to* (2) & (3) *Refd.* Shrewsbury v. Keightley (1865), 19 C. B. N. S. 606. *Generally, Refd.* Patriclain v. Shackleton (1770), 5 Burr. 2604; Doe v. Horde (1777), 2 Cowp. 689; Peacable v. Read (1801), 1 East. 568; Doe d. Cook v. Danvers (1806), 3 Smith, K. B. 291; Jerritt v. Wear (1817), 3 Price, 575; Chelmondeley v. Clinton (1820), 2 Jac. & W. 1; Doe d. Maddock v. Lynes (1824), 3 B. & C. 388; Doe d. Feynham v. Tyler (1830), 4 Moo. & P. 29; Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705; Doe d. Blight v. Pett (1840), 11 Ad. & El. 842; Doe d. Hartridge v. Gilbert (1843), 5 Q. B. 423; Simpson v. Bathurst, Shepherd v. Bathurst (1869), 5 Ch. App. 493; Weller v. Stone (1885), 54 L. J. Ch. 497; Boyce v. Edbrooke, [1903] 1 Ch. 836. *Mentd.* Cooke v. Yates (1827), 4 Bing. 90; Bevan v. Haggood (1860), 30 L. J. Ch. 107.

2407. Absence of express power—Power not implied in favour of jointress.—Power of jointress to make leases not expressed cannot be implied.—ROE d. BOLTON (DUKE) v. GRANTHAM (1761), 3 Burr. 1259; 97 E. R. 820.

Annotation.—*Refd.* Re Bolton Estates, Russell v. Meyrick, [1903] 2 Ch. 461.

2408. Assignment of life estate—Subject to rent & with power of re-entry—No power to lease in assignee.—(1) Where a power of leasing was given to the father, tenant for life, & after his decease, to the son, tenant for life; & the son obtained a grant from the father of his life estate, without noticing the power, subject to a certain rent, with a power of re-entry for non-payment, etc.:—*Held*: the son, during the lifetime of his father, could not lease under the power.

(2) Under a leasing power, with a condition (*inter alia*) for re-entry for non-payment of rent for twenty-one days, a lease granted with a condition for re-entry for non-payment of rent in twenty days, in case no sufficient distress can be taken on the premises whereby to levy the rent, etc. is not a good execution of the leasing power; such conditional power of re-entry being less beneficial to the remainderman than an absolute power of re-entry on non-payment of rent.—COXE v. DAY (1810), 13 East, 118; 104 E. R. 312.

Annotation.—*As to* (2) *Consd.* Smith v. Jersey (1821), 3 Bll. 290.

Part performance by leasee—Whether remainderman bound.—A parol agreement to grant a lease, entered into by a tenant for life, with leasing power,

coupled with part performance by the leasee during the lifetime of the tenant for life, does not bind the remainderman who did not acquiesce in the part

2409. Leasehold lands mixed with entailed lands.]

—If tenant in tail reserves an entire rent upon a farm in which some leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner.—REES v. PHILLIP (1810), Wight. 69; 145 E. R. 1178.

2410. Lease not in conformity with power—Voidable by remainderman.]—E. being tenant for life under a deed of settlement, with a power to lease under certain restrictions, grants leases not in conformity with the power & dies, leaving by will the residue of his personalty to J. his son, the next remainderman under the settlement. J. having called upon the exors. to pay the residue, they require an indemnity against the contingent claims of the tenants in case of eviction, & upon the refusal of J. to give such indemnity, he files a bill against them for an account & payment of the residue:—*Held*: as J. had the power to disturb the leases, he was bound either to confirm them, or to give the indemnity required, & the exor. had a right to hold the residue, till he obtained the confirmation or indemnity.—VERNON v. EGMONT (1827), 1 Bli. N. S. 554; 4 E. R. 979, II. L.

Annotations.—*Refd.* Marshall v. Holloway (1832), 5 Sim. 198; Cochrane v. Robinson (1840), 10 L. J. Ch. 109; Mellish v. Vallins (1862), 31 L. J. Ch. 592. *Mentd.* Blount v. Hipkins (1834), 4 L. J. Ch. 13.

2411. Private Act giving tenant for life power to lease—Parol agreement for lease not enforced—If prejudicial to remainderman.]—A parol agreement for a lease, made by a tenant for life, with a power of leasing [under a private Act] & purporting to bind those in remainder, cannot bind the remaindermen.—TROTMAN v. FLESHER, FLESHER v. TROTMAN (1861), 3 Giff. 1; 4 L. T. 108; 7 Jur. N. S. 386; 66 E. R. 297.

2412. — Subsequent Act conveying premises to trustees for sale—Clause dealing with interim income—No leasing power implied.]—By a private Act passed in 1720 for the purpose of confirming a prior settlement, the Shrewsbury estates were limited to the issue of the settlor as they should succeed to the earldom; & the Act contained powers for each successive tenant for life or in tail to lease all or any part of the lands for three lives or twenty-one years, or for any term of years determinable on three lives, so as there should be reserved & made payable by every such lease the usual & accustomed yearly rents, boons, & services, with a proviso for re-entry for non-payment.

By a subsequent Act, passed in 1803, certain outlying portions of the estate were conveyed to trustees, "for ever freed, released, & discharged, & absolutely acquitted, exempted, & exonerated, of & from all & every the uses, trusts, estates, entails, remainders, charges, powers, provisos, limitations, & agreements in & by the settlement & the Act of 1720 respectively created, limited, provided, & declared of & concerning the same hereditaments & premises, or any of them, except only such leases as had been theretofore made & granted of the same in pursuance of the powers contained in the settlement & Act," in trust to sell, & on payment of the purchase-money, to convey the same to the purchasers "freed & discharged, & acquitted, exempted, & exonerated as aforesaid," the proceeds of such sales to be laid out in the purchase of other lands, to be subject to the same uses, etc., as the lands so sold.

By Sect. 7 of the Act of 1803 it was enacted & declared, that "in the meantime & until the manors, lands, etc., thereby directed to be sold,

performance or know of the agreement.—HOPE v. CLONCURRY (LORD) (1874), 8 I. R. Eq. 555.—IR.

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should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, & enjoyed, & the rents, issues, & profits thereof should be had, received, & taken by & be applied to & for the benefit of such person & persons as would have been entitled thereto, & ought to have held, possessed, or enjoyed & received the same respectively in case that Act had not been made."

No sale was effected under the powers conferred by this Act: & in 1838 the then earl granted to P. a lease of a portion of the land so vested in the trustees for sale, for ninety-nine years, provided three persons named, or either of them, should so long live, at the yearly rent of £30, P. covenanting to lay out £1,000 in building on the land within five years:—*Held*: the earl had no power to lease the land in question so as to bind succeeding tenants in tail of the Shrewsbury estates.—*SHREWSBURY (EARL) v. KEIGHTLEY* (1866), L. R. 2 C. P. 130; 36 L. J. C. P. 17; 16 L. T. 265; 12 Jur. N. S. 999; 15 W. R. 284, Ex. Ch.

Effect of statutory power.]—See Part XIII., Sect. 1, sub-sect. 6, A., post.

SUB-SECT. 2.—CONSTRUCTION OF POWER.

2413. Intention of parties considered.]—

(1) Tenant in tail makes a lease without rent, it is not void, but voidable (*WYNDHAM, J.*).

(2) Powers are to be expounded according to the intent of the parties (*TWISDEN, J.*).—*OPEY v. THOMAS* (1665), T. Raym. 132; 83 E. R. 71; *sub nom. OPEY v. THOMAS*, 1 Sid. 260.

Annotations:—As to (2) *Refd. Smith v. Jersey* (1821), 3 Bl. 290. *Generally, Refd. Symonds v. Cudmore* (1691), 12 Mod. Rep. 32. *Mentd. Hayward v. Wilson* (1696), Comb. 377.

2414. —.]—*POMERY v. PARTINGTON*, No. 2499, *post*.

2415. Liberal construction given.]—Power to make leases to be liberally construed.—*RIGHT d. BASSETT v. THOMAS* (1763), 3 Burr. 1441; 1 Wm. Bl. 440; 97 E. R. 916.

2416. How far objects of settlement considered—Powers clearly expressed.]—Regard is to be had to the objects of the settlement, where the power is of doubtful construction; but no such consideration is to control powers expressed in clear terms, according to their ordinary acceptation.—*SHEEHY v. MUSKERRY (LORD)* (1848), 1 H. L. Cas. 576; 9 E. R. 885.

Annotations:—*Consd. Mostyn v. Lancaster, Taylor v. Mostyn* (1883), 23 Ch. D. 583. *Refd. Edwards v. Millbank* (1859), 4 Drew. 606; *Jegon v. Vivian* (1865), L. R. 1 C. P. 9; *King v. Bird*, [1909] 1 K. B. 837.

2417. — Power ambiguously expressed.]—*SHEEHY v. MUSKERRY (LORD)*, No. 2416, *ante*.

2418. Power of tenant in tail—Construction of private Act.]—*SHREWSBURY (EARL) v. KEIGHTLEY*, No. 2412, *ante*.

SUB-SECT. 3.—EXECUTION OF POWER.

A. In General.

2419. Power must be pursued strictly.]—*SUSSEX (COUNTESS) v. WROTH* (1582), Cro. Eliz. 5; 78 E. R. 272; *sub nom. LEAPER v. WROTH*, cited in 6 Co. Rep. at p. 33a; *sub nom. LEPUR &*

WROTH'S CASE, 1 Leon. 35; *sub nom. WROTH & SUSSEX (COUNTESS) CASE*, 3 Leon. 130; *sub nom. SUSSEX (COUNTESS) & WORTH'S CASE*, 4 Leon. 65.

Annotations:—*Consd. Fitzwilliam's Case* (1603), 6 Co. Rep. 329; *Slocumb v. Hawkins* (1612), Yelv. 222; *Berry v. White* (1662), O. Bridg. 82; *Bosworth v. Forard* (1666), O. Bridg. 153; *Winter v. Loveday* (1696), 5 Mod. Rep. 378. *Refd. Fitzgerald v. Fauconberge* (1729), Fitz-G. 207.

2420. —.]—*TAYLOR d. ATKYNS v. HORDE*, No. 2406, *ante*.

2421. —.]—The lease of a tenant for life, with power of leasing under certain conditions, must be in strict conformity to those conditions; & if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainderman.—*CAVAN (COUNTESS) v. DOE d. PULTENEY* (1795), 6 Bro. Parl. Cas. 175; 2 E. R. 1010, H. L.

2422. —.]—Lease, under a power, by a person, having only a particular estate, if not conformable to the power, is not good at law: but, where the persons, granting the lease, have at law the inheritance, with directions only, how they are to execute leases, the legal estate passes.—*A.-G. v. GRIFFITH* (1807), 13 Ves. 565; 33 E. R. 406, L. C.

Annotations:—*Mentd. A.-G. v. Backhouse* (1810), 17 Ves. 283; *A.-G. Newbury Corp'n.* (1838), Coop. Tr. Cas. 72.

2423. Execution by power of attorney—Power personal to donee.]—*GRESHAM'S (LADY) CASE* (1582), cited in 9 Co. Rep. at p. 76a; 77 E. R. 845.

Annotation:—*Distd. Combes's Case* (1613), 9 Co. Rep. 135.

2424. Who may execute power—Power given to donee & assigns—Assignment by donee—Execution by executor of assignee.]—A power of leasing given to A. & his assigns, may be well executed by the assignee of the exor. of A.'s assignee.—*HOWE v. WHITEBANK* (1679), 1 Freem. K. B. 476; 89 E. R. 357; *sub nom. WHITFIELD v. HOW*, 2 Show. 57; *sub nom. HOW v. WHITFIELD*, T. Jo. 110; 1 Vent. 339.

Annotations:—*Consd. Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705; *Ashton v. Wood* (1857), 3 Sm. & G. 436; *Stevens v. Austen* (1861), 3 E. & E. 685. *Refd. Doe d. Williams v. Matthews* (1833), 5 B. & Ad. 298; *Osborne v. Rowlett* (1880), 13 Ch. D. 774.

2425. — Agreement for lease by tenant for life—Death of tenant for life—Execution by trustees during minority of infant tenant in tail.]—By a will devising real estate in strict settlement, powers of granting building leases were given to any tenant for life & to trustees during the minority of any tenant in tail. The tenant for life, in pursuance of his power, entered into a contract to grant a building lease, but died without having executed a lease, & was succeeded by an infant tenant in tail:—*Held*: the trustees had power to effectuate the contract of the tenant for life by executing a lease.—*DAVIS v. HARFORD* (1882), 22 Ch. D. 128; 52 L. J. Ch. 61; 47 L. T. 540; 31 W. R. 61.

2426. Settlement on son for life with power to lease—Lease not pursuant to power—To father on trust for younger child—Considered as lease by father.]—A man made a voluntary settlement on his son for life, & after to his first & other sons in tail, with power for the son to make a lease in possession for ninety-nine years, determinable on three lives, & also to make leases for sixty years to commence after his death, if he had issue male, to continue so long as he had issue male; the son makes a lease to his father in trust for one

PART XII. SECT. 2, SUB-SECT. 2.

2415i. Liberal construction given.]—A power to make leases is to be construed liberally.—*SHANNON v. BRADSTREET* (1803), 1 Sch. & Lef. 52.—*IR.*

any difference in value between the terms which he had agreed to grant, & that which his leasing power enabled him to do.—*LESLIE v. CROMMELIN* (1867). 2 L. R. Eq. 131.—*IR.*

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(a), (b) & (c).]

of the prior lease, but worked no more than a surrender conditioned to be void if the new grant should fail.—*DOE d. BIDDULPH v. POOLE* (1848), 11 Q. B. 713; 17 L. J. Q. B. 143; 11 L. T. O. S. 25; 12 Jur. 450; 116 E. R. 641.

Annotations:—Apld. Noble v. Ward (1867), L. R. 2 Exch. 135; Canterbury Corp. v. Cooper (1908), 99 L. T. 612. *Refd.* Doe d. Egremont v. Courtenay (1848), 11 Q. B. 702; Morris v. Baron, [1918] A. C. 1.

2435. Reservation of rent to tenant for life, his heirs & assigns—Remainderman entitled to rent.]—Where one seised in fee settles lands on himself for life, with remainders to other persons, reserving a leasing power, which he afterwards exercises, reserving rent to himself, his heirs & assigns, those in remainder shall have the rent. So, where one seised in fee settles lands on A. for life, with remainders, & gives him a leasing power, which he exercises, reserving rent, during the term, to himself, his heirs & assigns, those in remainder shall take it. By a deed to lead the uses of a recovery, lands were limited to the use of such persons as A. should by deed or will appoint, &, in default of & until appointment, to the use of B., in trust for A., his heirs & assigns, reserving to A. a leasing power. A., reciting the power, demised for a term to C. "yielding & paying unto A., his heirs & assigns, during the term," a certain rent, with covenants to pay rent, to repair, etc., & a proviso for re-entry by A., his heirs & assigns, in case of breach:—*Held*: the covenants enured in favour of the assignee of the reversion.—*GREENAWAY v. HART* (1854), 14 C. B. 340; 2 C. L. R. 370; 23 L. J. C. P. 115; 23 L. T. O. S. 174; 18 Jur. 449; 2 W. R. 702; 139 E. R. 140. *Annotation:—Refd.* Yellowly v. Gower (1855), 11 Exch. 274.

2436. Power to lease by deed.—Lease not under seal.]—Where lands were settled in tail under a special Act of Parliament, empowering the owner for the time being to grant leases in accordance with the provisions of 32 Hen. 8, c. 28, & a tenant in tail in possession executed an agreement for a lease not under seal:—*Held*: such agreement was not binding upon the issue in tail, notwithstanding the acceptance on his part of rent for the purpose forming the subject of the agreement.—*OSBORN v. MARLBOROUGH (DUKE)* (1866), 14 L. T. 789; 12 Jur. N. S. 559; 14 W. R. 886.

B. Validity of Execution.

(a) In General.

See, now, Law of Property Act, 1925 (c. 20), s. 152.

2437. Unreasonable lease to one child in preference to others.]—A proviso in a deed of settlement authorising the covenantor to limit any part of the settled estate for lives or years, will not enable him to make an unreasonable lease, in preference of one of his children.—*MILDMAY v. STANDISH* (1584), Cro. Eliz. 34; Moore, K. B. 144; 78 E. R. 300; *sub nom.* MILDMAY'S CASE, 1 Co. Rep. 175 a.

Annotations:—Consd. Peover v. Hassel (1861), 1 John. & H. 341. *Refd.* Paget's Case (1591), 1 And. 259; Cross v. Faustonditch (1608), Cro. Jac. 180; Colt & Glover v. Coventry & Lichfield (Br.) (1612), Hob. 140; Howel v.

best rent, without fine, is so far a purchaser as to be entitled to equity to relief, as against the remainderman, from a defect in the execution of the power under which the lease was intended to have been made. *Semble*: it is questionable whether the rule that equity will aid a defective execution of a power only in behalf of purchasers for valuable consideration, or

Sambay (1615), 1 Brownl. 179; *Gardner v. Sheldon* (1671) Taugh. 269; *Ratcliffe's Case* (1720), 1 Stra. 267; *Smith v. Ashton* (1765), 1 Cas. in Ch. 263. *Mentd.* Bedell's Case (1607), 7 Co. Rep. 40 a; *Harpur's Case* (1615), 11 Co. Rep. 23 a; *Miller v. Manwaring* (1634), Cro. Car. 397; *Foster v. Foster* (1661), 1 Keb. 160; *Bate v. Amherst* (1663), T. Raym. 82; *Goodtitle v. Pettoe* (1732), 2 Stra. 934; *Sargent v. Reed* (1745), 2 Stra. 1228; *Doe d. Milburn v. Salkeld* (1755), Willes, 673; *Rowe v. Roach* (1813), 1 M. & S. 304; *Clifford v. Turrell* (1845), 14 L. J. Ch. 390; *Poole v. Whitcomb* (1862), 12 C. B. N. S. 770; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260.

2438. Power coupled with an interest.—Mortgage of estate subsequent to leases.—Assignment of mortgage prior to some & subsequent to other leases.]—*VINCENT v. ENNYS* (1730), 2 Eq. Cas. Abr. 665; 22 E. R. 559.

Annotation:—Dtd. Walmsley v. Butterworth (1835), 4 L. J. Ch. 253.

2439. — Lease by woman to second husband.]—*DOE d. HARTRIDGE v. GILBERT*, No. 2429, *ante*.

2440. Lease of lands comprised in power.—Along with other lands.]—*CARDIGAN (EARL) v. MONTAGUE* (1754), Sugden on Powers, 8th ed. App. 918, L. C.

Annotations:—Consd. Taylor v. Horde (1757), 1 Burr. 60. *Apld.* Doe d. Egremont v. Stephens (1846), 6 Q. B. 208. *Consd.* Boyce v. Edbrooke, [1903] 1 Ch. 836. *Refd.* Bevan v. Habgood (1860), 1 John. & H. 222; *Re* Lacon's Settlement, Lacon v. Lacon, [1911] 1 Ch. 351. *Mentd.* Jones v. Robinson (1853), 3 De G. M. & G. 910.

2441. — — —.]—Lease of lands of which lessor was seised in fee, & of other lands of which he was seised for life with a power of leasing, at one entire rent, & the lease not well executed according to the power:—*Held*: the lease was good after the death of lessor for the lands in fee, though not for the other lands, for the rent may be apportioned.—*DOE d. VAUGHAN v. MEYLER* (1814), 2 M. & S. 276; 105 E. R. 384.

Annotations:—Apprvd. Smith v. Jersey (1821), 3 Bl. 290. *Consd.* Doe d. Williams v. Matthews (1833), 5 B. & Ad. 298. *Refd.* Neale v. Mackenzie (1836), 1 M. & W. 747; Matthey v. Curling, [1922] 2 A. C. 180.

2442. — — —.]—A lease executed professedly in pursuance of a power, included property to which the power did not extend. There was one entire rent reserved:—*Held*: the lease was entirely void against the remainderman as the rent could not be apportioned.—*DOE d. WILLIAMS v. MATTHEWS* (1833), 5 B. & Ad. 298; 2 Nev. & M. K. 13. 264; 2 L. J. K. B. 163; 110 E. R. 801.

2443. — — —.]—Lands were devised for life, remainder over, with power to the tenant for life to lease:—*Held*: a lease by the tenant for life, comprehending, at a single rent, as well some of the lands devised, as others not devised & not previously let with those devised, was bad as to the lands devised, although the rent reserved, with the heriots, etc., was in proportion to the rents, etc., previously reserved on all respectively.—*DOE d. EGREMONT v. STEPHENS* (1844), 6 Q. B. 208; 13 L. J. Q. B. 350; 3 L. T. O. S. 160; 8 Jur. 951; 115 E. R. 81.

Annotation:—Refd. Doe d. Biddulph v. Hole (1850), 15 Q. B. 848.

2444. Power to lease under written agreement.—Parol demise by tenant for life.—Interest determines with life of lessor.]—Under a parol demise from year to year, by a tenant for life, with power to lease by deed, etc., & under written agreements for leases not exceeding three years, signed by the

a child, is a sound one.—*DONNELL v. CHURCH & CLARK* (1842), 4 I. Eq. R. 630.—*IR.*

*r. Excessive execution of power.—Effect of laches.]—*D., tenant for life, purporting to exercise a leasing power, made, in 1767, a lease which contained a covenant for quiet enjoyment against the acts of all persons claiming through him. In 1848, the lease was impeached

PART XII. SECT. 2, SUB-SECT. 3.—
B. (a).

*p. Fraud on power.]—*HARNETT v. YIELDING (1805), 2 Sch. & Lef. 549.—*IR.*

*a. Defective execution of power.—Equitable relief.]—*Qu.: whether, in case of a lease made by tenant for life, having leasing power, the lessee at

lessees, but not by the tenant for life, though witnessed by his agent, the interest of the lessees determines with the life of the lessor, & the rents are apportionable.—*SYMONS v. SYMONS & POWELL* (1821), 6 Madd. 207; 56 E. R. 1070.

2445. Lease by tenant for life to trustee for himself.—The doctrine that a tenant for life with a power to sell or lease may sell or lease to a trustee for himself is an established exception to the rule as to dealings by persons filling fiduciary positions.—*BEVAN v. HARGOOD* (1800), 1 John. & H. 222; 30 L. J. Ch. 107; 3 L. T. 209; 7 Jur. N. S. 41; 8 W. R. 703; 70 E. R. 728.

Annotation:—*Dbd.* *Boyce v. Edbrooke*, [1903] 1 Ch. 836.

(b) *Building and Repairing Leases.*

2446. Power to grant building lease—Lease not expressed to be building lease—Covenant by lessee to repair old houses or houses to be built—Naked power not coupled with interest.—A. tenant for life having power to grant building leases for sixty-one years reserving the best improved ground rent granted a lease for that term which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the premises demised, old houses, or such other house as should be built during the term:—*Held*: this was not a building lease within the power. Such a lease being granted by tenant for life, who had a bare naked power without any legal interest, is void, & consequently not capable of being confirmed by the remainderman accepting rent.—*JONES d. COWPER v. VERNEY* (1739), Willes, 169; 125 E. R. 1115.

Annotations:—*Consd.* *Edwards v. Millbank* (1859), 4 Drew. 606. *Reid.* *Smith v. Jersey* (1821), 3 Bl. 290; *Rutland v. Doe d. Wythe* (1843), 12 M. & W. 355.

2447. — Building or rebuilding & repairing—Lease containing covenant to repair only.—Testator devised a messuage & premises to his son for life, with power to demise for sixty-one years, “for the purpose of new building or effectually rebuilding & repairing any messuage, etc. being or to be on the premises.” The son granted a lease for that term, in which the tenant covenanted to expend £250 at least, for the purpose of effectually repairing the messuage & premises, to the lessor’s satisfaction; & he also covenanted when the same should be so well & effectually repaired as aforesaid, to repair & uphold the same as need should require, during the term. On ejectment brought after the son’s death by the remainderman against the lessee:—*Held*: this lease was not a good execution of the power, inasmuch as a covenant effectually to repair, if the above-mentioned covenant were such, was not equivalent to a covenant effectually to rebuild & repair.—*DOE d. DYMOKE v. WITHERS* (1831), 2 B. & Ad. 896; 1 L. J. K. B. 38; 109 E. R. 1375.

Annotation:—*Dbd.* *Truscott v. Diamond Rock Boring Co.* (1882), 20 Ch. D. 251.

2448. — & to lease mines—Building lease reserving minerals.—Where under a settlement a tenant for life has power to lease all or any part of the settled lands for building purposes, & also power to lease mines of coal, iron, or other material, either with or without the surface lands, those powers enable him to lease the settled lands for building purposes, reserving the minerals under the lands so leased.—*Re RUTLAND’S (DUKE) SETTLED ESTATES, RUTLAND (DUKE) v. BRISTOL*

(MARQUIS), [1900] 2 Ch. 206; 69 L. J. Ch. 603; 44 Sol. Jo. 484.

2449. Pattern lease with absolute covenant to repair—Proviso for re-entry for non-performance—Lease containing covenant to repair—Within six months after notice.—In a power of leasing, it was stipulated that the leases should contain the usual & accustomed covenants, & the pattern lease contained an absolute covenant to repair, with a clause of re-entry for the non-performance of the covenant:—*Held*: a lease, which contained a covenant to repair within six months after notice by the lessor, with a clause of re-entry for non-performance, was not a valid lease under the power.—*DOE d. EGREMONT (LORD) v. BURROUGH* (1844), 6 Q. B. 229; 13 L. J. Q. B. 357; 3 L. T. O. S. 160; 8 Jur. 954; 115 E. R. 89.

2450. Power to grant building or repairing lease—Buildings in state of decay—Lease containing ordinary covenants to repair & deliver up.—Testator devised his freehold dwelling-house & trade premises to his daughters & the survivor for life, “with full power to them or her to grant leases thereof, or of any part thereof, for a term or terms not exceeding twenty-one years, at a rack-rent, & without taking any premium or premiums for the same, or building or repairing leases for the term of sixty-one years”:—*Held*: a lease for forty years with a covenant by the lessee to well & sufficiently repair, maintain, amend & keep the demised premises in, by & with all manner of needful & necessary reparations & amendments, & at the end of the term to yield them up, so being in all things well & sufficiently repaired, amended, & kept together, with a power to the lessor to enter & view & give written notice of all defects & want of reparation, & a covenant by the tenant within three months to make good all such defects, was a valid lease in execution of the power.—*EASTON v. PRATT* (1861), 2 H. & C. 676; 4 New Rep. 69; 33 L. J. Ex. 233; 10 Jur. N. S. 732; 12 W. R. 805; 159 E. R. 280; *sub nom.* *PRATT & CORDEY v. EASTON & BILTON*, 9 L. T. 841, Ex. Ch.

Annotation:—*Apld.* *Truscott v. Diamond Rock Boring Co.* (1882), 20 Ch. D. 251.

2451. Power to lease to “any person who should improve or repair the premises”—Agreement for lease—“Lessee to do necessary repairs.”—A settlement contained a power to the trustees to lease the property to any person who should improve or repair the same, or covenant or agree to improve or repair the same. The trustees of the settlement agreed to let part of the property to a tenant, “the lessee to do the necessary repairs”:—*Held*: the agreement to lease was within the power.—*TRUSCOTT v. DIAMOND ROCK BORING CO.* (1882), 20 Ch. D. 251; 51 L. J. Ch. 259; 46 L. T. 7; 46 J. P. 486; 30 W. R. 277, C. A.

Annotation:—*Reid.* *Calthorpe v. McOscar*, [1923] 2 K. B. 573.

(c) *Power to Grant Leases for Lives.*

See, now, Law of Property Act, 1925 (c. 20), s. 149 (6).

2452. Lease for years determinable on lives—To commence after determination of subsisting lease.

(1) Under a power to make a lease or leases, grant or grants, etc., as well in possession as in reversion of certain tenements or any parcel thereof, etc., with a proviso, that such lease or

as an excess of the power:—*Semle*: the mere lapse of time, & the acquiescence from 1767 to 1848 would bar relief.—*DONEGAL (MARQUIS) v. GREG* (1849), 13 L. Eq. R. 12.—*IR.*

PART XII. SECT. 2, SUB-SECT. 3.—*B. (c).*

t. *Power to lease for lives—Lease for lives renewable for ever.*—*STEELE v. MITCHELL* (1840), 3 L. Eq. R. 1; 2

Dr. & Wal. 568.—*IR.*

u. *Power to lease for lives or years—Lease for lives & for such other lives as should be added pursuant to covenant for perpetual renewal.*—*Marriage articles*

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leases, grant or grants, shall not exceed the number of three lives at most, or twenty-one years, & so as the ancient & accustomed annual rent should be reserved; the premises being at the time of the creation of the power demised to one B. for life; a lease may be made for ninety-nine years determinable on two lives to commence after the death or determination of the estate of B.; & a reservation of an annual rent to the lessor who was tenant for life, his heirs & assigns, & to such person & persons to whom the premises demised after the death of the lessor should belong during the term, is good.

(2) Under a power to lease for three lives, a lease for ninety-nine years determinable on three lives is not good.—*WHITLOCK'S CASE* (1609), 8 Co. Rep. 69 b; 2 Roll. Abr. 260, pl. 3; 77 E. R. 580.

Annotations.—1s to (1) *Apld.* *Berry v. White* (1662), O. Bridg. 82. *Consd.* *Smith v. Ashton* (1675), Freem. Ch. 308; *Zouch d. Woolston v. Woolston* (1761), 2 Burr. 1136; *Isherwood v. Oldknow* (1815), 3 M. & S. 382. *Apld.* *Greenaway v. Hart* (1854), 14 C. B. 340. *Distd.* *Yellowly v. Gower* (1855), 11 Exch. 274. *Refd.* *Rowles v. Mason* (1612), 2 Brownl. 192; *Secheverel v. Dale* (1627), Poph. 193; *Bland v. Inman* (1632), Cro. Car. 288; *Orby v. Mohun* (1706), Freem. Ch. 291; *Morton v. Woods* (1869), 9 B. & S. 632. As to (2) *Apld.* *Rattle v. Popham* (1734), Cunn. 102; *Roe d. Brune v. Prieaux* (1808), 10 East, 158. *Generally, Refd.* *Lyn v. Wyn* (1665), O. Bridg. 122; *Bosworth v. Forard* (1666), O. Bridg. 153; *Sacheverel v. Frogate* (1671), 1 Vent. 148, 161; *Churchman v. Harvey* (1757), Amb. 335.

2453. — *Lease for lives & longest liver.*—*ALSOPI v. PINE* (1672), 3 Keb. 44; 84 E. R. 585.

2454. *Power to lease for lives—Or any term of years upon lives—Lease for years if lives so long live.*—A power to make leases for three lives, or twenty-one years, or for any term of years, upon one, two, or three lives, will warrant a lease for ninety-nine years, if three lives should so long live.—*LUTWICH v. PIGGOT* (1689), 3 Mod. Rep. 268; 87 E. R. 177.

2455. — *Absolute lease for years—To commence after determination of existing lease for lives.*—A power to grant leases of "a manor & other hereditaments in possession for one, two, or three lives, or thirty years, or for any other number of years, determinable upon one, two, or three lives; or, in reversion, for one or two lives, or for thirty years, or for any other number of years determinable upon one or two lives, so as such demise be not made of any of the ancient demesne lands parcel of the manor," is well executed by the grant of an absolute lease for thirty years, to commence after the determination of an existing lease for two lives, provided it be not of copyhold lands; for ancient demesne being a quality inseparable from all copyhold lands, they are restrained by the proviso, as being "ancient demesne lands, parcel of the manor," but the rents & services are demisable within the power.—*WINTER v. LOVEDEN* (1697), 5 Mod. Rep. 378; *Freem. K. B.* 507; 1 Com. 37; *Carth.* 427; *Holt, K. B.* 414; 1 Ld. Raym. 260; *Comb.* 371; 2 Salk. 537; 12 Mod. Rep. 147; 87 E. R. 717; *sub nom.* *LOVEDAY v. WINTER*, 5 Mod. Rep. 244.

Annotations.—*Consd.* *Campbell v. Leach, Leach & Thomas v. Campbell* (1775), Amb. 740. *Expld.* *Doe d. Bartlett v.*

Rendle (1814), 3 M. & S. 99. *Refd.* *Goodtitle v. Funucan* (1781), 2 Doug. K. B. 565; *Doe d. Allen v. Calvert* (1802), 2 East, 376; *Cardigan v. Armitage* (1823), 2 B. & C. 197; *Re London & South Western Railway Act, 1856, Ex p. Henley* (1861), 29 Beav. 311.

2456. — *Lease to commence after determination of lives—On which subsisting lease determinable.*—Under a power to tenant for life to lease for ninety-nine years determinable on one, two, or three lives, a lease for ninety-nine years, if E. should so long live, to commence from the death of J. & M., two lives on which a subsisting lease for years was determinable, was held ill.—*DOE d. COPLESTON v. HIERN* (1816), 5 M. & S. 40; 105 E. R. 966.

Annotation.—*Distd.* *Sheehy v. Muskerry* (1848), 1 H. L. Cas. 576.

2457. — *Lease for settlor's life—Lease for years with covenant to renew.*—Leases made by the heir of entail in possession, for nineteen years, with covenant to renew annually during his life, are not void, as being a transgression of the power to lease for the settlor's life, or nineteen years.—*QUEENSBERRY LEASES CASE* (1819), 1 Bl. 339; 4 E. R. 127, H. L.

Annotation.—*Refd.* *Henty v. Wrey* (1882), 21 Ch. D. 332.

2458. — *Consistent with interest of tenant for life—Lease for lives renewable for ever.*—On the marriage of T., a settlement was made of certain lands held on a lease for lives renewable for ever. The settlement gave T. an estate for life, & contained the following power of leasing: "It shall be lawful for T. & all & every other person or persons to whom any use is hereby limited, when in actual possession of the lands, etc., to demise the lands for any number of lives or years, consistent with their respective interests therein, to commence in possession, & not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, etc. T. granted a lease to A. at a farm rent, for the lives of three persons therein named; with a covenant, that on failure of any of the three lives, the lessor, his heirs & assigns, would, on the payment of £5 as a fine upon each life that should happen to die, add to the time & term of the lease the life of another person, nominated by the lessee, from time to time successively for ever.—*Held*: this lease was not warranted by the power; & a decree by the Ct. of Chancery in Ireland, directing specific performance of the covenant of renewal, was reversed, & the bill ordered to be dismissed with costs.—*CLARK v. SMITH* (1842), 9 Cl. & Fin. 126; 6 Jur. 697; 8 E. R. 363, H. L.

2459. *Power to lease for lives or years—Lease for lives or years "which shall last longest."*—J. by marriage arts., covenants to settle his estate to certain uses, reserving to himself a power of making leases for thirty-one years, or three lives. He grants a lease to A. for three lives, or thirty-one years, which shall last longest.—*Held*: this lease was supportable as a good execution of the power.—*COMMONS v. MARSHALL* (1774), 6 Bro. Parl. Cas. 168; 2 E. R. 1005, H. L.

2460. *Lives must be certain & co-existing.*—Under a power of leasing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, such lands as were then demised for any such term, lands are not included

contained a clause to make leases in these words: "with the usual leasing power for three lives, or 31 years, in possession, & not in reversion."—*Scmble*: a lease made under such a power, for three lives, & for such other lives as should be added, pursuant to a covenant for perpetual renewal, is not, therefore, void, as the

demise for three lives is separable from the excess.—*JACK d. WHEATLEY v. CREED* (1828), 2 Hud. & B. 128; 2 Ir. L. Rec. 1st ser. 71.—*IR.*

a. — *Lease with clause enabling lessee to surrender.*—Marriage articles contained a clause to make leases in these words: "with the usual leasing power for three lives or 31 years, in

possession, & not in reversion."—*Held*: a lease with a clause enabling the lessee to surrender was contrary to the power, & void.—*JACK d. WHEATLEY v. CREED* (1828), 2 Hud. & B. 128; 2 Ir. L. Rec. 1st ser. 71.—*IR.*

b. — *Agreement for lease not delivered to trustees during lifetime of*

which were then held under a demise "to W. & G. for ninety-nine years, if W. & his widow, & any eldest son living, or *in ventre sa mère* at the time of his, W.'s death, or if no son, any eldest daughter then living or a *ventre sa mère*, or any or either of those three, viz. of W. & such his wife, son, or daughter should so long live, remainder to G. & his widow, son, or daughter, in the same manner"; of which description of persons, five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time, to come in under a lease. Under such a general power, the three lives must be certain & co-existing.—*DOE d. WYNDHAM v. HALCOMBE* (1798), 7 Term Rep. 713; 101 E. R. 1214.

Annotation :—*Refd.* *Clarke v. Smith* (1842), 9 Cl. & Fin. 126.

2461. Power to lease determinable on lives—Lease for lives absolutely.—A. being seised in fee of an estate, by lease & release executed upon his marriage, settled same upon himself for life, remainder to his first & other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives. A. afterwards granted a lease of part of the estate in question for the lives of three persons therein named, & the life of the survivor; & there was a covenant that the lessee should quietly hold & enjoy the premises for & during the term, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease, being for three lives absolutely, was not conformable to the power, & became void on the death of A., & his eldest son brought an ejectment & evicted the lessee, two of the *cestuis que vies* being then living :—*Held* : by the words, during the term in that covenant, the parties intended a term to continue so long as any of the *cestuis qui vies* survived, & not a term to continue only for the life of the grantor.—*EVANS v. VAUGHAN* (1825), 4 B. & C. 261; 6 Dow. & Ry. K. B. 349; 3 L. J. O. S. K. B. 213; 107 E. R. 1056.

Annotation :—*Refd.* *Carpenter v. Parker* (1857), 3 C. B. N. S. 206.

2462. Power to lease for similar term as leases then held—Lease for two lives existing at date of settlement—Grant of lease for three lives.—In 1743 a tenant in fee granted a lease for three lives, & in 1776 his son, whilst one of these lives was in being, granted another lease of the same property for two lives, to take effect after the death of the survivor of the three lives. In 1819 a settlement of these estates was made, by which power was given to the tenant for life to grant leases for lives for a similar term or terms as were comprised in the lease of 1776. In 1848 the then tenant for life granted a lease of the property for three lives :—*Held* : the lease was invalid, the power not justifying the granting of a lease for more than two lives.—*JENNER v. MORRIS* (1861), 4 L. T. 347; 7 Jur. N. S. 385; 9 W. R. 566.

(d) *Power to Grant Leases in Possession.*

2463. Lease in reversion.—*SUSSEX (COUNTESS) v. WROTH* (1582), Cro. Eliz. 5; 78 E. R. 272; *sub nom.* *LEAPER v. WROTH*, cited in 6 Co. Rep. at p. 33 a; *sub nom.* *LEPER & WROTH'S CASE*, 1 Leon. 35; *sub nom.* *WROTH & SUSSEX (COUNTESS) CASE*, 3 Leon. 130; *sub nom.* *SUSSEX (COUNTESS) & WORTH'S CASE*, 4 Leon. 65.

Annotations :—*Consd.* *Fitzwilliam's Case* (1603), 6 Co. Rep. 32 a; *Slocomb v. Hawkins* (1612), Yelv. 222; *Berry v.*

lessor—Adequate rent reserved.—*KING v. RONEY* (1855), 5 L. Ch. R. 64.—*IR.*

a. *Power to lease for lives & years—Lease for lives & years—To commence at certain date preceding death*

of survivor of cestuis que vie in lease.—Under a power to make leases for any term not exceeding three lives & 41 years :—*Held* : a lease for three lives & 41 years, commencing from Nov. 1

White (1662), O. Bridg. 82; *Winter v. Loveday* (1696), 5 Mod. Rep. 378. *Refd.* *Bosworth v. Forard* (1666), O. Bridg. 153; *Fitzgerald v. Fauconberge* (1729), Fitz-G. 207.

2464. Lease to take effect on determination of existing lease.—A. being seised in fee, made a lease for life, & levied a fine for fifteen years, remainder to himself for life, with a power to make leases for life, or years in possession. The conusee may lease, during his term, land in lease at the time of the fine, when such lease expires.—*FOX v. PRICKWOOD* (1614), Cro. Jac. 347; 79 E. R. 297.

Annotation :—*Consd.* *Bosworth v. Forard* (1666), O. Bridg. 153.

2465. —.]—(1) In debt by a remainderman for rent reserved upon a lease by tenant for life, plff. must show what authority the tenant for life had to make the lease.

(2) If the owner of an estate after granting a lease, settles the estate upon J. for life, with power to make leases in possession, J. can make no lease until the former one expires.—*SANDS v. LEDGER* (1702), 2 Ld. Raym. 792; 92 E. R. 20.

Annotation :—*Mentd.* *Baptiste v. Cobbold* (1797), 1 Bos. & P. 7.

2466. —.]—*GOODTITLE v. FUNUCAN*, No. 2502, *post*.

2467. —.]—Under a marriage settlement tenant for life, with remainder to his first & other sons by his wife F., in tail, with remainder to himself in fee, had power to grant leases for ninety-nine years in possession at the most improved rent under an indenture of lease to be executed with certain formalities. Twenty-eight years after the marriage, the wife still living, & there being no issue of the marriage, the husband gave a bond conditioned for the granting a lease for ninety-nine years, at a rent of £20 *per annum*, upon the expiration of a subsisting lease. As soon as the subsisting lease determined, the obligee of the bond entered into possession, & for some years paid a rent of £20 :—*Held* : notwithstanding some evidence of inadequacy in the rent, the representatives of the obligee were entitled to a decree for specific performance of the agreement contained in the bond.—*BUTLER v. POWIS* (1845), 2 Coll. 156; 5 L. T. O. S. 303; 9 Jur. 859; 63 E. R. 679.

Annotation :—*Refd.* *Moore v. Clench* (1875), 1 Ch. D. 447.

2468. — *Lease by tenant for life.*—A tenant for life having power to grant leases in possession may bind himself by covenant to grant a lease in reversion expectant on the determination of a subsisting term; but a trustee having a similar power cannot, for he is bound to exercise the power for the benefit of the estate.—*MOORE v. CLENCH* (1875), 1 Ch. D. 447; 45 L. J. Ch. 80; 34 L. T. 13; 24 W. R. 169.

Annotation :—*Distd.* *Salamon v. Sopwith* (1876), 35 L. T. 463.

2469. — *Lease by trustee.*—*MOORE v. CLENCH*, No. 2468, *ante*.

2470. — —.]—Trustees of a messuage & premises partly freehold & partly leasehold for a term of which fourteen years were unexpired, but which lease was renewable by custom on paying a fine granted a lease to W. of the whole for fourteen years & covenanted to use their best endeavours to obtain a renewal of the lease, & thereupon would grant him a lease for a further term of seven years from the expiration of his tenancy at a like rent. The trustees' power was to lease at a rack rent for any term not exceeding

preceding the day of the death of the survivor of the *cestuis que vie* in the lease, was a valid lease within such power.—*Re CROMMELIN ESTATE* (1851), 1 I. C. L. R. 182.—*IR.*

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twenty-one years. Before the expiration of W.'s lease new trustees had been appointed & the reversion in fee had become vested in other persons who would not renew the lease on the old fine the property having much increased in value.

—*Held*: the trustees had no power to enter into a covenant to grant a further term at a like rent on the renewal of the lease & that the covenant did not bind the new trustees.—*SALAMON v. SOPWITH* (1876), 35 L. T. 826, C. A.

2471. Lease from day of date.]—ANTRIM (MARQUESS) *v.* BUCKINGHAM (DUKE) (1663), Cas. in Ch. 17; Freem. Ch. 168; O. Bridg. 617; 22 E. R. 672; *sub nom.* BUCKINGHAM (DUKE) & ANTRIM'S (LORD) CASE, 1 Sid. 101; *sub nom.* ANTRIM'S (LADY) CASE, 3 Salk. 276.

Annotation:—Dbd. Doe d. Hartridge *v.* Gilbert (1843), 5 Q. B. 423.

2472. —.]—DOE d. BAYNTUM *v.* WATTON (1774), 1 Cowp. 189; 98 E. R. 1037.

Annotations:—Overd. Pugh *v.* Leeds (1777), 2 Cowp. 714. *Refd.* Roe d. Heale *v.* Rashleigh (1819), 3 B. & Ald. 156.

2473. —.]—One, under a power reserved in his marriage settlement to lease for twenty-one years in possession, but not in reversion, grants a lease to his only daughter for twenty-one years, to commence from the day of the date, adjudged a good lease. The word "from" may mean either inclusive or exclusive, according to the context & subject-matter; & the ct. will construe it so as to effectuate the deeds of parties, & not to destroy them.—*PUGH v. LEEDS* (DUKE) (1777), 2 Cowp. 714; 98 E. R. 1323.

Annotations:—Apld. Doe d. Cox *v.* Day (1809), 10 East, 427. *Consd.* Ackland *v.* Lutley (1839), 9 Ad. & El. 879. *Refd.* *Ex p.* Fallon (1793), 5 Term Rep. 283; Welch *v.* Fisher (1813), 8 Taunt. 338; Cockell *v.* Gray (1822), 6 Moore, C. P. 483; Isaacs *v.* Royal Insee. (1870), L. R. 5 Exch. 296; *It.* Railway Sleepers Supply Co. (1885), 29 Ch. D. 204; Sidebotham *v.* Holland (1894), 64 L. J. Q. B. 200; English *v.* Cliff, [1914] 2 Ch. 376. *Mentd.* R. *v.* Gamlingay (1790), 3 Term Rep. 513; Watson *v.* Pears (1809), 2 Camp. 294; Kerr *v.* Jeston (1842), 6 Jur. 1110; Brakspear *v.* Barton, [1924] 2 K. B. 88.

2474. Lease expressed to commence at date after date thereof—Not executed till after day of commencement.]—Under a power to demise for twenty-one years in possession & not in reversion a lease dated in fact on Feb. 17, 1802, *habendum* from Mar. 25 next ensuing the date thereof is good if not executed & delivered till after Mar. 25, for it then takes effect as a lease in possession with reference back to the date actually expressed.—*DOE d. COX v. DAY* (1809), 10 East, 427; 103 E. R. 838.

2475. Lease by tenant in tail—Lease voidable.]—OPEY *v.* THOMASius, No. 2413, ante.

2476. Agreement to exercise power at future period.]—A tenant for life of hereditaments with a power of leasing, in which there was a clause prohibiting reversionary leases, entered into an agreement to exercise this power at a future period, & was alive at the time appointed for the exercise, the terms of the agreement being fair & reasonable:—*Held*: this agreement might be enforced against, & was binding upon, the persons entitled to the hereditaments in remainder, after the death of A.—*DOWELL v. DEW* (1843), 12 L. J. Ch. 158; 7 Jur. 117, L. C.

Annotations:—Refd. Buckland *v.* Papillon (1866), L. R. 1 Eq. 477; Gas Light & Coke Co. *v.* Towse (1887), 35 Ch. D. 519. *Mentd.* Gregory *v.* Wilson (1852), 9 Hare, 683; Crofts *v.* Middleton (1855), 2 K. & J. 184; Purchase *v.* Lichfield Brewery Co., [1915] 1 K. B. 194.

2477. Agreement to renew unexpired lease.]—Testator, by his will, devised his real estate to the use of A. for life, with remainder to his first & other sons in tail; & he declared it should be

lawful for every tenant for life, or in tail in possession, who should have attained twenty-one, by an indenture to be sealed & delivered by them respectively in the presence of two or more witnesses, to demise all or any parts of the estates to any person or persons for any term not exceeding twenty-one years, to take effect in possession, & not by way of future interest, or as that there were reserved the most improved rent, etc., without taking any fine, etc., such lease to contain a condition for re-entry on non-payment of the rent, & the lessee to execute a counterpart, & to covenant for due payment of the rent, etc. A. made an agreement to renew for fourteen years an unexpired lease, & died without executing a lease, but after the expiration of the original lease. On a bill filed by the infant tenant in tail for specific performance:—*Held*: the agreement was *ultra vires* the deceased tenant for life, & dismissed the bill.—*RICKETTS v. BELL* (1847), 1 De G. & Sm. 335; 10 L. T. O. S. 105; 11 Jur. 918; 63 E. R. 1093.

(e) Power to Reserve Rent.

i. In General.

2478. Reservation informal as to persons to whom payable—Right of remainderman to rent.]—Lease for years in reversion, under a special power to a tenant for life to grant leases for years or lives sustained. The instrument creating the power having directed a particular rent to be reserved, a reservation informal in respect of the persons to whom the rent is made payable, will carry the rent to the remaindermen; because the informality consisted in surplusage only; & the words of the actual reservation satisfied the power.—*BERRY v. WHITE* (1602), O. Bridg. 82; 124 E. R. 480.

Annotations:—Apld. Greenaway *v.* Hart (1854), 14 C. B. 340. *Consd.* Yellowly *v.* Gower (1855), 11 Exch. 274. *Refd.* Lyn *v.* Wynn (1665), O. Bridg. 122. *Mentd.* Holland *v.* Fisher (1662), O. Bridg. 181; Clayton *v.* Kinaston (1697), 1 Ld. Raym. 419; Machell *v.* Clarke (1702), 2 Ld. Raym. 778; Harvey *v.* Stokes (1737), 2 Com. 566.

2479. Power to lease "at so much per acre"—Estate consisting of lands & rectory—Lease of rectory at rent—Rectory consisting of tithes only.]—*WALKER v. WAKEMAN* (1675), 1 Vent. 294; 86 E. R. 189; *sub nom.* *WAKER v. WAKEMAN*, 2 Lev. 150; *sub nom.* *WAKEMAN v. WAKER*, Freem. K. B. 413; 3 Keb. 544, 547, 619.

Annotations:—Distd. Bagot *v.* Oughton (1726), Fortes. Rep. 332. *Consd.* Goodtitle *v.* Fumcan (1781), 2 Doug. K. B. 565; Pomery *v.* Partington (1790), 3 Term Rep. 665. *Expld.* Doe d. Bartlett *v.* Rendle (1814), 3 M. & S. 99. *Refd.* Smith *v.* Ashton (1675), Freem Ch. 308; Winter *v.* Loveden (1697), 1 Ld. Raym. 267.

2480. "Such rent as lessor shall think fit"—Lease reserving no rent.]—*TALBOT v. TIPPER* (1694), Skin. 427; 90 E. R. 189.

Annotation:—Consd. Sheehy *v.* Muskerry (1848), 1 H. L. Cas. 576.

2481. — Power to lease at fixed rent & money heriot—Lease reserving larger heriot.]—Where a power of leasing requires that a fixed rent & a money heriot payable under peculiar circumstances shall be reserved, a lease granted under the power reserving a larger heriot is void.—*DOE d. EGREMONT (LORD) v. HELLINGS* (1842), 6 Jur. 821.

ii. Lease at Best Rent.

2482. "Best rent incident to reversion"—Lease expiring before half-yearly rent day.]—*DOE d. WILMOT v. GIFFORD* (1810), cited in 5 B. & Ald. at p. 371; 106 E. R. 1227.

Annotations:—Distd. Doe d. Shrewsbury *v.* Wilson (1822), 5 B. & Ald. 363. *Apld.* Doe d. Harries *v.* Morse (1833), 2 Cr. & M. 247. *Distd.* Rutland *v.* Wythe (1843), 10 Cl. & Fin. 419.

1. *Setting aside lease—Sufficiency of proof of inadequacy of rent.*—Where a ct. is satisfied that a lessee has acted in good faith, & where it appears that

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thirty years, to commence on Oct. 10, 1791, & the other bearing date June 4, 1787, for the term of sixty-three years, to commence Oct. 10, 1821:—*Held*: this latter lease was void, inasmuch as it was not to take effect immediately after the determination of the subsisting lease.

(2) The first of these two leases reserved a rent of £270, the second reserved only £120. By a clause in the second lease the tenant was bound to rebuild either before the expiration of the term granted by the first lease, or within the first year of the term granted by the second. *Semble*: although the rents reserved by the two leases might be the most beneficial as between the lessor & lessee, yet they were not so between the tenant for life & the reversioner, & upon that account also, the second lease was void.—*DOE d. SUTTON v. HARVEY* (1823), 1 B. & C. 426; 2 Dow. & Ry. K. B. 589; 107 E. R. 158.

Annotations:—*Distd.* *Re Aldam's S. E.*, [1902] 2 Ch. 46. *Mentd.* *Key v. Key* (1853), 22 L. T. O. S. 67.

2492. "By half-yearly payments"—Lease at rent payable on certain feast days—Admissibility of evidence showing feast days usual half-yearly days.—By a marriage settlement certain estates were settled in strict settlement, & a power was reserved to the persons being in the actual possession of the premises, by virtue of the limitations in the settlement, to lease any part of the lands thereby settled "for one, two, or three life or lives, or any term or number of years not exceeding twenty-one years, so as upon all & every such lease or leases there should be reserved & continued payable during the respective continuance of such lease or leases, by half-yearly payments, the best & most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money or other thing by way of fine or income for the same." By lease dated Jan. 11, 1783, a tenant for life of the estates demised a part of the settled estates, to hold from Jan. 4, preceding, for the lives of three persons therein named, yielding & paying yearly & every year during the term the yearly rent or sum of £31 10s., at or upon the two most usual feasts or days of payment in the year, viz. the feast of St. Philip & James the Apostles May 1, & St. Michael the Archangel Sept. 9, by even & equal portions; the first payment to be made on the feast of St. Philip & James the Apostles next ensuing the date of the lease:—*Held*: (1) the lease was not a due execution of the power, & it was therefore invalid; (2) the leases of other estates in the same part of the country were not admissible in evidence to show that the days on which the rent was reserved in the lease were the usual half-yearly days of payment of rent in that part of the country.—*DOE d. HARRIES v. MORSE* (1833), 2 Cr. & M. 247; 4 Tyr. 185; 3 L. J. Ex. 70; 149 E. R. 752.

Annotations:—*As to* (1) *Distd.* *Rutland v. Wythe* (1843), 10 Cl. & Fin. 419; *Doe d. Hopkinson v. Ferrand* (1851), 20 L. J. C. P. 202. *Generally*, *Consd.* *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705.

iii. Lease at Ancient or Usual Rent.

2493. "At usual rent"—Rent payable at different periods.—A manor was entailed by a special Act of Parliament which contained a proviso that the donees should do no act to the prejudice of their issue, unless for jointures or for

term of life, etc., or for years or at will, according to the custom of the manor; rendering the true & ancient rent of the lands, etc., so demised, & that all other acts should be void. One of the donees accepted a fine of a stranger *sur conusans de droit come ceo*, etc., of the moiety of the manor etc., & by the same fine granted the moiety for three hundred years rendering rent. Among the lands, etc., so granted was an acre of waste, parcel of the manor of the value of twelve pence, but which had never been demised before; nor had the free rents, nor the copyhold rents, heriots, etc., parcel of the manor which were included in the same grant, ever been demised before. The rent reserved amounted to the rent formerly reserved upon the demesne lands, the free rents, the copyhold rents, etc., eighteen pence more & twelve pence for the acre of waste, & was made payable at two feasts of the year, the old rent having been reserved payable at four. After the death of the donee, the lessee brought an *ejectione firmæ* against the heir to the entail, & on special verdict, stating the above facts, judgment was given for deft., & resolved:—(1) although it is provided by the Act that all estates, etc., restrained by the Act, etc., shall be void, yet by construction of law they are not void as to the tenant in tail himself, but voidable by the issue; (2) in respect of the acre of waste which was never demised before, the rent which is entirely reserved out of the whole cannot be called the true & ancient rent; (3) the reservation of the rent at two days instead of four makes the grant & render void.—*MOUNTJOY'S (LORD) CASE* (1589), 5 Co. Rep. 3 b; 77 E. R. 52.

Annotations:—*As to* (2) *Apd.* *Doe d. Bartlett v. Rendle* (1814), 3 M. & S. 99. *Refd.* *Doe d. Vaughan v. Meyler* (1814), 2 M. & S. 276. *As to* (3) *Distd.* *Worcester's (Dean & Chapter) Case* (1605), 6 Co. Rep. 37 a; *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705. *Refd.* *Taylor d. Atkyns v. Horde* (1757), 1 Burr. 60. *Generally*, *Refd.* *Orby v. Mohun* (1706), *Fremm. Ch.* 291; *Doe d. Shrewsbury v. Wilson* (1822), 5 B. & Ald. 363; *Delacherois v. Delacherois* (1864), 4 New Rep. 501; *Re Aldam's S. E.*, [1902] 2 Ch. 46. *Mentd.* *Gee v. Freedland* (1626), *Cro. Car.* 47; *Scott v. A'Chez* (1713), *Park.* 21.

2494. ————*J.*—By a private Act, passed in 1720, certain estates were settled in strict settlement, & a power was reserved to the respective tenants in tail, by deed, to lease any part of the lands thereby settled, "for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon every such lease there be reserved, & made payable yearly, during the continuance thereof, the usual accustomed yearly rents, boons, & services for same; & so as there be contained therein a condition of re-entry for non payment of the rent, & rents thereby to be reserved." By lease, dated Jan. 6, 1785, a tenant in tail of the estates demised a part of the premises thereby, settled to hold from the date of the lease for ninety-nine years, & three persons therein named should so long live, yielding & paying yearly & every year during the term, unto the lessor, the yearly rent of £50 upon Mar. 25, & Sept. 29, by even & equal portions, the first payment to be made on Mar. 25 ensuing the date of the lease. Previous to the time of passing the Act, the premises demised by his lease had been demised jointly with other premises by the settlor's ancestor, by a lease bearing date Feb. 2, 1708, "for ninety-nine years, determinable upon three lives, at a yearly rent of £82 payable on the same days as those mentioned

the person who is authorised to exercise leasing powers has acted *bonâ fide*, before the ct. should go the length of

setting aside a lease the strongest & most convincing proof of the inadequacy of the rent reserved should be

forthcoming. — *CARTER v. SHIPLEY*, [1921] N. Z. L. R. 1065.—N.Z.

in the lease of Jan. 6, 1785, & the first payment to commence on Mar. 25 ensuing the date of the lease." It did not appear whether any other lease was granted between that period & the year 1756. At that time another lease of the premises, demised by the lease of Jan. 6, 1785, was granted at a rent of £32 payable at the same period as in the other leases:—*Held*: (1) it was not a valid objection to the lease of Jan. 6, 1785, that the rent was made payable on Mar. 25 & Sept. 29, although the term commenced on Jan. 6, & there was a forehand rent, which might prejudice the remainderman, inasmuch as the rent was made payable on the same days by the former lease, & this was the usual & accustomed rent; (2) for the same reason, it was no objection to the lease that the rent was made payable by half-yearly payments, although the power required it to be payable yearly: the word yearly meaning a payment of rent in the year; (3) part of premises formerly demised, jointly with others, at one entire rent, might be let under the terms of this power, at a rent bearing the same proportion to the old rent that the premises demised by the lease bore to the whole premises formerly demised.—*DOE d. SHREWSBURY (EARL) v. WILSON* (1822), 5 B. & Ald. 363; 106 E. R. 1223.

Annotations:—*As to* (1) *Consd.* *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705; *Rutland v. Wythe* (1843), 10 Cl. & Fin. 419. *Refd.* *Fryer v. Coombs* (1840), 11 Ad. & El. 403; *Doe d. Egremont v. Stephens* (1844), 6 Q. B. 208. *As to* (2) *Refd.* *Doe d. Harries v. Morse* (1834), 2 Cr. & M. 247.

2495. ———.]—Tenant in fee simple devised lands in L., & a manor & lands in P., to a tenant for life, with power to let the lands in L. for twenty-one years in possession, & also to make leases of the lands in the manor of P. for ninety-nine years determinable on one, two, or three lives, in possession or reversion, of such parts as were or had been anciently demised for one, two, or three lives, so as the ancient & accustomed yearly rents & reservations should be thereby reserved; & also to let all other lands in P. for twenty-one years, all the leases being made & granted in the same manner & form, & with & under such & the like reservations, restrictions, covenants, conditions, & agreements, as were usually & customarily contained in leases of the same kind in the several & respective parishes & places where the same premises were situate. Leases for ninety-nine years, determinable on lives as aforesaid, having been made by the tenant for life:—*Held*: (1) to show whether the first proviso in such power be complied with, the previous leases of the same premises, but not other similar leases in P., were evidence; & *semble*, the latest preceding lease of the same premises is the most proper evidence; (2) to show whether the second proviso be complied with, leases of the same kind in P. are evidence; (3) *Qu.*: whether a lease be good which reserved the ancient amount of yearly rent on the premises, but made it payable quarterly, the ancient reservation having been of a half-yearly payment; (4) a lease under the power, with a condition for re-entry on the rent being twenty days in arrear, was not bad, although the condition in the ancient lease was for re-entry after rent being twenty-one days in arrear; (5) nor was such lease bad for restricting the re-entry to the case of there being no distress upon the premises, the ancient restriction of the re-entry being to the case of there being no overt distress upon the premises; (6) *Qu.*: whether, the ancient lease having reserved, as a heriot, the best beast of the lessee, being one of the lives, his exors., administrators,

or assigns, or such person as should be in possession of the premises, & entitled to the same by virtue of the lease, a lease reserving only the best beast of the lessee, being one of the lives, be good; (7) a lease was not bad under the power, which reserved the best beast of the person or persons who, for the time being, should be tenant or tenants in possession of the premises.—*DOE d. DOUGLAS v. LOCK* (1835), 2 Ad. & El. 705; 4 Nev. & M. K. B. 807; 4 L. J. K. B. 113; 111 E. R. 271.

Annotations:—*As to* (2) *Refd.* *Doe d. Biddulph v. Holo* (1850), 15 Q. B. 848. *Generally, Refd.* *Wickham v. Hawker* (1840), 7 M. & W. 63; *Doe d. Egremont v. Stephens* (1844), 6 Q. B. 208; *Doe d. Croft v. Tiddbury* (1854), 2 C. L. R. 347. *Mentd.* *Durham & Sunderland Ry. v. Walker* (1842), 2 Q. B. 940; *Williams v. Hayward* (1859), 5 Jur. N. S. 1417; *Proude v. Bates* (1865), 6 New Rep. 92; *Thellusson v. Liddard*, [1900] 2 Ch. 635.

2496. ———.]—(1) *Semble*: when leasing power requires that the lessee shall execute a counterpart, it is not necessary that the execution of the lease & of the counterpart should be contemporaneous.

(2) A power to lease, so as the usual rent be reserved or made payable yearly, is well executed by a lease reserving the usual yearly rent, but making it payable half-yearly.—*Fryer v. Coombs* (1840), 11 Ad. & El. 403; 4 Per. & Dav. 120; 113 E. R. 468.

Annotations:—*Generally, Refd.* *Vigers v. St. Paul's (Dean)* (1849), 14 Q. B. 920; *Dayrell v. Hoare* (1840), 12 Ad. & El. 356. *Mentd.* *Wootton v. Steffenoni* (1843), 12 M. & W. 129; *Whitaker v. Harrold* (1847), 11 Q. B. 163; *Hooper v. Clark* (1867), 8 B. & S. 150.

2497. ———.]—Land let with portion never let before.]—*MOUNTJOY'S (LORD) CASE*, No. 2493, *ante*.

2498. ———.]—*BAGOT v. OUGHTON* (1725), *Portes. Rep.* 332; 92 E. R. 876.

2499. ———.]—Under the settlement of an estate, with a power to the tenant in possession to let all or any part of the premises so as the usual rents be reserved, a lease of tithes, which had never been let before, was held void. In all these cases, the intention of the parties is to govern the ct. is construing the power.—*POMERY v. PARTINGTON* (1790), 3 Term Rep. 665; 100 E. R. 792.

Annotations:—*Consd.* *Doe d. Bartlett v. Rendle* (1814), 3 M. & S. 99. *Refd.* *Doe d. Jersey v. Smith* (1819), 7 Price, 281. *Mentd.* *Lock v. Furze* (1866), L. R. 1 C. P. 441.

2500. ———.]—Devise of lands to trustees & their heirs in trust to the use of W. & his first & other sons in strict settlement remainder to J. & his first & other sons in strict settlement with power to the trustees from time to time during the minorities of the persons to whom the premises should descend & to any tenant for life to grant any lease of all or any part of the lands so limited, so as there be reserved the ancient & accustomed yearly rent:—*Held*: a lease by W. of part of the land devised in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised at one entire rent, viz. the ancient rent for that part which had been anciently demised was void for the whole of the lands included in that parcel as well the lands never before let as those anciently let; but it seems to be good as to the other parcels which contained only lands anciently demised & on each of which there was a several reservation of the ancient rent.—*DOE d. BARTLETT v. RENDLE* (1814), 3 M. & S. 99; 105 E. R. 548.

Annotations:—*Apld.* *Doe d. Williams v. Matthews* (1833), 5 B. & Ad. 298; *Doe d. Egremont v. Stephens* (1844), 6 Q. B. 208. *Refd.* *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705.

2501. ———.]—*DOE d. WILLIAMS v. MATTHEWS* (1833), 5 B. & Ad. 298; 2 Nev. & M. K. B. 264; 2 L. J. K. B. 163; 110 E. R. 801.

Sect. 2.—Powers of leasing: Sub-sect. 3, B. (e) iii.,

2502. — Covenants less advantageous to reversion than formerly.]—Where there is a power to grant leases in possession, but not by way of reversion or future interest, a lease *per verba de presenti* is not contrary to the power, although the estate, at the time of granting the lease, was held by tenants at will, or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. Under a power to lease all manors, messuages, lands, etc., so as there be reserved as much rent as is now paid for the same, such parts of the estate enumerated in the power as have never been demised may be let. *Qu.*: if a lease made under such a power, reserving the old rent, but with covenants less advantageous to the reversion than formerly, would not be a fraud on the power, & void.—*GOODTITLE v. FUNUCAN* (1781), 2 Doug. K. B. 565; 99 E. R. 357.

*Annotations:—**Apld.* *Pomery v. Partington* (1790), 3 Term Rep. 665. *Consd.* *Doe d. Bartlett v. Rendle* (1814), 3 M. & S. 99. *Refd.* *Roe d. Brune v. l'rideaux* (1808), 10 East, 158; *Smith v. Jersey* (1821), 3 Bli. 290; *Greenaway v. Hart* (1854), 14 C. B. 340. *Mentd.* *Doe d. Allan v. Calvert* (1802), 2 East, 376.

2503. — Portion of land let at proportionate rent.]—*DOE d. SHREWSBURY (EARL) v. WILSON*, No. 2494, *ante*.

2504. — Entire rent for two tenements usually let separately.]—Tenant for life, under the limitations of a devise, had power to lease, for term of years determinable upon two or three lives any part of the premises usually so leased, so that there were reserved the ancient & accustomed rents & heriots of the premises therein contained, or more, & so that in every of the leases there were contained the usual & reasonable covenants:—*Held*: two tenements, which had previously been leased separately, might be leased together under a single demise, no objection being made that the rents, etc., reserved were not in proper proportion.—*DOE d. EGREMONT (EARL) v. WILLIAMS* (1848), 11 Q. B. 688; 17 L. J. Q. B. 154; 11 L. T. O. S. 27; 12 Jur. 455; 116 E. R. 631.

2505. “At same rent as two years previous” — Land not let two years previously may be leased at any rent.]—*CUMBERFORD'S CASE* (1635), 2 Roll. Abr. 262, pl. 15.

*Annotations:—**Apld.* *Wakeman v. Waker* (1675), *Freem. K. B.* 413. *Consd.* *Goodtitle v. Funucan* (1781), 2 Doug. K. B. 565. *Refd.* *Smith v. Ashton* (1675), *Freem. Ch.* 308; *Winter v. Lovedurr* (1697), 12 Mod. Rep. 147; *Pomery v. Partington* (1790), 3 Term Rep. 665; *Doe d. Bartlett v. Rendle* (1814), 3 M. & S. 99.

2506. “Ancient rents or more” — Lease “reserving the old accustomed rents.”]—Tenant for life, with power to make leases of all lands anciently demised, reserving the ancient rents, or more, & of other lands, reserving the most & best improved rents that could be got, makes a lease of part of the premises usually demised, reserving the old accustomed rents; & a lease of other part not usually demised, reserving such sum of money as should amount to the best & most improved yearly rent. But these leases were held to be void as against the remainderman; the first, as not being warranted by the power; & the other, for the uncertainty of it.—*HAMILTON (DUCHESS) v. MORDAUNT* (1726), 6 Bro. Parl. Cas. 145; 2 E. R. 989, H. L.; *affg.* *S. C. sub nom. ORBY (LADY) v. MOHUN (LADY)* (1706), 2 Vern. 531, 542.

*Annotations:—**Consd.* *Evelyn v. Evelyn* (1731), 2 P. Wms. 659; *Taylor d. Atkyns v. Horde* (1757), 1 Burr. 60. *Refd.* *Harvey v. Harvey* (1739), *Barn. Ch.* 103; *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705; *Doe d. Bidolph v. Hole* (1850), 15 Q. B. 848.

2507. “At the usual or other the most rent” —

Fine & reserved rent—Reserved rent exceeding rent in former lease.]—Devise of testator's reversion to J. for life, with power to jointure & raise portions for younger children, remainder to his first & other sons, etc., with power to J. & those in remainder during their respective possessions to make leases of the lands in Sussex & Huntingdonshire, for not exceeding twenty-one years, at the most rent; & of the lands in Middlesex & London for not exceeding sixty-one years, at the usual or other the most rent:—*Held*: J. might well lease the lands in Middlesex upon a fine, & at a reserved rent, which rent exceeded the rent reserved upon a former lease in being at the date of the will, & at testator's death, & upon which lease the then lessor had also taken a fine.—*DOE d. NEWNHAM v. CREED* (1815), 4 M. & S. 371; 105 E. R. 871.

2508. “With no evident diminution of rental” — Lease at more than old rents—Underlease by lessee at increased rent.]—Under a strict tailsie prohibiting alienation, but containing a power to grant leases, provided they do not exceed twenty-one years, & be not let with evident diminution of the rental; the heir of tailsie in possession, acting upon the opinion of counsel, made leases to his steward at rents a little above the former rents of the lands leased, but far below their market value; with intent that the steward should underlet the lands at their full value, & pay the surplus, beyond the rents reserved in the principal leases, to persons named by the grantor of the leases, the heir of tailsie in possession. The steward accordingly underlet the lands at rents exceeding the principal rents by £1,371, & some time after the grants of the principal leases, executed a trust obligation in favour of the objects of the trust:—*Held*: the leases, from the time of the grants until the declaration made by the trust obligations, were held in trust for the grantor, & they were invalid as a violation of the prohibitions, & not within the permission of the deed of tailsie.—*HAMILTON v. WARING* (1820), 2 Bli. 196; 4 E. R. 300, H. L.

2509. “At ancient heriots or more” — Reservation of money heriot instead of three best beasts—Onus on lessee to show this as beneficial as old heriot.]—Tenant for life with a power to lease for three lives, reserving “the ancient & accustomed heriots or more,” granted a lease reserving £6 13s. 4d. as a heriot on the falling of each life. The ancient heriot was the three best beasts or the £6 13s. 4d., at the lord's option, not on the falling of each life, but contingent on a certain order of survivorship. In ejectment against lessee:—*Held*: as the lease avowedly varied from the ancient leases, the onus was on the lessee to show that the new reservation, without the option, was as beneficial to the lord as the ancient reservation.—*DOE d. EGREMONT (EARL) v. CRAZEBROOK* (1843), 4 Q. B. 406; 3 Gal. & Dav. 334; 12 L. J. Q. B. 221; 7 Jur. 530; 114 E. R. 951.

2510. — Old heriot of best beast of lessee, executors, administrators or assigns—Lease with heriot of best beast of lessee.]—*DOE d. DOUGLAS v. LOCK*, No. 2495, *ante*.

2511. Evidence of ancient rent—Letter to previous life tenant—Containing particulars of estate.]—Where A., tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants & rents of the estate, which letter the tenant for life indorsed “A particular of my estate,” etc., & handed down to B., the succeeding tenant for life, who had a like limited power of leasing, by whom it was also preserved & handed down amongst the muniments of the estate to the first tenant in tail:

—*Held*: such paper was evidence for the tenant in tail against a lessee of B., in order to show that the rent reserved by B. the tenant for life, was less than the ancient rent which was reserved at the time to which such paper referred; the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, & who had an interest the other way, viz. to diminish the rent in order to increase his fine upon renewal under the power.—*ROE d. BRUNE v. RAWLINGS* (1806), 7 East, 279; 3 Smith, K. B. 254; 103 E. R. 107.

Annotations:—*Refd.* Lorton v. Kingston (1838), 5 Cl. & Fin. 269. *Mentd.* Higham v. Ridgway (1808), 10 East, 109; Doe d. Reece v. Robson (1812), 15 East, 32; Gleadow v. Atkin (1833), 1 Cr. & M. 410; Doe d. Mudd v. Suckermore (1837), 8 Ad. & El. 703; Marks v. Lahee (1837), 3 Bing. N. C. 408; Papendick v. Bridgwater (1855), 5 E. & B. 166; R. v. Birmingham Overseers (1861), 1 B. & S. 763; Haines v. Guthrie (1884), 13 Q. B. D. 818.

2512. — *Whether latest lease has greatest weight.*—By will of 1761 power was given to tenants for life to lease for lives, so that there were reserved in every such lease the ancient & accustomed rents & heriots for the premises, or more. By codicil of 1763, reciting that another child was born to testator since the making of his will, that his former children were provided for, & that he wished to provide for his last born child, provision was made accordingly & the will was thereby also ratified. In a lease of 1724 the rent was £1; & a heriot, or £3 in lieu of it, was reserved; & the lease was granted on payment of a fine. By another lease, granted in 1762, between the times of making the will & the codicil, the rent was £15, & there was no heriot or fine. A tenant for life, in execution of the leasing power, granted a lease according to the lease of 1724:—*Held*: although the latest lease preceding the creation of the power was entitled to greater weight than any single earlier lease, & ought to govern the decision where there was a balance of evidence, yet, where the ancient custom appeared to have been uniform, & a single lease varying therefrom was granted just before the creation of the power, the exceptional lease ought not then to govern merely because it was the latest.—*DOE d. BIDDULPH v. HOLE* (1850), 15 Q. B. 848; 20 L. J. Q. B. 57; 15 L. T. O. S. 392; 15 Jur. 13; 117 E. R. 678.

2513. — *Previous lease of same premises.*—*DOE d. DOUGLAS v. LOCK*, No. 2495, *ante*.

(f) *Power to Re-Enter for Non-Payment of Rent.*

2514. *Lease providing for re-entry if rent in arrear—& no sufficient distress on premises.*—*TANKERVILLE (LORD) v. WINGFIELD & PRITCHARD* (1773), 7 Price, 343, n.; 3 Bli. 331, n.; 2 Brod. & Bing. 498, n.; 5 Moore, C. P. 346, n.; 146 E. R. 993; *sub nom.* HOTLEY v. SCOT, Lofft, 316.

Annotations:—*Consd.* Smith v. Jersey (1821), 3 Bli. 290. *Refd.* Goodtitle v. Funnican (1781), 2 Doug. K. B. 565; Greenaway v. Hart (1854), 14 C. B. 340.

2515. — *—*—A power reserved upon a marriage settlement to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for lives providing a re-entry in case the rent remains in arrears fifteen days, & there is no sufficient distresses on the premises.—*SMITH v. JERSEY (EARL)* (1821), 3 Bli. 290; 4 E. R. 610; *sub nom.* *SMITH v. DOE d. JERSEY (EARL)*, 2 Brod. & Bing. 473; 5 Moore, C. P. 332; 7 Price, 370, H. L.; *revsq.* S. C. *sub nom.* *DOE d. JERSEY (EARL) v. SMITH* (1819), 1 Brod. & Bing. 97, Ex. Ch.

Annotations:—*Apld.* Doe d. Shrewsbury v. Wilson (1822), 5 B. & Ald. 363. *Consd.* Morris v. Rhydydefed Colliery Co. (1858), 3 H. & N. 473. *Refd.* Doe d. Harries v. Morse (1833), 3 L. J. Ex. 70; Rutland v. Doe d. Wythe (1843),

12 M. & W. 355; Eno v. Eno (1847), 6 Hare, 171. *Mentd.* Colpoys v. Colpoys (1822), Jac. 451; Boys v. Williams (1831), 2 Russ. & M. 689; Doe d. Howell v. Thomas (1840), 1 Man. & G. 335; Bulleel v. Abinger (1842), 6 Jur. 410; Shore v. Wilson (1842), 9 Cl. & Fin. 355; Heells v. Blain (1864), 18 C. B. N. S. 90; *Re* Grainger, Dawson v. Higgins, [1900] 2 Ch. 756.

2516. — *—*—Testator by his will empowered his devisee for life of real estate to demise & lease for twenty-one years, “so as upon such lease there were reserved & made payable, during the continuance thereof, the best improved yearly rent that could reasonably be had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, & that in every such lease there should be contained a clause of re-entry for non-payment.” In exercise of this power, a lease was made for twenty-one years, to hold from Oct. 11, 1833, at the yearly rent of £903, payable by equal half-yearly payments, viz. on Apr. 6, & on Oct. 11, in every year, except the last half-year’s rent, which was thereby reserved & agreed to be paid on Aug. 1, next before the determination of the term:—*Held*: this lease was a valid execution of the power.—*RUTLAND v. DOE d. WYTHE* (1843), 12 M. & W. 355; 10 Cl. & Fin. 419; 152 E. R. 1235, H. L.; *revsq.* (1839), 5 M. & W. 688, Ex. Ch.; *reseq.* S. C. *sub nom.* *DOE d. WYTHE v. RUTLAND* (1837), 2 M. & W. 661.

Annotations:—*Refd.* Doe d. Hartridge v. Gilbert (1843), 8 Jur. 37; Doe d. Hopkinson v. Ferrand (1851), 20 L. J. C. P. 202; Boyce v. Edbrooke (1903), 88 L. T. 344.

2517. — *—*—*Period for re-entry different in power & lease.*—*COXE v. DAY*, No. 2408, *ante*.

2518. — *—*—*—*—*DOE d. DOUGLAS v. LOCK*, No. 2495, *ante*.

2519. — *Admissibility in evidence of previous leases under power.*—*SMITH v. JERSEY (EARL)*, No. 2515, *ante*.

2520. *Lease of reversion.*—*NUGENT v. CUTHBERT* (1822), cited, Sugden’s Law of Property, 475, H. L.

Annotation:—*Distd.* Davies v. Davies (1888), 38 Ch. D. 499.

2521. *Power to lease on usual conditions—Lease following terms of former lease—Containing no clause of re-entry.*—Power in a will, to let such part of testator’s premises as had been usually granted, or demised, & were then in lease for any term of years, determinable on lives, to any persons for the like terms, & in like manner, & under the like rents, services, & conditions, as the same had been usually granted; & the residue of the same premises unto any person for any term of years not exceeding twenty-one years in possession, at the best rent that could be reasonably gotten for the same; so as that no such demise or lease should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, & so as each lessee should execute a counterpart of his lease:—*Held*: a lease made under this power, of lands, which were in lease at the time of the creation of the power, the second lease accurately following the terms of the former lease of the same land, was well executed under this power, though the second lease did not contain a clause of re-entry on non-payment of 40s. reserved in lieu of a heriot; the first lease containing no clause of re-entry on non-payment of a like reservation.—*DOE d. BLIGH v. COLMAN* (1822), 1 Bing. 28; 7 Moore, C. P. 271; 130 E. R. 12.

(g) *Other Cases.*

2522. *Power to lease for term of years—Lease for longer term—Valid for authorised term.*—Where a person has power to lease for ten years, & he

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leases for twenty, it is good in equity for ten.—*PARRY v. BROWN* (1863), *Freem. Ch.* 171; 22 *E. R.* 1137; *sub nom.* *PARRY v. BOWEN*, *Nels.* 87; 3 *Rep. Ch.* 11; *sub nom.* *PAWCY v. BOWEN*, 1 *Cas. in Ch.* 23, *L. C.*

2523. ———.—[Tenant for life of estate, on which were mines opened, with power to let leases in possession for twenty-one years, reserving best rent, leases the mines, opened & unopened, for twenty-six years, without reference to the power, & before the expiration of a former lease, reserving ore as rent to him, his heirs, & assigns. The former lease shall be presumed surrendered. The lease shall bind the remainderman for twenty-one years.—*CAMPBELL v. LEACH* (1775), 2 *Amb.* 740; 27 *E. R.* 478, *L. C.*

*Annotations:—**Consd.* *Medwin v. Sandham* (1789), 3 *Swan.* 685. *Refd.* *Re Smyth, Ex p. Smyth* (1818), 1 *Swan.* 337; *Morgan v. Milman* (1852), 10 *Hare*, 279; *Daly v. Beckett* (1857), 24 *Beav.* 114; *Clogg v. Rowland* (1866), *L. R.* 2 *Eq.* 160.

2524. ———.—[By marriage settlement, husband has the wife's estate for life, with power to grant leases for twenty-one years, but no longer. In breach of the power he grants a lease to A. for ninety-nine years, determinable upon lives. Wife survives him, & conveys the fee to B.; & in the conveyance is recited, the lease to A., who is recognised as then being tenant in possession of the estate, at the yearly rent reserved.

B. brings ejectment against the assignees of the lease:—*Held*: the lease being void, & the recital being only matter of description, no demand of possession was necessary to sustain the action.—*DOE d. BIGGS v. WHITE* (1823), 2 *Dow. & Ry. K. B.* 718; 1 *L. J. O. S. K. B.* 170.

2525. ———.—*Mines open & unopened on estate—Lease of both at gross rent.*—*CAMPBELL v. LEACH*, *No.* 2523, *ante*.

2526. ———.—*Or lives—Lease for years determinable on lives.*—[An estate, the greater part of which was in lease, either for years certain not exceeding twenty-one, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises or any part thereof, when he should be in the actual possession of the same, or any part thereof, from time to time, by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years not exceeding twenty-one years, or for the life or lives of any one, two, or three person or persons: so as no greater estate than for three lives be at any one time in being in any part of the premises; & so as the ancient yearly rent, etc. be reserved":—*Held*: the power only authorised either a chattel lease not exceeding twenty-one years, or a freehold lease not exceeding three lives; & a lease by tenant for life for ninety-nine years determinable on lives, as it might exceed twenty-one years, was void at law, & was not even good *pro tanto* for the twenty-one years.—*ROE d. BRUNE v. PRIDEAUX* (1808), 10 *East*, 158; 103 *E. R.* 735.

*Annotations:—**Refd.* *Oakley v. Monck* (1866), *L. R.* 1 *Exch.* 159; *Smith v. Widlake* (1877), 3 *C. P. D.* 10.

2527. ———.—*Freehold lease.*—*DOE d. — v. DAVIS* (1845), 5 *L. T. O. S.* 563.

2528. ———.—*"Term not exceeding twenty-one years"*—*Lease for twenty-one years—Determinable at option of lessee at certain periods.*—[The trustees of a marriage settlement containing a power of leasing "for any term or number of years not

exceeding twenty-one years," agreed to grant a lease of the mansion-house & grounds for a term of twenty-one years, determinable at the option of the lessee at the end of the first seven or four years of the term:—*Held*: such a lease was within the power.—*EDWARDS v. MILLBANK* (1859), 4 *Drew.* 606; 29 *L. J. Ch.* 45; 7 *W. R.* 651; 62 *E. R.* 232.

*Annotation:—**Consd.* *R. v. Bird*, [1909] 1 *K. B.* 827.

2529. ———.—*Lease for shorter term.*—*EASTON v. PRATT*, *No.* 2450, *ante*.

2530. *Power to lease with usual & reasonable covenants—Covenant for lessor to rebuild if premises blown down or burned.*—[Under a power to a tenant for life to lease for years, reserving the usual covenants, etc., a lease made by him, containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual.—*DOE d. ELLIS & MEDWIN v. SANDHAM* (1787), 1 *Term Rep.* 705; 99 *E. R.* 1332; *subsequent proceedings, sub nom.* *MEDWIN v. SANDHAM* (1789), 3 *Swan.* 685.

*Annotations:—**Refd.* *Hare v. Groves* (1796), 3 *Anst.* 687. *Mentd.* *MacLae v. Sutherland* (1854), 3 *E. & B.* 1.

2531. ———.—*Usual covenants of district—Covenant by lessor to repair.*—[Under a power to lease for twenty-one years reserving the best rent, so as the lease should not contain any clause whereby authority should be given to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste, & so as such lease should contain such other conditions, covenants, & restrictions, as were generally inserted according to the usage of the counties where the premises were:—*Held*: a lease was good, though the lessor thereby took the repairs of the mansion house, excepting the glass windows, on himself, & covenanted that if he did not repair it within three months after notice, the tenant might & deduct the charges out of the rent reserved to the lessor, & though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, to renew during his, lessor's, life at the request of the lessee, his exors., etc., on the same terms, because this covenant only bound the lessor himself, & if the best rent were not reserved upon such renewal, the lease would be void against the remainderman.—*DOE d. BROMLEY v. BETTISON* (1810), 12 *East*, 305; 104 *E. R.* 119.

*Annotations:—**Distd.* *Yellowly v. Gower* (1855), 11 *Exch.* 274. *Consd.* *Gas Light & Coke Co. v. Towse* (1887), 35 *Ch. D.* 519. *Refd.* *Moore v. Clench* (1875), 34 *L. T.* 13.

2532. ———.—*Proviso for re-entry if rent twenty days in arrear—Former period twenty-one days.*—*DOE d. DOUGLAS v. LOCK*, *No.* 2495, *ante*.

2533. ———.—*Proviso for re-entry if no distress on premises—Former proviso if no overt distress.*—*DOE d. DOUGLAS v. LOCK*, *No.* 2495, *ante*.

2534. *Power to add lives—Or exchange lives—Construction of power.*—[Under a devise of seven different estates to a sister, brothers, & nephews, respectively, one to each stock, including as to six of the estates, three several lives in succession on each estate, & as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power "to add another life or lives to make three in like manner as after mentioned, for other persons to do the same"; & then giving this general power "that when & so often as the lives on either of the estates before given shall be by death reduced to two, that then it shall be in the power of the person or persons then enjoying the estate or

estates to renew the same with the person or persons to whom the revenue thereof shall belong by adding a third life in such estate, & paying such reversioner two years purchase for such renewal; & also to exchange either of the two lives on payment of one year's purchase":—*Held*: this power of renewal only authorised the addition of one life to the three on each estate, & of making one exchange of a life.—*DOE d. HARDWICKE v. HARDWICKE* (1809), 10 East, 549; 103 E. R. 884.

Annotation:—*Refd.* *Swinburne v. Milburn* (1884), 9 App. Cas. 844.

2535. Power to lease by deed—Parol lease.]—Under a parol demise from year to year, by a tenant for life, with power to lease by deed, etc., the interest of the lessee determines with the life of the lessor, & the rent is apportionable.—*Re SMYTH, Ex p. SMYTH* (1818), 1 Swan. 337; 36 E. R. 412, L. C.

Annotation:—*Refd.* *Browne v. Amyot* (1844), 3 Hare, 173.

2536. Power to lease without impeachment of waste—Condition in lease to pay ten pounds per acre for ploughing up pasture land.]—A lease granted by virtue of a power enabling tenant for life to make leases without impeachment of waste, contained a proviso that the tenant should pay a further rent of £10 per acre for ploughing up pasture land or for managing the farm contrary to the covenants. In an action to recover the penalty, a motion in arrest of judgment on the ground that this amounted to a licence to commit waste, was disallowed. *Qu.*: whether the above reservation was a rent or a penalty.—*BRINGLOE v. GOODSON* (1839), 8 Scott, 71; *subsequent proceedings*, 5 Bing. N. C. 738.

2537. — Covenant by lessee not to plough up pasture—Except on system employed by life tenant.]—*DOE d. HOPKINSON v. FERRAND*, No. 2487, *ante*.

2538. — Covenant in lease that lessor shall do repairs.]—By a settlement made in 1810, S., in contemplation of his marriage, conveyed certain real estates to trustees to his own use until the marriage, & after the marriage to the trustees their exors., administrators, & assigns, for the term of five hundred years without impeachment of waste upon certain trusts, & immediately after the expiration or sooner determination thereof, & in the meantime subject thereto, to the use of S. for life, without impeachment of waste, with remainder to certain other uses. It was also provided by the deed, that it should be lawful for S. during his life, from time to time, by deed either referring to or not referring to the power, to demise the real estate for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, & so that the lessee was not by any clause or words therein to be contained made punishable for waste, or exempted from punishment for committing waste. The marriage took place, & S. afterwards, by deed, leased the premises to deft. for twelve years. By the lease which did not refer to the deed of settlement, the rent was reserved to S., his heirs & assigns; & it contained a covenant by the lessee to repair a blacksmith's shop, & all the glass & leadwork of the windows of the messuages, & all doors, etc., the lessee being allowed sufficient bricks, etc., for the repairs, & to yield up the premises so repaired at the end of the term to S., his heirs & assigns; there was also a covenant by S. that he would repair all the messuages, houses, outhouses, edifices, & buildings, except in respect

of repairs thereinbefore covenanted to be done by deft. S. died before the expiration of the term. In an action by the trustees against the lessee for a breach of the covenants of the lease, in not repairing the premises:—*Held*: the lease was not in pursuance of the power, & void as between the trustees & the lessee, because the condition as to the rent being reserved incident to the immediate reversion was not performed, for the rent was made payable to "S., his heirs & assigns," & S. had no legal reversion, & because the lease contained an implied exemption from punishment for permissive waste.—*YELLOWLY v. GOWER* (1855), 11 Exch. 274; 24 L. J. Ex. 289; 156 E. R. 833.

Annotation:—*Refd.* *Davies v. Davies* (1888), 38 Ch. D. 499.

2539. — Power in lease to dig & use stones, etc., for colliery & buildings.]—An indenture of settlement contained a power for the tenant for life to lease for lives certain hereditaments to any person willing to build houses thereon. Also a power to lease for sixty-three years the coal mines under the lands "with all such powers, authorities, accommodations, liberties, & privileges as shall be necessary or are usually contained in leases of collieries or mines in the county, place, or neighbourhood where the collieries intended to be demised are or shall be situate, for seeking, winning, working, drawing, taking, & carrying away the coals; so as the lessees be not made punishable for waste by any express words therein contained. In execution of this power the tenant for life granted a lease which contained a power for the lessee "to erect, build & construct, & set up in & upon the mines, lands & premises, all such engine houses, machine offices, counting houses, warehouses, store rooms, workshops, workmen's cottages, huts, etc., erections, buildings & accommodations as shall be *bonâ fide* necessary or proper for or in the due prosecution & carrying on of the works." There was also a power to dig & use stones, slate, brick earth & materials in any part of the land which should be required for the collieries or for any buildings thereby authorised to be made in the exercise of any power thereby granted. Ejectment having been brought to recover possession of the coal mines on the ground that the lease was not a due execution of the power, the jury found that a power to build cottages in places convenient with reference to the works was both necessary & usual in leases of collieries in the neighbourhood:—*Held*: the lease was not in excess of the power; the lease was not void on the ground that the power to build was in violation of the provision in the settlement that the lessees should not be made punishable for waste.—*MORRIS v. RHYDYDEFED COLLIERY CO.* (1858), 3 H. & N. 885; 28 L. J. Ex. 119; 32 L. T. O. S. 163; 5 Jur. N. S. 439; 7 W. R. 95; 157 E. R. 726, Ex. Ch.

Annotation:—*Consd.* *Re Reveley's S. E.* (1863), 32 L. J. Ch. 812.

2540. Power to lease for twenty-one years at best rent without waste—Lease of part with sporting rights over rest.]—Estates, hereditaments, & premises were devised to R. for life with power to the tenant for life to make any lease of the several estates, hereditaments, & premises, or any part or parts thereof, for twenty-one years, reserving the most improved yearly rent with a condition for re-entry on non-payment, so that there should be no clause giving the lessee power to commit waste, & so as the rent should be incident to, & go along with, the reversion:—*Held*: this power did not authorise a lease of part of the land with liberty to sport over the rest.—*DAYRELL v. HOARE*

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(1840), 12 Ad. & El. 356; 4 Per. & Dav. 114; 9 L. J. Q. B. 299; 113 E. R. 847.

Annotations:—Distd. Brown v. Peto, [1900] 2 Q. B. 653. Apprvd. Re Gladstone, Gladstone v. Gladstone, [1900] 2 Ch. 101. Refd. Jagon v. Vivian (1865), L. R. 1 C. P. 9; Re Newell & Nevill's Contract, [1900] 1 Ch. 90; Re Rutland's S. E., Rutland v. Bristol, [1900] 2 Ch. 206; Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

2541. Lessee to execute counterpart—Execution not contemporaneous with lease.]—FRYER v. COOMBS, No. 2496, ante.

2542. Lease by way of mortgage.]—G., a tenant for life in a marriage settlement, was thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine, & a power was also given, with the consent of trustees, to raise any sum of money. The trustees, in pursuance of the power, consent that G. should, by mortgaging all or any part of the lands, or in any other manner he should think fit, raise any sum of money not exceeding £5,000.

Under this power & consent G., in consideration of £300 & a rent, grants to V. part of the lands in settlement upon a lease for lives. The grant, & a receipt expressing that the £300 was raised under the power and consent as part of the £5,000, were duly registered.

Before, & at the date of this grant, V. was the solr. of G., who was involved in litigation, & in distress.

The rent, with the premium calculated at six per cent., were considerably short of the annual value of the lands.

Upon a bill, by a tenant in remainder under the settlement, to set aside the lease, & on appeal:—*Held*: the lease was a good execution of the power to raise money; but void, as obtained by a solr. from his client, in circumstances of embarrassment, & at an undervalue.—*WARD v. HARTPOLE* (1776), 3 Bli. 470; 4 E. R. 671, H. L.

2543. —.]—M., who died in 1831, settled certain real estates, & empowered the tenant for life thereof to grant leases of the mines therein for such term or number of years, & under & subject to such rents or reservations & agreements as to such tenant for life should seem reasonable & proper.

In 1843 L., the first tenant for life, demised to C. the collieries comprised in a lease made in 1829, which expired in 1848, with powers to work, etc., "except as in the indenture of lease was excepted," for ninety-nine years at a peppercorn rent, subject to redemption on payment of £6,000 & interest:—*Held*: the mtge. of 1843 was a valid exercise of the leasing power.—*MOSTYN v. LANCASTER, TAYLOR v. MOSTYN* (1883), 23 Ch. D. 583; 52 L. J. Ch. 848; 48 L. T. 715; 31 W. R. 686, C. A.

2544. Power to lay out land as roads & to lease—Grant of right of way to particular lessees.]—A private estate Act, enabling tenants for life to grant building leases, empowered the lessors to lay out & appropriate any part of the land authorised to be leased, as & for a way, street, square, passage, or sewer, or other conveniences for the general improvement of the estate & the accommodation of the tenants & occupiers:—*Held*: exclusive private rights of way over land so appropriated for a way, might be granted to particular lessees, as such appropriation did not confer a right of user by all the tenants & occupiers.—*WHITE v. LEESON* (1859), 5 H. & N. 53; 29 L. J. Ex. 105; 1 L. T. 189; 24 J. P. 24; 5 Jur. N. S. 1361; 8 W. R. 137; 157 E. R. 1097.

2545. Power to lease mines & pay profits to

trustees for investment—Lease for sixty years—Power construed as restricted to life tenancy.]—

A gift of a power to lease mines & minerals, following the gift of a life estate in the real property of which they form part, though expressed in general terms, does not of necessity imply a power in the tenant for life to make a lease exceeding the term of his own life. A. devised his estates to his daughter for her life, without impeachment of waste, & then to her issue, male & female, & in default of such issue, over. The will gave the daughter, or any person in possession under the limitations in the will, power to work or to make a lease of the mines. She was to receive & pay over to trustees the rents & profits of the mines, which were to be applied to the purchase of other estates, of which she was to receive the rents for her own life. While in possession she made a lease, reciting the will & granting a term of sixty years:—*Held*: the lease was not warranted by the power, for on the whole will it appeared to be the intention of testator to restrict her to making a lease for her own life only.—*VIVIAN v. JAGON* (1868), L. R. 3 H. L. 285; 37 L. J. C. P. 313; 19 L. T. 218, H. L.; affg. S. C. *sub nom.* *JAGON v. VIVIAN* (1867), L. R. 2 C. P. 422, Ex. Ch.

Annotation:—Refd. Re Aldam's S. E., [1902] 2 Ch. 46.

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2546. Forfeiture of life interest.]—HARVEY'S CASE (circa 1586), 4 Leon. 161; 74 E. R. 794.

2547. —.]—By settlement of 1712 a house called B. part of the manor of H. was settled upon the settlor's nephew for life, remainder to the first & other sons in tail, with divers remainders over. By indenture in 1722, the brother of the settlor settled the remainder of the manor upon his son, nephew of the first settlor, for life, remainder to W. his first son, then born, for life; remainder to his first & other sons in tail male; & a term was created by this deed to raise £4,000 for the daughters of W. & there was a proviso in the deed, that in case W. or such one who should come into possession of the manor should, within seven years, convey B. to the same uses as the manor was limited he should have a power of making a jointure; but if he should refuse or neglect so to do, all the uses limited of the manor, subsequent to his estate for life, should cease; there was also a proviso by which W. was entitled to make leases, for the benefit of his daughters or younger sons.

F., the grandson, took possession of B. & afterwards of the manor, & lived several years, but did not settle B. to the uses of the deed of 1722, but suffered a recovery of it, & disposed of it by will; & did not execute the power of jointuring, but charged the term with £4,000 for his daughters & executed the power of leasing for their benefit.

The bill was to have B. conveyed to the uses of the deed of 1722, or to have the leases declared void, & the execution of the power bad, or for a compensation to the amount of the charges on the manor of H.:—*Held*: this was not a case of election; & as upon neglect of settling B. to the same uses, only the estate subsequent to W.'s estate for life were made void, & the powers, though subsequent in the order of the deed, were annexed to the estate for life the execution thereof ought not to be set aside.—*FREKE v. BARRINGTON* (1791), 3 Bro. C. C. 274; 29 E. R. 533.

Annotation:—Refd. Lewis v. Freke (1794), 2 Ves. 507.

2548. Grant of lease outside power.]—A.-G. v. GRADYLL (1721), Bunb. 92; 145 E. R. 607.

2549. Assignment or mortgage of life estate.]—VINCENT v. ENNYS (1730), 2 Eq. Cas. Abr. 665; 22 E. R. 559.

Annotation:—*Refd.* *Walmesley v. Butterworth* (1835), 4 L. J. Ch. 253.

2550. —.]—If a tenant for life with power to grant leases in possession for twenty-one years at the best rent convey his life estate to trustees to pay an annuity for his life, & the surplus to himself, the power is not thereby extinguished, but he may still grant a lease agreeable to the terms thereof.—REN v. BULKELEY (1779), 1 Doug. K. B. 292; 99 E. R. 189.

Annotations:—*Refd.* *Walmesley v. Butterworth* (1835), 4 L. J. Ch. 253; *Bringlee v. Goodson* (1838), 4 Bing. N. C. 726.

2551. — Reservation of power by tenant for life.—With consent of grantee.]—LONG v. RANKIN (1822), Sugden on Powers, 8th ed. 895, H. L.

Annotations:—*Apd.* *Walmesley v. Butterworth* (1835), 4 L. J. Ch. 253; *Alexander v. Mills* (1870), 6 Ch. App. 124. *Refd.* *Bringlee v. Goodson* (1838), 4 Bing. N. C. 726; *Simpson v. Bathurst, Shepherd v. Bathurst* (1869), 5 Ch. App. 193; *Hardaker v. Moorhouse* (1884), 53 L. J. Ch. 713; *Lonsdale v. Lowther*, [1900] 2 Ch. 687; *Parr v. A.-G.*, [1926] A. C. 239.

2552. — Bankruptcy of tenant for life.]—Pltf. executed a post-nuptial settlement whereby he conveyed certain freehold hereditaments, the legal estate in which were outstanding, to a trustee upon trust to pay the rents, issues, & profits to pltf.'s wife during her life, & after her death to pltf. during his life, & after the death of the survivor for the benefit of their children. The settlement contained a power to pltf. during his life, & after his death to the wife during her life, & after the death of the survivor to the trustee, to renew leases for lives, & take fines on renewals, but so that the usual rents were still reserved. Pltf. subsequently assigned his interest under the settlement to B. by way of mtge. The trustee of the settlement disputed the right of pltf. to take the fines for his own benefit, claiming them on behalf of the wife. Pltf. accordingly filed a bill against the trustee, & B., praying that he might be declared entitled to take the fines on renewals of leases for his own benefit. After the filing of the bill pltf. became bkpt., & his assignee obtained a supplemental order to carry on the suit:—*Held*: (1) on the construction of the settlement pltf. was entitled to take the fines on renewals for his own benefit; (2) inasmuch as the legal estate was outstanding & beyond pltf.'s control, & the trustee had interfered with his power of granting leases, he was entitled to bring a suit in equity for declaration of his right; (3) the power of granting renewed leases was not extinguished or suspended either by the assignment of pltf.'s interest by way of mtge. or by his bkpcy.—*SIMPSON v. BATHURST, SHEPHERD v. BATHURST* (1869), 5 Ch. App. 193; 23 L. T. 29; 18 W. R. 772, L. C.

Annotations:—*As to (3)* *Refd.* *Re Cowin, Cowin v. Grayett* (1886), 33 Ch. D. 179; *Re Boddingfeld & Herring's Contract*, [1893] 2 Ch. 332.

2553. Assignment of term to raise portions.]—An estate was settled on A. for life, with power to charge it with an annuity for her husband, & portions for their younger children, & to grant leases. A. granted the estate to trustees for five hundred years, on trust, if she should so direct, to raise portions by mtge. or sale:—*Held*: the term, till called into operation, was subservient to

the leasing power, & was no answer to an ejectment by a lessee holding under a lease granted subsequently to the settlement.—*DOE d. COURTAIL v. THOMAS* (1829), 9 B. & C. 288; 4 Man. & Ry. K. B. 218; 7 L. J. O. S. K. B. 214; 109 E. R. 107.

Annotations:—*Refd.* *Doe d. Rogers v. Rogers* (1833), 5 B. & Ad. 755; *Worham v. Pemberton, Newenham v. Pemberton* (1847), 1 De G. & Sm. 644. *Mentd.* *Doe d. Egremont v. Date* (1842), 11 L. J. Q. B. 220.

SECT. 3.—OTHER POWERS.

2554. Whether execution of power valid.—Power to charge.—Assignment of life interest for small consideration.]—A feme covert having a power under her marriage settlement to create a term, & to raise money after the death of her husband, & being in distress, executes that power in the lifetime of her husband, & assigns her interest for a trifling consideration. The judges, upon a case sent to them, were of opinion it was a good execution of the power, & so this ct. held it, on the judge's certificate.—*SUTHERLAND (COUNTESS) v. NORTHMORE* (1729), 1 Dick. 56; 21 E. R. 188.

Annotation:—*Refd.* *Hanbury v. Bateman*, [1920] 1 Ch. 313.

2555. — — Necessity for reference to deed creating power.]—(1) Where a person having a power to charge an estate with £2,000 after the death of his wife gives her £1,000 payable with interest three months after his own death:—*Held*: the gift of the £1,000 was a good execution of the power though it could not be raised at the time appointed; & the interest could not be made good until it amounted to £2,000, for that would be to charge the estate with the principal sum of £2,000.

(2) If a man has a power to charge an estate, it is not necessary, in the execution of it, he should refer to the deed out of which the power arises; for in a ct. of equity it is enough that his intent appears. & if in the execution he sufficiently describes the estate he had a power to charge, the estate is certainly bound, especially where the person charging is a purchaser of the power (*LORD HARDWICKE, C.*).—*PROBERT v. CLIFFORD* (1739), *West temp.* Hard. 638; 27 E. R. 3, L. C.

2556. — — Prior limitations overreached.]—Power by marriage settlement to the husband to charge not confined to the immediately preceding limitation of the reversion to him:—*Held*: to overreach all the prior limitations. (Construction of a charge by will, if the reversion should never fall to the testator, viz. if it should not come to him personally, in his life; the charge therefore effectual, though the reversion came to his heir.—*STACKHOUSE v. BARNSTON* (1805), 10 Ves. 453; 32 E. R. 921.

Annotations:—*Refd.* *Cupitt v. Jackson* (1821), *M'Cle.* 495. *Mentd.* *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1.

2557. — — Except by way of sale.—Charge by way of mortgage excluded.]—A prohibition against raising a charge by sale:—*Held*: to prevent its being done by mtge.

Devise of real estates to trustees in fee, upon trust, "out of the rents, issues, & profits" thereof, to pay two annuities. " & by same ways & means, or by such other ways & means, except a sale or sales, as they may think proper, to levy & raise " sufficient to pay off the charges on the estate. Subject to the trusts aforesaid, to A. for life, with

PART XII. SECT. 3.

g. Whether execution of power valid —Power to charge.]—Where there was a power to charge a freehold estate

"by any deed or deeds, writing or writings, or by last will & testament duly attested," with £2,000 for any purpose the donor pleased, the donor

by a codicil referring to the power, but executed in the presence of two witnesses in order "to provide for his faithful servants A. & P.," gave &

Sect. 3.—Other powers.]

remainders over:—*Held*: the trustees could not raise the charges either by sale, by mtge., or by leases on fines, but that they must be raised out of the rents & the profits of timber & mines, the trustees exercising a discretion, so as not to exhaust the whole income, & leave nothing for the tenant for life.—*BENNETT v. WYNDHAM* (1857), 23 Beav. 521; 20 L. T. O. S. 138; 3 Jur. N. S. 1143; 5 W. R. 410; 53 E. R. 205; *on appeal* (1862), 4 De G. F. & J. 259, L. J.J.

Annotations:—*Consd. Re Allan, Havelock v. Havelock* (1881), 17 Ch. D. 307. *Apld. Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675. *Refd. Re Raybould, Raybould v. Turner*, [1900] 1 Ch. 199.

2558. — Given by will to tenant for life—Death before testator.—A power of charging the inheritance given under a will to a tenant for life, who dies before testator, cannot be exercised by such tenant for life under Wills Act, 1837 (c. 26), s. 33.—*GRIGGS v. GIBSON, MAYNARD v. GIBSON* (No. 2) (1866), 35 L. J. Ch. 458; 14 W. R. 538.

Annotation:—*Refd. Re Walker, Walker v. Duncombe*, [1901] 1 Ch. 879.

2559. — Power to raise money—After death of wife—Gift to wife after death of donee of power.—*PROBERT v. CLIFFORD*, No. 2555, *ante*.

2560. — Annuity charged on estate till certain sum paid off—No reference to power.—A tenant for life, having a power to raise a sum of money, granted an annuity charged on the settled estates till a certain sum should be paid off, without, in the annuity deed, referring to the power:—*Held*: this, under the particular circumstances of the case, was a good, though an informal, execution of the power.—*MARNELL v. BLAKE* (1816), 4 Dow. 248; 3 E. R. 1153, H. L.

Annotation:—*Refd. Minchin v. Minchin* (1871), 19 W. R. 993.

2561. — By mortgage annuity or otherwise—Sale by tenant for life.—A. being tenant in tail of an estate, in remainder expectant on the death of B., entered into arts. on his marriage, by which, after reciting that it had been agreed that the estate should, subject to B.'s life interest therein & to the raising, by mtge. or otherwise, of any sum or sums not exceeding £15,000 for A.'s use, be settled to the uses thereafter expressed, he covenanted that he would, subject to the raising, by any ways or means & at any time or times he should think proper, of the sum or sums before-mentioned, by mtge., annuity or otherwise, for his own benefit, & to any deed or deeds he might make for securing the repayment thereof & interest, do all necessary acts for settling the estate, subject to B.'s life interest, in the manner agreed upon:—*Held*: A. was authorised to raise the £15,000 by sale; & he was justified in selling his interest in remainder in the whole of the estate, as the £15,000 was nearly the full value of such interest.—*TASKER v. SMALL* (1836), 6 Sim. 625; *Donnelly*, 82; 5 L. J. Ch. 321; 58 E. R. 728; *on appeal* (1837), 3 My. & Cr. 63, L. C.

Annotations:—*Mentd. Roberts v. Marchant* (1843), 13 L. J. Ch. 56; *Cutts v. Thodey* (1844), 2 L. T. O. S. 474; *Nelthorpe v. Holgate* (1844), 1 Coll. 203; *West Midland Ry. v. Nixon* (1863), 1 Hem. & M. 176; *Bird v. G. E. Ry.* (1865), 19 C. B. N. S. 268; *De Hoghton v. Money* (1866), 2 Ch. App. 164; *Aberaman Iron Works v. Wickens* (1868), 4 Ch. App. 101; *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165; *Lumley v. Timms* (1873), 28 L. T. 157; *I. R. Comrs. v. Angus, Same v. Lewis* (1879), 23 Q. B. D. 579; *Richards v. Pryse*, [1927] 2 K. B. 76.

bequeathed £2,000 to trustees, etc.:—*Held*: the power was not well executed.—*COOKE v. NUNN* (1836), 4 L. R. Rec. N. S. 136.—*IR.*

h. ———.]—*SIMPSON v.*

VAN (1843), 3 Dr. & War. 446.—*IR.*
k. ———.]—*FOSBERRY v. SMITH*
(1856), 5 I. Ch. R. 321.—*IR.*
l. ———.]—*GORMAN v. BYRNE*
(1858), 8 I. C. L. R. 394.—*IR.*

2562. — For benefit of grandchildren of settlor—Exercise by parents on death of settlor.—

C., before the marriage of his daughter, conveyed certain lands to the use of himself for life, with remainder to trustees for a term of two hundred years, upon trust for securing a rentcharge of £100 *per annum* to the husband & wife for their joint lives, & the life of the survivor; & from & after the expiration or sooner determination of that term, & in the meantime subject thereto & to the trusts thereof, to the use of other trustees for a term of one thousand five hundred years, with remainder to C. in fee. The trusts of the one thousand five hundred years' term were declared to be as follows: That the trustees should, after the decease of C., but subject & without prejudice to the yearly rentcharge & the remedies for securing the same, by mtge. or sale or other disposition of the settled estates, or out of the rents thereof, levy & raise £2,000, in trust for all & every the child & children of the marriage, or such one or more of them, exclusive of the others, & in such shares, etc., & with such annual or other sums of money for the maintenance of such children from & after the decease of C., as the parents should by deed appoint:—*Held*: that the one thousand five hundred years' term did not wait for its commencement until the death of the survivor of the husband & wife, but commenced at the death of C.; & therefore it was competent to the parents after the death of C., by deed executed in pursuance of their power, to direct an annual sum to be raised out of the estates for the maintenance of their children born & to be born.—*GOUGH v. ANDREWS* (1844), 1 Coll. 59; 2 L. T. O. S. 475; 8 Jur. 305; 63 E. R. 321.

2563. — Power to enfranchise & convey to customary tenants—Conveyance to one equitably entitled—Erroneously admitted without surrender.—

Seemle: power to a tenant for life lord of a manor to enfranchise, & for that purpose to convey the freehold to the customary or copyhold tenants, authorises a conveyance of the freehold to one who is equitably entitled, & has been erroneously admitted without a previous surrender by his trustee.—*WILSON v. ALLEN* (1820), 1 Jac. & W. 611; 37 E. R. 501.

Annotations:—*Refd. Eccl. Comrs. v. L. & S. W. Ry.* (1854), 2 C. L. R. 1796; *Minton v. Kierwood* (1868), 3 Ch. App. 614. *Mentd. Cooper v. Norfolk Ry.* (1849), 3 Exch. 546; *McNico v. Kay* (1856), 28 L. T. O. S. 20; *Flood v. Pritchard* (1879), 40 L. T. 873.

2564. — Power to lay out money in freehold land & fee simple & inheritance thereof—Purchase of fixed rentcharge—Purchase of freehold subject to one thousand years term.—By a private Act, money was directed to be laid out in the purchase of freehold lands, tenements, or hereditaments, & the fee simple & inheritance thereof, which might be approved by this ct.:—*Held*: (1) the purchase of a fixed rentcharge was not a proper investment; (2) the purchase of a freehold estate, subject to a term of one thousand years, at a fixed rent, was equally objectionable.—*Ex p. GARTSIDE* (1837), 6 L. J. Ch. 266, L. C.

2565. — Power of sale & exchange to trustees

—*Conveyance in exchange by tenant for life—Execution of deeds to bring transaction within trustees' power.*—A. being entitled under his marriage settlement, to a life interest in certain freehold estates, with remainder to the use of trustees for a term of one thousand years, to secure

m. ———.]—*REDDIE'S TRUSTEES v. LINDSAY* (1890), 17 R. (Ct. of Sess.) 558; 27 Sc. L. R. 514.—*SCOT.*

n. ———.]—*STEWART v. WALLBRIDGE* (1857), 14 U. C. R. 312.—*CAN.*

a jointure & portions, with remainder to himself in fee, conveyed part of the lands to B. in fee, in exchange for other lands. B.'s heir afterwards having contracted for the sale of the land, the purchaser refused to complete the contract, on the ground that A. had no power to exchange the lands in fee. The vendor then procured the execution of certain deeds, with a view of bringing the exchange within the terms of a power of sale & exchange, given to the trustees under the settlement:—*Held*: under these circumstances, & likewise on the ground that the after-executed deeds were grossly inaccurate, the purchaser was not bound specifically to perform the agreement.

Semble: the after-executed deeds, although the surviving trustee of the marriage settlement was a party to them, did not make the transaction between A. & B. a due execution of the power.—*COWGILL v. OXMAINTOWN (LORD)* (1839), 3 Y. & C. Ex. 369; 3 Jur. 313; 160 E. R. 745.

Annotation:—*Distd. Garnett v. Acton* (1860), 28 Beav. 333.

2566. — Power to exchange for lands of equal value — Inadequacy of value.—*FERRAND v. WILSON*, No. 1806, *ante*.

2567. — Power to substitute lands with consent of trustees—Consent to be signified by deed—Conveyance executed by trustees subsequent to its date.—E. being the tenant for life under a settlement of certain estates, had power to release the settled estates from certain charges by the substitution of other lands, which, however, was only to take place with the consent of the trustees of two separate terms, "to be signified by some deed to be duly executed by them respectively, & not otherwise." In 1857, E. having agreed to sell a portion of the settled estates called M. to pltf., conveyed same to him by a deed to which the two trustees were both made parties, as giving their consent to a substitution of other property, but the execution by one of them was under a power of attorney dated six weeks after the deed, & the other did not execute it till nine months after its date. Pltfs. having subsequently agreed to sell the property called M. to deft., the latter objected to the title, on the ground that this was not a good execution of the power, but pltf. having produced an affidavit showing that the trustees had seen the draft of the deed before its execution, & were acquainted with the whole intended transaction:—*Held*: due execution had been sufficiently shown, & deft. was bound to accept the title.—*OFFEN v. HARMAN* (1859), 1 De G. F. & J. 253; 29 L. J. Ch. 307; 1 L. T. 315; 6 Jur. N. S. 487; 8 W. R. 129; 45 E. R. 355, L. JJ.

2568. "Same power of leasing, selling & exchanging as in will"—Power in will for trustees to sell & exchange only—Life tenant's powers same as trustees.—Testatrix, by her will, declared, that every person thereby made tenant for life should have such & the like powers of leasing, selling, & exchanging any part of the devised estate as were by her father's will given to the tenants for life & in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of leasing, selling, or exchanging; but gave trustees full power to sell & exchange the hereditaments therein comprised, & to give

receipts for the purchase-money:—*Held*: tenant for life in possession of the estate devised by testatrix had the same powers of selling & exchanging that estate as were by the father's will given to the trustees.—*COX v. COX* (1855), 1 K. & J. 251; 69 E. R. 451.

2569. Power to raise money—Interest payable from date of payment.—Where any settlement or contract contains a provision that a certain fixed sum of money is to be charged on land & to be paid at a fixed time, then, as between the owner of the land & the person entitled to the money, the money, in the eye of a ct. of equity, bears interest from the date fixed for payment of the money, although nothing is said as to interest in the settlement or contract, unless there are circumstances negating the presumption that interest is payable.—*Re DRAX, SAVILE v. DRAX*, [1903] 1 Ch. 781; 72 L. J. Ch. 505; 88 L. T. 510; 51 W. R. 612; 47 Sol. Jo. 405, C. A.

2570. Power to allot land as public way—Dedication of road as highway.—In 1827 a tenant for life having power under a private estate Act to allot & set out a competent part of the settled land for public ways or otherwise for the use & convenience of the occupiers, had constructed a carriage road on the estate for the development of building:—*Held*: it was competent to the tenant for life to dedicate the road as a highway for foot passengers under the estate Act.—*BROCKMAN v. FOLKESTONE CORPN.* (1912), 107 L. T. 483; 76 J. P. 443; 10 L. G. R. 856, C. A.; *on appeal, sub nom. FOLKESTONE CORPN. v. BROCKMAN*, [1914] A. C. 338, H. L.

Annotations:—*Refd. A-G v. Sewell* (1918), 17 L. G. R. 202; *S. E. Ry. v. Warr* (1923), 21 L. G. R. 669.

2571. Grant by successive tenants for life of right to use adit—Confirmation by local Act—Successors of life tenant bound.—A tenant for life of a settled estate & his brother, who was entitled contingently to a tenancy for life in remainder described as "the grantors," entered into an agreement in 1900, with a water co. authorising the co. to make beneath the estate an adit for the storage of water. The agreement provided that the works should be completed before Dec. 31, 1914, or such later day as the grantors or their successors should, if they thought fit, appoint, that on completion the grantors or their successors would grant to pltfs. the right in perpetuity to use the adit, & for payment to the grantors & their successors of a rent. The agreement was set forth in the schedule of a local Act, & by sect. 42 thereof the agreement "set forth in the schedule to the Act" was confirmed & made binding on the parties thereto, who were authorised to carry same into effect. The Act did not expressly confirm any powers given by the agreement to the grantors:—*Held*: there was sufficient confirmation of the powers vested in the grantors by the agreement; that the grantors were therefore empowered to extend the time for completion & to accept further considerations than those specified in the agreement & a grant by grantors to the co. upon the completion of the works of a right in perpetuity to use the adit would bind the children or other successors of the tenant for life.—*WESTGATE & BIRCHINGTON WATER CO. v. POWELL-COTTON* (1915), 85 L. J. Ch. 459; 113 L. T. 689.

Powers of investment.—*See TRUSTS & TRUSTEES.*

Part XIII.—Statutory Powers in Relation to Settled Property.

SECT. 1.—UNDER SETTLED LAND ACTS.

SUB-SECT. 1.—DEFINITIONS.

A. "Settlement."

See, now, Settled Land Act, 1925 (c. 18), ss. 1, 117 (1) (xxiv).

2572. State of affairs in relation to certain land—Brought about by one or more documents.]—A., being the tenant for life of certain settled estates under a settlement made in 1862, duly disentailed the same in 1920 & limited them to himself in fee simple. The lands in question were subject to a jointure rentcharge, & A. sold various portions prior to 1926 subject to the charge but in each case with a covenant of indemnity.

On Settled Land Act, 1925 (c. 18), coming into force, A. applied to the ct. for the appointment of two persons as trustees under the original settlement of 1862 for the purposes of the Act.

The point having been raised whether such persons on appointment might not, by virtue of Settled Land Act, 1925 (c. 18), s. 31, be trustees for the purposes of the Act not only in respect of the lands to which A. was still beneficially entitled in fee simple but also in respect of the lands already sold, a summons was taken out for the determination of this question:—*Held*: (1) on the coming into force of Settled Land Act, 1925 (c. 38), the whole of the estate became, by virtue of sect. 1 (1) (v), settled land, but the part vested in A. was the subject-matter of one settlement & each part vested in a purchaser was the subject-matter of another settlement, though each settlement was brought about by one & the same document, namely, the original settlement of 1862.

In general, a settlement for the purposes of the Act, is a state of affairs in relation to certain land, brought about or deemed to have been brought about by one or more documents, the particular state of affairs being one or more of those specified in Settled Land Act, 1925 (c. 18), s. 1 (1) (i) to (v) (ROMER, J.).

(2) The different portions of the land being subject to different settlements, there was nothing in the language of Settled Land Act, 1925 (c. 38), s. 31, which would, under the circumstances, prevent the ct. from appointing trustees of the one settlement without those trustees thereby becoming trustees of any of the others.—*Re OGLE'S SETTLED ESTATES*, [1927] 1 Ch. 229; 96 L. J. Ch. 113; 136 L. T. 300; 70 Sol. Jo. 953.

2573. "Any number of instruments"—Settlement & sub-settlement—By appointment in exercise of power.]—Re KNOWLES' SETTLED ESTATES, No. 3100, *post*.

—**Compound settlement.]—See Sub-sect. 13, *post*.**

2574. "By way of succession"—Limitation to vicar "& his successors"—By award under Inclosure Act.]—An award, under an Inclosure Act to "A. & his successors, vicars of X." of lands in respect of glebe is not an instrument limiting an estate or interest in land "to or in trust for any persons by way of succession" so as to constitute "a settlement" within Settled Land Act, 1882 (c. 38), s. 2 (1).

But, where the purchase-moneys of glebe lands,

comprised in such an award & afterwards taken by a railway co., are paid into ct., then by the combined operation of Settled Land Act, 1882 (c. 38), s. 32, & Lands Clauses (Consolidation) Act, 1845 (c. 18), s. 69, & upon the authorities, such moneys may be dealt with as capital moneys arising under Settled Land Acts; & the ct. has discretionary jurisdiction under Settled Land Act, 1887 (c. 30), to authorise the application of them in the redemption of terminable rentcharges on the glebe created under Land Improvement Act, 1864 (c. 114).—*Ex p. CASTLE BYTHAM (VICAR)*, *Ex p. MIDLAND RY. CO.*, [1895] 1 Ch. 348; 64 L. J. Ch. 116; 71 L. T. 606; 43 W. R. 156; 11 T. L. R. 2; 39 Sol. Jo. 10; 13 R. 24.
Annotation:—*Consd. Re Bath & Wells (Bp.)*, [1899] 2 Ch. 138.

See, also, No. 2592, post.

2575. — Various interests limited to same person.]—Real estate stood limited to trustees upon trust for a married woman for her life for her separate use without power of anticipation & after her death to such uses as she should by will appoint & in default to the use of herself in fee; & she contracted to sell the property to a purchaser. The ct. was not satisfied that these limitations created a "settlement" within Settled Land Act, 1882 (c. 38), s. 2, but held, that the married woman had the powers of a tenant for life within s. 58 (1) (ix) of the same Act, & could make a title as such to the purchaser.—*Re POCOCK & PRANKERD'S CONTRACT*, [1896] 1 Ch. 302; 65 L. J. Ch. 211; 44 W. R. 247; *sub nom. Re POCOCK & PRANKERD & WISBECH GRAMMAR SCHOOL (GOVERNORS)*, 73 L. T. 706.

Annotation:—*Apld. Re Osborne & Brights*, [1902] 1 Ch. 335.

2576. — Property set apart to provide for annuity.]—Testatrix by her will bequeathed an annuity to A., & directed that a portion of her estate should be set apart to provide for the payment of the annuity, & subject thereto she bequeathed the portion of her estate to B.:—*Held*: the property so set apart to provide for the payment of the annuity was property "standing limited to or in trust for persons by way of succession" within Settled Land Act, 1882 (c. 38), s. 2 (1).—*A.-G. v. OWEN, A.-G. v. COULSON*, [1899] 2 Q. B. 253; 68 L. J. Q. B. 779; 81 L. T. 121; 63 J. P. 611; 15 T. L. R. 381, D. C.

Annotations:—*Apld. Re St. Albans, Loder v. St. Albans*, [1900] 2 Ch. 873. *Follid. Re Campbell*, [1902] 1 K. B. 113. *Reidf. Re Trafford's S. E.*, [1915] 1 Ch. 9; *Re Waller, Margarlson v. Waller*, [1916] 1 Ch. 153.

2577. ——*Testator by his will gave certain legacies & annuities, some of which were contingent upon the legatees & annuitants attaining the age of twenty-one. He directed that every legacy & annuity should be primarily payable out of his personalty, & charged his real estate in aid, but not in exoneration, of his personalty with the same, if the personalty should be insufficient. He devised his real estate to the use of his eldest son for life with remainders over. He declared that if his residuary personalty should be insufficient for payment of his funeral & testamentary expenses, debts, legacies, & annuities, the trustees might raise the deficiency by mtgc. of the real*

estate, but so that the annuities should be paid out of rents & profits, & not by raising a capital sum to provide for the same; & he charged the residuary personalty with the payment of the legacies & annuities, & directed that the ultimate residue of the personalty should be invested & should follow the limitations of the real estate. After testator's death the exors. had paid settlement estate duty in respect of the contingent legacies & annuities. There was a probability that the personal estate would be insufficient to pay the funeral & testamentary expenses, legacies, & annuities. The question having arisen as to how the settlement estate duty ought to be borne as between the residuary estate & the legatees & annuitants:—*Held*: the contingent legacies must be treated as settled.—*Re ST. ALBANS (DUKE)*, *LODER v. ST. ALBANS (DUKE)*, [1900] 2 Ch. 873; 69 L. J. Ch. 863; 49 W. R. 74; 44 Sol. Jo. 690.

Annotation:—*Refd. Re King, Travers v. Kelly*, [1904] 1 Ch. 363.

2578. ———.]—The object of testator in this case was to provide for the payment of certain life annuities & for immediate distribution of the residue, subject to due provision being made for payment of the annuities. For that purpose a special fund was to be created for the protection of the annuitants, & subject to the trust imposed upon that fund in their favour, the residue of the estate was to be distributed among the residuary legatees. I think that the provisions by which those objects of testator were brought about amounted to a settlement within Settled Land Act, 1882 (c. 38), s. 2 (1) (*MATHEW, L.J.*).—*Re CAMPBELL*, [1902] 1 K. B. 113; 71 L. J. K. B. 160; 85 L. T. 708, C. A.

Annotations:—*Apld. Berry v. Gaukroger*, [1903] 2 Ch. 116. *Refd. Re Trafford's S. E.*, [1915] 1 Ch. 9; *Re Waller, Margarlson v. Waller*, [1916] 1 Ch. 153; *Re Allington & L. C. C.'s Contract*, [1927] 2 Ch. 253.

2579. ——— **Undivided share in land.**—Testator directed his trustees to set aside & appropriate sufficient of his property to meet certain annuities bequeathed by his will. By a deed of appropriation the trustees appropriated certain freehold ground rents to meet such annuities. Testator declared that his trustees should be trustees of his will for the purpose of Settled Land Acts, 1882 to 1890, & he further declared that they could exercise all the powers conferred on a tenant for life by Settled Land Acts, 1882 to 1890:—*Held*: (1) notwithstanding that "an undivided share in land" was excepted from the definition of "land" in Settled Land Act, 1925 (c. 18), s. 117 (1) (ix), as regards the land appropriated to meet the annuities, the will operated as a settlement within s. 1 (1), of the Act, & as regards the other land the will operated as a settlement within the same sub-sect., & therefore, as regards the whole of the residuary real estate the will operated as a settlement under the Act; (2) the appointment of the trustees of the will as trustees for the purpose of Settled Land Acts, 1882 to 1890, made them, under s. 23 (1) (a) (b), of the Act of 1925, trustees for the purposes of the settlement under that Act, & they could, therefore, exercise the powers of a tenant for life.—*Re BIRD, WATSON v. NUNES*, [1927] 1 Ch. 210; 96 L. J. Ch. 127; 136 L. T. 346; 70 Sol. Jo. 1139.

2580. ——— **Family charges.**—*Re AILESBUURY (MARQUIS) & IVEAGH (LORD)*, No. 3036, *post*.

2581. ——— **Arising after life estate.**—*Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

2582. ———.]—*Re WIMBORNE (LORD) & BROWNE'S CONTRACT*, No. 2845, *post*.

2583. ——— **Remainder to tenant for life in fee**—**Merger of life estate.**—By a marriage settlement, land belonging to the settlor was assured to the settlor for life with remainder, subject to a jointure, portions, & portions term thereby charged & limited, to the settlor in fee:—*Held*: notwithstanding the merger of the life estate, the settlement was a settlement within Settled Land Act, 1882 (c. 38), s. 2 (1), & the settlor was life tenant within s. 2 (5).—*Re MARSHALL'S SETTLEMENT, MARSHALL v. MARSHALL*, [1905] 2 Ch. 325; 74 L. J. Ch. 588; 93 L. T. 246; 54 W. R. 75; 21 T. L. R. 678; 49 Sol. Jo. 671.

Annotations:—*Fold. Re Monckton's Settlement, Monckton v. Calder*, [1917] 1 Ch. 224. *Consd. Re Carnarvon's Chesterfield S. E., Re Carnarvon's Highclere S. E.*, [1927] 1 Ch. 138.

2584. ——— **Remainder in fee simple on death of tenant for life.**—In 1894 lands were by deed settled to the use of A. for life, remainder to the use of B., the eldest son of A., in fee simple if he should survive A., with powers for A. to create portions terms for his younger children & for B. to jointure any wife & to create portions terms for his younger children. In 1896 B. married, & in exercise of his power by deed charged a jointure for his wife & created a portions term for his younger children. In 1916 A. died, having in exercise of his power created portions terms for his younger children, & B. became tenant in fee simple in possession subject to the several portions terms & the jointure:—*Held*: (1) in the events which had happened, the lands stood limited to or in trust for persons by way of succession under the deed of 1894, which constituted a "settlement" within the definitions in Settled Land Act, 1882 (c. 38), s. 2 (1); (2) B. was tenant for life of the settlement within s. 2 (5) of the Act, & could exercise all the powers of a tenant for life under the Act.—*Re MONCKTON'S SETTLEMENT, MONCKTON v. CALDER*, [1917] 1 Ch. 224; 86 L. J. Ch. 187; 115 L. T. 899.

Annotations:—*As to (2) Fold. Re Sutton's Contract* (1920), 65 Sol. Jo. 259. *Generally, Consd. Re Carnarvon's Chesterfield S. E., Re Carnarvon's Highclere S. E.*, [1927] 1 Ch. 138.

2585. ——— **Annuities charged on settled land**—**Remainder to tenant for life in fee.**—*Re PHILLIMORE'S ESTATE, PHILLIMORE v. MILNES*, No. 3042, *post*.

2586. ——— **Subsequent limitations.**—*Re TRAFFORD'S SETTLED ESTATES*, No. 3041, *post*.

2587. ——— **Settlement of personalty with power to invest in land.**—A settlement of purely personal property in the names of trustees upon trust for a lady for her life, & after her death for her children on attaining twenty-one or marrying, contained a power to the trustees to invest the trust funds in the purchase of lands to be held by them upon trust for sale, & until sale to apply the rents & profits in accordance with the trusts of the personal property. The trustees invested part of the trust funds in the purchase of lands which were conveyed to them to be held upon the trusts of the settlement. The tenant for life desired to be recouped out of capital moneys for expenditure on improvements upon part of the land so purchased; & the question was raised whether the settlement came within the provisions of Settled Land Act, 1882 (c. 38):—*Held*: the settlement, although not in its inception a settlement of land, was nevertheless a "settlement" upon trust for "persons by way of succession" within the definition in Settled Land Act, 1882 (c. 38), s. 2 (1). It also came strictly within s. 63 of the same Act, & the lady must be deemed a tenant for life within the meaning of the Act.—*Re CHILDS'*

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SETTLEMENT, [1907] 2 Ch. 348; 76 L. J. Ch. 565; 97 L. T. 80; 23 T. L. R. 609.

Annotation:—Reid. Re Wagstaff's S. E., [1909] 2 Ch. 201.

2588. — *Limitation for benefit of church.*—*Re HIGGS, SYMONDS v. RHODES*, [1927] W. N. 316.

2589. "Act of Parliament"—Includes general Act—*Thellusson Act*.—(1) The words "Act of Parliament" in the definition clause Settled Land Act, 1882 (c. 38), s. 2 (1), are not confined to private Acts of Parliament but include general Acts, such as the Thellusson Act, 1800 (c. 98). So where under a will a direction to accumulate was void under the Thellusson Act & the accumulations went to the testator's next of kin:—*Held*: the will & the Act together constituted a settlement within Settled Land Act, 1882 (c. 38).

(2) The extrices of deceased next of kin & the surviving next of kin were under the joint operation of the will & the Thellusson Act entitled for the life of another to receive the rents directed to be accumulated:—*Held*: that they had jointly the powers of a tenant for life within Settled Land Act, 1882 (c. 38).—*VINE v. RALEIGH*, [1896] 1 Ch. 37; 65 L. J. Ch. 103; 73 L. T. 655; 44 W. R. 169; 40 Sol. Jo. 85.

Annotations:—As to (2) Fould. Re Bennet, Bennet v. Bennet, [1903] 2 Ch. 136; Re Johnson, Johnson v. Johnson, [1914] 2 Ch. 134.

Compound settlement.—*See* Sub-sect. 13, *post*.

B. "Settled Land."

See Settled Land Act, 1925 (c. 18), ss. 2, 117 (1) (ix), (xxiv).

2590. Sale of interest by reversioner—*Before passing of Settled Land Act, 1882 (c. 38).*—*WHEELWRIGHT v. WALKER*, No. 3106, *post*.

2591. Title of dignity.—*Re RIVETT-CARNAC'S WILL*, No. 2824, *post*.

Undivided share.—*See* Part XV., *post*.

2592. Ecclesiastical property.—Some houses in a cathedral city had from time immemorial been granted by the bishop of the diocese for the time being to one of the ecclesiastical dignitaries, for his life. The deed of grant was called a "collation," & the grantee was "inducted" by the registrar of the diocese into possession of the property. By the last deed of collation the bishop granted the houses to the then archdeacon of the city for his life, but so long only as he should continue to be archdeacon. On the deed was indorsed a certificate signed by the registrar that five days after the date of the deed the grantee was duly inducted by him into the actual corporal possession of the property. Upon a summons by the archdeacon, with the approval of the bishop, asking that trustees might be appointed for the purposes of Settled Land Act, 1882 (c. 38), of the settlement created by the deed, the object being that the archdeacon, as tenant for life, or having the powers of a tenant for life under Settled Land Act, 1882 (c. 38), might sell the houses, & the proceeds of sale might be invested in the names of trustees, & the income thereof paid to the persons who would have been from time to time entitled

to the rents of the houses if unsold:—*Held*: this being ecclesiastical property, Settled Land Act, 1882 (c. 38), did not apply to it.—*Re BATH & WELLS (BP.)*, [1899] 2 Ch. 138; 81 L. T. 69; 15 T. L. R. 421; *sub nom. Ex p. BATH & WELLS (BP.)*, 68 L. J. Ch. 524.

See, also, No. 2574, *ante*.

2593. Ground rents.—Testator gave his annual ground rents, secured on two estates, to trustees upon trust to collect & apply same in reduction of a mtge. debt thereon, & subject thereto upon trust as to two-fifths of the annual income for J. for life, as to other two-fifths for P. for life, & as to the remaining one-fifth for L. for life. He directed that on the decease of either J., P. or L. his or her share of the ground rents should go to his or her children. Testator empowered his trustees to sell the ground rents, pay off the mtge., debt, invest the residuary proceeds of sale, & stand possessed thereof upon the trusts declared respecting the annual ground rents should they remain unsold. Testator died in 1891. J. had three, & P. one, infant children entitled to the ground rents in remainder. The trustees considered it advisable in the interest of all the beneficiaries to retain the ground rents & apply the income in reduction of the mtge. debt thereon, which by Jan. 1901, was reduced to less than half. The mtge. debt became vested in the surviving trustee of the will. Upon a summons taken out by the tenants for life against the surviving trustee & infant remaindermen:—*Held*: the tenants for life were entitled to immediate possession of the ground rents & to sell them to pay off the mtge. debt & also to delivery up of the documents of title held by the surviving trustee, as trustee, relating to the ground rents.

"The peculiarity in this case is that here the 'settled land' consists entirely of ground-rents" (COZENS-HARDY, J.).—*Re WILKINSON, LLOYD v. STEEL* (1901), 85 L. T. 43.

Annotation:—Reid. Re Stamford & Warrington, Payne v. Grey, [1925] 1 Ch. 162.

2594. Reversion in fee remaining in settlor.—Where under a settlement the trustees take only an estate for their lives, & that of the survivor, the reversion in fee left in the settlor is comprised in "the subject of the settlement" by Settled Land Act, 1882 (c. 38), s. 2 (2), & a person having the powers of a tenant for life under Settled Land Act, 1882 (c. 38), can sell & make a good title to the fee simple.—*Re HUNTER & HEWLETT'S CONTRACT*, [1907] 1 Ch. 46; 76 L. J. Ch. 26; 95 L. T. 674.

2595. Land purchased under express power—Settlement of personality.—*Re CHILDS' SETTLEMENT*, No. 2587, *ante*.

2596. Land subject to subsisting charge—Settled Land Act, 1925 (c. 18), s. 3.—By a disentailing deed of 1924 the property sold was assured to the use of the vendor in fee simple subject to all charges & incumbrances affecting same. When Settled Land Act, 1925 (c. 18), came into operation the property was vested in the vendor in fee but subject to two family charges which were interests vested in possession, namely, a sum of £8,750 secured by a term of two hundred years, limited by a settlement of 1880, & a jointure rentcharge of

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p. Land held upon charitable trust—*For maintenance of minister.*—A charitable trust for the maintenance of a minister of religion entitling the incumbent for the time being of a church to the rents & profits of land is a settled estate within Real Property Statute, 1864, No. 213, s. 79.—*Re DRHANY'S SETTLED ESTATES* (1888), 14 V. L. R. 712.—AUS.

q. Land subject to annuity.—Land devised subject to annuities charged thereon is not settled land within Settled Estates & Settled Land Act, 1909.—*Re PODMORE, UNION TRUSTEE CO. OF AUSTRALIA, LTD. v. ALLNUTT*, [1914] V. L. R. 423.—AUS.

r. Estate in land subject to trust.—*Re READY, [1920] St. R. Q. 87.*—AUS.

t. —.—]—Testator devised lands

upon trust "to allow my wife so long as she remains my widow & no longer the use & occupation & the rents, issues, & profits for her own use absolutely," & he directed that upon re-marriage or death of his wife the land should be sold & the proceeds divided among his children. He died in 1897, & in Jan. 1906, his widow leased the land for five years with right of renewal, & died in Apr. 1906. The

£4,000 imposed upon the property by a deed of 1925. Before the disentailing deed of 1924 the property had been subject to a compound settlement constituted by the documents, including a disentailing deed of 1914, or some of them, mentioned in an order of the Ch. Div. dated Mar. 1, 1920, under which the trustees of the 1880 settlement were appointed trustees, for the purposes of Settled Land Acts, 1882 to 1890, of the compound settlement. By a vesting deed of 1926 it was declared that the property was vested in the vendor in fee simple & that the trustees of the 1880 settlement were trustees of the compound settlement for the purposes of the Settled Land Act, 1925 (c. 18). In these circumstances the question arose whether, if the purchase price of the property was paid to the existing trustees, the purchaser got a good title discharged from all claims in respect of the £8,750, & the £4,000 jointure rentcharge:—*Held*: immediately before Settled Land Act, 1925 (c. 18), came into operation the property was not settled land, but that as it had been subject to a compound settlement under which the £8,750 was still a subsisting charge by Settled Land Act, 1925 (c. 18), s. 3, the settlement was deemed to be subsisting for the purposes of Settled Land Act, 1925 (c. 18); & under Settled Land Act, 1882 (c. 18), ss. 31, 33, the trustees of the settlement were trustees of it for the purposes of Settled Land Act, 1925 (c. 18), & a receipt by them of the purchase money would free the land sold from the £8,750.—*Re ALINGTON (LORD) & LONDON COUNTY COUNCIL'S CONTRACT*, [1927] 2 Ch. 253; 96 L. J. Ch. 465; 138 L. T. 131; 71 Sol. Jo. 695.

2597. ———.]—*Re GAUL & HOULSTON'S CONTRACT*, [1928] W. N. 45.

2598. ——— **Effect of death of chargee.**—Trustees of a will purchased certain estates, subject to jointure rentcharges created by the V. settlements. On Jan. 1, 1926, the estates were held subject to a compound settlement, constituted by the will, the V. settlements, & an indenture of 1907. Early in 1927, on the death of the jointress, the last of the jointure rentcharges determined:—*Held*: on the death of the jointress the compound settlement, comprising the V. settlements, ceased.—*Re DRAYCOTT SETTLED ESTATE*, [1928] 1 Ch. 371.

2599. Land subject to rentcharge—Settled Land Act, 1925 (c. 18), s. 1 (1) (v).—(1) A tenant for life of settled estates which were subject to a jointure rentcharge assigned his life estate to a co. A summons was taken out for the determination of the question who was the tenant for life for the purpose of the execution of the vesting deed required by the provisions of Settled Land Act, 1925 (c. 18):—*Held*: the words "of full age," as used throughout Settled Land Act, 1925 (c. 18), & Law of Property Act, 1925 (c. 20), must be treated as meaning no more than "not being an infant," & they were applicable to a co.; the tenant for life was, notwithstanding the assignment to the co., the tenant for life for the purpose of the execution of the vesting deed.

(2) A tenant in tail of settled estates, which were subject to a jointure rentcharge, executed a disentailing deed in respect of those estates. He subsequently contracted to sell the fee simple of those estates to a co., subject to the rentcharge:—*Held*: the property was settled land by virtue, &

by virtue only, of Settled Land Act, 1925 (c. 18), s. 1 (1) (v), & by virtue of Settled Land Act, 1925 (c. 18), s. 20 (1) (ix), the co. had the powers of a tenant for life, & was the tenant for life for the purpose of the execution of the vesting deed.—*Re CARNARVON'S (EARL) CHESTERFIELD SETTLED ESTATES, Re CARNARVON'S (EARL) HIGHCLERE SETTLED ESTATES*, [1927] 1 Ch. 138; 96 L. J. Ch. 49; 136 L. T. 241; 70 Sol. Jo. 977.

Annotations:—As to (2) *Folld. Re Alington & L. C. C.'s Contract*, [1927] 2 Ch. 253. *Consd. Re Podley, Wallace v. Wallace*, [1927] 2 Ch. 168. *Reid. Re Ogle's S. E.*, [1927] 1 Ch. 229.

2600. ———.]—*Re OGLE'S SETTLED ESTATES*, No. 2572, *ante*.

2601. Land held upon charitable trust—House devised for use of minister.—*Re HIGGS, SYMONDS v. RHODES*, [1927] W. N. 316.

2602. Land subject to immediate binding trust for sale.—Under testator's will T. became entitled as tenant in tail of the settled land subject only to a jointure rentcharge of £1,500 appointed by a deceased tenant for life to his widow under a power in the will. On her marriage in 1923 T., being then still an infant, obtained an order of the ct. approving her marriage & authorising her execution of three deeds. By the first T. disentailed, & by the second conveyed the settled land, subject to the jointure, to trustees upon trust for sale, with power to postpone, & to stand possessed of the net proceeds of sale & the rents & profits until sale upon the trusts of a settlement of even date, which was the third deed. Under this settlement the income of the proceeds of sale & the rents & profits until sale were applicable in paying life annuities of £5,000 to T., £1,000 to her husband, £3,500 to the jointress, & in paying the balance to T. during her life. In 1924 & 1925 two orders were made under Settled Land Act, 1884 (c. 18), s. 7, which together gave T. power to exercise all the powers of a tenant for life under Settled Land Acts, 1881 to 1890:—*Held*: by virtue of Law of Property Act, 1925 (c. 20), s. 2 (2), as amended [by Law of Property (Amendment) Act, 1926 (c. 11), sched.], the land was subject to an "immediate binding trust for sale," & was not settled land within Settled Land Act, 1925 (c. 18).—*Re LEIGH'S SETTLED ESTATES (No. 2)*, [1927] 2 Ch. 13; 96 L. J. Ch. 423; 137 L. T. 378; 71 Sol. Jo. 369.

Property of infant.—*See* INFANTS, Vol. XXVIII., pp. 202, 203, Nos. 621, 624.

C. "Tenant for Life."

See Settled Land Act, 1925 (c. 18), ss. 19, 117 (1) xxviii.

2603. Persons within term—Acts construed broadly.—(1) Testatrix devised all her real estate to trustees upon trust "to enter into possession or receipt of the rents & profits of or to manage or superintend the management of the same." The will gave the trustees extensive powers of management. Testatrix then directed the trustees to pay certain annuities to her daughter, & subject thereto, to apply such annual sums as should be necessary for keeping certain mansion houses & the gardens & grounds thereof "in a fit state for residence," including the payment of wages of all servants & other persons employed

lease was registered in Dec. 1906. The exors. of testator received the rent monthly after the death of the widow till Feb. 1907, when they sold the land:—*Held*: the land was a settled estate within Settled Estates Act, R. S. O. 1897 (c. 71).—*NATIONAL TRUST CO. v. SHORE* (1908), 16 O. L. R.

177; 11 O. W. R. 228.—*CAN.*

u. ———.]—In order that land may be subject to a trust or direction for sale within Settled Land Act, 1882, s. 63, it is not necessary that there should be an express trust or direction for sale. An implied trust or direction for that purpose, arising from a

devise on trust to pay debts is sufficient.—*Re M'CURDY'S SETTLED ESTATE* (1891), 27 L. R. Ir. 395.—*IR.*

a. *Part of estate settled land.*—The fact that part of an estate is settled land, within the Acts, does not render the entirety so.—*Re BEVIE ESTATE* (1891), 27 L. R. Ir. 361.—*IR.*

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by the trustees in & about such mansion-houses, gardens, & grounds, " & shall permit my daughter at any time & from time to time during her life to reside at the mansion houses, gardens, & grounds"; & that during any & every such residence by her daughter, "under such permission as aforesaid," the trustees should, out of the rents & profits, subject to the prior payments thereout thereinbefore directed, pay to her daughter an allowance of £80 per week during such residence; & testatrix, after giving similar rights of residence to grandchildren, directed that the furniture, etc., in the "residences," respectively should be annexed thereto as heirlooms to be enjoyed by the person or persons for the time being entitled to the same residences under the limitation thereinbefore directed:—*Held*: the daughter came within the definition of a "tenant for life" in Settled Land Act, 1882 (c. 38), s. 2 (5), as being "the person for the time being beneficially entitled to possession of settled land for her life."

(2) The policy of the law is to regard the provisions of the Settled Land Acts as being beneficial, & not to cut down the class or number of persons coming within the definition of "tenant for life."—*Re LLANOVER'S (BARONESS) WILL, HERBERT v. FRESHFIELD*, [1903] 2 Ch. 16; 72 L. J. Ch. 406; 88 L. T. 618; 51 W. R. 418; 19 T. L. R. 338; 47 Sol. Jo. 385, C. A.

Annotations:—*As to (1) Reid. Re Anderson, Halligev v. Kirkley*, [1920] 1 Ch. 175. *As to (2) Reid. Re Boyer's S. F.*, [1916] 2 Ch. 404.

2604. "Beneficially entitled"—For own benefit—Not as trustee.—*Re JONES*, No. 2622, *post*.

2605. "Possession"—Antithesis of "remainder" or "reversion."—*Re ATKINSON, ATKINSON v. BRUCE*, No. 2664, *post*.

2606. "So entitled"—Entitled for life.—*Re ATKINSON, ATKINSON v. BRUCE*, No. 2664, *post*.

2607. Discretionary trust to apply income—For benefit of husband, wife & children.—*Re ATKINSON, ATKINSON v. BRUCE*, No. 2664, *post*.

2608. Property on trust for sale—Covenant by beneficiaries not to take in specie—Beneficiaries entitled to bid at sale.—Under a settlement land was appointed to the use of a father for his life, & after his death to the use of trustees during the life of his son W., & after his death to the use of his sons successively in tail male, with remainder to the use of the trustees during the life of the father's son G., with remainders over; & it was declared that the appointments to the trustees were made on trust that they should, as soon as might be, absolutely sell the life estates, & pay the net proceeds of sale to W. & G. in equal shares as tenants in common; & it was provided that until sale the rents & profits of the life estates should be paid to W. & G. in equal shares as tenants in common; & W. & G. covenanted with the father, & also separately with the trustees, that neither of them would claim to have the life estates thereby appointed made over to them or either of them in specie, it being the intention of the parties that the trusts for sale should be absolute & irrevocable, notwithstanding any law of equity authorising beneficiaries of proceeds of sale to elect to take the property in lieu of the proceeds of sale. After the death of the father, W. & G. contracted to sell some of the land in fee. The purchaser objected that the vendors were not tenants for life within Settled Land Act, 1882 (c. 38):—*Held*:

as either W. or G. alone, or both of them together, might bid at any sale by the trustees, they must be treated as if they had bought the life estates back, in which case they would be tenants for life, & could therefore sell under the powers of the Act.—*Re HALE & CLARK* (1886), 55 L. J. Ch. 550; 34 W. R. 624; *sub nom. Re HALE & SMYTH'S CONTRACT*, 55 L. T. 151.

2609. Several persons constituting tenant for life—Undivided shares—Separately settled.—Where by a will a power of sale was given to the trustees of the whole estate, but undivided shares were separately settled:—*Held*: there was a conflict within Settled Land Act, 1882 (c. 38), s. 56 (2), between the provisions of the will & the provisions of the Act; the tenants for life of undivided shares did not together constitute, within Settled Land Act, 1884 (c. 18), s. 6 (2), a tenant for life for the purposes of the Act of 1882, & therefore the consents of all the persons who were tenants for life, or persons having the powers of tenants for life, of the undivided shares were necessary to the exercise of their power of sale by the trustees of the will.—*Re OSBORNE & BRIGHT'S, LTD.*, [1902] 1 Ch. 335; 71 L. J. Ch. 285; 86 L. T. 178; 50 W. R. 468; 46 Sol. Jo. 230.

Annotations:—*Overd. Re Morris' S. E.*, [1920] 2 Ch. 229. *N.F. Re Hone & Parker's Contract*, [1922] 2 Ch. 424.

2610. —————Where land is settled in undivided shares by an instrument which gives the trustees a power of sale over the entirety, Settled Land Act, 1884 (c. 18), s. 6 (2), renders it sufficient if the consent of the tenant for life of any one of such shares is obtained to the exercise of the trustees' power.

Testator by his will directed his trustees to hold his residuary real & personal estate upon trust for the children of his two marriages in equal shares, the income of the share of each son to be paid to him for life, subject to trusts to prevent alienation or incumbrance of income, the income of each daughter to be paid to her for life, independently of her husband & subject to similar trusts, & on the decease of each child upon trust for their children respectively as therein mentioned. In the event of the death of any child of testator without issue his or her share was to accrue for the benefit of his surviving children. The will gave the trustees a discretionary power to sell testator's real & leasehold property & to convey the same free from the trusts of the will. There were five children now living, who, & the widow of a son who had died, were each entitled to a life interest in one undivided ninth share of the trust estate. Four of them had signed a written consent to sales by the trustees, but the other two had declined to do so. The trustees had entered into a provisional contract for the sale of a leasehold house which formed part of the estate:—*Held*: the tenants for life of the undivided shares were persons entitled for "concurrent estates or interests" within Settled Land Act, 1882 (c. 38), s. 2 (6), & together constituted the tenant for life of those shares, & therefore, under Settled Land Act, 1884 (c. 18), s. 6 (2), the consent of one only of those persons was necessary to the exercise by the trustees of their power of sale.

Qu.: whether in the circumstances of the case there was any tenant for life at all of the entirety of the settled land.—*Re MORRIS' SETTLED ESTATES*, [1920] 2 Ch. 229; 89 L. J. Ch. 407; 123 L. T. 690, C. A.

Annotation:—*Fold. Re Hone & Parker's Contract*, [1922] 2 Ch. 424.

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26101. Several persons constituting tenant for life—Undivided shares.—*Re ROWE*, [1926] V. L. R. 4524; 8 A. L. T. 68; [1926] Argus L. R. 366.—**AUS.**

2611. — Some shares settled—Others held absolutely.]—Where trustees have a power of sale over an entire land estate, which is held by the beneficiaries in undivided shares, some absolutely, & some by life tenants & remaindermen, there is no conflict within Settled Land Act, 1882 (c. 38), s. 56 (2), between the trustees' power of sale over the entirety & that of the life tenants over the settled undivided shares. The trustees' power of sale can therefore be exercised without the consent of any of the life tenants.—*Re HONE & PARKER'S CONTRACT*, [1922] 2 Ch. 424; 91 L. J. Ch. 725; 127 L. T. 690; 67 Sol. Jo. 31.

2612. Person entitled to reside.]—*Re LLANOVER'S (BARONESS) WILL*, HERBERT V. FRESHFIELD, No. 2603, *ante*.

2613. — On exercise of option.]—*Re GIBBONS*, GIBBONS V. GIBBONS, No. 2652, *post*.

See, also, Sub-sect. 1, D. (h), *post*.

2614. Tenant for life in remainder in fee—Subject to incumbrances.]—*Re MARSHALL'S SETTLEMENT*, MARSHALL V. MARSHALL, No. 2583, *ante*.

2615. — — — — —]—*Re MONCKTON'S SETTLEMENT*, MONCKTON V. CALDER, No. 2584, *ante*.

2616. Tenant in fee simple—Subject to charges.]—A rentcharge was limited by will to trustees who were appointed trustees for the purposes of Settled Lands Acts, & ultimately to the use that if A. should die in the lifetime of his wife, she should, after the death of A. & his father, receive a jointure & the rentcharge was limited to the trustees for a term of years for securing the jointure, & subject as aforesaid the rentcharge was limited to other trustees for a term of years to secure portions for the children of A. as A. should by deed or will appoint & subject thereto the rentcharge was limited to the use of A. in fee simple. A.'s father was dead, & he had had two children & had exercised his power of appointment on the marriage of two of them:—*Held*: (1) by virtue of Settled Land Act, 1882 (c. 38), s. 2 (1) & (5), A. had the powers of a tenant for life; (2) provided the price paid was the best price that could reasonably be obtained in accordance with s. 4 (1) of the 1882 Act, the vendor need not sell for cash, but might sell for a consideration as good as cash, in this case for Consols.—*Re SUTTON'S CONTRACT* (1920), 65 Sol. Jo. 259.

See Settled Land Act, 1925 (c. 18), s. 20 (1) (ix).

2617. "Statutory owner" distinguished from tenant for life—Person having powers under Settled Land Act, 1925 (c. 18), s. 23 (1) (a).]—Under a resettlement of 1919 & in the events that happened the fifth Earl of Craven was entitled to a protected life interest in the net rents & profits of the Craven estates, but he had never been a life tenant proper, or a limited owner with an estate or interest in possession having the powers of a life tenant under above Act, s. 20, or s. 58 of the 1882 Act. He was however given a life tenant's powers by the resettlement & had therefore full life tenant powers under s. 23 (1) (a). With the concurrence of the trustees he desired to be relieved of these powers:—*Held*: (1) the Earl, though having a life tenant's powers under s. 23 (1) (a), was not a life-tenant within the definition of s. 117 (1) (xxviii), but only a statutory owner under (xxvi), therefore the Ct. could not make

an order under s. 24 (1) authorising the trustees to exercise the powers on the Earl's behalf, as that sect. was confined to life tenants proper or limited owners with an estate or interest in possession having life tenant powers under s. 20, & did not apply to a mere statutory owner; (2) s. 104 (1) which prevents a life tenant releasing his powers, was similarly confined to those life tenants or limited owners, & did not apply to a mere statutory owner; therefore the Earl could release his powers by deed under Law of Property Act, 1925 (c. 20), s. 155, & on his so doing Settled Land Act, 1925 (c. 18), s. 23 (1) (a), would cease to operate, & the trustees would have a life tenant's powers under sub-sect. 1 (b).—*Re CRAVEN SETTLED ESTATES*, [1926] Ch. 985; 95 L. J. Ch. 559; 136 L. T. 121; 70 Sol. Jo. 1111.

2618. "Of full age"—Equivalent to "not being an infant"—Application to corporation.]—*Re CARNARVON'S (EARL) CHESTERFIELD SETTLED ESTATES*, *Re CARNARVON'S (EARL) HIGHCLERE SETTLED ESTATES*, No. 2599, *ante*.

Tenant for life of compound settlement.]—*See* Sub-sect. 13, *post*.

D. Limited Owners having Powers of Tenant for Life.

(a) *In General.*

See Settled Land Act, 1925 (c. 18), s. 20.

2619. Persons within term—Act construed broadly.]—At the dates of his will & death testator was lessee for a long term of a house called "The Grange," which he & his wife & family occupied at the same two dates. By his will testator devised "The Grange" specifically to his trustees, upon trust to permit his wife during her life to occupy it, she paying all rents, rates, taxes, assessments, & outgoings in respect of it; & observing & performing the covenants on the part of the lessee contained in the lease thereof, & with permission also to use & enjoy testator's effects in "The Grange." Testator provided that after her death the trustees were to hold "The Grange" upon trust to permit "such one or more of my children who shall for the time being be unmarried & shall desire to reside in "The Grange," to occupy "The Grange," & use & enjoy my effects in "The Grange" so long as one or more of my said children shall remain unmarried & shall desire to reside there, he, she, or they paying all rents, rates, taxes, assessments & outgoings in respect of "The Grange," & observing & performing the covenants on the part of the lessee contained in the said lease thereof." Then the will declared that, after the marriage of all testator's children or the death of the last unmarried child or in case all the unmarried children should notify the trustees their desire not to reside in "The Grange," the trustees should hold "The Grange" & the effects therein upon similar trusts in favour of a married son, S., to those thereinbefore declared in favour of testator's wife. Then followed a similar provision, after a provision for S.'s children, for H., another son of testator. After the deaths of testator & his widow, X. & Y. were the two youngest & the only unmarried children of testator. They resided together at & expressed their desire to

26121. Person entitled to reside.]—C. directed his trustees to permit his wife to reside in one of his two dwelling-houses to be elected by her within twelve months of his death & in default of her election that his trustees should elect:—*Held*: the widow might reside in the house at any time, & on her exercising her right of re-

sidence became a tenant for life under Settled Land Act & entitled to exercise the statutory powers.—*Re CLARK* (1915), 11 Tas. L. R. 169.—AUS.

261211. — — — — —]—Land was devised to trustees upon trust to permit a beneficiary to reside rent free in a dwelling-house thereon for her life:—*Held*: the

beneficiary was tenant for life of the land within Settled Estates & Settled Lands Act, 1915, s. 50 (6).—*Re ADDIS*' SETTLED ESTATES, [1920] V. L. R. 437.—AUS.

b. Person entitled to use & occupation.]—*Re MCCABE* (DECEASED) (1909), 28 N. Z. L. R. 780.—N.Z.

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(a), (b), (c), (d), (e) & (f).]

continue to reside at "The Grange," & raised the question whether they were tenants for life of that property within the meaning of Settled Land Acts & entitled to exercise the powers given to tenants for life by the Acts:—*Held*: X. & Y., although not strictly tenants for life within Settled Land Act, 1882 (c. 38), s. 2 (5), had, under Settled Land Act, 1882 (c. 38), s. 58 (1) (vi), the powers given by the Act to tenants for life.

Sect. 58 of the Act is to be interpreted broadly, & includes persons who fall within the definition in s. 2, ss. 5, of a tenant for life.—*Re BOYER'S SETTLED ESTATES*, [1916] 2 Ch. 404; 85 L. J. Ch. 787; 115 L. T. 473; 60 Sol. Jo. 680.

Annotations.—*Foll.* *Re Gibbons, Gibbons v. Gibbons*, [1920] 1 Ch. 372. *Refd.* *Re Anderson, Halliday v. Kirkley*, [1920] 1 Ch. 175.

2620. — **Persons within definition of tenant for life.**—*Re BOYER'S SETTLED ESTATES*, No. 2619, *ante*.

(b) Person having Estate or Interest in Possession.

See Settled Land Act, 1925 (c. 18), s. 20 (1).

2621. Meaning of "in possession"—Contrasted with reversion—Not with possession of another person.—(1) M., by his will, devised real estate to trustees, upon trust to pay the net rents & income to his wife, who was one of the trustees for the maintenance, education & benefit of his son J. until he should attain twenty-one, & without being liable to account to his trustees or his son for the same, & upon his attaining that age, then upon trust for him absolutely, but if he should die under twenty-one, without leaving issue, then upon trust as to the rent & income for his wife during life or widowhood & after her death or second marriage upon trusts for grandchildren:—*Held*: the infant son was a person having the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58 (1) (ii).

(2) The words "in possession" in Settled Land Act, 1882 (c. 38), s. 58 (1), refer to possession as contrasted with reversion or remainder, & not to possession personally as contrasted with possession by another person.—*Re MORGAN* (1883), 24 Ch. D. 114; 53 L. J. Ch. 85; 48 L. T. 964; 31 W. R. 948.

Annotations.—*As to* (1) *Consd.* *Re Conll's S. E.*, [1905] 1 Ch. 712; *A-G v. Coole*, [1921] 3 K. B. 607.

2622. — *Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A. with remainder to the use of A.'s children & issue. The trustees of the life estate were directed to enter into possession of & manage the property, pay outgoing, keep down the interest on incumbrances, & during A.'s life pay out of the residue an annuity of £400 to the person next entitled in remainder, & pay the ultimate residue to A. The estates were so heavily incumbered that after payment of outgoing & interest there was not enough to pay the annuity of £400. A. therefore had received nothing, & there was no prospect of his receiving anything for many years:—Held*: (1) A. was a person entitled to the income of land under a

trust or direction for payment thereof to him during his life; (2) [A.'s income was] subject to expenses of management within Settled Land Act, 1882 (c. 38), s. 58 (1) (ix), & therefore possessed the power of selling given by the Act to tenants for

(3) I think that the words "where the estate or interest of each of them is in possession" means that the right is immediate & not in reversion or expectancy (*BAGGALLY, L.J.*).

(4) "Beneficially entitled" in s. 2 does not mean "entitled & deriving a benefit from it," but entitled for his own benefit if there is anything to be derived from the estate & not simply as trustee for others (*COTTON, L.J.*).—*Re JONES* (1884), 26 Ch. D. 736; 53 L. J. Ch. 807; 50 L. T. 466; 32 W. R. 735, C.A.

Annotations.—*As to* (1) *Appl.* *Re Cookes' S. E.*, *Cookes v. Cookes*, [1885] W. N. 177. *Consd.* *Re Strangways, Hickley v. Strangways* (1886), 34 Ch. D. 123. *Dist.* *Re Llanover, Herbert v. Ram*, [1907] 1 Ch. 635. *Refd.* *Re Llanover S. E.*, [1926] Ch. 626. *As to* (2) *Appl.* *Re Clitheroe Estate* (1885), 31 Ch. D. 135; *Re Llanover, Herbert v. Ram*, [1907] 1 Ch. 635. *As to* (4) *Consd.* *Re Llanover's Will, Herbert v. Freshfield*, [1903] 2 Ch. 16. *Generally, Refd.* *Re Pollock, Pollock v. Pollock* (1905), 75 L. J. Ch. 120.

2623. — *—*—*—*—*Re ATKINSON, ATKINSON v. BRUCE*, No. 2664, *post*.

2624. What amounts to possession—Interest subject to term.—*Re STRANGWAYS, HICKLEY v. STRANGWAYS*, No. 2653, *post*.

2625. — *—*—*—*—*Re EDWARDS' SETTLEMENT*, No. 2645, *post*.

(c) Tenant in Tail.

See Settled Land Act, 1925 (c. 18), s. 20 (1) (i).

2626. "Purchased by money provided by Parliament"—Lands granted by Crown—Settled by Parliament.—The lands comprised in the statutory settlement made by Amendment of Law Act, 1705 (c. 3), & annexed to the Dukedom of Marlborough are Crown lands, granted by the Crown, & are not lands "purchased by money provided by Parliament," within Settled Land Act, 1882 (c. 38), s. 58, so as to preclude the Duke of Marlborough, [the tenant in tail] from exercising the powers conferred on a tenant for life under that Act.—*Re MARLBOROUGH'S (DUKE) PARLIAMENTARY ESTATES* (1891), 8 T. L. R. 179.

2627. — *—*—*—*—*Re MARLBOROUGH'S (DUKE) BLENHEIM ESTATES & SETTLED LAND ACTS* (1892), 8 T. L. R. 582.

Estate tail settled by Act of Parliament—With restriction on alienation—Estate duty.—*See ESTATE & OTHER DEATH DUTIES*, Vol. XXI., p. 24, No. 133.

(d) Tenant in Fee Simple with Executory Limitation Over.

See Settled Land Act, 1925 (c. 18), s. 20 (1) (ii).

2628. Trust for son absolutely at twenty-one—Gift over on death under twenty-one.—*Re MORGAN*, No. 2621, *ante*.

Necessity for being of full age.—*See* Settled Land Act, 1925 (c. 18), s. 20 (1).

2629. Conditional gift—To provide residence for specified person—Gift over on failure.—*Testatrix*

PART XIII. SECT. 1, SUB-SECT. 1.—
D. (a).

2620 i. Persons within term—Persons within definition of tenant for life.—*QUEENSLAND TRUSTEES, LTD. v. FINNEY*, [1905] S. L. Q. 98.—**AUS.**

2620 ii. — *—*—*—*—*In the Will of SULLIVAN* (1923), 19 Tas. L. R. 41.—**AUS.**

c. No specific gift during any person's life.—*Re TOOHEY'S SETTLED*

ESTATE (1887), 3 Q. L. J. 39.—**AUS.**

d. Infant—Discretion of court.—Where an infant was entitled to an undivided share of land the ct. refused to appoint one of the co-owners to exercise on behalf of the infant the power of concurring in a sale under Settled Estates Act. Upon a sale under the Act, the infant's share in the purchase-money was directed to be brought into ct.—*Re GREENVILLE ESTATE* (1883), 11 L. R. Ir. 138.—**IR.**

PART XIII. SECT. 1, SUB-SECT. 1.—
D. (d).

e. Trust for infant absolutely—Gift over on marriage without consent before twenty-one.—Land was devised to an infant absolutely, subject to a proviso that if she married without the consent of testator's exors. before attaining twenty-one, then the gift should become absolutely null & void. The income derived from the pro-

gave her residuary estate, in the events which happened (a) to her niece C. on condition that she resided in testatrix's house during the life of testatrix's sister M. & provided there a home for M. so long as she wished; (b) in the event of C. not complying with the condition, to another niece upon the like condition; (c) in the event of neither niece complying with the condition, upon trust for M. for life with other trusts over on her death. At the date of testatrix's death M. was a lunatic not so found, confined in an asylum, & was not expected to recover her faculties. Upon a summons by C. under Settled Land Acts:—*Held*: C. was a person having the powers of a tenant for life under Settled Land Act, 1882 (c. 38); the condition as to providing a home was void so far as it prevented C. from exercising her power of sale; & she was entitled to sell the house & keep the proceeds absolutely.—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, [1904] 2 Ch. 777; 73 L. J. Ch. 783; 91 L. T. 775; 53 W. R. 11; 48 Sol. Jo. 688.

2630. Gift to class—Contingently on attaining twenty-one—Power of member attaining twenty-one.—Testator devised freehold premises upon trust after his daughter's decease for her children attaining twenty-one or marrying in equal shares. At the death of testator's daughter one child had attained twenty-one & three were infants:—*Held*: (1) the child, who had attained twenty-one had the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58 (1) (ii), as having an estate in fee simple in possession with an executory limitation or disposition over in the event of other members of the class obtaining vested interests in the shares of the premises which had not for the time being vested in the other children of testator's daughter & was entitled to the possession of the title deeds; (2) she was entitled to the whole income of the trust premises subject to the divesting of a proportionate part upon a like contingency.—*Re WALMSLEY'S SETTLED ESTATES* (1911), 105 L. T. 332; 55 Sol. Jo. 600.

2631. —Contingently on surviving life tenant—Provision for maintenance during minority.—Testator's will contained a gift for life to a daughter, of the income of a share, & such share to be held after her death in trust for such daughter's children as shall be living at his death, or born afterwards, or shall have died in his lifetime leaving issue surviving him in equal shares. The will contained a provision that during minority the income of any share to which a minor might be entitled in expectancy, might be applied in maintenance. The two adult grandchildren of testator were held entitled to exercise the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58 (1) (ii), as being tenants in fee simple, with an executory limitation gift or disposition over on failure of issue, or in any other event, such provision as to maintenance being held only an additional defeasance & not a partial disposition of the interest.—*Re DILKS, GODSELL v. HULSE* (1924), 131 L. T. 533; 68 Sol. Jo. 538.

2632. Gift to person contingently on attaining twenty-one—Position of persons entitled on failure of contingency.—Testator by his will, dated in 1917, devised & bequeathed certain lands & a house & its contents "upon trust in fee simple or absolutely for such son, living at my death, of my son W. as first or alone attains the age of twenty-one years, or, failing any such son, then upon

trust as part of my residuary estate"; & he gave his residue in trust for both or either of his sons W. & J. who should survive him, &, if both, in equal shares. The will also provided that if & so long as some son, living at testator's death, of his son W. should be living, but the property should not have become absolutely vested beneficially in any such son, the trustee should at the expense of the residuary estate maintain the house & keep up an establishment there, & allow the same to be used or enjoyed by any of the persons for the time being entitled in expectancy thereto. Testator died in 1919. His two sons survived him. W. had four sons living at testator's death, the eldest of them being then thirteen years of age:—*Held*: (1) the interests of the grandsons were contingent, & until one of them should have attained the age of twenty-one or all of them should have died without attaining that age, W. & J. were entitled to the intermediate rents & profits of the property.

(2) W. & J. were not persons having the powers of a tenant for life under s. 58 (1) (ii), (vi) or (ix), Settled Land Act, 1882 (c. 38), s. 58 (1) (ii), (vi) or (ix).

I cannot see how the residuary legatees, who take subject to the powers & obligations of the trustees to which I have already referred can possibly be said to be tenants in fee simple. . . . The trustee has an obligation to keep up this house & to spend money upon it in order to keep up an establishment & to keep it in repair for the purposes of the subsequent power that is given to the trustee to allow any one of the persons entitled in expectancy to occupy the house at any time that they wish. If, after the discharge of that obligation & the exercise of that power, should the trustee see fit to exercise it, there is anything left in the way of rents & profits arising from this property, then the residuary legatees are entitled to it. But how do they get it? They get it as a part of the residue otherwise undisposed of, & not as income of the property at all. Therefore, in my opinion, whether you put it in the words "during his own or any other life" or not, there is no trust or direction for payment of the income of the land to these residuary legatees at all (LORD STERNDALE, M.R.).—*Re ASTOR, ASTOR v. ASTOR*, [1922] 1 Ch. 364; *sub nom. Re ASTOR (VISCOUNT)*, *ASTOR v. ADAMS*, 91 L. J. Ch. 277.

(e) *Person entitled to Base or Determinable Fee*
See Settled Land Act, 1925 (c. 18), s. 20 (1) (iii).

(f) *Tenant for Years Determinable on Life.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (iv).

2633. Person entitled to rent for remainder of lease—"If she should so long live"—Provision for annuity equal to rent after expiration of lease.—Testator who had granted a lease of a house for a term of thirty-one years from Mar. 25, 1859, at a rent of £50 a year by his will dated June 20, 1866, devised his freehold interest in such house to trustees upon trust to permit his wife to receive the rent for her own benefit "during the remainder of the term granted by the lease if she should so long live" & in case she should die "before the expiration of the term created by such lease" then he gave & devised the house to the children of his brother in fee, & he directed that if his wife should "happen to live after the expiration of the term created by such lease" then the trustees

party was to be applied during her minority for her maintenance & education & the surplus accumulated for her:—*Held*: the infant had the powers

of a tenant for life, under Settled Estates & Settled Lands Act, 1909, No. 2235, s. 124 (1) (ii) as being a person entitled in possession to an

estate in fee simple subject to an executory limitation over.—*Re CHEKE, CHEKE v. HAMILTON*, [1910] V. L. R. 310.—**AUS.**

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(f), (g) & (h) i., ii., iii. & iv.]

should sell the house & out of the income from the investment of the proceeds pay £50 a year to his wife during her life, & subject thereto he gave the residue of the proceeds for his brother's children. Testator died in 1866 & the question being raised whether his widow could under Settled Land Act, 1882 (c. 38), accept a surrender of such lease & grant a new lease of the house for a term of twenty-one years from Dec. 25, 1883, at an increased rent:—*Held*: the widow was not a person under sect. 58 of that Act entitled to the powers of a tenant for life & was therefore not able to accept a surrender & make a new lease of the house.

I think the object of that sect. [Settled Land Act, 1882 (c. 38), s. 51] is to strike at & defeat (so far as they might control the powers given by the Act) all provisions even if contained in existing settlements which might be in their intention & substance prohibitory, obstructive or penal for the purpose of preventing alienations or other acts contemplated by the statutes. I do not think it was intended to enlarge or alter the substance of any original limitation of a particular estate (not properly an estate for life) which might be lawfully in force when the statute came into operation & as to which the author of the settlement had neither contemplated nor in any manner provided against any such acts as those in question, nor indeed could rationally have done so as the law stood when the settlement was made (LORD SELBORNE, C.).—*Re HAZLE'S SETTLED ESTATES* (1885), 29 Ch. D. 78; 54 L. J. Ch. 628; 52 L. T. 947; 33 W. R. 759, C. A.

Annotations:—*Apld.* *Re Atkinson, Atkinson v. Bruce* (1885), 30 Ch. D. 601. *Refd.* *Re Clithorne Estate* (1885), 28 Ch. D. 378; *Re Carne's S. E.* (1898), 68 L. J. Ch. 120; *Re Gibbons, Gibbons v. Gibbons*, [1919] 2 Ch. 99.

(g) *Tenant for Life of Another.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (v).

2634. Whether beneficial ownership necessary—Executors of deceased tenant pur autre vie.—To-gether with surviving tenants pur autre vie.—*VINE v. RALEIGH*, No. 2589, *ante*.

2635. ————]—Persons beneficially entitled under a settlement to the income arising from real estate until the death of the last survivor of them & the exors. of a deceased person similarly entitled are together persons having the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58 (1) (ix).—*Re JOHNSON, JOHNSON v. JOHNSON*, [1914] 2 Ch. 134; 83 L. J. Ch. 758; 58 Sol. Jo. 611.

Annotation:—*Refd.* *Re Mountgarret & Moore's Contract* (1915), 112 L. T. 939.

2636. ———— **Trustees pur autre vie.**—Settled Land Act, 1882 (c. 38), s. 58, which gives the powers of a life tenant to the nine classes of limited owners therein described, only applies to beneficial owners, & therefore trustees with an estate *pur autre vie* cannot exercise a life tenant's powers under s. 58 (1) (v).—*Re JEMMETT & GUEST'S CONTRACT*, [1907] 1 Ch. 629; 76 L. J. Ch. 367.

Annotations:—*Distd.* *Re Johnson, Johnson & Johnson*, [1914] 2 Ch. 134. *Refd.* *Re Mountgarret & Moore's Contract* (1915), 112 L. T. 939.

PART XIII. SECT. 1, SUB-SECT. 1.—
D. (h) ii.

2641 i. Right of widow to exercise powers—Notwithstanding trust for maintenance of children.—Testator gave the lands of F. & personal property to trustees on trust after payment of debts, etc., to permit & suffer his wife G. to manage the residue of the same, & to receive the interest, dividends,

& annual produce thereof "for her life, or until she shall marry again for the benefit of herself & our children as she may think fit." A full life interest in part of the lands was by the effect of the will & two codicils thereto secured to her on her re-marriage:—*Held*: G. had the powers of a tenant for life as regards the lands of F. under Settled Land Act, 1882 (c. 38), s. 58 (1) (vi), subject in effect

(h) *Tenant of Life Estate subject to Liability to Cesser.*

i. *In General.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (vi).

2637. Person entitled to rent for remainder of lease—"If she should so long live"—Provision for annuity equal to rent after expiration of lease.—*Re HAZLE'S SETTLED ESTATES*, No. 2633, *ante*.

2638. Persons entitled to surplus rents—During trust for accumulation.—*Re DRINKWATER'S SETTLED ESTATES* (1905), 40 Sol. Jo. 237.

Annotation:—*Refd.* *Re Sumner's S. E.*, [1911] 1 Ch. 315.

2639. ————]—*Re LLANOVER (BARONESS), HERBERT v. RAM*, No. 2669, *post*.

2640. Person entitled on failure of contingency—Gift to persons contingently on attaining twenty-one.—*Re ASTOR, ASTOR v. ASTOR*, No. 2632, *ante*.

ii. *Interest during Widowhood.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (vi).

2641. Right of widow to exercise powers—Notwithstanding trust for maintenance of children.—*Re THEAKER'S SETTLED ESTATES* (1898), cited 75 L. J. Ch. at p. 121.

Annotation:—*Folld.* *Re Pollock, Pollock v. Pollock* (1905), 75 L. J. Ch. 120.

2642. ————]—Testator gave all his real & personal estate to trustees upon trust, as to a certain piece of land & a public-house for his wife during widowhood, for the benefit & maintenance of herself & her children & the proper bringing up of the latter:—*Held*: the widow had the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58 (1) (vi), notwithstanding that her interest was charged with the maintenance of the children.—*Re POLLOCK, POLLOCK v. POLLOCK*, [1906] 1 Ch. 146; 75 L. J. Ch. 120; 94 L. T. 92; 54 W. R. 267; 50 Sol. Jo. 111.

iii. *Interest during Occupation of House.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (vi).

2643. Right of person occupying to exercise powers—Condition requiring occupation.—*Re PAGET'S SETTLED ESTATES*, No. 2739, *post*.

2644. ————]—*Re EASTMAN'S SETTLED ESTATES* (1898), 68 L. J. Ch. 122, n.; 43 Sol. Jo. 114.

Annotations:—*Apld.* *Re Carne's S. E.*, [1899] 1 Ch. 324; *Llanover's Will, Herbert v. Freshfield*, [1902] 2 Ch. 679.

Consd. *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378. *Refd.* *Re Betty, Betty v. A. G.* (1899), 80 L. T. 675; *Re Boyer's S. E.*, [1916] 2 Ch. 401.

2645. ———— **Trust to permit occupation—Necessity for exercise of option to reside.**—By a settlement dated in 1872 a freehold house was limited to trustees for a term of ninety-nine years upon trust to permit the premises to be personally occupied by C. during her life, & so long as she should remain a widow & be desirous of personally occupying the same, & after her death or second marriage then over. The trust in C.'s favour came into operation in 1894, but she never occupied or expressed any wish to occupy, & in 1896 joined with other persons interested in the premises in granting a lease of them for the term of five years:—*Held*: (1) during the continuance of the lease, C. could not be regarded as tenant for life in pos-

to an equitable incumbrance on her interest in favour of the children.—*Re MARTIN*, [1919] 1 L. R. 71.—*IR.*

PART XIII. SECT. 1, SUB-SECT. 1.—
D. (h) iii.

2643 i. Right of person occupying to exercise powers—Condition requiring occupation.—*Re HACK* (1918), 14 Tas. L. R. 55.—*AUS.*

session for the purposes of the Settled Land Act. (2) *Semble*: upon the determination of the lease, if she exercised her right of personal occupation, she would have the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58.—*Re EDWARDS' SETTLEMENT*, [1897] 2 Ch. 412; 66 L. J. Ch. 658; 76 L. T. 774.

Annotation:—*As to* (1) *Reid*, *Re Trenchard*, *Ward v. Trenchard* (1900), 16 T. L. R. 525.

2646. ———.—[*Testator by his will directed that his widow should, during life or widowhood, be entitled "to use & occupy" his residence "for her own personal use & occupation," & also the furniture in or about same. The wife never lived at the house, & when it was sold by the trustees of the will she joined as party to the conveyance, which recited that she had signified her intention of not wishing to use the house as a residence, & was willing to renounce such right & to join in the conveyance:—Held*: (1) on the construction of the will she was not entitled to let the house & receive the rent or to receive the income of the proceeds of sale, but had only an option, liberty, or licence to occupy the house personally; & before the widow could claim to be a tenant for life or a person having the powers of a tenant for life within Settled Land Act, 1882 (c. 38), she must have exercised the option by informing the trustees that she desired to reside in the house; (2) she was not entitled to the income of the proceeds of furniture which had been sold.—*Re ANDERSON, HALLIGY v. KIRKLEY*, [1920] 1 Ch. 175; 89 L. J. Ch. 81; 122 L. T. 261.

2647. ———.—[*By a settlement a mansion house & lands were, subject to a rentcharge, vested in trustees for a term of one thousand years, upon trust in the first place to allow pltf. to occupy the mansion house & certain specified lands, rent free, for so long as she might wish to continue to do so; & upon further trust, by mtge. thereof, or by or out of the rents & profits thereof, or by any other reasonable ways or means, to raise some specified sums of money, & subject to the term, to the use of one of defts. in fee:—Held*: (1) pltf. was tenant for life, within Settled Land Act, 1882 (c. 38), of the mansion house & lands which she was to be allowed to occupy, & could in respect of them exercise the powers conferred by the Act upon a tenant for life; (2) the trustees of the term were not trustees for the purposes of the Act, but trustees for those purposes must be appointed.—*Re CARNE'S SETTLED ESTATES*, [1899] 1 Ch. 324; 68 L. J. Ch. 120; 47 W. R. 352; *sub nom. Re ST. DONATS SETTLED ESTATE*, 79 L. T. 542.

Annotations:—*As to* (1) *Apld. Re Betty*, *Betty v. A.-G.* (1899), 80 L. T. 675; *Re Trenchard*, *Ward v. Trenchard* (1900), 16 T. L. R. 525; *Re Llanover's Will*, *Herbert v. Freshfield*, [1902] 2 Ch. 679.

2648. ———.—[*Testator by his will gave his wife the use of his residence as long as she should desire it, his estate to pay all rates, taxes, & outgoings in respect thereof:—Held*: she had the powers of a tenant for life in respect thereof under Settled Land Acts.—*Re TRENCHARD (DECEASED)*, *WARD v. TRENCHARD* (1900), 16 T. L. R. 525.

Annotations:—*Consd. Re Simpson*, *Clarke v. Simpson*, [1913] 1 Ch. 277. *Reid. Re Trenchard*, *Trenchard v. Trenchard* (1902), 71 L. J. Ch. 178.

2649. ———.—[*Re LLANOVER'S (BARONESS) WILL*, *HERBERT v. FRESHFIELD*, No. 2603, *ante*.

2650. ———.—[*Direction must relate to specified house.*—*Re BOND'S ESTATE*, *BURRELL v. BOND* (1904), 48 Sol. Jo. 192.

Annotation:—*Consd. Re Boyers S. E.*, [1916] 2 Ch. 404.

2651. ———.—[*Until marriage.*—*Re BOYER'S SETTLED ESTATES*, No. 2619, *ante*.

2652. ———.—[*Testator after providing for the upkeep of his house, grounds & furniture as a residence for his family until the youngest of his children should come of age, gave to his eldest son, as soon as that event happened, the option of occupying & enjoying the use of the house & furniture without payment of rent during his life, such option to be exercised by a written notice to the trustees of the will within three months from the time when the right to exercise it arose. Subject to this similar options were given in succession to the other two children of testator, & there was an ultimate gift of his residuary estate to the trustees in trust for the three children. The youngest child having attained twenty-one the eldest son in 1913 gave notice to the trustees of the exercise of his option. He resided in the house until 1916 when he let it unfurnished & removed the furniture to another house, which he rented:—Held*: the gift was not of a mere option to reside. Upon the exercise of the option the son became beneficially entitled to possession of the settled property within Settled Land Act, 1882 (c. 38), s. 2 (5), & was therefore tenant for life under the settlement created by the will; & under s. 58 (1) (vi), he had the powers of a tenant for life under the Act, including a power to let.—*Re GIBBONS, GIBBONS v. GIBBONS*, [1920] 1 Ch. 372; 89 L. J. Ch. 148; 122 L. T. 710; 36 T. L. R. 203; 64 Sol. Jo. 274, C. A.

iv. Interest subject to Trust for Accumulation.

See Settled Land Act, 1925 (c. 18), s. 20 (1) (vi).

2653. *Whether tenant for life entitled to exercise powers—Tenant having no estate in possession—Until determination of term for accumulation.*—[*Testator, who died in 1884, by his will made in 1874, devised his residuary real estate to trustees upon trust, during the period of twenty years after his death, out of the rents to manage & superintend his real estate, & improve the same, & to accumulate or invest in the purchase of land the unapplied part of the rents, & after the determination of the term of twenty years to settle & assure the devised & purchased real estate to the uses & upon the trusts of an existing settlement under which testator's son took certain estates as tenant for life:—Held*: testator's son, not having any estate or interest in possession until the determination of the term, had not, during its continuance, the powers of a tenant for life under Settled Land Act with respect to the hereditaments devised by the will.—*Re STRANGWAYS, HICKLEY v. STRANGWAYS* (1886), 34 Ch. D. 423; 56 L. J. Ch. 195; 55 L. T. 714; 35 W. R. 83; 3 T. L. R. 94, C. A.

Annotations:—*Consd. Williams v. Jenkins*, [1893] 1 Ch. 700. *Distd. Re De Houghton*, *De Houghton v. De Houghton*, [1896] 1 Ch. 855; *Re Martyn*, *Coodo v. Martyn* (1900), 69 L. J. Ch. 733; *Re Llewellyn*, *Llewellyn v. Llewellyn*, [1911] 1 Ch. 451. *Consd. Re Mountgarret & Moore's Contract* (1915), 112 L. T. 939. *Distd. Re Musgrave*, *Machell v. Parry*, [1916] 2 Ch. 417. *Reid. Re Beauchamp's Will Trusts*, *Cadge v. Barker-Hahlo*, [1914] 1 Ch. 676.

2654. ———.—[*Tenant having estate in possession—Subject to term for accumulation.*—[*Where land is limited to trustees of a marriage settlement to the use of the trustees for twenty-one years & subject thereto to the use of the husband for life, & the trusts of the term are to manage the property, pay certain annuities, & to accumulate the residue, such accumulations to be capital moneys under Settled*

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2654.1. *Whether tenant for life entitled to exercise powers—Tenant having estate in possession—Subject to term for accumulation.*—*Re WOODHOUSE, ANNERLEY v. WOODHOUSE*, [1898] 1 L. R. 69.—IR.

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Land Act, the husband is a person having the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58.—*Re MARTYN, COODE v. MARTYN* (1900), 69 L. J. Ch. 733; 83 L. T. 146; 44 Sol. Jo. 657.

Annotations:—Folld. Re Llewellyn, Llewellyn v. Llewellyn, [1911] 1 Ch. 451. Consd. Re Beauchamp's Will Trusts, Cadge v. Barker-Hahlo, [1914] 1 Ch. 676. Refd. Re Mountgarret & Moore's Contract (1915), 112 L. T. 939.

2655. —————.]—Testator by his will devised his capital mansion house & the whole of his real estates to his trustees in fee simple, upon trust to permit his daughter during her life to have the personal use or occupation of the mansion house free from rent, rates & taxes, & any liability for repair & upkeep, & he directed his trustees to stand possessed of all his hereditaments & premises, subject to the trust in favour of his daughter, upon trust to let & manage the same for twenty-one years after his death, & after the payment of all outgoings, to accumulate the balance of the rents & profits, & apply them as therein mentioned, & upon the expiration of the period of twenty-one years, & subject to the trusts of the mansion house in favour of his daughter, testator directed that the whole of the devised hereditaments should be held upon trust for his eldest daughter for life, with remainder to her first-born son for life, with remainders over. Upon the death of testator in 1912 questions arose (*inter alia*) as to the position of the daughter under the will. It was not disputed that she was tenant for life of the mansion house, but it was objected that she had not the powers of a tenant for life of the rest of the real estate:—*Held*: the daughter had the powers of a tenant for life in respect of testator's residuary estate under Settled Land Act, 1882 (c. 38), s. 58 (1) (vi).—*Re BEAUCHAMP'S WILL TRUSTS, CADGE v. BARKER-HAHLO, [1914] 1 Ch. 676; 83 L. J. Ch. 440; 110 L. T. 814; 58 Sol. Jo. 320.*

Annotation:—Refd. Re Mountgarret & Moore's Contract (1915), 112 L. T. 939.

2656. —————.]—M. devised lands to four named grandsons as tenants in common for life with cross remainders between them, & directed that after the death of the survivor the same lands should fall into his residuary real & personal estate which was given upon other trusts. By a codicil testator directed the trustees of his will to let the lands by lease or otherwise & accumulate the rents for a period of ten years after his death & apply the accumulations towards the construction of a proposed carriage road over the Styhead Pass in Cumberland:—*Held*: the grandsons were, notwithstanding the term, persons who had the powers of tenants for life under Settled Land Act, 1882 (c. 38), as being "a tenant for . . . life . . . whose estate . . . is subject to a trust for accumulation of income for payment of debts or other purpose" & whose estate was in possession, within Settled Land Act, 1882 (c. 38), s. 58 (1) (vi).—*Re MUSGRAVE, MACHELL v. PARRY, [1916] 2 Ch. 417; 85 L. J. Ch. 639; 115 L. T. 149; 60 Sol. Jo. 694.*

Annotation:—Mentd. Re Wooldridge, Wooldridge v. Coc, [1920] W. N. 78.

2657. —————.]—**Subject to trust for accumulation until tenant attains specified age.**—Testator devised certain real estate unto & to the use of his trustees in fee simple to the use that it should be lawful for them to receive the rents, profits, & annual income thereof until his son, appct., attained the age of twenty-seven years, paying thereout during such time the annual sum of £400

to appct., & to accumulate the surplus which should devolve upon the same uses as the property itself, & subject thereto to the use of appct. & his assigns during his life, with remainders over:—*Held*: appct., who had not yet attained the age of twenty-seven years, was by virtue of the provisions of Settled Land Act, 1882 (c. 38), s. 58 (1) (vi), a person having the powers of a tenant for life under that Act.—*Re LLEWELLYN, LLEWELLYN v. LLEWELLYN, [1911] 1 Ch. 451; 80 L. J. Ch. 259; 104 L. T. 279; 55 Sol. Jo. 254.*

Annotations:—Appld. Re Beauchamp's Will Trusts, Cadge v. Barker-Hahlo, [1914] 1 Ch. 676. Refd. Re Mountgarret & Moore's Contract (1915), 112 L. T. 939.

2658. —————.]—**Suspension of life estate—During accumulation for payment of debts.**—Testator devised his real estate to trustees upon trust to permit his daughter to receive the rents & profits during her life for her separate use, & directed that if a certain claim against him for £1,000, settled by him on her marriage, should be enforced, then "all her interest & benefit from the estate" should "cease until all the debts & claims on the same" were paid; with a gift over at her death in favour of her children. After testator's death the claim for £1,000 was enforced. The personal estate of testator was insufficient for payment of the £1,000 & other debts & claims. The daughter, who was the heiress-at-law of testator, claimed a declaration that she had the powers of a tenant for life, under the settlement created by the will, within Settled Land Act, 1882 (c. 38):—*Held*: the life estate given by the will to the daughter was not gone, but only suspended; there was an implied trust for payment of the debts & claims by the trustees; when those were paid the daughter would come in again by virtue of her suspended estate, & be equitable tenant for life; and that as the implied trust for payment of debts was one which might be properly carried out by accumulating the rents & profits, if it were necessary from time to time so to do, it was substantially a "trust for accumulation of income" for payment of debts within Settled Land Act, 1882 (c. 38), s. 58 (1) (vi), & the daughter was therefore a person entitled to exercise the powers of a tenant for life.—*WILLIAMS v. JENKINS, [1893] 1 Ch. 700; 62 L. J. Ch. 665; 68 L. T. 251; 41 W. R. 489; 3 R. 298.*

Powers of persons entitled to receive surplus rents.—See Nos. 2638, 2639, *ante*.

(i) *Tenant by the Curtesy.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (vii), & generally, REAL PROPERTY, Vol. XXXVIII., pp. 675–679.

2659. Estate must be in possession.—Under a will certain real estate was vested in trustees in trust for A. for life, & on her death in trust for her children equally as tenants in common; the shares of daughters to be for their separate use without power of anticipation. On a sale of the real estate upon A.'s death, two of the vendors who were married women claimed to convey as tenants for life within Settled Land Act, 1882 (c. 38). The purchaser contended that they must convey as absolute owners & obtain an order under Conveyancing Act, 1881 (c. 41), s. 30. In an action for specific performance:—*Held*: the husbands, if they survived, taking an estate by the curtesy by virtue of the general law & not under the will, & the estate given to the married women being one & entire with no limitation to the husbands, the effect of the restraint on anticipation was not to bring the case within Settled Land Act, 1882 (c. 38), s. 2, as creating a settlement whereby the estate was limited to persons by way of succession;

&, therefore, the married women were not tenants for life within the meaning of the Act.

The Act of 1882 enumerates among the persons who have the powers of a tenant for life "a tenant by the curtesy." That means a tenant by the curtesy in possession (CHITTY, J.).—*BATES v. KESTERTON*, [1896] 1 Ch. 159; 65 L. J. Ch. 108; 73 L. T. 656; 44 W. R. 150; 40 Sol. Jo. 97.

(j) *Person entitled to Income.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (viii).

2660. Actual receipt of income not necessary—Whole income exhausted by incumbrances.]—*Re JONES*, No. 2622, *ante*.

2661. — Charges including maintenance of tenant for life.]—*Re COOKES' SETTLED ESTATES*, *COOKES v. COOKES*, [1885] W. N. 177.

2662. Income subject to expenses of management—Direction for repairs of buildings.]—Testatrix by her will directed her trustees to stand possessed of the net rents of her real estate, upon trust to pay the same to W., a married woman, for life, for her separate use, her receipt alone to be a sufficient discharge to the trustees; & testatrix directed her trustees out of the rents of her real estate, to keep in repair all the buildings on the estate during the period of their trust, & also the chancel of P. church. No power of sale or leasing was contained in the will:—*Held*: (1) notwithstanding the direction to the trustees with respect to repairs, W. was equitable tenant for life of the settled land, & as such, was entitled to be let into the possession & management of the estate, upon her undertaking to see to the repairs; (2) inasmuch as there were no trustees of the settlement created by the will for the purposes of Settled Land Act, 1882 (c. 38), W. was not entitled to exercise the powers of a tenant for life under that Act until trustees of the settlement were appointed & a proper notice of her intention was given them.—*Re BENTLEY, WADE v. WILSON* (1885), 54 L. J. Ch. 782; 33 W. R. 610.

Annotation:—As to (1) Apd. Re Wythes, West v. Wythes, [1893] 2 Ch. 369.

2663. Term on trust to accumulate income—Life tenant not entitled to possession—Term determinable on satisfaction of trusts.]—Testator by will dated in 1883 devised an estate to the use of trustees for a term of 1,300 years & subject thereto to his son H. for life, with remainders over in strict settlement. The trusts of the term were to raise portions, to pay annuities, H. being one of the annuitants, & to apply the residue as a sinking fund to pay off mtge. debts & other charges. It was estimated that the trusts of the term would require from fifteen to twenty years for their fulfilment. Testator directed that the trustees should "during the continuance of the last-mentioned trusts" enter into & hold possession of the rents & profits of the estate "& not deliver the same to any person beneficially interested in any part thereof," & should manage the estate as therein mentioned. Very full powers of management were given to the trustees, provided that when all the trusts of the term should have been fully paid & satisfied the term should cease. He, moreover, gave to the trustees such other powers over the estate as were given to a tenant for life in possession by Settled Land Act, 1882 (c. 38):—*Held*: H. was a person having the power of a tenant for life of the estate within Settled Land Act, 1882 (c. 38), s. 58 (1) (ix), & his consent was necessary under s. 56 (2), to the effectual exercise by the trustees of the powers of sale & enfranchisement contained in the will.—*Re CLITHEROE ESTATE* (1885), 31 Ch. D. 135; 34 W. R. 169; *sub nom.*

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Re BUCCLEUCH'S (DUKE) (CLITHEROE) ESTATE, 55 L. J. Ch. 107; 53 L. T. 733; 2 T. L. R. 133, C. A.

Annotations:—Expld. & Distd. Re Strangways, Hickley v. Strangways (1886), 34 Ch. D. 423. *Distd. Re Llanover, Herbert v. Ram*, [1907] 1 Ch. 635. *Refd. Re Hoghton, De Hoghton v. De Hoghton*, [1896] 1 Ch. 855; *Re Llewellyn, Llewellyn v. Llewellyn* (1911), 80 L. J. Ch. 259.

2664. Discretionary trust for application of income—For benefit of husband, wife & children.]—

(1) A trust, although it be to last during the life of A. to apply the rents & profits of an estate for the benefit of A. & of his wife & his children, if any, does not constitute A. or A. & his wife together, a tenant for life of the estate under Settled Land Act, 1882 (c. 38), s. 2 (6), or a person with the powers of a tenant for life under sect. 58 of that Act.

The word "possession" in sect. 2 (5) & in sect. 58 (1) is to be read as in antithesis to "remainder" or "reversion."

(3) The words "so entitled," in sect. 2 (6) mean entitled under the direction in the preceding subsect., *i.e.* for life.

(4) To make s. 51 [Settled Land Act, 1882, (c. 38)] apply you must find in the settlement a limitation which, but for an attempted prohibition, would constitute a tenant for life capable of exercising the powers of the Act (COTTON, L.J.).—*Re ATKINSON, ATKINSON v. BRUCE* (1886), 31 Ch. D. 577; 54 L. T. 403; 34 W. R. 445, C. A.

Annotations:—As to (1) Apd. Re Horne's S. E. (1888), 39 Ch. D. 84. *Consd. Re Beauchamp's Will Trusts, Cadge v. Barker-Hahlo*, [1914] 1 Ch. 676. *Refd. Re Sumner's S. E.*, [1911] 1 Ch. 315; *Re Astor, Astor v. Astor*, [1922] 1 Ch. 364.

2665. Instrument not creating succession—Various interests limited to same person.]—*Re POCOCK & PRANKERD'S CONTRACT*, No. 2575, *ante*.

2666. Income payable to several persons—Annuitants.]—Testator devised his residuary real & personal estate to trustees upon trust to pay out of the rents & profits several life annuities to persons specified, & directed that if in any year there should be a surplus of the income of his residuary real & personal estate over the total amount of the annuities, the trustees should divide the same between such of the annuitants as should be living in shares proportionate to the amount of the annuities to which they should be then entitled:—*Held*: as the annuitants for the time being were, between them, entitled to the entire rents & profits of the residuary real estate, they were persons having together the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58.—*Re BENNET, BENNET v. BENNET*, [1903] 2 Ch. 136; 72 L. J. Ch. 524; 88 L. T. 683.

2667. — Forfeiture on remarriage—Surplus rents during widowhood.]—(1) By his will, made in 1903, testator devised all his real estate of every tenure unto & to the use of trustees upon trust that they should, out of the rents & profits thereof, & until the expiration of ten years after his death, or until the death or marriage again of his wife, whichever should be the longer period, pay certain annuities, & the costs & expenses of management of his estate, & should pay the ultimate residue of the rents & profits to his wife during her widowhood. Full powers of management were conferred upon the trustees by the will. Testator died in 1907. Upon a summons by the widow to determine whether she was a tenant for life, or had the powers of a tenant for life, under Settled Land Acts in respect of the real estate settled by the will:—*Held*: she was a person entitled to the income of land under a trust for payment thereof to her during her life, or until forfeiture of her interest therein on her

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remarriage, & as such had the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58 (1) (ix).

(2) The word "forfeiture" in Settled Land Act, 1882 (c. 38), s. 58 (1) (ix), must be construed to include cesser, or determination on bkpcy. alienation, remarrying, or any other event.—*Re SUMNER'S SETTLED ESTATES*, [1911] 1 Ch. 315; 80 L. J. Ch. 257; 103 L. T. 897; 55 Sol. Jo. 155; *sub nom. Re SUMNER, ELLISON v. SUMNER*, 27 T. L. R. 173.

Annotation:—*Distd. Re Astor, Astor v. Adams* (1921), 91 L. J. Ch. 277.

2668. Interest under intestacy.]—*Re LLANOVER (BARONESS), HERBERT v. RAM*, No. 2669, *post*.

2669. Terminable life interest.]—Testatrix devised her freehold hereditaments to the use of her trustees, giving them large powers of management, & directing them to pay certain annuities & other periodic sums out of rents & profits. During the successive lives of pltf. & two other persons, but not for more than twenty years after testatrix's death, the trustees were to apply the surplus rents in the discharge of incumbrances on the estates thereinbefore devised, or in the purchase of other estates to be held on like trusts.

Subject to & after the determination or failure of the several directions thereinbefore contained, the trustees were to stand possessed of the hereditaments in trust for F.'s daughters successively according to seniority in tail male, with a like remainder to E.'s daughters. No such daughters were yet *in esse*.

After the determination or failure of the directions & trusts thereinbefore contained, the trustees were to settle the hereditaments to successive uses for lives & in tail male for ultimate remaindermen, but without any ultimate limitation of the fee. There were ultimate remaindermen for lives & in tail male *in esse*.

In *Re Llanover (Baroness)*, [1903] 2 Ch. 330, FARWELL, J., held that the direction to apply the surplus rents in the purchase of other estates must be deemed to be struck out by Accumulations Act, 1892 (c. 58), & the accumulation trust must be read as limited to the discharge of incumbrances.

On a subsequent motion to vary the minutes he formally declared that when & so soon as the accumulations should be sufficient to discharge the incumbrances the accumulation trust would become a trust for the purchase of land only & consequently void under Accumulations Act, 1892 (c. 58), & that from that time, & so long as the surplus rents should by law remain undisposed of, they would belong, & be payable by the trustees as received, to pltf. as heiress-at-law. The accumulations were not yet sufficient to discharge the incumbrances:—*Held*: on the construction of the will, subject to the accumulation trust for discharge of incumbrances, the surplus rents would be payable to a daughter of F. or E. as tenant in tail male, but that until the birth of such a daughter, & subject to any such daughter's interest, the surplus rents subject to the accumulation trust were payable by the trustees to pltf. as heiress-at-law during the lives of F. & E., after whose deaths, subject to any daughter's estate in tail male, the ultimate remainders would come into possession; (2) having regard to the nature & extent of her interest as heiress-at-law, pltf. had not at the present time the powers of a life tenant either under Settled Land Act, 1882 (c. 38), s. 58 (1) (vi) & (ix).

(3) *Semble*: Settled Land Act, 1882 (c. 38),

s. 58 (1) (vi), does not apply to a person merely entitled to receive surplus rents from trustees who are in possession & managing the estates, & (ix) does not apply (a) to a terminable life interest, or (b) to any interest taken under an intestacy, though comprised in the subject of the settlement under s. 2 (2).—*Re LLANOVER (BARONESS), HERBERT v. RAM*, [1907] 1 Ch. 635; 76 L. J. Ch. 427; 97 L. T. 286.

Annotations:—*As to (2) Distd. Re Sumner's S. E.*, [1911] 1 Ch. 315; *Re Astor, Astor v. Adams* (1921), 91 L. J. Ch. 277; *Re Llanover S. E.*, [1926] Ch. 626. *As to (3) Dbtd. Re Sumner's S. E.*, [1911] 1 Ch. 315.

2670. Income undisposed of—Arising in absence of trust.]—*Re LLANOVER (BARONESS), HERBERT v. RAM*, No. 2669, *ante*.

2671. — Received as part of residue—Not as income of property.]—*Re ASTOR, ASTOR v. ASTOR*, No. 2632, *ante*.

2672. — — — — —.]—*Re ALSTON-ROBERTS-WEST'S SETTLED ESTATES*, [1928] W. N. 41.

2673. — "Implied or constructive" trust—Resulting trust.]—Where the income of land devised to trustees is undisposed of during certain lives & results in possession to testator's adult heir during those lives, that heir takes that income under an "implied or constructive" trust for payment thereof to him during those lives within Settled Land Act, 1925 (c. 18), s. 20 (1) (viii), read with the definition of trust in s. 117 (1) (xii), & has consequently the powers of a life tenant.—*Re LLANOVER SETTLED ESTATES*, [1926] Ch. 626; 95 L. J. Ch. 419; 135 L. T. 363.

Annotation:—*Refd. Re Alston-Roberts-West's S. E.*, [1928] W. N. 41.

2674. — — — — —.]—*Re ALSTON-ROBERTS-WEST'S SETTLED ESTATES*, [1928] W. N. 41.

2675. Meaning of "forfeiture."]—*Re SUMNER'S SETTLED ESTATES*, No. 2667, *ante*.

2676. Right to part of income—Remainder to be capital money.]—Under indentures of settlement & appointment made in 1906 & 1918 respectively, land became settled upon trust to pay two-third parts of the net income thereof to T. during his life, & the other one-third part of such net income was directed to be held upon the trusts & subject to the powers upon & subject to which capital money arising under the Settled Land Acts from freehold hereditaments forming part of the settled estate would be held; that was to say, in trust, after the death of T. for his first & other sons in tail. During the life of T. all the powers conferred by the Settled Land Acts on a tenant for life in possession of settled land were declared to be exercisable by the trustees in relation to the settled estate:—*Held*: T. was not entitled to the income of the settled estate during his life subject to a trust for accumulation of income within Settled Land Act, 1925 (c. 18), s. 20 (1) (viii); &, accordingly, he had not the powers of a tenant for life, but the trustees of the settlement had such powers by virtue of the terms of the settlement & s. 23 (1) of that Act.

In my judgment there is a substantial distinction between a case where a person is entitled to the whole income of settled land, subject to an overriding trend for the accumulation of income, & a case where a person is entitled only to a certain portion of the income, & the remainder of the income is to be held & dealt with as capital money. *LAWRENCE, J.*—*Re FREWEN*, [1926] Ch. 580; 95 L. J. Ch. 297; 134 L. T. 747; 70 Sol. Jo. 650.

2677. Income during fixed term—If beneficiary so long live.]—Under a settlement, dated Sept. 13, 1906, lands stood limited, in the events which happened, to the use of trustees for a term of ninety-nine years, if C. should so long live, upon trust to

pay the rents & profits thereof to C. during the remainder of her life, & subject to the term & the trusts thereof, to the use of W. during his life, with remainders over:—*Held*: C. was a person entitled to the income of the settled land during her life, until the determination of her interest by means of the expiration of the term & consequently, she was a person having the powers of a tenant for life, within Settled Land Act, 1925 (c. 18), s. 20 (1) (viii).—*Re WALERAN SETTLED ESTATES*, [1927] 1 Ch. 522; 96 L. J. Ch. 209; 136 L. T. 605; 70 Sol. Jo. 1242.

2678. "Immediate binding trust for sale"—Must overreach all prior equitable charges—So as to affect whole subject-matter of settlement.]—(1) Land is not "subject to an immediate binding trust for sale" within Settled Land Act, 1925 (c. 18), s. 20 (1) (viii), unless the trust for sale is exercisable so as to overreach all prior equitable charges, with the result that the whole subject-matter of the settlement is subject to the trust for sale.

(2) Under testator's will T. became entitled as tenant in tail of the settled land subject only to a jointure rentcharge of £1,500 appointed by deceased tenant for life to his widow under a power in the will. In 1923 T. disentailed, & by a conveyance conveyed the settled land, subject to the jointure, to trustees upon trust for sale, with power to postpone, & to stand possessed of the net proceeds of sale & the rents & profits until sale upon the trusts of a settlement of even date. Under this settlement the income of the proceeds of sale & the rents & profits until sale were applicable in paying life annuities of £5,000 to T., £1,000 to her husband, £3,500 to the jointress, & in paying the balance to T. during her life. In 1924 & 1925 two orders were made under Settled Land Act, 1884 (c. 18), s. 7, which together gave T. power to exercise all the powers of a tenant for life under Settled Land Acts, 1884 to 1890:—*Held*: the settled land was subject to a compound settlement consisting of the will, the disentailing deed, the conveyance & the settlement, & T. had the powers of a tenant for life of the compound settlement conferred on her by Settled Land Act, 1925 (c. 18), s. 20 (1) (viii), as the land was not "subject to an immediate binding trust for sale." & was entitled to have a vesting deed executed in her favour pursuant to sched. II. para. 1; (3) on the falling in of the jointure T. would by virtue of Law of Property Act, 1925 (c. 20), s. 29 (4), become entitled to exercise the powers conferred by the orders made under Settled Land Act, 1884 (c. 18), s. 7, but must exercise them in the names & on behalf of the trustees for sale.—*Re LEIGH'S SETTLED ESTATES*, [1926] Ch. 852; 95 L. J. Ch. 511; 136 L. T. 395; 70 Sol. Jo. 758.

Annotation:—As to (1) Distd. & Dbtd. Re Parker's S. E., Parker v. Parker (1927), 71 Sol. Jo. 981.

2679. Income of "land"—Life interests in undivided moieties.]—Under the will of Lord S., immediately before the coming into operation of Law of Property Act, 1925 (c. 20), the entirety of his Lancashire estate was limited to trustees for a term of one thousand years, with power to sell or exchange. In the meantime, & subject thereto, H. & G. were each entitled to a life interest in an undivided moiety of the estate. During the existence of the term the trustees were entitled to the rents & profits of the estate, which were to be applied in paying off incumbrances:—*Held*: (1) Para. 1 of Part IV of the First Schedule to the

Law of Property Act, 1925 (c. 20), applied to land held in undivided shares vested in possession only when two elements were present, namely, the absence of any antecedent freehold estate, & present immediate beneficial enjoyment by possession, physical or notional, & therefore did not apply to this case; (2) H. & G. were not "a person entitled to the income of 'land'" who had the powers of a tenant for life under Settled Land Act, 1925 (c. 18), s. 20 (1) (viii), because, undivided shares in land being excluded from the definition of "land" in that Act, it was impossible for two undivided moieties of land to constitute "land" within the sect.; & as the entirety of the estate was settled by the will, & there was no tenant for life, or person having the powers of a tenant for life, the trustees of the will had the powers of a tenant for life, & the fee simple was vested in them under paras. 5 & 6 (c) of Part II of the First Schedule of the Law of Property Act, 1925 (c. 20), & Settled Land Act, 1925 (c. 18), s. 23 (1) (b); (3) the powers of sale & exchange & other powers given to the trustees by the will remained exercisable by them.—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, [1927] 2 Ch. 217; 96 L. J. Ch. 461; 137 L. T. 633; 71 Sol. Jo. 620.

(k) *Person beneficially entitled in Fee Simple subject to Subsisting Charge.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (ix).

2680. Persons entitled in fee simple on failure of contingency—Gift to person contingently on attaining twenty-one.]—*Re ASTOR, ASTOR v. ASTOR*, No. 2632, *ante*.

2681. Fee simple subject to rentcharge—Purchased by company—After disentail by tenant in tail.]—*Re CARNARVON'S (EARL) CHESTERFIELD SETTLED ESTATES, Re CARNARVON'S (EARL) HIGHCLERE SETTLED ESTATES*, No. 2599, *ante*.

(l) *Married Woman entitled to Estate subject to Restraint on Anticipation.*

See Settled Land Act, 1925 (c. 18), s. 20 (1) (x), & generally, HUSBAND & WIFE, Vol. XXVII., pp. 101–132.

2682. Life estate subject to restraint—Remainder to tenant for life in fee.]—*Re POCOCK & PRANKERD'S CONTRACT*, No. 2575, *ante*.

2683. Fee simple subject to restraint.]—BATES v. KESTERTON, No. 2659, *ante*.

(m) *In respect of Settled Land of Infant.*

See Settled Land Act, 1925 (c. 18), s. 26; INFANTS, Vol. XXVIII., pp. 202–205, Nos. 621–651.

(n) *In respect of Settled Land of Lunatic.*

See Settled Land Act, 1925 (c. 18), s. 28.

Judicial powers over estate of lunatic.]—See LUNATICS, Vol. XXXIII., pp. 189–230.

Exercise of power of sale.]—See LUNATICS, Vol. XXXIII., pp. 209, 214, 215, 227, Nos. 1153–1156, 1210–1212, 1376.

Exercise of power of leasing.]—See LUNATICS, Vol. XXXIII., p. 211, Nos. 1179, 1180.

(o) *Trustees of Settlement.*

See Settled Land Act, 1925 (c. 18), s. 23.

2684. Trustees appointed by settlor—For purpose of Settled Land Acts, 1882–1890—With powers of tenant for life.]—*Re BIRD, WATSON v. NUNES*, No. 2579, *ante*.

PART XIII. SECT. 1, SUB-SECT. 1.—D. (o).

1. *Trustees appointed by settlor—Power of sale.]—*Re NGAWAKAKUPE No. 3 BLOCK SETTLED ESTATE (1905), 25 N. Z. L. R. 320.—N.Z.

Sect. 1.—Under Settled Land Acts: Sub-sect. 1, D. (o), E., F., G. & H. (a) & (b); sub-sect. 2, A.]

2685. Trustees of will—Interest of tenant for life not “land”—Undivided moieties.]—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, No. 2679, *ante*.

2686. — Trust for payment of allowance.]—*Re ALSTON-ROBERTS-WEST'S SETTLED ESTATES*, [1928] W. N. 41.

2687. Limitation in trust for charity.]—*Re HIGGS, SYMONDS v. RHODES*, [1927] W. N. 316.

E. Trustees for the Purposes of the Settled Land Acts.

See Part XIV., post.

F. Trustees for Sale.

See Law of Property Act, 1925 (c. 20), s. 28

G. The Court.

See Settled Land Act, 1925 (c. 18), s. 113.

Jurisdiction in respect of Ireland.]—*See COURTS*, Vol. XVI., p. 104, No. 42.

H. Capital Money Arising under the Acts.

(a) In General.

See Settled Land Act, 1925 (c. 18), s. 117 (1) (ii).

2688. Repayments of cost of improvements—Contributions by lessees.]—*Re HESKETH, SAUNDERS v. BIBBY-HESKETH* (1900), 45 Sol. Jo. 11.

2689. Damages—In respect of damage to heirlooms.]—*Re WALTON, MILLER v. WALTON* (1900), 44 Sol. Jo. 615.

2690. — In respect of breaches of repairing covenant—Lease by previous life tenant.]—Where a tenant for life without impeachment of waste recovers damages from a lessee for dilapidations to the mansion house & buildings arising from breaches of repairing covenants in a lease granted by a previous tenant for life under the statutory power, the damages are not capital moneys payable to the trustees of the settlement or into *ct.*, but must be taken to represent the damages which the tenant for life has sustained, & may accordingly be kept by him & used for such purposes as he may think fit.—*Re LACON'S SETTLEMENT, LACON v. LACON*, [1911] 2 Ch. 17; 80 L. J. Ch. 610; 104 L. T. 840; 27 T. L. R. 485; 55 Sol. Jo. 551, C. A. *Annotations:—Distd. Re Pyke, Birnstringl v. Birnstringl*, [1912] 1 Ch. 770. *Folld. Re Dealtry, Davenport v. Dealtry* (1913), 108 L. T. 832. *Consd. Re Williams' Settlement, Williams Wynn v. Williams*, [1922] 2 Ch. 750.

— Money received by way of damages for breach of covenant.]—*See Settled Land Act, 1925 (c. 18), s. 80 (1).*

2691. Fund for discharge of incumbrances—Mineral rents accumulated by special direction—Incumbrances discharged by other moneys.]—*Re WHARNCLIFFE'S TRUSTS, WHARNCLIFFE (EARL) v. WORTLEY* (1904), 48 Sol. Jo. 176, C. A.

2692. Forfeited deposits—On abortive sale.]—Where a tenant for life sold land, under Settled Land Act, by public auction, & a deposit was paid by the purchaser, but it was subsequently discovered that the purchaser had not the funds to complete the purchase, & the purchaser signed an agreement, whereby, in consideration for his release from the contract, he undertook to forfeit the deposit & pay the auctioneer's fees:—*Held*: the deposit so forfeited came within Settled Land Act, 1882 (c. 38), s. 31 (1) (ii), & was accordingly capital money & not income of the tenant for life.—*Re WARD'S SETTLED ESTATE* (1919), 63 Sol. Jo. 319.

2693. Proceeds of sale of land held under trusts

for sale.]—The trust deed of a charity placed the entire management & control of its property, which, whether land or investments, was all revenue, in the hands of a sole trustee, in whom it was vested with full power to sell & give receipts for the purchase-money:—*Held*: (1) the trustee could sell the land under his trust deed & give a receipt for the purchase-money without resorting to his life tenant powers under Settled Land Act, 1925 (c. 18), s. 29, at all; (2) in any case the proceeds of sale would remain revenue & would not become capital moneys arising under the Act, for both these reasons Settled Land Act, 1925, (c. 18), s. 94 (1), had no application.—*Re BOOTH & SOUTHEND-ON-SEA ESTATES CO.'S CONTRACT*, [1927] 1 Ch. 579; 96 L. J. Ch. 272; 43 T. L. R. 334; *sub nom.* BOOTH v. SOUTHEND-ON-SEA ESTATE CO.'S CONTRACT, 137 L. T. 122.

Accumulations directed to be capitalised.]—*See PERPETUITIES*, Vol. XXXVII., p. 135, No. 639.

Fine on grant of lease.]—*See Settled Land Act, 1925 (c. 18), s. 42 (4).*

Mining rents partially capitalised.]—*See Settled Land Act, 1925 (c. 18), s. 47.*

Consideration for grant of option.]—*See Settled Land Act, 1925 (c. 18), s. 51 (5).*

Proceeds of sale of timber partially capitalised.]—*See Settled Land Act, 1925 (c. 18), s. 66.*

Proceeds of sale of heirlooms.]—*See Settled Land Act, 1925 (c. 18), s. 67 (2).*

Money raised on mortgage.]—*See Settled Land Act, 1925 (c. 18), s. 71 (1).*

Money in court under Lands Clauses & other Acts.]—*See Settled Land Act, 1925 (c. 18), s. 76.*

Money in hands of trustees under powers of settlement.]—*See Settled Land Act, 1925 (c. 18), s. 77.*

Personal estate settled by reference to capital or land.]—*See Settled Land Act, 1925 (c. 18), s. 78.*

Capital arising otherwise than under the Act.]—*See Settled Land Act, 1925 (c. 18), s. 81.*

Money paid in respect of contracts.]—*See Settled Land Act, 1925 (c. 18), s. 90 (5).*

(b) What Moneys Liable to be laid out in Purchase of Land.

See Settled Land Act, 1925 (c. 18), ss. 76, 77, 117 (1) (ii).

2694. Money in hands of trustees for investment—Power to invest in land.]—(1) Under Settled Land Act, 1882 (c. 38), s. 33, the tenant for life has the same powers over money in the hands of trustees liable to be laid out in the purchase of land to be made subject to the settlement as he would have over the land itself, & the sect. gives the tenant for life an option to direct how the money shall be applied or invested as capital money under the Settled Land Acts.

(2) *Semble*: sect. 33, only applies to money subject to a trust to be laid out in land, & not to money subject to a discretionary power to be so laid out.—*Re GEE, PEARSON GEE v. PEARSON* (1895), 64 L. J. Ch. 606; 11 T. L. R. 431; 39 Sol. Jo. 539.

2695. —.]—Personal property held by trustees with power to invest in land is liable to be laid out in the purchase of land within the Settled Land Act, 1882 (c. 38), ss. 32, 33.—*Re SOLTAU'S TRUST*, [1898] 2 Ch. 629; 68 L. J. Ch. 39; 79 L. T. 335.

2696. —.]—*Re THOMAS, WEATHERALL v. THOMAS*, No. 2994, *post*.

2697. — Particular land.]—Money which the trustees of a settlement are empowered to invest, at the request of the tenant for life, in the purchase of particular land is money which

is "liable to be laid out in the purchase of land" within Settled Land Act, 1882 (c. 38), s. 33.

Where by a settlement, which comprised a moiety of certain freeholds, the trustees were empowered, at the request of the tenant for life, to invest money comprised in the settlement in the purchase of the other or unsettled moiety of the freeholds:—*Held*: the case came within Settled Land Act, 1882 (c. 38), s. 33, & money in the hands of the trustees might be invested, as capital money, in the purchase by them, jointly with the owner of the unsettled moiety, of land convenient to be held together with the freeholds.—*Re HILL, HILL v. PILCHER*, [1896] 1 Ch. 962; 65 L. J. Ch. 511; 74 L. T. 460; 44 W. R. 573.

2698. — *Absolute trust to invest.*—*Re GEE, PEARSON GEE v. PEARSON*, No. 2694, *ante*.

2699. *Money in court—Compulsory purchase—Lands belonging to charity.*—Lands belonging absolutely to a charity were taken by a public body, & the purchase-money paid into ct. under the Lands Clauses Consolidation Act, 1845 (c. 18):—*Held*: the purchase-money could be dealt with under Settled Land Act, 1882 (c. 38), s. 32, as "money liable to be laid out in the purchase of land to be made subject to a settlement."—*Re BYRON'S CHARITY* (1883), 23 Ch. D. 171; 53 L. J. Ch. 152; 48 L. T. 515; 31 W. R. 517.

Annotation:—*Consd. Ex p. Castle Bytham, Ex p. Mid. Ry.*, [1895] 1 Ch. 348.

2700. — *Glebe lands.*—*Ex p. CASTLE BYTHAM (VICAR), Ex p. MIDLAND RY. CO.*, No. 2574, *ante*.

—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 245, Nos. 1442–1446.

2701. *Proceeds of sale under Settled Estates Act, 1877 (c. 18).*—By an order under Settled Estates Act, 1877 (c. 18), contracts for the sale of settled land were confirmed, & trustees were appointed to receive the proceeds, & were directed to apply same "to some one or more of the purposes mentioned in Settled Estates Act, 1877 (c. 18), s. 34," & in the meantime to invest same in Consols. The proceeds were received & invested in Consols, but no step was taken to apply them to any of the purposes of sect. 34. On the application of the tenant for life under Settled Land Act, 1882 (c. 38):—*Held*: the trustees might, under sects. 21 & 33 of that Act, realise the Consols, & invest the proceeds in railway debenture stocks.—*Re TENNANT* (1889), 40 Ch. D. 594; 58 L. J. Ch. 457; 60 L. T. 488; 37 W. R. 542; 5 T. L. R. 316.

Annotation:—*Reid. Re Mundy's S. E.*, [1891] 1 Ch. 399.

2702. —.—*Re TESSYMAN'S TRUSTS*, No. 2788, *post*.

2703. *Repayment of costs of improvement—Sinking fund.*—By a settlement of family estates, made in 1877, the trustees were empowered by the direction of the tenant for life, to raise money by mtge. of the settled lands, to be applied by him for the purpose of improvements thereon similar in the main to those authorised by Settled Land Act, 1882 (c. 38), & the annual rents of the settled lands were charged with the payment to the trustees, for twenty-five years from the raising of the money, of an annual sum equal to one-twenty-fifth of the money paid to the tenant for life, who was to be bound to pay such annual sum, & to keep down the interest on the charge. Under the powers of the settlement money had been raised for improvements by direction of the tenant for life, & he had made certain annual payments towards the sinking fund created by the settlement:—*Held*: the money standing to the credit of the sinking fund was capital money under Settled Land Act, 1882 (c. 38), s. 33, & applicable

as such.—*Re SUDBURY & POYNTON ESTATES, VERNON v. VERNON*, [1893] 3 Ch. 74; 62 L. J. Ch. 539; 68 L. T. 707; 41 W. R. 585; 37 Sol. Jo. 424; 3 R. 561.

SUB-SECT. 2.—CHARACTERISTICS OF STATUTORY POWERS.

A. Fiduciary.

See Settled Land Act, 1925 (c. 18), s. 107.

2704. *Exercise to be in interests of parties concerned.*—*Re RADNOR'S (EARL) WILL TRUSTS*, No. 2921, *post*.

2705. —.—*The Costessey Hall estates* were settled by a deed of Jan. 26, 1874, under which Lord Stafford was tenant for life in possession. By the will of the late Lord Stafford he bequeathed certain pictures upon trust to permit the same to be used & enjoyed by the person who under the settlement of 1874 should for the time being be entitled to the Costessey Hall estates, to be held as heirlooms for the successive owners of the hall, but not to vest absolutely in any tenant in tail male by purchase who should not attain the age of twenty-one years or die under that age leaving issue male. Testator died in 1884. One of the pictures bequeathed as heirlooms had been recently sold for a large sum of money. The money was paid to the trustees of the will & invested by them in Consols. The judge held that the settlement was a compound settlement, & he appointed the trustees of the will to be trustees for the purposes of the Settled Land Acts of the settlement of the heirlooms & the proceeds of sale thereof created by the deed of 1874 & the will. The heirlooms were now vested in an infant female tenant in tail in remainder. The tenant for life asked that the trustees of the compound settlement should apply £15,000, part of the proceeds of sale of the picture, in discharge of a mtge. on land settled by the deed of 1874:—*Held*: (1) the effect of the order of the judge was that both the land settled by the deed of 1874 & the heirlooms must be treated as if they had been settled by the same document; (2) the words "land" in s. 37 & "settled land" in Settled Land Act, 1882 (c. 38), s. 21 (ii), meant the land by reference to the limitations of which the heirlooms were settled by the will; (3) the slight difference in the limitations of the deed & the will, & the fact that the heirlooms were vested in the tenant in tail, were not sufficient ground for distinguishing *Re Marlborough's (Duke) Settlement, Marlborough (Duke) v. Marjoribanks*, No. 2798, *post*; (4) the investment in Consols by the trustees before they were appointed trustees of the compound settlement did not prevent the desired application of the money; (5) the tenant for life, although a trustee under s. 53, was not committing a breach of trust, & the money ought to be applied in the discharge of the mtge.

(6) I do not think that I can say that the tenant for life is not entitled to regard as more important, in the interests of all the persons, including himself, who are now or may hereafter become entitled to the estate, the freeing of those estates from the incumbrance in question, rather than the keeping of this money invested or dealing with it in some other form (WARRINGTON, J.).—*Re STAFFORD'S (LORD) SETTLEMENT & WILL, GERARD v. STAFFORD*, [1904] 2 Ch. 72; 73 L. J. Ch. 560; 91 L. T. 229; 52 W. R. 530; *previous proceedings* (1903), 20 T. L. R. 61.

Annotations:—*As to* (4) *Reid, Re Gladwin's Trusts* (1919), 63 Sol. Jo. 265. *Generally, Mendt. Re Coull's S. E.*, [1905] 1 Ch. 712.

2706. —.—*Where under Settled Land Act,*

Sect. 1.—Under Settled Land Acts: Sub-sect. 2, A., B. & C.]

1882 (c. 38), s. 20, a tenant for life submits for approval to the trustees of the settlement a scheme for the execution of an improvement, the duty of the trustees is confined to seeing (a) that the improvement proposed is an improvement authorised by the Act, namely, that it is for the benefit of some land comprised in the settlement; (b) that the scheme for the execution of the improvement is a proper one for carrying out the particular improvement; & (c) that in submitting the scheme to the trustees the tenant for life is acting *bonâ fide* & on competent skilled advice. The trustees are not concerned with the general policy pursued by the tenant for life in improving the property, nor, in a case where there is capital money in hand, with the amount already spent on improvements.

There is a further consideration which the trustees in considering a scheme must bear in mind, namely, whether or not the tenant for life is proposing something which is outside his position as a tenant for life acting in regard to the interests of all parties entitled under the settlement, & deemed to be in the position of & to have the duties & liabilities of a trustee (WARRINGTON, J.). —*Re EGMONT'S (EARL) SETTLED ESTATES, LEFROY v. EGMONT (EARL)*. [1906] 2 Ch. 151; 75 L. J. Ch. 649; 95 L. T. 187; 54 W. R. 504; 22 T. L. R. 430.

2707. —[*Re RODES, SANDERS v. HOBSON*, No. 2976, *post*.]

2708. —**Incumbrancers.**—[The conveyance by the tenant for life under sect. 20 [Settled Land Act, 1882 (c. 38)] can only pass the estates subject to any charge by mtg. . . . or otherwise of his life estate, which has been made by the tenant for life for the purpose of raising money. . . . The tenant for life can only convey under the Act so as not to affect the charges on the estate, including those charges or incumbrances on the life estate which have been created by himself. When, therefore, his life estate is incumbered up to the hilt, he can only sell that which is practically a reversion, not an estate in possession (NORTH, J.). —*Re SEBRIGHT'S SETTLED ESTATES* (1886), 33 Ch. D. 429; 55 L. T. 354; *affd.*, 33 Ch. D. p. 442, C. A. **Annotations:**—*Consd.* *Cardigan v. Curzon-Howe* (1888), 40 Ch. D. 338; *Re Dickin & Kitchall's Contract*, [1908] 1 Ch. 218.

2709. — **Annuitant.**—Settled land was all charged by the settlement with the payment of certain annuities; part of the settled land was subject to a mtg. created prior to the settlement; the tenant for life proposed to raise £40,000 to pay off this mtg. by means of a mtg. of all the land, which would override & take priority of the annuities; the selling value of the whole of the settled land was £80,000; a sale at that price would be far more beneficial to the annuitants than the proposed mtg. The annuitants applied to the ct. for an injunction to restrain the tenant for life from mortgaging the settled land so as to create a first charge over that part thereof which was not subject to the existing mtg. :—*Held*: the tenant for life had power to so mortgage the whole of the settled land in order to pay off an incumbrance upon a part thereof; but as the exercise of that power would, in this case, be unjust to the annuitants whose interests he was bound to consider, the ct. would interfere to prevent him from exercising that power, though he was acting *bonâ fide*. —*HAMPDEN v. BUCKINGHAMSHIRE (EARL)*, [1893] 2 Ch. 531; 62 L. J. Ch. 643; 68 L. T. 695; 41 W. R. 516; 37 Sol. Jo. 455; 2 R. 419, C. A.

Annotations:—*Apld.* *Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778; *Re Hunt's S. E., Bulteel v. Lawde-*

shayne, [1905] 2 Ch. 418. *Consd.* *Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379. *Refd.* *Re Monson's S. E.*, [1898] 1 Ch. 427; *Re Stamford & Warrington, Payne v. Grey*, [1916] 1 Ch. 404; *Re Gladwin's Trust*, [1919] 1 Ch. 232.

2710. — **Remaindermen.**—[*HATTEN v. RUSSELL*, No. 2832, *post*.]

2711. —[*Re RICHARDSON, RICHARDSON v. RICHARDSON*, No. 2834, *post*.]

2712. —[*Re HOPE'S SETTLED ESTATES*, No. 2925, *post*.]

2713. —[*Re WESTMINSTER'S (DUKE) SETTLED ESTATES, WESTMINSTER (DUKE) v. SHAFTESBURY (EARL)*, No. 2820, *post*.]

2714. — **Discretion of tenant for life to prevail in case of doubt.**—[The powers conferred by Settled Land Act, 1882 (c. 38), upon a tenant for life are, pursuant to sect. 53, to be exercised with a due regard to the interests of all parties entitled under the settlement, & the discretion vested in him by the Act as to the application of capital moneys must not be so exercised as unduly to prejudice such parties, but where it is a matter of doubt, then the discretion of the tenant for life, if fairly exercised, ought to prevail. Four estates, A., B., C., & D., were devised by the same will in trust for the same tenant for life. After her death estates A., B., & C. were devised to different persons in strict settlement, & a long term of years was created in estate D., subject to which such estate was devised as to one moiety to the uses of estate A., & as to the other moiety to the uses of estate B. The trusts of the term were for the payment off of the incumbrances on all four estates in the order in which they were devised. Upon an application by the tenant for life:—*Held*: (1) notwithstanding the interposition of the term of years, estate B. & one moiety of estate D. constituted one settled estate within the meaning of the Settled Land Act; & capital moneys arising from the moiety of estate D. were applicable for improvements on estate B.; it appearing that this application of the moneys, though it might delay, would not endanger the payment of the incumbrances on the other estates; (2) the costs as between solr. & client of the solr. & surveyor of the tenant for life for preparing & carrying out the necessary schemes for such improvements were costs incidental to the application & were payable out of the capital moneys arising from estate B. & the moiety of estate D. —*Re STAMFORD'S (LORD) SETTLED ESTATES* (1889), 43 Ch. D. 81; 58 L. J. Ch. 849; 61 L. T. 504; 38 W. R. 317. **Annotations:**—*As to* (1) *Refd.* *Re Mundy's S. E.*, [1891] 1 Ch. 399; *Re Gerard's S. E.*, [1893] 3 Ch. 252; *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319; *Re Partington, Leigh v. Kane*, [1902] 1 Ch. 711.

2715. **Exercise to be for benefit of settled land.**—[*BRUCE (LORD HENRY) v. AILESBUURY (MARQUESS)*, No. 2772, *post*.]

2716. — **Motive of tenant for life immaterial—Intention to benefit wife.**—[*SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, No. 2887, *post*.]

2717. — **Personal views of tenant for life immaterial—Objection to sale of intoxicants.**—[*Re SOMERS (EARL), COCKS v. SOMERSET* (1895), 11 T. L. R. 567; 39 Sol. Jo. 705.

2718. — **Incidental benefit to tenant for life no objection.**—[*Re HARE, LEYCESTER-PENRHYN v. LEYCESTER-PENRHYN* (1908), 43 L. Jo. 659.

Direction of investment.—[*See* No. 2783, *post*.]
Exercise of power of leasing.—[*See* Nos. 2887, 2888, 2896-2898, *post*.]

Accepting surrender of lease.—[*See* No. 2976, *post*.]

Sale of heirlooms.—[*See* No. 2921, *post*.]

B. Inalienable.

See Settled Land Act, 1925 (c. 18), s. 104.

2719. General rule.—*Re SEBRIGHT'S SETTLED ESTATES*, No. 2775, *post*.

2720. ———— *Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

2721. Effect of assignment of life interest.—*Re SEBRIGHT'S SETTLED ESTATES*, No. 2775, *post*.

2722. ———— *Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

2723. ———— **Consent of assignee for value—Right of purchaser to require evidence.**—*Re DU CANE & NETTLEFOLD'S CONTRACT*, No. 2842, *post*.

2724. ———— **What amounts to consent—Assignee becoming purchaser.**—*Re KINGSLEY & HOLDER'S CONTRACT* (1903), 115 L. T. Jo. 201.

2725. ———— **Cannot be required to join.**—*Re DICKIN & KELSALL'S CONTRACT*, No. 2953, *post*.

2726. ———— **Exercise of leasing powers.**—*LONSDALE (EARL) v. LOWTHER*, No. 2998, *post*.

2727. ———— **Share of interest—Merger of share in remainder.**—Although a life tenant of real estate has assigned a share of his life estate to a remainderman, so as to merge that share, he can still make a title to the entire settled estate with the consent of his assignee.—*Re BAILLOW'S CONTRACT*, [1903] 1 Ch. 382; 72 L. J. Ch. 214; 88 L. T. 84; 51 W. R. 399.

——— *See Settled Land Act*, 1925 (c. 18), s. 24.

2728. Effect of resettlement—Powers under original settlement.—*Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

2729. ———— *Re WIMBORNE (LORD) & BROWN'S CONTRACT*, No. 2845, *post*.

2730. ———— *Re TRAFFORD'S SETTLED ESTATES*, No. 3041, *post*.

2731. ———— *Re COPE & WADLAND'S CONTRACT*, No. 3118, *post*.

2732. Arrangement by way of compromise—Disposition of interests—Right to make not restricted.—Testator gave his wife the use of his residence, W., so long as she should desire to make it her permanent place of residence & should remain his widow, & directed that his estate should pay all rates, taxes, & outgoings in respect of the house & keep it in repair. He left his residuary real & personal estate upon trust for sale & conversion, & then for his children & their issue; the income of the shares of daughters to be paid to them during coverture without anticipation, & the capital of those shares to be divided after the daughters' deaths amongst their children. He directed his trustees to postpone the sale of W., & to develop it as they thought fit. The judge decided that the widow had the powers of a tenant for life under Settled Land Act, 1882 (c. 38), & would not forfeit the benefits given by the will if she sold or leased the property. It was now proposed that she & the trustees should enter into a compromise whereby she should release to them her claims in respect of W. in consideration of an annual payment of £275 during widowhood—a sum less than the estimated value of her interests under the will:—*Held*: under Settled Land Act, 1882 (c. 38), s. 51 (1), the condition as to residence was void only so far as it tended to prevent the exercise of the powers of the tenant for life; there was nothing to prevent the widow from releasing her beneficial interests in the manner proposed; if she did so she would forfeit those interests by

ceasing to reside, but would receive the value of them in the shape of the annuity of £275; no question of improper investment arose, as the real result of the transaction would be to relieve testator's estate from part of the payments to which it was subject; & the compromise was for the benefit of all parties, was within the power of the trustees, & ought to be sanctioned.—*Re TRENCHARD, TRENCHARD v. TRENCHARD*, [1902] 1 Ch. 378; 71 L. J. Ch. 178; 86 L. T. 196; 50 W. R. 266; 46 Sol. Jo. 231.

Annotation:—*Consd. Re Simpson, Clarke v. Simpson*, [1913] 1 Ch. 277.

2733. Statutory owner—Settled Land Act, 1925 (c. 18), s. 117 (1) xxvi—Not within prohibition.—*Re CRAVEN SETTLED ESTATES*, No. 2617, *ante*.

2734. ———— **Not within powers of Settled Land Act, 1925 (c. 18), s. 20.**—*Re CRAVEN SETTLED ESTATES*, No. 2617, *ante*.

2735. ———— **Effect of release under Law of Property Act, 1925 (c. 20), s. 155.**—*Re CRAVEN SETTLED ESTATES*, No. 2617, *ante*.

Effect of bankruptcy of tenant for life.—*See BANKRUPTCY*, Vol. V., p. 743, Nos. 6413–6414.

C. Prohibition against Exercise Void.

See, now, Settled Land Act, 1925 (c. 18), s. 106.

2736. Extent of statutory prohibition.—*Re HAZLE'S SETTLED ESTATES*, No. 2633, *ante*.

2737. ———— *Re ATKINSON, ATKINSON v. BRUCE*, No. 2604, *ante*.

2738. Restriction on power of sale—Settlement by private Act—Power of trustees restricted—Power of life tenant unaffected.—*Re CHAYTOR'S SETTLED ESTATE ACT*, No. 2796, *post*.

Effect of gift over.—*See* Nos. 2746, 2747, *post*.

2739. Condition requiring residence of life tenant—No bar to powers—Sale.—Testator devised real estate to the use of his son F. so long as he should reside in the dwelling-house, or upon some part of the devised estate, for not less than three calendar months in each year after he should become entitled to the actual possession thereof. After the death of F., if he should have complied with the above condition, the estate was given among his children as he should appoint. In default of appointment, or if F. should fail to comply with the condition, on the determination of his estate therein it was given to the use of trustees for sale. The only house on the estate in which F. could reside was very large, & could not be inhabited properly without an annual outlay of more than twice the annual income derived from the estate. An opportunity arose for selling a part of the estate for a purpose which, if carried into effect, would render the mansion house, if unsold, uninhabitable:—*Held*: (1) F. had the powers of a tenant for life under Settled Land Act, 1882 (c. 38), including the power to sell the estate; (2) the condition requiring residence was within sect. 51 of the Act, & void; (3) leave should be given to sell the mansion house.—*Re PAGET'S SETTLED ESTATES* (1885), 30 Ch. D. 161; 55 L. J. Ch. 42; 53 L. T. 90; 33 W. R. 898; 1 T. L. R. 567.

Annotations:—*As to* (1) *Appl. Re Eastman's Settlement*, (1898), 43 Sol. Jo. 114. *Reid. Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378. *As to* (2) *Consd. Re Haynes, Kemp v. Haynes* (1887), 37 Ch. D. 306. *Fold. Re Dalrymple, Bircham v. Springfield* (1901), 49 W. R. 627.

ESTATE, [1911] 1 I. R. 76.—*IR*.

PART XIII. SECT. 1, SUB-SECT. 2.—C.

2739 i. Condition requiring residence of life tenant—No bar to powers—Sale.—*Re ADAIR & SETTLED LAND ACT*, [1909] 1 I. R. 311.—*IR*.

PART XIII. SECT. 1, SUB-SECT. 2.—B.

2721 i. Effect of assignment of life interest.—Where the first tenant for life of settled lands has assigned his life estate to the second tenant for life under the settlement, so that the life

estate of the former has become merged in that of the latter, the power of sale conferred on a tenant for life by Settled Lands Act can be exercised by the second tenant for life, notwithstanding the provisions of Settled Land Acts, 1882, s. 50.—*Re BRUEN'S*

Sect. 1.—Under Settled Land Acts: Sub-sect. 2, C.; sub-sect. 3, A. & B.]

"The report of that case is, perhaps, not strictly accurate, as one would imagine there must have been some words, giving F. a life estate" (KEKEWICH, J.). *Generally, Refd.* *Re Boyer's S. E.*, [1916] 2 Ch. 404.

2740. — Letting.]—A gift by a husband of his house to trustees in trust to allow his wife to reside in it rent free, she paying for repairs, insurance, etc., "& from & after the decease or second marriage of my said wife or of her ceasing to reside at the said dwelling-house," the same to fall into residue, does not prevent the wife from evacuating the house & exercising her power of leasing as tenant for life under Settled Land Acts, & receiving the rents received from such letting for her own use & benefit during her widowhood.—*Re FREME (DECEASED)*, *SAMUEL v. FREME* (1912), 56 Sol. Jo. 362.

2741. — Validity.]—*Re PAGET'S SETTLED ESTATES*, No. 2739, *ante*.

2742. — Valid except as restraint on exercise of powers.]—A tenant for life under a will broke the terms of a condition of residence on pain of forfeiture contained in the will:—*Held*: no sale having been made, the forfeiture took effect, notwithstanding Settled Land Act, 1882 (c. 38), s. 51.—*Re HAYNES, KEMP v. HAYNES* (1887), 37 Ch. D. 306; 57 L. J. Ch. 519; 58 L. T. 14; 36 W. R. 321; 4 T. L. R. 168.

Annotations:—N.F. *Re Dalrymple, Bircham v. Springfield* (1901), 49 W. R. 627. *Follid.* *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378.

2743. — — — — —.]—*Re TRENCHARD, TRENCHARD v. TRENCHARD*, No. 2732, *ante*.

2744. — Reduction of annuity on residence ceasing.]—*Re EASTMAN'S SETTLED ESTATES* (1898), 68 L. J. Ch. 122, n.; 43 Sol. Jo. 114.

Annotations:—Follid. *Re St. Donats S. E.* (1898), 70 L. T. 542; *Re Carne's S. E.*, [1899] 1 Ch. 324. *Appld.* *Re Trenchard, Ward v. Trenchard* (1900), 16 T. L. R. 525; *Re Llanover's Will, Herbert v. Freshfield*, [1902] 2 Ch. 679. *Expld.* *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378. *Refd.* *Re Betty, Betty v. A.-G.* (1899), 80 L. T. 675; *Re Boyer's S. E.*, [1916] 2 Ch. 404.

2745. — Additional allowance for outgoings.]—*Re SIMPSON, CLARKE v. SIMPSON*, No. 2819, *post*.

Gift over.]—*See* Nos. 2746, 2747, *post*.

2746. Effect of gift over—Of personalty.]—There is no jurisdiction *ex post facto* to sanction the sale of heirlooms. Where heirlooms had been sold to advantage without an order, the ct. directed the trustees not to take steps to recover them.

Personal estate was bequeathed on trust to apply the income in keeping up a sea wall & ornamental grounds on settled real estate & on trust to pay the balance of the income to the tenant for life of the real estate during lives in being & twenty-one years, with a proviso that, if the tenant for life should become disentitled to the possession or income of the real estate, the settled personal estate should sink into the residue:—*Held*: this proviso was void under Settled Land Act, 1882 (c. 38), s. 51, & the tenant for life who had sold the real estate was still entitled to the income of the personal estate.—*Re AMES, AMES v. AMES*, [1893] 2 Ch. 479; 62 L. J. Ch. 685; 68 L. T. 787; 41 W. R. 505; 37 Sol. Jo. 423; 3 R. 558.

Annotation:—Refd. *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378.

27461. Effect of gift over—Of personalty.]—Testatrix gave to A. B. the use of her house in D. during her life, as a residence, with a proviso, that in the event of A. B. ceasing to reside in it it should form part of her residuary estate. She also gave to A. B. the income of a sum of £10,000, for

life, or so long as she made the house her principal residence, with a like gift over in the event of her ceasing to make the house her principal residence:—*Held*: in the event of a sale of the house by A. B. under the Settled Land Acts, the gift over of the £10,000 was void under Settled

2747. — Of settled land.]—Testator settled real estate. His widow died in 1869, having bequeathed personal estate to be held on trust for the person entitled to the enjoyment of the settled real estate, with a proviso that in case of sale of the real estate, either during the life of a person then in being, or within twenty-one years from her death, her trust property should go over:—*Held*: in case of sale of the real estate under Settled Land Acts the gift over was ineffectual.—*Re SMITH, GROSE-SMITH v. BRIDGER*, [1899] 1 Ch. 331; 68 L. J. Ch. 198; 80 L. T. 218; 47 W. R. 357.

Annotation:—Refd. *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378.

2748. — Reduction of share of life tenant.]—S. by her will devised certain freeholds to trustees upon trust for T. for life, subject to a condition of residence, & in case T. should cease to reside there, then on trust to sell & invest the proceeds & pay one-third of the income thereof to T. for life, & the remaining two-thirds to other persons therein mentioned:—*Held*: the provision was such as to induce the tenant for life to abstain from exercising his powers under Settled Land Act, 1882 (c. 38), s. 51, & was void.—*Re DALRYMPLE, BIRCHAM v. SPRINGFIELD* (1901), 49 W. R. 627; 45 Sol. Jo. 555.

2749. — Settled property to fall into residue.]—*Re TRENCHARD, TRENCHARD v. TRENCHARD*, No. 2732, *ante*.

2750. — — — — —.]—*Re GRIFFITHS, HEASTY v. GRIFFITHS* (1910), 130 L. T. Jo. 106.

2751. — — — — —.]—*Re FREME (DECEASED), SAMUEL v. FREME*, No. 2740, *ante*.

2752. — — — — —.]—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, No. 2834, *post*.

Alienation of life interest.]—*See* Settled Land Act, 1925 (c. 18), s. 24.

SUB-SECT. 3.—PRELIMINARY CONDITIONS TO EXERCISE.

A. Notice.

See Settled Land Act, 1925 (c. 18), s. 101.

2753. Necessity for—Appointment of trustees to receive notice.]—Where a tenant for life is a lunatic, & his committee desires to exercise the powers of leasing given by Settled Land Act, 1882 (c. 38), & no trustees of the settlement are in existence, new trustees must be appointed for the purposes of the Act.—*Re TAYLOR* (1883), 52 L. J. Ch. 728; 49 L. T. 420; 31 W. R. 596, C. A.

2754. — — — — —.]—*WHEELWRIGHT v. WALKER*, No. 3106, *post*.

2755. — — — — —.]—*Re BENTLEY, WADE v. WILSON*, No. 2662, *ante*.

2756. — — — — —.]—*Re MONSON'S (LORD) SETTLED ESTATES*, [1898] 1 Ch. 427; 67 L. J. Ch. 176; 78 L. T. 225; 46 W. R. 330; 14 T. L. R. 247; 42 Sol. Jo. 289.

Annotation:—Consd. *Re Coull's S. E.*, [1905] 1 Ch. 712.

2757. Form of notice—Sufficiency of general notice of intention.]—The notice to be given under Settled Land Act, 1882 (c. 38), s. 45, by the tenant for life of settled land to the trustees of the settlement for the purposes of the Act, when he is

Land Act, 1852, s. 51.—*Re FITZGERALD, BRERETON v. DAY*, [1902] 1 L. R. 162.—*IR.*

PART XIII. SECT. 1, SUB-SECT. 3.—A. g. Necessity for.]—One month's notice of the intention to make an agreement for a lease must be given

intending to make a sale or lease, must be not a merely general notice of an intention to sell or lease all or any part of the estate at any time after the expiration of one month from the date of the notice as & when a proper opportunity shall from time to time occur, but a notice of a specific sale or lease which is contemplated at the time when the notice is given.—*Re RAY'S SETTLED ESTATES* (1884), 25 Ch. D. 464; 53 L. J. Ch. 205; 50 L. T. 80; 32 W. R. 458.

—*See, now, Settled Land Act, 1925* (c. 18), s. 101 (2).

2758. Time for notice—Sale.—(1) On a sale by tenant for life under Settled Land Act, 1882 (c. 38), a notice to the trustees given less than a month before the contract, but more than a month before the day fixed for completion, held a sufficient compliance with sect. 45.

On the reading of the sect. it is quite plain that a distinction is drawn, between the making of the sale & the making of a contract for sale; & if the notice therefore required by the sect. is given before either one of those two things—assuming that they are two things, then the notice will be good (*CHITTY, J.*).

(2) The giving of the notice is a matter between the tenant for life & the trustees, & one with which the purchaser is not concerned (*CHITTY, J.*).—*MARLBOROUGH (DUKE) v. SARTORIS* (1886), 32 Ch. D. 616; 56 L. J. Ch. 70; 55 L. T. 506; 35 W. R. 55; 2 T. L. R. 644.

Annotations:—As to (2) Consd. *Mogridge v. Clapp*, [1892] 3 Ch. 382. *Generally, Refd.* *Re Radnor's Will Trusts* (1890), 45 Ch. D. 402.

2759. Defect in respect of notice—Title not destroyed — Purchaser not concerned.—*MARLBOROUGH (DUKE) v. SARTORIS*, No. 2758, *ante*.

2760. ————— No trustees appointed.—*HATTEN v. RUSSELL*, No. 2832, *post*.

2761. ——————*In Oct. 1884, H., purporting to demise as absolute owner, which he believed himself to be, granted a building lease of certain land to pltf. for the term of ninety-nine years. Pltf. made no inquiry as to H.'s title, but assumed that he was the absolute owner of the land demised. Deft. afterwards agreed to purchase the lease of the demised land from pltf.; but, on investigating the title, he discovered that the land had, under a will, belonged to H.'s deceased wife, & that H. was only tenant by the curtesy. A tenant by the curtesy has, under Settled Land Act, 1882 (c. 38), s. 58 (1) (viii), all the powers of a tenant for life; but the lease, though complying*

with the enabling sects. of the Settled Land Acts, contained no reference thereto; & at its date there were no trustees of the will, to whom the notices, required by Settled Land Act, 1882 (c. 38), s. 45, in the case of a lease by a tenant for life, could be given. Deft. then refused to complete, upon the ground that the lease was invalid, or, if not, that pltf.'s title was so questionable that it ought not to be forced upon a purchaser. In an action by pltf. for specific performance of the agreement:—*Held*: (1) the lease could, & did, operate under Settled Land Act, 1882 (c. 38), to convey the land within the meaning of sect. 20 (2); (2) as to the absence of trustees of the settlement & the want of the notices required by sect. 45, pltf., having dealt with the lessor in good faith, was protected by sect. 45 (3) & accordingly, the lease was a valid lease, although there were no trustees, & pltf. was entitled to specific performance of the agreement.

(3) The doctrine of constructive notice ought not to be applied so as to invalidate the titles of persons dealing *bona fide* with tenants for life when exercising their powers under the Settled Land Acts.—*MOGRIDGE v. CLAPP*, [1892] 3 Ch. 382; 61 L. J. Ch. 534; 67 L. T. 100; 40 W. R. 663; 8 T. L. R. 631; 36 Sol. Jo. 554, C. A.

Annotations:—As to (1) Refd. *Re Daniels, Weeks v. Daniels* (1912), 106 L. T. 792. *As to (2) Distd.* *Chandler v. Bradley*, [1897] 1 Ch. 315; *Re Fisher & Grazebrook's Contract*, [1898] 2 Ch. 660. *Generally, Refd.* *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599.

Lunatic tenant for life.—*See LUNATICS*, Vol. XXXIII., pp. 209, 211, Nos. 1154–1156, 1178–1180.

B. Leave of Court.

2762. Settlement by way of trust for sale—Order under Settled Land Act, 1884 (c. 18), s. 7—Before commencement of Law of Property Act, 1925 (c. 20).—*Re (ECIL'S (LADY FRANCIS) SETTLED ESTATES*, [1926] W. N. 262.

Annotations:—Refd. *Re Leigh's S. E.*, [1926] Ch. 852; *Re Leigh's S. E.* (No. 2), [1927] 2 Ch. 13.

2763. ————— Exercise in name of trustees.—*Re LEIGH'S SETTLED ESTATES*, No. 2678, *ante*.

—*See, now, Law of Property Act, 1925* (c. 20), ss. 28, 29.

Sale or purchase of settled chattels.—*See Settled Land Act, 1925* (c. 18), s. 67 (3).

Variations of building or mining leases.—*See Settled Land Act, 1925* (c. 18), s. 46.

to the trustees of the settlement for the purposes of Settled Land Acts, in order that the agreement might bind the persons entitled in remainder.—*HUGHES v. FANAGAN* (1891), 30 L. R. Ir. 111.—*IR.*

PART XIII. SECT. 1, SUB-SECT. 3.—B.

a. What court will consider—Benefit to parties concerned.—*Re PENDER'S SETTLED ESTATE* (1889), 15 V. L. R. 474.—*AUS.*

k. ——————*On petition for leave to sell under Settled Estate Act, the ct. will consider the interest of all parties concerned, especially of infants, & will not necessarily refuse the petition because a number of those interested are opposed to it.—Ex p. BELLAMY* (1890), 11 N. S. W. Eq. 187; 7 N. S. W. N. 13.—*AUS.*

l. ——————*Re REDMAN'S SETTLED ESTATE* (1890), 11 N. S. W. Eq. 324.—*AUS.*

m. ——————*Re COOPER'S TRUSTS* (1901), 1 S. R. N. S. W. (Eq.) 234; 18 N. S. W. N. 292.—*AUS.*

n. ——————*Re LAWRY'S SETTLED ESTATE* (1918), 19 S. R. N. S. W. 1; 36 N. S. W. N. 9.—*AUS.*

o. ——————*Re HOOPER* (1896), 28 O. R. 179.—*CAN.*

p. ——————*Re CORNELL* (1905), 5 O. W. R. 60; 9 O. L. R. 128.—*CAN.*

q. ——————*Re HOWARD* (1911), 16 W. L. R. 246; 16 B. C. R. 48.—*CAN.*

r. ——————*Re IEVER'S SETTLEMENTS*, [1904] 1 I. R. 492.—*IR.*

t. ——————*Re ELY'S (MARQUIS) ESTATE*, [1905] 1 I. R. 413; 38 I. L. T. 49.—*IR.*

a. ——————*Re BARKER'S WILL* (1903), 23 N. Z. L. R. 359.—*N.Z.*

b. ——————*The consent of the ct. given to a sale of settled land by the tenants for life thereof, where the property was in a valuable position in Wellington, the houses built on it were old, & if pulled down would have to be rebuilt in brick, whilst if they were allowed to remain the tenants for life would receive a very*

small income considering the value of the land.—*Re BUCK'S SETTLED ESTATE* (1904), 23 N. Z. L. R. 899.—*N.Z.*

c. Application for leave to mortgage.]

—This was an application by the trustees of a settled estate, under R. S. O., 1897 (c. 71), for leave to mortgage the estate for the purpose of building, the existing buildings having been destroyed by fire. The settlement contained a clause that the trustees might "sell, but not mortgage, the trust property or any part thereof".—*Held*: this clause of the settlement was not an express declaration that the lands should not be mortgaged within Settled Estates Act, s. 37; & merely meant that the power of sale given to the trustee was not to be construed as including a power to mortgage.—*Re CURRY & WATSON'S SETTLEMENT* (1904), 24 C. L. T. 291; 7 O. L. R. 701; 3 O. W. R. 776.—*CAN.*

d. ——————*Re DARCH* (1914), 26 O. W. R. 100; 6 O. W. N. 107; 16 D. L. R. 875.—*CAN.*

Sect. 1.—Under Settled Land Acts: Sub-sect. 3, C. (a), (b) & (c) i. & ii.]

C. Leave of Court or Consent of Trustees.

(a) *In General.*

2764. Consent of trustees—Who may consent—Trustees entitled to assignee's interest.]—The assignee for value of a life tenant's estate died, having devised that estate *pur autre vie* to trustees during the life of P., aged eleven, with legal remainders over in strict settlement. The original life tenant or *cestui que vie* was aged forty, so that the legal remainders in the estate *pur autre vie* were very unlikely to come into possession. The trustees who were in possession of the settled estates under this devise had full powers of management till P. attained twenty-five & for his whole life if he previously incumbered, but otherwise on attaining twenty-five he took a life interest with possession till he incumbered. The original tenant contracted to sell part of the settled estates under the powers preserved to him by Settled Land Act, 1882 (c. 38), s. 50:—*Held*: in the special circumstances the consent of the trustees was a sufficient consent within the sect. on behalf of the estate of the assignee for value.—*Re MOUNTGARRET & MOORE'S CONTRACT*, [1915] 1 Ch. 443; 84 L. J. Ch. 398; 112 L. T. 939; 31 T. L. R. 189; 59 Sol. Jo. 382.

—.]—*See, also*, No. 2768, *post*.

(b) *Cutting or Sale of Timber.*

See Settled Land Act, 1925 (c. 18), s. 66.

(c) *Lease, Sale or Exchange of Mansion House.*

i. *In General.*

See Settled Land Act, 1925 (c. 18), s. 65.

2765. Lease — Including lease of easement — Or lease of part.]—*SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, No. 2887, *post*.

2766. — — —.]—(1) *Settled Land Act*, 1890 (c. 69), s. 10, which precludes the life tenant (*inter alia*) from leasing "the principal mansion house, if any, on any settled land, & the pleasure grounds & park & lands, if any, usually occupied therewith, without the consent of the trustees or an order of the ct., applies to a park not usually occupied with the principal mansion house, the words "usually occupied therewith" referring merely to the words "lands, if any," immediately preceding them.

Settled Land Act, 1890 (c. 69), s. 10, also applies to the lease of an easement over the same property.

In *Sutherland (Dowager Duchess) v. Sutherland (Duke)*, No. 2887, *post*, it was argued that sect. 10 [of *Settled Land Act*, 1890 (c. 69)] did not apply to a lease of an easement over the principal mansion house park & lands; but *Romer, J.*, said: In my judgment, though sect. 10 does not repeat the words in sect. 6 [the leasing sect.] of *Settled Land Act*, 1882 (c. 38), or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same, it has the same operation & effect as if the words had been repeated (*SWINFEN EADY, J.*).

(2) The word "park" as used in *Settled Land Acts* is not confined to an ancient legal park, but includes an ordinary private park.—*PEASE v.*

COURTNEY, [1904] 2 Ch. 503; 73 L. J. Ch. 760; 91 L. T. 341; 53 W. R. 75; 20 T. L. R. 653; 48

| *Annotation*:—*As to* (1) *Reid. Re Wythes' S. E.* (1908), 98 L. T. 277.

2767. Park—Not confined to legal definition—Ordinary private park.]—*PEASE v. COURTNEY*, No. 2766, *ante*.

2768. Two estates in one settlement—Each estate with mansion house.]—The consent of the trustees of the settlement, required by *Settled Land Act*, 1890 (c. 69), s. 10 (2), to be given to the sale or lease of the principal mansion house on any settled land, need not be communicated to the parties.

Two estates, each of which included a mansion house, were settled by the same instruments, to the same uses. The tenant for life acting under the powers of *Settled Land Acts*, leased one of the mansion houses to his wife. The evidence showed that the lease was advantageous to all the parties entitled under the settlement. Each of the trustees of the settlement, with full knowledge of the facts relating to the proposed lease, approved of it as being for the benefit of the estate, but neither of them gave any formal consent thereto, each being advised that the house in question was not the principal mansion house on the settled land:—*Held*: (1) on the evidence, it was not the principal mansion house; (2) if any consent to the lease was required the trustees had given their consent.—*GILBEY v. RUSH*, [1906] 1 Ch. 11; 75 L. J. Ch. 32; 93 L. T. 616; 54 W. R. 71; 22 T. L. R. 23; 50 Sol. Jo. 26.

Annotation:—*As to* (2) *Reid. Re Copal Varnish Co.*, [1917] 2 Ch. 349.

2769. — — — Building converted into school.]

—Two estates, the B. P. estate, in Kent, & the C. H. estate, in Essex, each having its own principal mansion house, were settled by the same settlement upon the same trusts. The tenant for life had definitely adopted C. H. as his residence. The B. P. estate was a building estate, & its development as such, which had already commenced at the date of the settlement, was subsequently continued until the character of the surrounding neighbourhood had become altered to such an extent as to render a house of the size & pretensions of B. H. quite out of place & very difficult to let. Ultimately, with the sanction of the ct., B. H. & 18 acres of pleasure grounds & park were let on a twenty-one years' lease to a schoolmaster, £200 being first expended out of capital moneys in making the hall suitable for the purposes of a school. The remainder of the pleasure grounds & park, which had originally comprised about 103 acres, was cut up & laid out under a building scheme & a considerable portion sold or let on building leases:—*Held*: in the circumstances, B. H. had ceased to be the principal mansion house on any settled land, & the hall & the pleasure grounds & park & lands usually occupied therewith were no longer subject to the restrictions imposed by *Settled Land Act*, 1890 (c. 69), s. 10.—*Re WYTHES' SETTLED ESTATES*, [1908] 1 Ch. 593; 77 L. J. Ch. 319; 98 L. T. 277; *sub nom. Re WYTHES, WEST v. WYTHES*, 24 T. L. R. 251.

PART XIII. SECT. 1, SUB-SECT. 3.— C. (a).

e. *Consent of trustees—Who may consent.]—Re BENJAMIN (DECEASED)*, [1920] V. L. R. 393.—**AUS.**

f. — — —.]—*Ex p.* (1868), 2 I. R. Eq. 237.—**IR**

g. *Leave of court—Necessity for.]—*

Re DUBLIN, WICKLOW & WEXFORD RY. CO., Ex p. TOTTENHAM (1885), 13 L. R. Ir. 479.—**IR.**

h. — — — *To allow exchange of lands.]—**Settled Land Act*, 1908, s. 70, is confined to a case where a tenant for life owns land which he desires to exchange for the settled land & does not include a case where he desires to

exchange the settled land for land owned by another person. It is therefore doubtful whether the ct. has jurisdiction to sanction this exchange of settled land for other land owned by the tenant for life; & even assuming that the ct. has such jurisdiction, it ought not to exercise it in favour of an exchange which involves an in-

2770. Consent of trustees—Necessity for communication to parties.]—GILBEY v. RUSH, No. 2768 *ante*.

2771. — What amounts to.]—GILBEY v. RUSH, No. 2768, *ante*.

ii. Exercise of Discretion by Court.

See Settled Land Act, 1925 (c. 18), s. 65.

2772. General rule.]—(1) In the Settled Land Acts, 1882 & 1890, the paramount object of the Legislature was the well-being of settled land.

An estate including an old family mansion house became vested under a settlement in a tenant for life, a young man who had mortgaged his life estate to a money-lender who had brought an action for foreclosure. The tenant for life, who was too poor to reside on the estate, had contracted under Settled Land Acts to sell the whole for a good price to a wealthy purchaser, & petitioned under Settled Land Act, 1890 (c. 69), s. 10, for the sanction of the ct. to the sale of the mansion house & demesne lands. The remaindermen opposed the petition, desiring that the mansion house & demesne lands should remain in the family :—*Held* : the ct. in the exercise of its discretion under Settled Land Acts must have regard to the well-being of the land & the interests of the persons from whose industrial occupation the rents & profits were derived, as well as to the interests of those entitled under the settlement ; & to refuse the sanction in such a case would be to defeat the object of the Legislature.

The question arises under the restriction as to the mansion house & the lands, pleasure grounds & park usually occupied therewith. It scarcely requires argument to show that if the commercial interest is alone to be considered the withdrawing from the sale of the mansion house & the pleasure grounds usually occupied therewith, in this particular case, would have a very serious depreciatory effect upon the sale of the remainder. The 7000 acres by themselves, or the odd 33,000 acres by themselves, certainly would not be likely to realise, if sold separately, the gross sum which would be obtained by selling both as one estate. But the question your lordships have to determine is whether, under the circumstances of this particular case, consent should be given to the sale of the whole (LORD HALSBURY, C.).

(2) I am not certain that any public considerations intervene when the question of the sale of heirlooms arises (LORD HALSBURY, C.).—BRUCE (LORD HENRY) v. AILESBUURY (MARQUESS), [1892] A. C. 356 ; 62 L. J. Ch. 95 ; 67 L. T. 490 ; 57 J. P. 164 ; 41 W. R. 318 ; 8 T. L. R. 787 ; 36 Sol. Jo. 711 ; 1 R. 37, H. L. ; *affg.* S. C. *sub nom.* *Re AILESBUURY'S (MARQUIS) SETTLED ESTATES*, [1892] 1 Ch. 506, C. A.

Annotations :—As to (1) Consd. Sutherland v. Sutherland, [1893] 3 Ch. 169. *Apld.* Richardson, Richardson v. Richardson, [1900] 2 Ch. 778. *Consd.* Re Aldam's S. E., [1902] 2 Ch. 46. *Reid.* Re Ailesbury & Inveagh, [1893] 2 Ch. 345 ; A.-G. v. Owen, A.-G. v. Coulson, [1899] 2 Q. B. 345 ; Re Bath & Wells (Bp.), [1899] 2 Ch. 138 ; Re Mundy & Roper's Contract, [1899] 1 Ch. 275 ; Re Calverley's S. E., [1904] 1 Ch. 150 ; Re Marshall's Settlement, Marshall v. Marshall, [1905] 2 Ch. 325 ; Re Stamford & Warrington, Payne v. Grey, [1916] 1 Ch. 404. *As to (2) Reid.* Re Hope, De Cetto v. Hope, [1899] 2 Ch. 679. *Generally, Mentd.* Mogridge v. Clapp, [1892] 3 Ch. 382 ; Chandler v. Bradley, [1897] 1 Ch. 315.

2773. Condition as to provision for heirlooms.]—

vestment of the trust funds in a purchase of a speculative nature.—*Re POTTER'S TRUST* (1914), 33 N. Z. L. 11. 1472.—N. Z.

PART XIII. SECT. 1, SUB-SECT. 3.— C. (c) II.

k. Condition of residence.]—A prin-

cipal mansion house & demesne in the county of Dublin were settled upon the same trusts as lands in the counties of Mayo & Sligo, with a condition of forfeiture on non-residence in, selling of, or letting of said mansion house & demesne, which attached both to them, & to the other lands settled :—*Held* :

they were a " principal mansion house " & demesne within Settled Land Act, 1882, s. 15 ; the condition of forfeiture was void for the purposes of that Act ; & the ct., on the facts, would authorise a temporary letting of them to be made.—*Re THOMPSON'S WILL* (1888), 21 L. R. Ir. 109.—IR.

Where testator bequeathed to his trustees certain chattels & directed that the same should be considered " As annexed to his mansion house Woodthorpe Hall, near Sheffield, as heirlooms, & be held in trust for the persons for the time being entitled to the mansion house," on summons under Settled Land Act, 1882 (c. 38), s. 15, the ct. made an order for sale of the mansion house, but ordered the summons to be amended by including the heirlooms, & ordered an inventory of the heirlooms, & an affidavit verifying the inventory to be produced, & the matter to be mentioned again in the presence of counsel for the trustees.

On the directions of the ct. being complied with, & the matter being mentioned again, the ct. made an order for sale of the heirlooms, with liberty for the tenant for life to bid at the sale, the cost to come out of the proceeds.—*Re BROWN'S WILL* (1884), 27 Ch. D. 179 ; 53 L. J. Ch. 921 ; 51 L. T. 156 ; 32 W. R. 891.

2774. Consent of mortgagees refused.]—*Re BEECHWOOD MANSION HOUSE & PARK* (1886), 2 T. L. R. 907, C. A.

2775. — Life interest mortgaged to full value.]

—(1) The ct., in the exercise of the discretion given by Settled Land Act, 1882 (c. 38), s. 15, in respect to ordering a sale of the mansion house & park on the settled land where the trustees of the settlement do not consent, will not, where the tenant for life has mortgaged his life interest to its full value, make the order on his application without full information as to the proposed sale & the consent of the mtgees.

(2) A tenant for life cannot divest himself of the powers conferred by the Act, but he may by assignment for value incapacitate himself from exercising those powers as against the assignee for value (LOPES, L.J.).—*Re SEBRIGHT'S SETTLED ESTATES* (1886), 33 Ch. D. 429 ; 56 L. J. Ch. 169 ; 55 L. T. 570 ; 35 W. R. 49, C. A.

Annotations :—As to (1) Reid. Cardigan v. Curzon-Howe (1888), 40 Ch. D. 338 ; *Re Dickinson & Kelsall's Contract*, [1908] 1 Ch. 218.

2776. Family seat—Sale directed by testator on death of life tenant.]—W., by will, after giving certain chattels in K. mansion house to be enjoyed by his eldest son as heirlooms during his life, devised the K. mansion house & all other his real estate to trustees upon trust out of the rents & profits to pay certain annuities to his daughters, & subject thereto to pay the rents & profits to his son during his life, & after his death to sell the same & divide the proceeds as therein mentioned. The son desired to sell the mansion house with the rest of the estate under the powers given him by Settled Land Acts. The trustees refused their consent :—*Held* : the mansion house not being a family seat, & testator having himself directed its sale at the death of the tenant for life, the case was not within the reasons for the exception of the mansion house from the full power of sale given by Settled Land Acts to the tenant for life, & he ought to be allowed to sell at his discretion.—*Re WORTHAM'S SETTLED ESTATES* (1896), 75 L. T. 293.

2777. Condition of residence—Tending to restrain exercise of powers.]—*Re PAGET'S SETTLED ESTATES*, No. 2739, *ante*.

Consent of trustees.]—See No. 2768, *ante*.

Sect. 1.—Under Settled Land Acts: Sub-sect. 3, C. (d) & (e), & D.; sub-sect. 4, A., B., C. & D. (a) & (b).]

(d) *Power to Compromise.*

See Settled Land Act, 1925 (c. 18), s. 58.

(e) *General Powers under Order of Court.*

See Settled Land Act, 1925 (c. 18), s. 64.

D. Vesting Deed.

See Settled Land Act, 1925 (c. 18), s. 13; Part XIII., Sect. 1, sub-sect. 14, post.

SUB-SECT. 4.—POWERS IN RESPECT OF APPLICATION OF CAPITAL MONEY AND LAND ACQUIRED.

A. What Moneys Capital Moneys.

See Sub-sect. 1, H. (b), ante.

B. Power of Tenant for Life to Direct Application.

See Settled Land Act, 1925 (c. 18), s. 75 (2).

2778. Bonâ fide exercise of power—How far controlled by court or trustees—Investment authorised by settlement.]—The exercise in good faith of the power of direction as to the investment or other application of capital moneys in the hands of the trustees given to the tenant for life by Settled Land Act, 1882 (c. 38), s. 22 (2), cannot be controlled by the trustees or by the ct.—*Re COLEBRIDGE'S (LORD) SETTLEMENT*, [1895] 2 Ch. 704; 73 L. T. 206; 44 W. R. 59; 11 T. L. R. 596; 30 Sol. Jo. 725; 13 R. 767.

Annotations:—Consd. Re Hunt's S. E., Bulteel v. Lawdeshayne, [1905] 2 Ch. 418; *Re Gladwin's Trust*, [1919] 1 Ch. 232. *Reid. Re Hotham, Hotham v. Doughty*, [1901] 2 Ch. 790; *Re Cleveland's S. E.*, [1902] 2 Ch. 350; *Re Theobald* (1903), 19 T. L. R. 536; *Re Keck's Settlement*, [1904] 2 Ch. 22.

2779. ——— Proper investigation of title & value of security.]—Upon a direction under Settled Land Act, 1882 (c. 38), s. 22 (2), given by the tenant for life to the trustees for the purposes of Settled Land Act to invest capital moneys in their hands upon a specified mtge. of real estate, the ct. declared that the trustees were not bound to invest upon the mtge. unless & until they were satisfied that the direction had been given upon a proper investigation as to title, & upon a proper report as to the value of the proposed security, & upon proper advice as to the form of the mtge., & on being so satisfied the trustees were bound to make the investment.—*Re HOTHAM, HOTHAM v. DOUGHTY*, [1902] 2 Ch. 575; 71 L. J. Ch. 789; 87 L. T. 112; 50 W. R. 692; 46 Sol. Jo. 685, C. A.

Annotations:—Apld. Re Peel's S. E., [1910] 1 Ch. 389. *Reid. Re Cleveland's S. E.*, [1902] 2 Ch. 350; *Re Theobald* (1903), 19 T. L. R. 536; *Re Keck's Settlement*, [1904] 2 Ch. 22; *Re Hunt's S. E., Bulteel v. Lawdeshayne*, [1905] 2 Ch. 418.

2780. ——— Not a suitable investment for trust funds.]—*Re HUNT'S SETTLED ESTATES, BULTEEL v. LAWDESHAYNE*, No. 2783, *post*.

2781. ——— ———.]—*Re GLADWIN'S TRUST*, No. 2794, *post*.

2782. ——— Investigation of title of property proposed to be acquired.]—*Re THEOBALD* (1903), 19 T. L. R. 536.

2783. What is bonâ fide exercise—Fraudulent collusion with interested persons.]—A tenant for life under Settled Land Act, 1882 (c. 38), directed the trustees of the settlement to invest capital moneys in their hands in the purchase of certain leasehold houses. The trustees procured the report of an independent surveyor showing that the proposed investment, though within the words

of the power given by the Act, was undesirable, & they declined to proceed with the purchase:—*Held*: (1) assuming the direction was given *bonâ fide*, the trustees were not bound to act upon it; (2) it was not given *bonâ fide*.—*Re HUNT'S SETTLED ESTATES, BULTEEL v. LAWDESHAYNE*, [1906] 2 Ch. 11; 75 L. J. Ch. 496; 94 L. T. 747, C. A.

Annotations:—Apld. Re Gladwin's Trust, [1919] 1 Ch. 232; *Re Cowley S. E.*, [1926] Ch. 725. *Reid. Shaw v. Cates*, [1909] 1 Ch. 389.

2784. ——— Whether wealth of tenant for life & remainderman apart from settlement considered.]—*Re GLADWIN'S TRUST*, No. 2794, *post*.

2785. Principles governing sanction of court—Relevance of decisions under Lands Clauses Acts.]—

(1) The question whether any particular application of capital money under the Settled Land Acts should be sanctioned by the ct. must be determined entirely by the code of rules laid down in Settled Land Acts, & not by reference to the decisions as to the application of purchase-money under Lands Clauses Act.

(2) A scheme was proposed by a tenant for life for the application of "capital moneys" under the powers of Settled Land Acts in the following improvements:—(a) building additions to the mansion house & improving its architectural appearance; (b) building a chapel for Roman Catholic service; (c) building new stables, the present stables being inconvenient & insufficient; (d) building a house for the residence of the estate agent:—*Held*: none of the proposed improvements were such as the Acts authorised for the application of capital moneys.—*Re GERARD'S (LORD) SETTLED ESTATE*, [1893] 3 Ch. 252; 63 L. J. Ch. 23; 69 L. T. 393; 37 Sol. Jo. 648; 7 R. 227; *sub nom. Re GERARD'S (LORD) SETTLED ESTATES, Re EASTWELL PARK ESTATE*, 9 T. L. R. 587, C. A.

Annotations:—As to (2) Consd. Stanford v. Roberts, [1901] 1 Ch. 440; *Re De Crespigny's S. E.*, [1914] 1 Ch. 227. *Reid. Re Tucker's S. E.*, [1895] 2 Ch. 468; *Re Wright's S. E.* (1900), 83 L. T. 159.

2786. Realisation of securities to provide capital money.]—*Re GLADWIN'S TRUST*, No. 2794, *post*.

What investments are suitable.]—*See Sub-sect. 4, D. (a), post.*

Land improvements with capital money.]—*See LAND IMPROVEMENT*, Vol. XXX., p. 290, Nos. 170-173.

C. Option of Tenant for Life to Direct Application.

See Settled Land Act, 1925 (c. 18), s. 77.

2787. Tenant for life has same power over money as over settled land.]—*Re GEE, PEARSON GEE v. PEARSON*, No. 2694, *ante*.

2788. Procedure where no tenant for life.]—T., by his will, devised real estate to trustees upon trust to apply the whole, or such part as they should think fit, for the benefit of his son C. or his wife or children in the usual form of a discretionary trust to protect the son's interest against bkpcy., with remainders over. The trustees had no power of sale. They presented a petition under Settled Estates Act, 1877 (c. 18), for approval of a conditional contract for sale, & payment of the purchase-money to them, with leave to invest it as capital money arising under Settled Land Act, 1882 (c. 38). Testator's son was living, & consented. His wife was made a consenting party to petition in respect of the interest which she might have under the discretionary trust:—*Held*: Settled Land Act, 1882 (c. 38), s. 33, applied & the money might be invested as capital money under that Act, though there was no tenant for life to exercise the option given by that sect.—*Re TESSYMAN'S TRUSTS* (1897), 77 L. T. 484; 42 Sol. Jo. 96.

2789. Whether option extends to money subject to discretionary power.]—*Re GEE, PEARSON GEE v. PEARSON*, No. 2694, *ante*.

2790. Option to have money paid into court—Investment at direction of court.]—*COOKES v. COOKES*, No. 2854, *post*.

D. Modes of Application.

(a) Investment.

See Settled Land Act, 1925 (c. 18), s. 73 (1) (i); Trustee Act, 1925 (c. 19), ss. 1–7.

2791. Investment in debenture stock—Trust for investment in land.]—Where under a will money is bequeathed to trustees in trust to lay it out in the purchase of land, to be settled in strict settlement, the trustees may invest it in debenture stock in accordance with Settled Land Act, 1882 (c. 38), s. 21.—*Re MACKENZIE'S TRUSTS* (1883), 23 Ch. D. 750; 52 L. J. Ch. 726; 48 L. T. 936; 31 W. R. 948.

Annotations:—Folld. Re Tennant (1889), 40 Ch. D. 591. *Reid. Re Mundy's S. E.*, [1891] 1 Ch. 399.

2792. — Investment under Local Loans Act, 1875 (c. 83), s. 27.]—(1) Testator, having devised his real estate to A. for life with remainder to his issue in tail, gave his personal estate to trustees upon trust to convert same into money, & to lay out the produce in the purchase of freehold lands in Ireland to be settled to uses corresponding with the limitations of the real estate. Upon an originating summons by the trustees, one of whom was the tenant for life, for the direction of the ct., it appearing that Irish land was at present an unsafe investment:—*Held*: the trustees might defer purchasing Irish land until they could prudently do so, & might in the meantime invest the personal estate under the powers of Settled Land Act, 1882 (c. 38), ss. 21, 23.

(2) Trustees whose powers of investment are dependent on Settled Land Act, 1882 (c. 38), s. 21, authorising trustees to invest capital trust money in the debentures or debenture stock of any railway co. "having for ten years next before the date of investment paid a dividend on its ordinary stock or shares," may not invest, under the powers of Local Loans Act, 1875 (c. 83), s. 27, in debentures or debenture stock issued by a local authority under that Act, unless, *qu.* the local authority has for ten years paid a dividend.—*Re MABERLY, MABERLY v. MABERLY* (1886), 33 Ch. D. 455; 56 L. J. Ch. 54; 55 L. T. 164; 34 W. R. 771; 2 T. L. R. 832.

Annotation:—Consd. Re Tattersall, Topham v. Armitage, [1906] 2 Ch. 399.

2793. Investments on leaseholds—Security bad to knowledge of trustees.]—*Re HUNT'S SETTLED ESTATES, BULTEEL v. LAWDESHAYNE*, No. 2783, *ante*.

2794. — Leasehold residence subject to heavy ground rent.]—Settled Land Act, 1882 (c. 38), s. 22 (2), is limited by sect. 53 & does not entitle a life tenant to insist on applying capital money on an investment not advisable for an ordinary trustee of trust funds.

A life tenant directed the trustees of settled real estate to raise £3,500 out of securities worth £9,600, representing the proceeds of sale of the entire real estate & to apply the £3,500 in the

purchase of a leasehold residence he had contracted to buy. The lease had eighty-three years to run, but the ground rent was £190. The purchase was advised by the life tenant's valuers but deprecated by the trustees' valuer, & the remainderman being an infant, the trustees declined to proceed without the ct.'s sanction:—*Held*: as no ordinary trustee would be justified in making such an investment, the ct. could not sanction it; & the fact that the life tenant was buying the house for a residence, & both he & the infant remainderman were wealthy persons independently of the settlement, made no difference.

Qu.: whether a life tenant can compel trustees to realise securities on which capital money has been invested under Settled Land Act, 1882 (c. 38), s. 25 (1), in order to provide capital money for a purpose specified in some other sub-sect.—*Re GLADWIN'S TRUST*, [1919] 1 Ch. 232; 88 L. J. Ch. 182; 120 L. T. 475; 63 Sol. Jo. 265.

2795. Right of trustees to choose broker.]—Upon an investment of capital moneys arising under Settled Land Acts, the tenant for life is not entitled to dictate to the trustees of the settlement as to what broker they shall employ in the matter. The trustees may select their broker as well as their solicitor.—*Re CLEVELAND'S (DUKE) SETTLED ESTATES*, [1902] 2 Ch. 350; 71 L. J. Ch. 763; 86 L. T. 678; 50 W. R. 508; 18 T. L. R. 610; 46 Sol. Jo. 514.

Annotation:—Reid. Re Theobald (1903), 19 T. L. R. 536.

Purchase of land.]—*See* Sub-sect. 4, D. (c), *post*.
Money paid for lease or reversion.]—*See* Sub-sect. 4, D. (c), *post*.

(b) Discharge of Incumbrances.

See Settled Land Act, 1925 (c. 18), s. 73 (1) (ii).

2796. Incumbrances on part of estates—Capital moneys from another part—Two estates in same settlement.]—A settlement of land was made in 1853 by a private Act of Parliament. By this Act the estates were vested in the trustees thereby appointed, upon trust by sale or mtge. thereof to raise money for the purpose of discharging certain incumbrances & liabilities. The Act provided that the trustees might from time to time absolutely sell & dispose of all or any part of the estates mentioned in a schedule, provided that the trustees should not sell any of the lands situate in the parishes of C. & H., unless it should be absolutely necessary for the purposes of the Act to do so, & in case of such necessity should not sell any of those lands until all the rest of the estates were sold. After Settled Land Act, 1882 (c. 38), had come into operation, the tenant for life entered into a contract to sell some of the lands situate in the parishes of C. & H. The whole of the rest of the estates had not then been sold:—*Held*: (1) the power of sale conferred on the tenant for life by Settled Land Act was an absolute power over & above that given to the trustees by private Act, & he was therefore entitled to sell free from the restriction imposed by private Act on the trustees; (2) under Settled Land Act, 1882 (c. 38), s. 2 (2), the purchase-money could be applied in discharging a mtge. which affected part of the land sold & another mtge., which affected another part of the settled estate & it was not necessary that the other

PART XIII. SECT. 1, SUB-SECT. 4.— D. (a).

1. *Application by trustees for fund for investment—Power of court to refuse.]—*On an application for payment out of a fund in ct., proceeds of the sale of certain settled estates for the purpose of investment by peti-

tioners as trustees, they having been appointed the trustees under the will which devised the settled estates, which application was opposed by the official guardian on behalf of the remainderman:—*Held*: the practice & current of authority were against what was asked by petitioners, & they were not entitled to it as a matter of right,

& the application dismissed.—*Re SMITH'S TRUSTS* (No. 2) (1889), 18 O. R. 327.—*CAN.*

PART XIII. SECT. 1, SUB-SECT. 4.— D. (b).

2796 i. *Incumbrances on part of estates—Capital moneys from another part—Two estates in same settlement.]—*

Sect. 1.—Under Settled Land Acts: Sub-sect. 4, D. (b), (c) & (d).]

mtge. should be one affecting the whole of the settled estates.—*Re CHAYTOR'S SETTLED ESTATE ACT* (1884), 25 Ch. D. 651; 53 L. J. (Ch. 312; 50 L. T. 88; 32 W. R. 517.

Annotation:—Reid. Re Stamford's S. E. (1889), 43 Ch. D. 84.

2797. ————.]—Testator, who died in 1878, devised his W. & S. estates to his son J. for life, with remainder to such of the children of J. as should attain twenty-one, & devised his residuary estate to J. absolutely. At the testator's death the W. estate was subject to a mtge. in fee; the S. estate was unincumbered. J., in 1887, sold part of the S. estate under Settled Land Act, 1882 (c. 38), & by his direction the trustees under the Act applied the money in part discharge of the mtge. on W. J. died intestate in 1888, leaving only infant children. It was decided after his death that the contingent remainders as to the S. estate failed, but that as to the W. estate they did not. The unsold part of the S. estate thus became the absolute property of the eldest son & heir-at-law of J., who then claimed a charge on the W. estate for the proceeds of sale which had been applied in part discharge of the mtge., on the ground that as the S. & the W. estate did not devolve in the same way, they were different settled estates, & capital money arising from one was not properly applied in paying off an incumbrance on the other:—*Held*: there was only one settlement & one settled estate, & the application, before the parts of that estate had devolved in different ways, of capital money arising from one part in discharging an incumbrance on another part of the estate was within the powers of the Act, & J.'s heir was not entitled to any relief.—*Re FREME, FREME v. LOGAN*, [1894] 1 Ch. 1; 63 L. J. Ch. 139; 69 L. T. 613; 42 W. R. 119; 7 R. 1, C. A.

2798. ———— *Proceeds of sale of heirlooms—Vesting absolutely in remainderman if unsold.*—The money arising by the sale, on the application of the tenant for life with the sanction of the ct. of chattels treated in a settlement as heirlooms, & so far as the rules of law & equity would permit annexed to the settled freehold land, may be applied in the discharge of incumbrances affecting the inheritance of the settled land, without keeping such incumbrances on foot for the benefit of the infant remainderman in whom the heirlooms would, if unsold, have vested absolutely on his attaining twenty-one.—*Re MARLBOROUGH'S (DUKE) SETTLEMENT, MARLBOROUGH (DUKE) v. MARJORIBANKS* (1886), 32 Ch. D. 1; 55 L. J. Ch. 339; 54 L. T. 914; 31 W. R. 377; 2 T. L. R. 323, C. A.

Annotations:—Apld. Re Stamford's Estate (1887), 56 L. T. 484; *Re Stafford's Settlement & Will, Gerard v. Stafford*, [1904] 2 Ch. 72. *Reid. Re Sebright's S. E.* (1886), 33 Ch. D. 429; *Clarke v. Thornton* (1887), 35 Ch. D. 307; *Re Beaumont's S. E.* (1888), 58 L. T. 916; *Re Radnor's Will Trusts* (1890), 45 Ch. D. 402; *Hampden v. Buckinghamshire*, [1893] 2 Ch. 531; *Re Marlborough & Governors of Queen Anne's Bounty*, [1897] 1 Ch. 712.

2799. ————.]—*Re STAFFORD'S (LORD) SETTLEMENT & WILL, GERARD v. STAFFORD*, No. 2705, *ante*.

2800. ———— *Different settlements with same limitations.*—*Re MONSON'S (LORD) SETTLED ESTATES*, No. 3064, *post*.

2801. ————.]—*Re STAFFORD'S (LORD) SETTLEMENT & WILL, GERARD v. STAFFORD*, No. 2705, *ante*.

2802. ————.]—*Re SYMONS, SYMONS-JEUNE v. BUNBURY*, No. 3045, *post*.

2803. Rentcharge—Arrears.—Arrears of a jointure rentcharge, which was limited & secured by powers of entry & distress & by a term of years & trusts thereof in the usual way, are an "incumbrance affecting the inheritance of the settled land" within Settled Land Act, 1882 (c. 38), s. 21 (ii), & may in a proper case, where their discharge would be the wisest course for all concerned, be discharged by the trustees of the settlement out of capital moneys in their hands, but conditionally upon the tenant for life agreeing that such payment shall be without prejudice to the question, should it arise, of the ultimate incidence of the liability for the arrears as between himself & the remainderman.—*Re MANCHESTER'S (DUKE) SETTLEMENT*, [1910] 1 Ch. 106; 79 L. J. Ch. 48; 101 L. T. 892; 26 T. L. R. 5; 53 Sol. Jo. 868.

2804. Annuity—Incumbrance on tithes.—By a charter in the reign of James I. a grant was made of certain tithes issuing out of the rectory of St. Botolph Without, Aldgate, in the city of London, to persons named in the grant, their heirs & assigns. In 1804, by a marriage settlement, it was provided that an annuity or clear yearly rentcharge of £640 should be issued & be payable out of the tithes in question for the term of one thousand years. The tithes afterwards became vested in the trustees of a will, subject to the annuity created by the settlement. The trustees sold part of the tithes to certain railway cos. for the sum of £30,670. The tenant for life under the will contended that the trustees of the will might, under Settled Land Act, 1882 (c. 38), s. 33, invest or apply the £30,670 as capital money arising under that Act. By sect. 21 of same statute it is provided that capital money shall be applied, *inter alia*, in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement. The tenant for life asked that the trustees might be at liberty to apply to the £30,670 in the purchase of the annuity created by the settlement with a view to its discharge:—*Held*: the annuity created by the settlement was not a rent, because it did not issue out of a corporeal hereditament; but it was an incumbrance on the tithes, & an incumbrance affecting the inheritance within Settled Land Act, 1882 (c. 38), therefore the trustees might be at liberty to purchase the annuity with a view to its discharge.—*Re ESDAILE, ESDAILE v. ESDAILE* (1886), 54 L. T. 637.

Annotation:—Reid. Re Gisborough's S. E., [1921] 2 Ch. 39.

2805. Mortgage—Long term.—The proceeds of settled land sold by the tenant for life under Settled Land Act, 1882 (c. 38), can be applied in paying off a debt secured by a mtge. of a long term.—*Re FREWEN, FREWEN v. JAMES* (1888), 38 Ch. D. 383; 57 L. J. Ch. 1052; 59 L. T. 131; 36 W. R. 840.

Annotations:—Apld. Re Gisborough's S. E., [1921] 2 Ch. 39. *Reid. Re Manchester's Settlement*, [1910] 1 Ch. 106.

2806. ———— *Tenant for life subject to term for securing incumbrances.*—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, No. 2834, *post*.

2807. Liability to repair highway—Ratione tenuræ.—*Qu.*: whether a liability to repair a highway *ratione tenuræ* on settled land is an incumbrance within Settled Land Act, 1882 (c. 38), s. 21 (ii).—*Re STAMFORD & WARRINGTON (EARL)*,

Purchase-money of settled lands applied, at the instance of the tenant for life, in redemption of rentcharges pay-

able to the Board of Works for loans for the drainage & improvement of other lands settled upon the like uses

—*Re NAVAN & KINGSCOURT RY. CO., Ex p. DYAS* (1888), 21 L. R. 1r. 369.—*Ex*.

PAYNE v. GREY, [1911] 1 Ch. 648; 80 L. J. Ch. 361; 105 L. T. 12; 75 J. P. 346; 27 T. L. R. 356; 55 Sol. Jo. 483; 9 L. G. R. 719.

2808. ———.]—A liability of the owners & occupiers of a settled estate to repair a highway *ratione tenuræ* is not an incumbrance which the trustees have power to discharge or redeem out of capital moneys in their hands under Settled Land Act, 1882 (c. 38), s. 21 (ii).—*Re HODGSON'S SETTLED ESTATE, ALTAMONT v. FORSYTH*, [1912] 1 Ch. 784; 81 L. J. Ch. 376; 106 L. T. 456.

2809. Death duties—Estate duty on heirlooms—Succession duty on jointure.—In 1889 estates were settled in strict settlement & heirlooms were settled upon trusts to correspond as nearly as might be to the uses of the freeholds. Under that settlement the seventh Earl of Egmont became tenant for life & the eighth became tenant for life in remainder. The seventh Earl died in 1897. Under a power contained in the settlement the eighth Earl granted to his wife a jointure "free from all deductions." He died in 1910. Estate duty & succession duty on the heirlooms were not paid in 1897, & the Crown now claimed the duties & interest thereon. The trustees had in their hands investments representing capital moneys & rents accrued during the lives of the eighth & the present Earl:—*Held*: the settlement must be treated as one settlement of the estates & of the heirlooms; the interest must be paid out of the income of the estate accrued during the lives of the tenants for life; capital moneys raised from other parts of the settled property might be applied in discharging incumbrances on the heirlooms; & according to the true construction of the settlement & grant the succession duty on the jointure must be paid out of the capital moneys.—*Re EGMONT'S (EARL) SETTLED ESTATES, LEFROY v. EGMONT*, [1912] 1 Ch. 251; 81 L. J. Ch. 250; 106 L. T. 292.

2810. Portions—When trustees entitled to raise out of capital.—By a settlement dated Oct. 2, 1906, lands & other hereditaments in Yorkshire were settled in the events which happened to the use of trustees for a term of ninety-nine years if G. should so long live upon the trusts therein mentioned, & subject thereto to the use of G. for life, & after his death to the use that his wife should receive during the remainder of her life a yearly rentcharge of £800, & subject & charged as aforesaid to the use of trustees for the term one thousand years from the death of G. upon the trusts thereafter declared with divers remainders over. The trusts of the one thousand years' term were, in the event which happened of G. leaving five younger children, that the trustees "shall," after the death of G. or in his lifetime, at his request in writing raise the sum of £25,000 for portions to go to or amongst all or any of the younger children of G. & their issue as G. should by deed or will appoint. In a deed dated Nov. 4, 1920, appointing this sum amongst these younger children & their issue, G. requested the trustees to raise this sum by any means authorised by the settlement or by law or preferably, if the law permitted, out of capital moneys; & on Jan. 13, 1921, G. in writing requested & directed his trustees to raise the sum out of capital moneys.

This summons raised the question whether the trustees could & ought to comply with G.'s direction. There was evidence that it was desirable to do so if it was lawfully possible:—*Held*:

although Settled Land Act, 1882 (c. 38), s. 21, did not sanction the application of capital moneys in the manner directed, the ct. would sanction such application subject to the consent being obtained of incumbrancers or persons whose interests had priority to the one thousand years' term, because if, as the trustees were bound to do at the direction of G., they raised the sum of £25,000 by mtgc. of the reversionary term of one thousand years, such mtgc. would be an incumbrance "affecting the inheritance" within s. 21 (ii), so that it could at once be discharged out of capital moneys. It was not the practice of the ct. to leave trustees to do indirectly what it would involve less expense to do directly.—*Re GIBBOROUGH'S (LORD) SETTLED ESTATES*, [1921] 2 Ch. 39; 90 L. J. Ch. 400; 125 L. T. 701; 65 Sol. Jo. 553.

(c) *Purchase of Land.*

See Settled Land Act, 1925 (c. 18), ss. 73 (i) (xi), (2), s. 74.

2811. Power to buy certain land—Purchase of other land.—*Re HILL, HILL v. PILCHER*, No. 2697, ante.

2812. Purchase of equity of redemption.—*Re RADNOR'S (EARL) SETTLED ESTATES*, [1898] W. N. 174.

2813. Repurchase of land sold—Sale in ignorance of defect in title.—A tenant for life sold a public-house, portion of a settled property. After conveyance it was found that the public-house was subject to a reversionary lease, granted by the predecessor in title of the tenant for life, of which all parties were ignorant:—*Held*: (1) this did not furnish any ground for rescission; (2) the repurchase of the public-house by the trustees out of capital moneys in their hands might be sanctioned.—*Re TYRELL, TYRELL v. WOODHOUSE* (1900), 82 L. T. 675; 64 J. P. 665.

2814. Settled land subject to charges—Jointure & portions—Land purchased with proceeds of sale of heirlooms—Whether subject to charges.—Where land is settled & chattels are also settled to devolve with the land as heirlooms, the settled land being charged with jointures & portions for younger children, on a sale of the heirlooms under Settled Land Act, 1882 (c. 38), s. 37, & the investment of the proceeds in land, the land so purchased is not subject to the charges created by the settlement affecting the land settled.—*Re MARLBOROUGH (DUKE) & GOVERNORS OF QUEEN ANNE'S BOUNTY*, [1897] 1 Ch. 712; 66 L. J. Ch. 323; 76 L. T. 388; 45 W. R. 426; 41 Sol. Jo. 387.

Investments in leaseholds.—See Nos. 2793, 2794, ante.

(d) *Money in Court.*

See Settled Land Act, 1925 (c. 18), s. 73 (1).

2815. Payment out to trustees—Notice to remainderman of proposed investments—Whether imposed as condition.—Where funds of large amount were in ct., representing the proceeds of sale of settled lands which were vested in a tenant in tail who was restrained by statute from alienating, the funds were, on the application of the tenant in tail, ordered to be paid out to trustees appointed for the purposes of Settled Land Acts, 1882 & 1884; but the ct. declined to direct the trustees to give notice of any intended investments to the tenant in tail next in remainder.—*Re BOLTON ESTATES ACT*, 1863 (1885), 52 L. T. 728.

2816. — Fund over one thousand pounds not arising under Settled Land Acts—Form of applica-

Sect. 1.—Under Settled Land Acts: Sub-sect. 4, D. (d), (e), (f), (g) & (h), & E.; sub-sect. 5, A.]

tion—Settled Land Act Rules, 1882, r. 2.]—An application for payment out of ct. to Settled Land Act trustees of a fund exceeding £1,000, which has not arisen under Settled Land Act, 1882 (c. 38), but has been derived from another source & is liable to be laid out in the purchase of land to be made subject to the settlement, may be made by petition instead of by summons in chambers under above rule.—*Re TORRY HILL ESTATE, PEMBERTON v. PEMBERTON*, [1909] 1 Ch. 468; 78 L. J. Ch. 373; 100 L. T. 433.

See, now, R. S. C. (Law of Property & other Acts), 1925, r. 11.

2817. — Beneficiary resident abroad—Transmission of capital moneys.]—L. was entitled to a share of certain land in Wales, & by his will he devised the interest on the principal of all money received by his exors. from Wales to his wife for life, & after her death, then his son was to have the whole of the money on attaining twenty-one. L. died domiciled in America, & his wife & son, who was a minor, were resident there. Trustees were appointed under the Settled Land Act of the share of L. in the land, & with the consent of the other beneficiaries it was sold. Application was made that L.'s share might be transmitted to his exors. in America to be re-invested there:—*Held*: the ct. had no power to allow the money to be sent to America, & if necessary, trustees must be appointed under the Act to receive it in that country.—*Re LLOYD, EDWARDS v. LLOYD* (1886), 54 L. T. 643.

Purchase-money on compulsory purchase.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 245, Nos. 1442–1446; *CHARITIES*, Vol. VIII., p. 359, No. 1565.

Estate of lunatic.]—*See LUNATICS*, Vol. XXXIII., p. 229, No. 1403.

(c) *Purchase-Money for Lease or Reversion.*

See Settled Land Act, 1925 (c. 18), s. 79.

2818. Cases under Lands Clauses Consolidation Act, 1845 (c. 18), s. 74—Authorities on Settled Land Act, 1882 (c. 38), s. 34.]—Settled Land Act, 1882 (c. 38), s. 34, & Lands Clauses Consolidation Act, 1845 (c. 18), s. 74, are similar enactments, so that where the facts are similar decisions on sect. 74 are authorities on sect. 34.

As between tenant for life & remainderman, where lands subject to a beneficial lease are sold under Settled Land Act, 1882 (c. 38), the tenant for life will, during the unexpired period of the term, be entitled to so much only of the income of the invested purchase-moneys as equals the rents under the lease, & the rest of that income must be accumulated & invested for the benefit of the inheritance until the date when the lease would have expired.—*COTTRELL v. COTTRELL* (1885), 28 Ch. D. 628; 54 L. J. Ch. 417; 52 L. T. 486; 33 W. R. 361.

Annotations:—Apld. Re Westminster's S. E., Westminster v. Shaftesbury, [1921] 1 Ch. 585. *Reid. Re Wix, Hardy v. Lemon*, [1916] 1 Ch. 279.

2819. Proceeds of sale of leaseholds—Provision of annuity to tenant for life—Exhausting proceeds in period of lease.]—Testator bequeathed a leasehold house to his exors. & trustees in trust to permit his wife to occupy the same during her widowhood, with a provision for payment of ground rent, rates, taxes, & outgoings execution

of repairs, & performance of covenants out of testator's general estate, it being his intention that his wife should be personally relieved therefrom. The widow resided in the house for fourteen years from testator's death, the outgoings, amounting to £160 a year, being paid by the trustees. She then sold the house as life tenant under Settled Land Act, 1882 (c. 38), & the trustees received the purchase-money:—*Held*: (1) under Settled Land Act, 1882 (c. 38), s. 34, the proceeds of sale must be applied in paying the widow during widowhood such an annuity as would exhaust those proceeds, capital & income, in the remaining eleven years of the lease; (2) the widow was not entitled to be paid £160 a year out of the general estate in lieu of the provision for payment of rent & outgoings, as that provision, being merely an extra benefit conferred on her to enable her to reside in the house, was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of Settled Land Act, 1882 (c. 38), s. 34, & consequently came to an end on the sale.—*Re SIMPSON, CLARKE v. SIMPSON*, [1913] 1 Ch. 277; 82 L. J. Ch. 169; 108 L. T. 317; 57 Sol. Jo. 302.

2820. Capitalisation of Increased Income—Accumulation at compound interest—How directed.]—

By a settlement dated Feb. 15, 1901, lands which included a large number of freehold reversions subject to building leases were settled in strict settlement & various powers were given to successive tenants for life "in addition to & in aid of the statutory powers." These included a power to "exchange for other manors, lands & hereditaments, . . . all or any of the hereditaments hereby assured," & a power "in case any . . . lessee . . . of any part of the hereditaments, . . . shall be willing to sell or dispose of . . . his subsisting interest, . . . to purchase the same . . . at such price or prices in money or for such other equivalent as" to the tenant for life should seem reasonable, "but so that the terms or interests which shall be purchased or otherwise acquired under the power shall be merged in & consolidated with the freehold & inheritance of the premises." By two deeds of even date the tenant for life conveyed to two persons some of the freehold reversions belonging to the settled estate, & by two further deeds of the same date received in exchange the surrender & merger of leaseholds to which other parts of the settled estate were subject, a sum being paid to the trustees of the settlement by way of parity of exchange which they applied in paying off incumbrances on the estate. The transactions resulted in a large increase of the annual income of the estate. The surrendered leaseholds were at the time of the transaction held upon terms that had less than sixty years to run:—*Held*: (1) neither the power of exchange given by Settled Land Act, 1882 (c. 38), s. 3 (iii), nor the power of exchange created by the settlement enabled leaseholds with less than sixty years to run, or any leasehold interests in land already comprised in the settlement, to be taken in exchange, but the transactions could be regarded as cross-sales & purchases, & as such were valid; (2) under s. 34 of the Act of 1882 an accumulation of part of the increased income resulting from the sale of the freehold reversions must be made during the residue of the terms of the leaseholds to which the conveyed reversions were subject; (3) no accumulation of increased income resulting from the

DRAINAGE ACT, Ex p. VERSCHOYLE (1885), 15 L. R. Ir. 576.—*IR.*

n. *Sale ordered by court—Order for*

application.]—Where a sale of settled estate is ordered by the ct., the purchase-money should be paid into the hands of the master in Equity,

& a subsequent order obtained for its proper application.—*Re McGRIGOR'S SETTLED ESTATES* (1878), 4 V. L. R. (Eq.) 1.—*AUS.*

acquisition of the surrendered leaseholds was requisite in view of the special power of acquiring leaseholds for surrender contained in the settlement; (4) assuming all the leaseholds to which the conveyed reversions were subject to have equal unexpired terms, there must be accumulated at compound interest out of the rents of the property comprised in the surrendered leaseholds an amount equal to 4 per cent. interest on the value of the surrendered leaseholds plus the annual benefit to the estate from discharging the incumbrances minus the annual rents of the leaseholds to which the conveyed reversions were subject.—*Re WESTMINSTER'S (DUKE) SETTLED ESTATES, WESTMINSTER (DUKE) v. SHAFTESBURY (EARL)*, [1921] 1 Ch. 585; 90 L. J. Ch. 305; 125 L. T. 82; *sub nom. Re GROSVENOR ESTATES, WESTMINSTER (DUKE) v. SHAFTESBURY (EARL)*, 37 T. L. R. 529.

Rights between tenant for life & remainderman.]—See Part X., Sect. 4, *ante*.

(f) *Proceeds of Sale of Heirlooms.*

2821. Improvement to settled estates.]—A tenant for life under a settlement containing a discretionary trust for sale of the settled estates, & also a power to sell certain settled heirlooms, asked leave of the ct. under Settled Land Act, 1882 (c. 38), s. 37, that he might be authorised to sell part of the settled estates, & also a specified portion of the heirlooms; that the money might be paid to the trustees, & that such part as might be necessary might be applied by them in paying for certain improvements, consisting of (a) a larger & better supply of water to a mansion house; (b) a new & improved system of drainage of the mansion house; (c) rebuilding of the stables, which were out of repair; (d) the building of an agent's house; & (e) the building of two cottages. The trustees submitted that the proposed improvements, except the cottages, were not within Settled Land Act, 1882 (c. 38), s. 25; & that even if they were the ct. would not supersede the power of the trustees by giving leave to the tenant for life to sell either the estate or the heirlooms:—*Held*: the proposed outlay was all within Settled Land Act, 1882 (c. 38), s. 25; & would have been authorised without the statute; & leave given to the tenant for life to sell both the settled estates & the heirlooms, & for the application of the proceeds as prayed.—*Re HOUGHTON ESTATE* (1885), 30 Ch. D. 102; 55 L. J. Ch. 37; 33 W. R. 869; *sub nom. CHOLMONDELEY'S (MARQUIS) SETTLED ESTATE*, 53 L. T. 196.

Annotations:—*Obtd. Re Gerard's S. E.*, [1893] 3 Ch. 252. *Consd. Re De Crespigny's S. E.*, [1914] 1 Ch. 227. *Re Kensington S. E.* (1905), 21 T. L. R. 351.

—*See, generally, LAND IMPROVEMENT, Vol. XXX.*, pp. 282–294.

2822. Repair of unsold heirlooms.]—*Re WALDEGRAVE, WALDEGRAVE (EARL) v. SELBORNE (EARL)*, No. 2950, *post*.

Discharge of incumbrances.]—See Nos. 2798, 2799, *ante*.

(g) *Expenses Incurred in Execution of the Acts.*

See Sub-sect. 11, *post*.

(h) *Payments for Improvements.*

See *LAND IMPROVEMENT, Vol. XXX.*, pp. 282–294, Nos. 68–208.

E. Devolution of Capital Moneys.

Money to be laid out in land.]—See *EQUITY, Vol. XX.*, pp. 371–375, Nos. 1084–1126.

See, generally, *EQUITY, Vol. XX.*, pp. 335–402.

SUB-SECT. 5.—POWER OF SALE.

A. In General.

See Settled Land Act, 1925 (c. 18), ss. 38, 39, 49, 55, 57.

2823. Power of tenant for life to sell.]—*THOMAS v. WILLIAMS, No. 2850, post*.

2824. — Property inalienable by law.]—(1) A dignity of title of honour, as an incorporeal hereditament, is “land” within Settled Land Act, 1882 (c. 38), s. 37.

When a dignity is limited to the heirs of the body, then although no place be named in the creation of the title, the dignity is within Statute De Donis, 1285 (c. 1), & descendible as an estate tail, & the patent does not create a fee simple conditional.

There is no difference in these respects between a baronetcy & other descendible dignities.

(2) Settled Land Act, 1882 (c. 38), does not enable a limited owner to sell any property which, when vested in a tenant in fee simple is by law inalienable.

(3) The ct. has jurisdiction under Settled Land Act, 1882 (c. 38), s. 37, to order a sale of personal chattels settled so as to devolve with such a title.—*Re RIVETT-CARNAC'S WILL*, (1885), 30 Ch. D. 136; 54 L. J. Ch. 1074; 53 L. T. 81; 33 W. R. 837; 1 T. L. R. 582.

Annotations:—*As to (1) Reffd. Re Aylesford's S. E.* (1886), 32 Ch. D. 162; *Re Sebright's S. E.* (1886), 55 L. T. 354; *Hill v. Hill*, [1897] 1 Q. B. 483; *Cowley v. Cowley*, [1900] 1 P. 305.

2825. — Remainder sold before Settled Land Act, 1882 (c. 38).]—*WHEELWRIGHT v. WALKER, No. 3106, post*.

2826. — Where express power in settlement—Settlement made by private Act—Proviso restricting power of sale.]—*Re CHAYTOR'S SETTLED ESTATE ACT, No. 2796, ante*.

2827. — Statutory power overriding settlement.]—*Re HOUGHTON ESTATE, No. 2821, ante*.

2828. — For sale of residuary estate.]—Where in a settlement of personality by his will, testator directs his trustees to purchase a dwelling-house for the widow's residence, & that such house afterwards shall fall into & form part of his residuary estate bequeathed on trust for sale, Law of Property Act, 1925 (c. 20), s. 32 is excluded, & the widow can sell under her life tenant powers.—*Re HANSON, HANSON v. EASTWOOD*, [1928] 1 Ch. 96; 97 L. J. Ch. 86; 138 L. T. 462; 71 Sol. Jo. 961.

2829. — Pendency of action—Decree for execution of trusts.]—The pendency of an action by tenant for life, in which a decree has been made for execution of the trusts of a settlement, does not prevent him from exercising his power of sale under Settled Land Act, 1882 (c. 38) without the sanction of the ct.—*CARDIGAN v. CURZON-HOWE* (1885), 30 Ch. D. 531; 55 L. J. Ch. 71; 33 W. R. 836; *sub nom. Re CARDIGAN'S (EARL) SETTLED ESTATES, CARDIGAN v. CURZON-HOWE*, 53 L. T. 704.

Annotations:—*Reffd. Re Sebright's S. E.* (1886), 33 Ch. D. 429; *Hampden v. Buckinghamshire*, [1893] 2 Ch. 531.

W. N. 145.—*AUS.*

p. —.—*Re COFFILL'S SETTLED ESTATE* (1920), 20 S. R. N. S. W. 412; 37 N. S. W. W. N. 110.—*AUS.*

q. —.—*A person who, by virtue*
C C C

PART XIII. SECT. 1, SUB-SECT. 5.—A.
o. Necessity for leave of court.]—Upon a petition under Conveyancing & Law of Property Act, 1898, the ct. allowed the sale of portion of a settled J.—VOL. XI.

estate consisting of vacant land & the expenditure of the purchase-money in the erection of buildings to be approved by the master upon the unsold portion.—*Re TIGHE'S SETTLED ESTATES* (1902), 2 S. R. N. S. W. 81; 19 N. S. W.

Sect. 1.—Under Settled Land Acts: Sub-sect. 5, A. & B.]

2830. — Undivided share—Whether concurrence of co-tenant necessary.]—*Re COLLINGE'S SETTLED ESTATES, No. 3134, post.*

2831. — — — — —.]—*COOPER v. BELSEY, No. 3135, post.*

2832. — Without consent of trustees.]—
(1) Except in a case mentioned in sect. 15, a tenant for life has, under the Settled Land Act, 1882 (c. 38), an absolute power of selling the settled land without the consent or control of the trustees of the settlement, unless they have reason to believe that any intended exercise of the power is improper, in which case they may apply to the ct. for directions under sect. 44. Consequently, neither the fact that at the time the tenant for life enters into a contract for sale there are no trustees of the settlement under the Act, nor when there are any, the fact that no notice has been given them by the tenant for life, under sect. 45 (1) of his intention to proceed to a sale, prevents his making a statutory title. It is sufficient for the protection of the purchaser if by the time he comes to complete there are trustees under the Act to whom he may pay his purchase-money if required so to do by the tenant for life under sect. 22 & notice has been given them under sect. 45 (1); though under sect. 45 (3) a purchaser dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice.

(2) Now, looking back to the power, I find, first of all, in sect. 3, "powers of sale, exchange, & partition, with, in sect. 4, the usual provisions which one finds in such powers, for instance: 'Every sale shall be made at the best price'; & 'every exchange & every partition shall be made for the best consideration in land or in land & money that can reasonably be obtained,' & so on. So that I think the meaning of this sect. 53 is that, for the security of the remaindermen, as between the tenant for life & them, he in exercise of this power shall be treated as a trustee & shall have all the liabilities of a trustee exercising a like power. The consequence of that is, no doubt, that if a purchaser knows the tenant for life is exercising the power improperly, & is aware that what the tenant for life is doing would amount to a breach of trust, he, the purchaser, has a perfect right to say, 'I will not complete'" (KAY, J.).—*HATTEN v. RUSSELL* (1888), 38 Ch. D. 334; 57 L. J. Ch. 425; 58 L. T. 271; 36 W. R. 317.

Annotations.—Generally, Re Bryant & Barningham's Contract (1890), 44 Ch. D. 218; *Mogridge v. Clapp*, [1892] 3 Ch. 382; *Re Fisher & Grazebrook's Contract*, [1898] 2 Ch. 660.

2833. — Subsoil alone.]—A tenant for life by virtue of Settled Land Act, 1882 (c. 38), s. 63 of a settlement by way of trust for sale created by will, of undivided shares of settled land beneath which a railway co. desired to construct tunnels for an electric railway, having joined with the owners of the remaining shares in entering into an agreement with the co. for the sale of them of the right to construct, maintain, & use tunnels with railways therein under the land, took out a summons under Settled Land Act, 1884 (c. 18), s. 7, asking for leave to enter into a contract in the form of an agreement with the co. for the sale of

them of that right. It was urged in support of the application that to proceed under Settled Land Acts was cheaper & more simple than under Lands Clauses Consolidation Act, 1845 (c. 18), & that the right in question constituted an easement under Settled Land Act, 1882 (c. 38), s. 3, or, if not, that the ct. had power under that sect. to make the order asked for:—*Held*: the sale of the subsoil of the settled land was not the sale of an easement under Settled Land Act, 1882 (c. 38), s. 3, but the ct. had power under that sect. to make an order authorising the sale as being a sale of part of the settled land.—*Re PEARSON'S WILL* (1900), 83 L. T. 626.

—*See MINES, Vol. XXXIV., p. 636, Nos. 328–332.*

2834. — Right to discharge mortgages.]—Land which was subject to mtges. was settled, subject to a term for securing incumbrances, to the use, in the events which happened, of A. for life, with remainders over. The trusts of the term provided that so long as the mtges. remained unpaid the trustees should receive the rents & profits & manage the premises & keep down the interest of the mtge. debts & certain rentcharges created by the settlement, that they should then pay to the tenant for life for the time being subject to the term an annuity of £600 a year, & should apply the residue of the rents & profits towards the payment of the principal moneys charged by the mtges., & there was a proviso for the cesser of the term upon the discharge of the mtge. debts. The settlement conferred on the trustees an immediate power of sale & exchange, but no power of leasing. The ct., having held that A. was a person having the powers of a tenant for life under Settled Land Act, 1882 (c. 38), ordered him to be let into possession upon his undertaking to perform the trusts of the term, & gave him the custody of the title deeds. The ct. would have made the order apart from the annuity to A.

A. subsequently contracted to sell, under the powers of Settled Land Acts, certain portions of the settled lands, including parts of all the mtged. lands & a portion which was unincumbered, & in order to complete the sale it was necessary that the mtges. should be paid off. A. therefore directed that the trustees should apply the proceeds of the sale in paying off the mtges. He deposed that he considered that this would be for the benefit of all the parties entitled under the settlement, seeing that the mtges. bore interest at 4 per cent. whereas the purchase-money could not be invested in trustee securities to yield more than 3 per cent. Upon a summons to determine whether the mtges. ought not to be kept on foot for the benefit of the ultimate remainderman:—*Held*: the beneficiaries under the settlement took subject to the power of sale conferred on the trustees, & inasmuch as the trustees in the exercise of that power might properly, for the purpose of carrying into effect a beneficial sale, pay off the existing incumbrances out of the purchase-money, a tenant for life doing the same thing under the powers of Settled Land Acts ought not to be held to be acting unjustly towards the remaindermen: consequently the mtges. ought not to be kept on foot, & upon the payment off out of the capital moneys of all the mtges. the term would cease.

of Settled Land Act, 1882 (c. 38), s. 63, is "deemed to be a tenant for life" of settled land is not entitled, as a matter of course, to an order under Settled Land Act, 1884 (c. 18), s. 7 (II), giving applt. leave to sell or proceed

with a sale of settled land.—*Re TUTHILL*, [1907] 1 I. R. 305.—*IR.*

r. — — —.]—Re SETTLED LAND ACTS & OBRÉ, [1920] 1 I. R. 32.—*IR.*

t. — — —.]—Re HARRIS' TRUST, [1919] S. C. 432; 56 Sc. L. R. 294; [1919]

1 S. L. T. 220.—*SCOT.*

a. — Consent of life tenant necessary — Life tenant receiving consideration from purchaser.]—EASTERN TRUST CO. v. DWYER, [1927] 1 D. L. R. 366; 59 N. S. R. 158.—*CAN.*

Semble: the ct. would have arrived at the same conclusion if the settlement had conferred no power of sale upon the trustees.

The tenant for life acting *bonâ fide* ought not to be interfered with unless the ct. can see that, in spite of his honesty, he is acting injuriously towards those whose interests he is bound to protect (STIRLING, J.).—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, [1900] 2 Ch. 778; 69 L. J. Ch. 804.

Annotations:—*Fold*. *Re Money Kyrle's Settltm.*, *Money Kyrle v. Money Kyrle*, [1900] 2 Ch. 839. *Distd. Re Llanover, Herbert v. Ram*, [1907] 1 Ch. 635. *Consd. Re Stamford & Warrington, Payne v. Grey*, [1925] Ch. 162. *Reid. Re Wilkinson, Lloyd v. Steel* (1901), 85 L. T. 43; *Wheeler v. Tootell* (1903), 47 Sol. Jo. 710; *Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417.

2835. — *Effect of assignment of part—Necessity for concurrence of assignees—Application of doctrine of merger.*—*Re BARLOW'S CONTRACT*, No. 2727, *ante*.

2836. — *Lunatic tenant for life.*—A tenant for life, who is a lunatic so found by inquisition, can sell & convey the fee as beneficial owner, & the ct. has power to authorise a committee to enter into covenants for title so as to bind the lunatic.—*Re RAY*, [1896] 1 Ch. 468; 65 L. J. Ch. 316; 73 L. T. 723; 60 J. P. 340; 44 W. R. 353; 40 Sol. Jo. 238, C. A.

—*See LUNATICS*, Vol. XXXIII., p. 209, Nos. 1154–1156.

2837. — “Unless settlement otherwise provides”—*Law of Property Act, 1925 (c. 20), s. 32.*—By a personalty settlement created by his will, testator directed his trustees to purchase a house as a residence for his wife until his son D. attained twenty-five, if she so long continued testator's widow. After D. attained twenty-five or the wife remarried, whichever first happened, the house was to fall into the residuary estate, which was given to the trustees on trust for sale & conversion. After testator's death a house was purchased & assured to the wife & the other trustees in fee simple. It was now desired to sell it, & the question arose whether a title could be made under the trust for sale which “unless the settlement otherwise provides” is imported by Law of Property Act, 1925 (c. 20), s. 32, or whether the title must be made under Settled Land Act, 1925 (c. 18):—*Held*: the direction that the house was to be purchased for the wife's residence was inconsistent with an immediate trust for sale, & amounted to a provision excluding Law of Property Act, 1925 (c. 20), s. 32, so that there was no trust for sale, & the title must be made under Settled Land Act, 1925 (c. 18). *Qu.*: whether Law of Property Act, 1925 (c. 20), s. 32, applies to a trust to purchase land.—*Re HANSON, HANSON v. EASTWOOD*, [1928] 1 Ch. 96; 97 L. J. Ch. 86; 138 L. T. 462; 71 Sol. Jo. 964.

—*Infant tenant for life.*—*See INFANTS*, Vol. XXVIII., pp. 203, 204, Nos. 628–633.

2838. *Sale by trustees—Discharge of Incumbrances.*—*Re RICHARDSON, RICHARDSON v. RICHARDSON*, No. 2834, *ante*.

Inalienability of power.—*See Part XIII., Sect. 1, sub-sect. 2, B, ante.*

Effect of resettlement.—*See Part XVI., Sect. 2, post.*

B. Appointment of Trustees.

2839. *Necessity for.*—*WHEELWRIGHT v. WALKER*, No. 3106, *post*.

2840. —*Re GORDON & ADAMS' CONTRACT, Re PRITCHARD'S SETTLED ESTATE*, No. 3050, *post*.

2841. — *Compound settlement.*—*Re TIBBITS' SETTLED ESTATES*, No. 3037, *post*.

2842. — ————(1) As a general rule it is not necessary, whenever a deed has been executed

affecting the interests created by an original settlement, so that that settlement is no longer the only instrument “under or by virtue of which the land stands limited for the time being to or in trust for persons by way of succession,” to appoint trustees of a compound settlement constituted by the original settlement & the subsequent deed.

(2) Settled Land Act, 1890 (c. 69), s. 4, is not to be read as providing that an assignment made by a tenant for life of settled land in consideration of marriage or by way of family arrangement, is to be deemed one of the instruments creating the settlement for all the purposes of the Act. It is limited to the purpose of excluding the operation of Settled Land Act, 1882 (c. 38), s. 50, altogether.

(3) Upon a sale, under the powers of Settled Land Acts, by a tenant for life who has made such an assignment, it is not necessary to appoint trustees of the settlement constituted by the original deed & the instrument effecting the assignment; but the trustees of the original settlement, having powers of sale, or appointed for the purposes of Settled Land Acts, are competent to receive & give receipts for the purchase-money.

(4) Upon a sale by a tenant for life who has alienated for value, the purchaser is in general entitled under Settled Land Act, 1882 (c. 38), s. 50, to ask for evidence of the consent of the assignee, but if the assignment contains a general consent beforehand, all the powers of the tenant for life under Settled Land Act, 1882 (c. 38), will remain unfettered.

(5) It is quite plain that one instrument may constitute a settlement, although it is to be admitted that several instruments may, under the same definition in the parts (Settled Land Act, 1882 (c. 38), s. 2 (1)), which I have not read, also constitute a settlement (STIRLING, J.).

(6) Suppose, for example, that under a power contained in a settlement the tenant for life has charged portions on the estate in favour of his younger children: of course, he may then be taken to know the particulars of the instrument executed by himself, but Settled Land Act, 1882 (c. 38), s. 20 (2), appears to me to show that he may sell the estate discharged from those portions so long as they have not been actually raised, & there is nothing in the Act to show that the framers of it contemplated that by a charge of portions persons who for the time being were trustees, either with powers of sale as expressly named for the purposes of the Settled Land Act, 1882 (c. 38), would be deprived of the power of receiving & giving receipts for the purchase-money, & that resort should be had to the powers conferred on the ct. by sect. 38, before a sale can be completed (STIRLING, J.).—*Re DU CANE & NETTLEFOLD'S CONTRACT*, [1898] 2 Ch. 96; 67 L. J. Ch. 393; 78 L. T. 458; 46 W. R. 523; 42 Sol. Jo. 468.

Annotations:—*As to (4) Consd. Re Dickinson & Kelsall's Contract*, [1903] 1 Ch. 213. *Reid. Re Cope & Wadland's Contract*, [1919] 2 Ch. 376. *As to (5) Apprvd. Re Mundy & Roper's Contract*, [1899] 1 Ch. 275. *Generally, Reid. Re Cornwallis-West & Munro's Contract*, [1903] 2 Ch. 150; *Re Wimbome & Browne's Contract*, [1904] 1 Ch. 537; *Parr v. A.-G.*, [1926] A. C. 239.

2843. — ————*Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

2844. — ————*Re CORNWALLIS-WEST & MUNRO'S CONTRACT*, No. 3054, *post*.

2845. — ————*Testator devised freeholds to the vendor for life, with remainders in strict settlement. The property was subsequently disentailed, resettled, & appointed so as to extinguish the vendor's life estate, but the original settlement created by the will was still subsisting in respect of a jointure & portions charged under the powers*

Sect. 1.—Under Settled Land Acts: Sub-sect. 5, B., C., D. & E.; sub-sect. 6, A.]

thereof:—*Held*: the vendor could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement created by the will & subsequent deeds.

The original settlement created by the will is still subsisting, as by reason of the jointure & portions charged & remaining to be raised thereunder the lands still stand limited to persons by way of succession under that instrument (SWINFEN EADY, J.).

An original settlement & a compound settlement may subsist side by side, & the mere fact that the life tenant has parted with his life estate does not prevent him from exercising his statutory powers under the original settlement (SWINFEN EADY, J.).—*Re WIMBORNE (LORD) & BROWNE'S CONTRACT*, [1904] 1 Ch. 537; 73 L. J. Ch. 270; 90 L. T. 540; 52 W. R. 334; 48 Sol. Jo. 246.

Annotations:—*Consd. Re Carnarvon's* (Chesterfield S. E., *Re Carnarvon's Highclere S. E.*, [1927] 1 Ch. 138. *Refd. Re Trafford's S. E.* (1914), 112 L. T. 107; *Re Constable's S. E.*, [1919] 1 Ch. 178; *Re Cope & Wadland's Contract*, [1919] 2 Ch. 376; *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523; *Part v. A.-G.*, [1926] A. C. 239.

2846. Effect of failure to appoint—On entering into contract for sale.—*HATTEN v. RUSSELL*, No. 2832, *ante*.

2847. ————]—Settled Land Act, 1882 (c. 38), s. 22, which confers on a tenant for life the option of capital money arising under the Act being paid either to the trustees of the settlement or into ct., presupposes that there are trustees for the purposes of the Act in existence. Therefore, where a vendor selling as tenant for life enters into a contract for the sale of settled land, he cannot, under s. 22, require the purchaser to pay the purchase-money into ct. where no trustees for the purposes of the Act are in existence when the time comes for the completion of the contract, & the contract will not be enforced. Where, however, a purchaser pays his purchase-money into ct. in ignorance of the fact that there are no trustees in existence, he will get a good title.—*Re FISHER & GRAZEBROOK'S CONTRACT*, [1898] 2 Ch. 660; 67 L. J. Ch. 613; 79 L. T. 268; 47 W. R. 58; 42 Sol. Jo. 731.

2848. ————]—At time fixed for completion.]—*HATTEN v. RUSSELL*, No. 2832, *ante*.

2849. ————]—Payment of purchase-money into court not ordered—Effect of payment in by purchaser in ignorance.]—*Re FISHER & GRAZEBROOK'S CONTRACT*, No. 2847, *ante*.

Who may be appointed.—See Part XIV., Sect. 2, *post*.

Effect of absence of notice to trustees.—See Sect. 1, sub-sect. 3, A., *ante*.

C. Price.

See Settled Land Act, 1925 (c. 18), ss. 39, 49, 55, 57.

2850. Ascertainment of best price—What court will consider—Possible increase in value of property.—An action was brought by a remainderman to obtain an injunction to restrain the tenant for

life & the trustees of a settled estate containing coal mines from selling it in such a manner as would be prejudicial to the interests of the remaindermen.

at the present time would be disadvantageous, as the development of the minerals had only recently commenced. The will by which the estate was settled gave the trustees a power to sell at the request of the tenant for life; & Settled Land Act, 1882 (c. 38), had come into operation since the commencement of the suit. A new trustee, who consented to an immediate sale, had been appointed by plffs. during the pendency of the suit without asking the consent of the ct.:—*Held*: by the will the trustees had a power of sale, & they could only be prevented from exercising it if the sale were improvident or a breach of trust, & by Settled Land Act the tenant for life had cumulative powers to sell, so that both under the will & the Act the tenant for life had a clear right to sell; the ct. would not speculate as to a probable increase in the value of property for the benefit of remaindermen to the disadvantage of the tenant for life; also, it was not here necessary for defts. to have obtained the consent of the ct. to their appointment of a new trustee *pendente lite*.—*THOMAS v. WILLIAMS* (1883), 24 Ch. D. 558; 52 L. J. Ch. 603; 49 L. T. 111; 31 W. R. 943.

Annotations:—*Refd. Re Ray's S. E.* (1884), 53 L. J. Ch. 205; *Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317.

2851. Validity of agreement to fix by arbitration—Effect of private Act.—A tenant for life of settled land agreed with a municipal corpn. to sell a portion of the settled land at a price to be fixed by arbn. The agreement was conditional on the sanction of Parliament by a local Act being obtained. The corpn. obtained a local Act which confirmed the agreement, scheduled to it, & made it "binding on the parties thereto respectively, & same shall & may be carried into effect accordingly." The agreement was made between the tenant for life, an assignee of his life estate, & the corpn., & provided that the award of the arbitrators or umpire fixing the price should be "binding upon all the parties hereto respectively, & upon all parties interested in the" (settled) "estates":—*Held*: although it was a breach of trust on the part of the tenant for life to delegate his authority & enter into an agreement to sell at a price to be fixed by some one else, yet the effect of the agreement & the Act was that the agreement should be carried into effect as a sale by a tenant for life under Settled Land Acts, with all the consequences which that involved, & the persons interested in remainder in the settled estates were therefore bound.—*Re WILTON'S (EARL) SETTLED ESTATES*, [1907] 1 Ch. 50; 76 L. J. Ch. 37; 96 L. T. 193; 23 T. L. R. 64; 51 Sol. Jo. 67.

2852. Validity of consideration other than cash—Consols.—*Re SUTTON'S CONTRACT*, No. 2616, *ante*.

D. Mode and Conditions of Sale.

See Settled Land Act, 1925 (c. 18), ss. 39 (6), 49.

2853. Restrictive covenant—Validity of agreement to release—On payment of sum of money.—

PART XIII. SECT. 1, SUB-SECT. 5.—C.

b. Land sold without power of sale—Land increasing in value—Refusal of court to approve sale.]—A trustee of settled land having no power of sale sold the same in 1903. The purchasers subsequently ascertained that their title was defective & a petition was presented in 1914 asking the ct. to sanction the sale retrospectively. The evidence showed that the land had gone up in value since 1903, & the ct.

refused to make an order *nunc pro tunc* approving of the sale at the original price against the wish of the guardian of certain infant beneficiaries.—*Re CROWSHAW'S SETTLED ESTATES* (1914), 14 S. R. N. S. W. 262; 31 N. S. W. W. N. 95.—*AUS.*

c. Payment of commission.]—*Re MILLIGAN SETTLED ESTATES* (1912), 21 O. W. R. 701; 3 O. W. N. 895; 2 D. L. R. 883.—*CAN.*

d. ————]—The trustees have power

to pay out of the purchase-money in the event of sale of an estate to the Congested Districts Board under the provisions of Irish Land Acts, 1903 to 1909, a proper negotiation fee properly & necessarily incurred.—*Re QUINTIN DICK* (1913), 47 I. L. T. 222.—*IR.*

PART XIII. SECT. 1, SUB-SECT. 5.—D.

e. Power to sell in lots.]—A tenant for life selling in exercise of the powers conferred by Settled Land Acts lands

IN 1891, a WATER CO. ENTERED INTO A CONTRACT WITH a tenant for life, acting under the powers conferred by Settled Land Acts, 1882 to 1890, for the purchase of a plot of settled land with the object of erecting thereon certain buildings for the purposes of their undertaking, & agreed to enter into a covenant not to build thereon or let it for building otherwise than for the purpose of their undertaking. They promoted a Bill in Parliament for power to erect the proposed buildings, which was thrown out before the conveyance was executed, & thereupon requested the vendor to agree to the omission from the conveyance of the covenant restrictive of building on the plot sold. The vendor, however, insisted on a conveyance in accordance with the contract, but entered into an agreement with the co. to which the trustees of the settlement were parties, to the effect that if the co. should not require the land for the purposes of their undertaking & should desire to erect other buildings thereon or to sell or let the same & thereof should give notice to the vendor, then the vendor would on payment of £10, consent to the co. building upon or selling the land without the restriction as to building contained in the conveyance, which agreement, although dated the day after the conveyance, was executed simultaneously & formed one transaction with it. The vendor died, & was succeeded by his son as tenant in tail of the settled land, who possessed lands adjoining the plot sold. The co. then gave notice & tendered to him £10 in accordance with the agreement, but he declined to give his consent, alleging that he was not bound thereby. On a special case stated by consent of the parties under R. S. C., Ord. 34, r. 1:—*Held*: the vendor as tenant for life of the settled land had no power under Settled Land Acts, 1882 to 1890, to enter into such an agreement with the co., which therefore was not binding on his successors in title.—*PALMER v. GRAND JUNCTION WATERWORKS CO.* (1902), 86 L. T. 352.

E. Payment of Purchase-Money.

See Settled Land Act, 1925 (c. 18), ss. 75 (1), 95.

2854. Payment into court—Option of tenant for life—Effect of consent to order for payment in.—In 1859 a suit was instituted for the administration of the estate of testator, who had devised land in strict settlement. In 1886 the tenant for life sold the land under the provisions of Settled Land Act. Trustees had previously been appointed by the ct. for the purposes of the Act. The purchaser refused to complete his contract, unless the purchase-money was paid into ct., & an order was made on his application, with the consent of the tenant for life, giving him liberty to pay it in, & it was paid in accordingly:—*Held*: (1) by consenting to the order for payment of the purchase-money into ct., the tenant for life had exercised the option given to him by sect. 22 (1) of the Act, of having the money paid either to the trustees of the settlement or into ct., & the money could not, therefore be paid out to the trustees but must remain in ct., & be invested or applied under the direction of the ct.

(2) *Semle*: the power to give receipts, which is conferred on trustees by sect. 40 of the Act, extends to trustees appointed by the ct. under sect. 38.—*COOKES v. COOKES* (1887), 34 Ch. D. 498; 56 L. J. Ch. 397; 56 L. T. 159; 35 W. R. 402; 3 T. L. R. 332.

2855. ——— Where no trustees appointed—Effect of ignorance of purchaser.—*Re FISHER & GRAZEBROOK'S CONTRACT*, No. 2847, *ante*.

2856. ——— ON TO TRUSTEES OF SETTLEMENT.—Where property sold by a tenant for life is subject to an incumbrance prior to the settlement, which exceeds the purchase-money in amount, & the whole of the purchase-money is intended to be applied in reduction of the incumbrance, the purchaser is not justified in paying his purchase-money direct to the incumbrancer by the direction of the tenant for life. He cannot get a good discharge for his purchase-money except by paying it to or by the direction of the trustees of the settlement or into Court. The absence of such a discharge will prevent the purchaser making a good title upon a subsequent sale.—*Re NORTON & LAS CASAS' CONTRACT*, [1909] 2 Ch. 59; 78 L. J. Ch. 489; 100 L. T. 881.

2857. Who may give receipt—Trustees appointed for purpose of sale.—*COOKES v. COOKES*, No. 2854, *ante*.

2858. ————*PyNE v. PHILLIPS*, [1895] W. N. 8.

2859. ——— Sole trustee.—*Re GARNETT ORME & HAARGREAVES' CONTRACT*, No. 3080, *post*.

2860. ——— Tenant for life.—A sole trustee with a conditional trust for sale who is also tenant for life of the settled estates is a trustee for the purposes of Settled Land Acts, 1890 (c. 69), & is entitled to receive & give a good discharge for the purchase-money of any part of the settled estate sold by him as tenant for life.—*Re JOHN-SON'S SETTLED ESTATES* (1913), 57 Sol. Jo. 717.

2861. ——— Compound settlement—Trustees of original settlement.—*Re DU CANE & NETTLEFOLD'S CONTRACT*, No. 2842, *ante*.

2862. ————*Re KECK & HART'S CONTRACT*, No. 2958, *post*.

2863. ————*Re ALINGTON (LORD) & LONDON COUNTY COUNCIL'S CONTRACT*, No. 2596, *ante*.

SUB-SECT. 6.—POWER OF LEASING.

A. In General.

See, now, Settled Land Act, 1925 (c. 18), ss. 41–43.

2864. Power of tenant in tail—Whether issue bound.—*ANON.* (undated), *Plowd. Queries*, 62; 75 E. R. 916.

2865. ————*A.* being seised of certain houses in tail, & of certain lands in fee held *in capite*, by deed indented made leases of the said houses whereof he was seised in tail rendering rent, & which leases were not warranted by 32 Hen. 8, & died: the reversion descended to the heirs general of *A.*, being two females: & it appeared that the leases were to have continuance after the said heirs general should be out of ward; & by office after the death of *A.* it was found that *A.* died seised of the said estate tail of the said houses, & that they descended to the said heirs general, by force whereof the said houses were seised into the Queen's hands. Resolved, that although the King, in the right of the heir, had avoided it for his time, yet it doth not avoid the leases so absolutely that the heirs in tail, after the King's interest determined, cannot make them good by acceptance of rent.—*BEDFORD'S (EARL) CASE* (1586), 7 Co. Rep. 7 b; 77 E. R. 421.

Annotations:—*Reid*, *Smaleman v. Eigburrow* (1616), 3 Bulst. 272; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278. *Mentd.* *Needler v. Winchester (Bp.)* (1614), Hob. 220.

2866. ————*FOORD'S CASE* (1596), as

held under a fee-farm grant can sell in lots, carrying out the sales by making sub-fee-farm grants or long leases to the respective purchasers.—*Re BRAITHWAITE'S SETTLED ESTATE*, [1922] 1 I. R. 71.—*IR.*

2881. — — — —.]—A tenant for life without leasing power demised a plot of building land for the term of sixty years, from Sept. 29, 1834, at the annual rent of sixpence; the lease contained a covenant by the tenant for life for quiet enjoyment. The lessee accordingly erected a house on the plot of land. After the death of the tenant for life the fee simple ultimately vested in H., who accepted rent at the rate above mentioned from J., who was a son of the original lessee, & was then in possession of the house. H. afterwards conveyed the house & land to pltf. by indenture: the grant was made expressly subject to the supposed term of sixty years. No notice to quit had been given, & the annual value of the house & land was about £6. Pltf. having sued to recover possession of the house & land:—*Held*: as the representatives of the original lessee, under the indenture of Sept. 29, 1834, could not have sued H. for breach of the covenant for quiet enjoyment, the void lease afforded no defence against pltf. claiming under the grant of the fee simple subject to it; a tenancy from year to year had not been created by the payment of a rent at the rate of sixpence a year; & pltf. was entitled to immediate possession of the house & land.—*SMITH v. WIDLAKE* (1877), 3 C. P. D. 10; 47 L. J. Q. B. 282; 26 W. R. 52, C. A.

Annotation:—*Mentd.* Mercantile Investment & General Trust Co. v. River Plate Trust & Agency Co., [1892] 2 Ch. 303.

2882. — — — — *Remainderman inactive while lessee rebuilds.*—When the remainderman lies by, & suffers the lessee or assignee to rebuild, & does not by his answer deny that he had notice of it, all these circumstances together will bind him from controverting the lease afterwards (*LORD HARDWICKE, C.*).—*STILES v. COWPER* (1748), 3 Atk. 692; 26 E. R. 1198, L. C.

Annotations:—*Consd.* *Story v. Johnson* (1835), 5 L. J.

during life of tenant for life.—If tenant for life make a lease for years, & then surrenders or forfeits his estate, yet the lease for years remains good during his life, if the years continue so long (*HOLT, C.J.*).—*SUTTON'S CASE* (1701), as reported in 12 Mod. Rep. 557; 88 E. R. 1516.

2884. *Effect of express power in settlement—Necessity for consent of tenant for life—To lease by trustees.*—*Re ATHERTON*, [1891] W. N. 85.

2885. — *Whether over-ridden by statutory power—Grant "in exercise of every power or authority enabling."*—*LONSDALE (EARL) v. LOWTHER*, No. 2998, *post*.

2886. — *To successive tenants for life as & when entitled.*—*LONSDALE (EARL) v. LOWTHER*, No. 2998, *post*.

2887. *What may be leased—Right of way—Over park attached to principal mansion house.*—The tenant for life of a settled estate for the purpose of giving his wife a dower or jointure house, in 1889 granted her a lease for twenty-one years of a house called X., about three miles from the principal mansion house on the T. estate, of which estate X. formed part, together with rights of way over all roads & drives which from time to time should exist on the T. estate. The drives then existing were about twenty-five miles long, & extended over the estate generally, including the part usually occupied with the mansion house & up to the gate & door of such mansion house. At the same time, & substantially as part of the same transaction, the tenant for life granted to his wife a building lease for ninety-nine years of a piece of land forming part of a portion of the T. estate

never previously used as building ground, & inconvenient for such a purpose, together with the right of way over certain drives, including the carriage-drive over & up to X. Any house on the building site would overlook & destroy the privacy of X.

It was part of the arrangement that the two leases should be renewed every few years, so as to ensure that, so far as possible, the terms should begin to run from the death of the tenant for life.

In May, 1891, the two leases were renewed on the same terms. Neither the old nor the new leases were substantially acted on during the life of the tenant for life. After the death of the tenant for life the lessees brought an action to have the validity of the leases established:—*Held*: (1) the leases were invalid, because they were not granted in the *bona fide* exercise of the leasing powers of the tenant for life having "regard to the interests of all parties entitled under the settlement" within Settled Land Act, 1882 (c. 38), s. 53; (2) having regard to Settled Land Act, 1882 (c. 38), s. 6, & Settled Land Act, 1890 (c. 69), s. 10, the lease of X. was invalid by reason of its granting rights of way over the park & lands usually occupied with the principal mansion house; (3) the lease of X. could not be regarded as a valid contract for a lease without the rights of way under Leases Act, 1849 (c. 26); (4) *Seemle*: a tenant for life may grant a lease to a married woman although she is his own wife.—*SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, [1893] 3 Ch. 169; 62 L. J. Ch. 946; 69 L. T. 186; 42 W. R. 12; 9 T. L. R. 530; 37 Sol. Jo. 618; 3 R. 650.

Annotations:—*As to* (1) *Consd.* *Gilbey v. Rush*, [1906] 1 Ch. 11; *Re Cornwallis West, Ex p. Trustees* (1919) 88 L. J. K. B. 1237. *As to* (2) *Fold.* *Pense v. Courtney*, [1904] 2 Ch. 503. *Generally, Reifd.* *Brown v. Peto*, [1900] 1 Q. B. 346; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599.

of remaindermen.—*CHANDLER v. BRADLEY*, No. 2910, *post*.

2889. *Effect of grant of invalid underlease.*—A tenant for life, impeachable for waste, under a settlement which included real estate & unopened mines severed from the surface, which was not included in the settlement, granted a take-note or licence for three years to search for & work gold & other ores in the mines subject to the rights of the Crown, if any. The tenant for life subsequently acquired a lease from the Crown for twenty-one years of the gold & silver ores in the mines together with a release of the Crown's statutory right of pre-emption over the base ores. He then granted further take-notes & leases of the mines for short terms, all of which expired during his life, & received rents & premiums. None of the take-notes or leases were valid under Settled Land Acts, under which alone he had power to deal with the mines. On the expiration of the Crown lease he obtained a renewal for a further period of twenty-one years, & granted valid separate sub-leases of the gold & silver ores & of the base minerals for the residue of the Crown term less one day. On the death of the tenant for life in 1916 the tenant in tail in remainder, who had barred the entail, brought an action against the exors. of the tenant for life claiming the amount of the premiums & three-fourths of the rents received by him, & a declaration that pltf. was entitled to the subsisting Crown lease subject to & with benefit of the sub-leases. *SARGANT, J.*, held that the take-notes & leases for short terms being invalid under Settled Land Acts the rents & premiums received thereunder could not be recovered by pltf., & the

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subsisting Crown lease & sub-leases did not belong to the estate.

The Ct. of Appeal affirmed the first part of the decision of SARGANT, J., but reversed the second, on the ground that the tenant for life had used his position to obtain the Crown lease, & so far as the release of the right of pre-emption over the base ores was concerned that lease extended to something which was included in the settlement. He must therefore be taken to have acquired the lease as trustee for the beneficiaries, & *pltf.* was entitled to the unexpired portion of the lease subject to & with benefit of the sub-leases.—*LLOYD-JONES v. CLARK-LLOYD*, [1919] 1 Ch. 424; 88 L. J. Ch. 278; 120 L. T. 578; 35 T. L. R. 273; 63 Sol. Jo. 317, C. A.

B. Requirements of Valid Lease.

(a) In General.

See Settled Land Act, 1925 (c. 18), ss. 41–43.

2890. Appointment of trustees.]—*Re BENTLEY, WADE v. WILSON*, No. 2062, *ante*.

2891. — Protection of lessee.]—*MOGRIDGE v. CLAPP*, No. 2761, *ante*.

2892. Bonâ fide exercise of power—Necessity for.]—*SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, No. 2887, *ante*.

2893. — —.]—*Re HANDMAN & WILCOX'S CONTRACT*, No. 2902, *post*.

2894. — What amounts to—Lease to wife of tenant for life.]—*SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, No. 2887, *ante*.

2895. — — Principal mansion house.]—*GILBEY v. RUSH*, No. 2768, *ante*.

2896. — — Lease of public house—With covenant against sale of intoxicating liquors.]—*Re SOMERS (EARL), COCKS v. SOMERSET* (1895), 11 T. L. R. 567; 39 Sol. Jo. 705.

2897. — — Lease to intended husband.]—*Deft.* was entitled under the will of her deceased husband to the use & enjoyment rent free of a certain house for so long during her widowhood as she should personally reside in the same. Being minded to marry again, she proposed to exercise her leasing powers as tenant for life under Settled Land Acts by granting a lease of the house to her intended husband for twenty-one years. *Pltfs.*, who were entitled in remainder on the cesser of her interest, objected to the lease & brought an action to restrain her from granting it. On a motion for an injunction:—*Held*: having regard to *deft.*'s object in granting the lease, it was not a *bonâ fide* exercise of the powers of a tenant for life under the Settled Land Acts, & *pltf.*s. were entitled to succeed.—*MIDDLEMAS v. STEVENS*, [1901] 1 Ch. 574; 70 L. J. Ch. 320; 84 L. T. 47; 49 W. R. 430; 17 T. L. R. 214.

2898. — — Lease to make provision for tenant for life & wife.]—A tenant for life of a mansion house & lands, part of the settled estate, granted a lease for twenty-one years from Mar. 25, 1909, to his son-in-law, at a rental of £380 *per annum*, which was less than the best rent obtainable. The son-in-law never entered into possession of the property or performed any of the covenants in the lease, but subdemised it at a peppercorn rent to the tenant for life & his wife for the full term of twenty-one years less one day, if they or the survivor of them should so long live. The tenant in fee simple in remainder was adjudged *bkpt.* in Mar. 1916, & the trustee in *bkpcy.* issued a writ in July, 1918, against the son-in-law to have the lease declared void, & judgment was given to

this effect in Jan. 1919. The tenant for life had died in July, 1917, & his wife, not having been made *deft.* to the action, had been allowed to remain in possession of the mansion house & lands. She now claimed to remain in possession of the mansion house & lands as of right, & the trustee in *bkpcy.* accordingly moved for a declaration that he was entitled to vacant possession as against her:—*Held*: this lease was not a lease which was intended "to take effect in possession not later than twelve months after its date" within Settled Land Act, 1882 (c. 38), s. 2 (1), & it had not reserved "the best rent than can reasonably be obtained" within s. 7 (2) of the Act, & accordingly, that there never was a *bonâ fide* exercise of the power of leasing under Settled Land Act, 1882 (c. 38), but an abuse of that power for the purpose of making provision for the tenant for life & his wife, with the result that the lease was void & the trustee entitled to possession.—*Re CORNWALLIS WEST, Ex p. TRUSTEE* (1919), 88 L. J. K. B. 1237; [1918–19] B. & C. R. 231.

2899. Lease by tenant for life to himself & others—Purported covenants between lessees & lessor.]—*BOYCE v. EDBROOKE*, No. 2903, *post*.

Notice to trustees.]—*See Sect. 1, sub-sect. 3, ante.*

Lease by infant tenant for life.]—*See INFANTS*, Vol. XXVIII., p. 203, Nos. 626, 627.

(b) Time for Commencement.

See Settled Land Act, 1925 (c. 18), s. 42 (1) (i).

2900. General rule—Lease must take effect in possession within twelve months.]—*Re CORNWALLIS WEST, Ex p. TRUSTEE*, No. 2898, *ante*.

2901. Validity of covenant to grant lease in future—Sub-lease.]—The *ct.* has no power under Settled Estates Act, 1877 (c. 18), ss. 4, 5, to sanction a sub-lease of settled land, held under a renewable lease, for the unexpired residue of the term, with a covenant for the extension of the term by a further sub-lease after the renewal of the head lease. Such a lease would, as regards the further lease, not be a lease taking effect in possession.—*Re FARNELL'S SETTLED ESTATES* (1886), 33 Ch. D. 599; 35 W. R. 250.

(c) Rent.

See Settled Land Act, 1925 (c. 18), ss. 42, 43, 57.

2902. Best rent—Necessity for.]—A tenant for life, purporting to act under the powers of Settled Land Act, 1882 (c. 38), granted a building lease of some vacant land at less than the best rent that could reasonably be obtained, the rent having been reduced in consideration of the waiver by the lessee of a claim for damages against the lessor, & the lessee covenanted to lay out a certain sum in building. The lessee neglected to build, & the lease was sold by auction to the vendor at a large price. The vendor agreed to sell at an enhanced price to the purchaser, & the purchaser objected that, having regard to the amount of the price, it must be shown that the rent reserved by the lease was the best that could reasonably be obtained within Settled Land Act, 1882 (c. 38), s. 7 (2). The vendor had no knowledge of the arrangement between the lessor & the lessee as to the reduction of the rent, & he insisted that, as purchaser for value without notice, he could make a good title to the purchaser:—*Held*: that, inasmuch as the lease did not comply with the statutory requirements as to rent, & the lessee did not act in good faith within s. 54, it was bad, & could be set aside as against a purchaser for value without notice.—

Re HANDMAN & WILCOX'S CONTRACT, [1902] 1 Ch. 599; 71 L. J. Ch. 263; 86 L. T. 240, C. A.
Annotation.—*Refd. Re Douglas & Powell's Contract*, [1902] 2 Ch. 296.

2903. ———.—[A tenant for life purported, in exercise of the powers of Settled Estates Act, 1877 (c. 18), s. 46, to demise the settled messuage, works, & premises to himself & his two partners for twenty-one years, the lease containing the usual lessee's covenants entered into by the three lessees jointly. A certain rent was reserved by the lease, but dehors the lease it was arranged between the partners that the tenant for life should be allowed to occupy the house rent free, & should receive an additional rent as compensation in the event of his ceasing to reside there. In an action by the remaindermen, after the death of the tenant for life, to recover possession of the premises from an assignee of the lease:—*Held*: the lease was void for non-compliance with the requirements of Settled Estates Act, 1877 (c. 18), s. 46, on the ground that (1) the best rent had not been reserved; & (2) because the covenants in the lease, being joint covenants by a man & others with himself, were not enforceable at law, & consequently were not proper covenants within the meaning of the sect., or such as the reversioners were entitled to have inserted in the lease.—*BOYCE v. EDBROOKE*, [1903] 1 Ch. 836; 72 L. J. Ch. 547; 88 L. T. 344; 51 W. R. 424.

Annotations.—*As to (1) Refd. Re Lacon's Settlmt.*, Lacon v. Lacon, [1911] 1 Ch. 351. *As to (2) Apld. Ellis v. Kerr*, [1910] 1 Ch. 529.

2904. ———.—[In 1905 defts., a brewery co., who were lessees of licensed premises at a yearly rent of £150 under a lease for fourteen years from June 24, 1902, granted under Settled Land Act, 1882 (c. 38), by a previous tenant for life, deducted from their rent the compensation fund charges levied under the provisions of Licensing Act, 1904 (c. 23). The tenant for life, who was an illiterate man, complained of the deductions & defts. subsequently agreed that if he granted them a new lease for twenty-one years at the same rent of £150. they would pay the charges themselves. Accordingly, the tenant for life, without having any legal assistance or consulting the solr. to the settled trust estate, in exercise of his statutory powers granted defts. a new lease of the licensed premises for twenty-one years at a yearly rent of £150, & defts. covenanted to pay the rent without deduction, & also to pay all rates, taxes, assessments & charges, including all payments to the compensation fund under Licensing Act, 1904 (c. 23), which then were or during the term should be charged on the demised premises without making any deduction from rent in respect thereof. Defts. had paid the charges under the Licensing Act in fulfilment of their promise.

In an action by the remaindermen against defts. for declaration that the lease did not reserve the best rent that could reasonably be obtained, & was not binding upon them:—*Held*: there was no valid reservation in the lease of the real amount which was to be paid for the use of the premises; the rent which was really reserved was £150 subject to the deductions, & no more, & was obviously in the circumstances, not the best rent that could be obtained; & therefore the new lease was not a valid lease under Settled Land Act, 1882 (c. 38), so as to be binding upon the remaindermen.—*PUMFORD v. BUTLER (W.) & Co., LTD.*, [1914] 2 Ch. 353; 83 L. J. Ch. 858; 111 L. T. 408; 78 J. P. 457; 30 T. L. R. 556; 58 Sol. Jo. 655.

2905. ———.—*Re CORNWALLIS WEST, Ex p. TRUSTEE*, No. 2898, *ante*.

2906. ———. *Meaning of.*—There is but one

criterion which our cts. always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others as he has for himself; if he has got more for himself than for others, that is decisive evidence against him (*LORD ELDON, C.*).—*MONTGOMERY v. CHARTERIS (EARL OF WEMYSS)*, *BUCCLEUCH (DUKE) v. MONTGOMERY, QUEENSBERRY LEASES* (1817), 5 Dow, 293, 344; 3 E. R. 1334, H. L.

Annotations.—*Apld. Chandler v. Bradley*, [1897] 1 Ch. 315. *Consd. Boyce v. Edbrooke* (1903), 72 L. J. Ch. 547. *Refd. Smith v. Jersey* (1821), 3 Bl. 290.

2907. ———.—[Leases & Sales of Settled Estates Act, 1856 (c. 120), s. 2, requiring the best rent to be reserved, is modified by sect. 5 of the same Act, extended by 21 & 22 Vict. c. 77, s. 5, which allow the ct. to permit the surrender of existing leases & the grant of new leases of the property surrendered. The best rent means the best that under all the circumstances can reasonably be had, taking into account the value of the lease surrendered.—*Re RAWLINS' ESTATE* (1865), L. R. 1 Eq. 286; 13 L. T. 626; 14 W. R. 218.

2908. ———. *What may be taken into consideration*—*Value of lease surrendered.*—*Re RAWLINS' ESTATE*, No. 2907, *ante*.

2909. ———.—[“Money laid out”—*Past voluntary expenditure.*—*Past voluntary expenditure by lessee on buildings comprised in his lease is not consideration in law which will justify a tenant for life in granting a lease under Settled Land Act, 1882 (c. 38), s. 8 (1), at less than the best rent that can be reasonably obtained as required by s. 7 (2); neither can such expenditure be regarded as “money laid out” within s. 7 (2), inasmuch as these words must be taken to refer to money laid out for the benefit of the settled land with direct reference to the grant of the lease.*—*Re CHAWNER'S SETTLED ESTATES*, [1892] 2 Ch. 192; 61 L. J. Ch. 331; 66 L. T. 745; 40 W. R. 538; 8 T. L. R. 466; 36 Sol. Jo. 397.

Annotation.—*Refd. Re Handman & Wilcox Contract*, [1902] 1 Ch. 599.

2910. ———. *Effect of bribe to tenant for life.*—*C.*, tenant for life of a freehold house, who had mortgaged his life interest, in 1892 granted to deft. a lease of the premises for seven years in consideration of a yearly rent of £25 & covenants by the lessee to execute certain repairs & improvements. As an inducement to execute the deed deft. had paid to C. the sum of £21, which he applied to his own use. There was no evidence that a higher rent could have been obtained. The lease purported to be granted by the mtgees. at the request of C. & by C., as tenant for life, by virtue of the Settled Land Act, 1882. C. died in 1895. In an action to set aside the lease:—*Held*: (1) the ct., in giving relief to the beneficiaries, would not consider the question whether they had been damnified or not; (2) on the evidence the payment to C. could not be regarded as a fine, & the liability of deft. was not therefore limited to paying the sum over again to trustees appointed for the purposes of Settled Land Acts; & (3) having regard to the improper payment to C., the “best rent” required by Settled Land Act, 1882 (c. 38), s. 7 (2), had not been obtained, & consequently the lease was void.—*CHANDLER v. BRADLEY*, [1897] 1 Ch. 315; 66 L. J. Ch. 214; 75 L. T. 581; 45 W. R. 296; 41 Sol. Jo. 157.

Annotations.—*As to (2) Refd. Re Lacon's Settlmt.*, Lacon v. Lacon, [1911] 2 Ch. 17. *As to (3) Consd. Handman v. Wilcox Contract*, [1902] 1 Ch. 599.

2911. *Necessity for valid reservation in lease.*—*PUMFORD v. BUTLER (W.) & Co., LTD.*, No. 2904, *ante*.

Sect. 1.—Under Settled Land Acts: Sub-sect. 6, C., D. & E.; sub-sect. 7, A., B. & C.]

C. Building Leases.

See Settled Land Act, 1925 (c. 18), ss. 44, 46.

What is a building lease.]—*See Settled Land Act, 1925 (c. 18), s. 117 (1) (i).*

2912. — Lease of part not built over.]—*Re SABIN'S SETTLED ESTATES, [1885] W. N. 197.*

2913. — Agreement by lessee for expenditure on improvements & repairs—Other than work normally undertaken by landlord.]—A lease made partly in consideration of the lessee agreeing to expend a specific sum of money in doing the improvements & repairs specified in a schedule is a building lease within Settled Land Act, 1882 (c. 38), s. 8 (1). The ct., in the exercise of its discretion under Settled Land Act, 1884 (c. 78), s. 7, will not sanction a building lease in which the repairs or improvements agreed to be done by the lessee are such as an ordinary landlord is expected to do.—*Re DANIELL'S SETTLED ESTATES, [1894] 3 Ch. 503; 64 L. J. Ch. 173; 71 L. T. 563; 43 W. R. 133; 38 Sol. Jo. 707; 7 R. 462, C. A.*

2914. — “Substantial improvements.”]*—Re ELLESMERE (EARL), [1898] W. N. 18.*

2915. Grant as absolute owner—Without reference to statutory power—Operation under the statutes.]—*MOGRIDGE v. CLAPP, No. 2761, ante.*

2916. Consideration—Voluntary expenditure by lessee.]—*Re CHAWNER'S SETTLED ESTATES, No. 2909, ante.*

D. Mining Leases.

See MINES, Vol. XXXV., pp. 641–644, Nos. 389–417.

E. Forestry Leases.

See Settled Land Act, 1925 (c. 18), s. 48.

SUB-SECT. 7.—POWER TO SELL HEIRLOOMS.

A. In General.

See Settled Land Act, 1925 (c. 18), s. 67.

2917. Jurisdiction of court to sanction—Merely on ground of benefit to all concerned.]—The ct. has no jurisdiction to order a sale of heirlooms which are settled in strict settlement, simply on the ground that a sale would be for the benefit of all parties interested.—*D'EYNCOURT v. GREGORY (1876), 3 Ch. D. 635; 45 L. J. Ch. 205, 741; 25 W. R. 6.*

Annotation:—Consd. Re Rivett-Carnac's Will (1885), 30 Ch. D. 136.

2918. — Sanction ex post facto—Heirlooms already sold.]—*Re AMES, AMES v. AMES, No. 2746, ante.*

2919. Heirlooms settled to devolve with a dignity.]—*Re RIVETT-CARNAC'S WILL, No. 2824, ante.*

2920. Control of court—Discretionary.]—*Re BEAUMONT'S SETTLED ESTATES, No. 2948, post.*

2921. — —.]—(1) In exercising the power of sale of heirlooms conferred upon a tenant for life of settled estate by Settled Land Act, 1882 (c. 38), s. 37, the tenant for life is, by force of s. 53, in the position of a trustee with a discretionary power to sell, & must have regard, not to

his own interests alone, but to the interests of all persons entitled under the settlement, the interest of those more remotely entitled being of less weight than the interest of those nearer to the succession. The ct., in giving its sanction to any such proposed sale, must in the exercise of its judicial discretion be satisfied that, under the circumstances of each particular case, the sale is reasonable & proper, having regard to the interests of all parties entitled.

(2) Now, as a general rule, I think that the circumstance that the tenant for life has incumbered his life estate under the settlement ought to be excluded from consideration by the ct. on a question of granting or refusing an order sanctioning a sale of heirlooms (*CHITTY, J.*)—*Re RADNOR'S (EARL) WILL TRUSTS (1890), 45 Ch. D. 402; 59 L. J. Ch. 782; 63 L. T. 191; 6 T. L. R. 480, C. A.*

Annotations:—As to (1) Consd. Re Allesbury's S. E., [1892] 1 Ch. 506; Re Fetherstonhaugh's Estate (1898), 14 T. L. R. 167. Apld. Re Hope, De Cetto v. Hope, [1899] 2 Ch. 679. Consd. Re Townshend's Settlement, (1903), 89 L. T. 691. Apld. Re Hope's S. E. (1910), 26 T. L. R. 413. Rejd. Mogridge v. Clapp, [1892] 3 Ch. 382; Hampden v. Buckinghamshire, [1893] 2 Ch. 531.

2922. — —.]—*Re HOPE'S SETTLEMENT, No. 2928, post.*

— Circumstances affecting decision.]—See Nos. 2928–2943, post.

2923. Duty of tenant for life—To act as trustee for all persons interested.]—*Re RADNOR'S (EARL) WILL TRUSTS, No. 2921, ante.*

2924. — —.]—(1) A tenant for life applying to the ct. under Settled Land Act, 1882 (c. 38), s. 37, for leave to sell heirlooms with a view to obtaining an increased income, must show that the proposed sale is in the interests of all parties entitled under the settlement, & the fact of his having got himself into difficulties by his own extravagance is not a circumstance which will have any weight with the ct. in favour of a sale.

(2) If the application is for leave to sell an heirloom of unique character & historical repute, such as a famous jewel or work of art, the ct., in the exercise of the judicial discretion given to it by the Act, will have regard to the intention of the settlor & also to the wishes & feelings of the remaindermen.—*Re HOPE, DE CETTO v. HOPE, [1899] 2 Ch. 679; 68 L. J. Ch. 625; 81 L. T. 141; 47 W. R. 641; 43 Sol. Jo. 655, C. A.*

Annotation:—Generally, Rejd. Re Sebright, Sebright v. Brownlow (1912), 28 T. L. R. 191.

2925. — —.]—A tenant for life is to be regarded as a trustee for all the persons interested in the settled estate, & in exercising the extensive powers conferred upon him by the Settled Land Acts, he is bound to regard not his own interests only, but also those of the persons who are to follow him. In considering those interests more weight must be given to those of persons nearest in succession than to the interests of those who are more remote. The ct.'s duty, when asked to sanction an exercise of the tenant for life's powers under the Acts, is to put itself in the position of an honest tenant for life striving to do his duty with regard to the interests of all concerned; the ct. may, however, properly give a certain weight to the opinions & wishes of the tenant for life as head of the family.

PART XIII. SECT. 1, SUB-SECT. 6.—C.

h. Power to grant renewable building leases.]—In applying English Settled Estates Act, 1856 (c. 120), to this Province, the words “usual custom” in sect. 2 must be satisfied with something less than the im-

memorial custom of England. It is satisfied by proof of a well recognised method or usage of framing building leases in a given locality. Under that Act & 53 Vict. c. 14 (O), the power to lease with extended right of renewal may be granted up to 999 years.—*Re WATSON'S TRUSTS (1892), 21 O. R.*

528.—CAN.

k. Lease for five hundred years.]—Leave was given to a tenant for life of a settlement to grant a building lease of settled land for five hundred years, under Settled Land Act, 1882 (c. 38), s. 10 (2).—*Re O'CONNELL'S ESTATE, [1903] 1 I. R. 154.—IR.*

The ct. sanctioned the sale by a tenant for life of certain heirlooms.—*Re HOPE'S SETTLED ESTATES* (1910), 26 T. L. R. 413.

2926. Case for sale must be made out.]—*Re HOPE'S SETTLEMENT*, No. 2928, *post*.

2927. Conditional sanction—Subject to sale of estate.]—*Re AILESBURY HEIRLOOMS* (1893), 37 Sol. Jo. 561.

Application of proceeds of sale.]—*See* Sub-sect. 4, D. (f), *ante*.

B. Circumstances affecting Court's Decision.

2928. Circumstances of each particular case.]—

(1) The discretion [of the ct. regarding sale of heirlooms] is a judicial discretion to be exercised in the circumstances of the case (*CHITTY*, J.).

(2) The circumstance that the pictures have no home is said to be a special ground. . . . Appct. is not to blame for having sold the mansion in Belgrave Square; but I cannot allow that as any special ground for assenting to the sale, because it is appet. himself, though in exercise of his legal power, who made the pictures homeless (*CHITTY*, J.).

(3) In regard to his financial position, that is not a circumstance which affects the rest of the family & those who succeed. . . . That is a circumstance which has been brought about by his own extravagance; . . . as a general rule the fact of the tenant for life having got himself into difficulties is not a circumstance which ought to have weight in deciding in favour of a sale (*CHITTY*, J.).

(4) A person who comes to the ct. under the Settled Land Acts & asks the ct.'s sanction to a sale, must make out a case for a sale (*CHITTY*, J.).—*Re HOPE'S SETTLEMENT* (1893), [1899] 2 Ch. 691, n.; 9 T. L. R. 506; 37 Sol. Jo. 560.

Annotation:—As to (3 & 4) Apprvd. Re Hope, De Cetto v. Hope, [1899] 2 Ch. 679.

2929. — Intention of settlor.]—*Re BEAUMONT'S SETTLED ESTATES*, No. 2948, *post*.

2930. —.]—*Re HOPE, DE CETTO v. HOPE*, No. 2924, *ante*.

2931. — Wishes & feelings of remainderman.]—*Re HOPE, DE CETTO v. HOPE*, No. 2924, *ante*.

2932. No substantial depreciation in value of estate—Heirlooms of small value compared with estate.]—*Re BEAUMONT'S SETTLED ESTATES*, No. 2948, *post*.

2933. Public considerations.]—*BRUCE (LORD HENRY) v. AILESBURY (MARQUESS)*, No. 2772, *ante*.

2934. Incumbrance of life interests.]—*Re RADNOR'S (EARL) WILL TRUSTS*, No. 2921, *ante*.

2935. Financial difficulties of tenant for life due to extravagance.]—*Re HOPE'S SETTLEMENT*, No. 2928, *ante*.

2936. —.]—*Re HOPE, DE CETTO v. HOPE*, No. 2924, *ante*.

2937. — Unable to marry.]—A nobleman, tenant for life of settled estates to which but for a settlement, to which he had himself been a party, he would have been entitled as tenant in tail was, through no fault of his own, in an impecunious position & unable to marry. The sale of certain heirlooms, including family portraits, some of historical interest, would put him in a better pecuniary position, & he applied under Settled Land Act, 1882 (c. 38) for leave to sell the same. A remainderman, who was older than the tenant for life, but who would succeed him as tenant for life in the event of his not having male issue, opposed the sale of any family portraits or any portraits of persons connected with the family:—*Held*: under the circumstances of the case,

the ct. ought to allow the sale of all the heirlooms, including the portraits.—*Re TOWNSHEND'S SETTLEMENT* (1903), 89 L. T. 691.

2938. Interests of all concerned.]—*Re RADNOR'S (EARL) WILL TRUSTS*, No. 2921, *ante*.

2939. —.]—*Re HOPE'S SETTLED ESTATES*, No. 2925, *ante*.

2940. —.]—On an application by a tenant for life for leave to sell heirlooms, the ct. has to consider not only the interests of the tenant for life, but also the interests of other persons; & it is for the tenant for life to show that the sale would be for the benefit of those to come after him. Where, therefore, it was only shown that the sale of heirlooms would be for the benefit of the tenant for life, the ct. refused the application.—*Re SEBRIGHT, SEBRIGHT v. BROWNLOW (EARL)* (1912), 28 T. L. R. 191; 56 Sol. Jo. 240.

Annotation:—Distd. Re Sebright, Sebright v. Brownlow (1914), 31 T. L. R. 25.

2941. —.]—On an application by a tenant for life for leave to sell heirlooms, the ct. taking into consideration the interests not only of the tenant for life but also of those to come after him, came to the conclusion that the purpose of the application was not merely to increase the income of the tenant for life, & granted the application.—*Re SEBRIGHT, SEBRIGHT v. BROWNLOW (EARL)* (1914), 31 T. L. R. 25.

2942. No suitable accommodation for heirlooms—Pictures.]—*Re HOPE'S SETTLEMENT*, No. 2928, *ante*.

2943. Wishes & opinions of tenant for life as head of family.]—*Re HOPE, DE CETTO v. HOPE*, No. 2924, *ante*.

See, also, No. 2927, *ante*.

C. In What Cases Authorised.

2944. Payment of charges on estate—Payment for benefit of all concerned.]—The ct. has jurisdiction to order a sale of heirlooms apart from the land to which they are attached for the purpose of paying off mtges., & will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where there are infant tenants in tail in remainder.—*FANE v. FANE* (1876), 2 Ch. D. 711; 46 L. J. Ch. 174.

Annotation:—Distd. D'Eyncourt v. Gregory (1876), 3 Ch. D. 635.

2945. — Income diminished through no fault of tenant for life.]—*Re THYNNE (LORD JOHN)* (1884), 77 L. T. Jo. 195.

2946. Where mansion house ordered to be sold—Heirlooms settled as annexed to mansion house.]—*Re BROWN'S WILL*, No. 2773, *ante*.

2947. — Chattels unsuitable for new mansion house.]—By the will of the settlor chattels were given upon trust to be held & enjoyed & go along with his P. house. After his death some of the personalty settled by the will was laid out in the purchase of real estate, with a house upon it more suitable for the family mansion than the P. house. It was desired to sell the P. house, & such of the chattels in it as were not suitable for removal to the new house, & to remove to that house such of the chattels as were suitable for removal:—*Held*: this might be done.—*BROWNE v. COLLINS* (1890), 62 L. T. 566.

2948. Heirlooms a characteristic feature of mansion house.]—A tenant for life of settled estates applied, under Settled Land Act, 1882 (c. 38), for the sanction of the ct. to a proposed sale of chattels consisting for the most part of pictures at the family mansion house & settled as heirlooms. It was proposed that the sum

Sect. 1.—Under Settled Land Acts: Sub-sect. 7, C.; Sub-sects. 8, 9 & 10, A., B. & C.]

arising from the sale should be applied in reduction of charges upon the settled estates. The estimated sum to arise from the sale was £7,300, & the annual income of the estates was about £7,500. The estates were settled as to one-half by a settlement made in 1876, & as to the other part by the will of testator who died in 1882. The guardians *ad litem* of the tenant in tail in remainder & the trustees were opposed to the proposed sale. It appeared that since testator's death there had been no substantial depreciation in the property. The pictures were a characteristic feature of the mansion house:—*Held*: under the circumstances of the case the ct. would in the exercise of its discretion refuse to sanction the proposed sale.—*Re BEAUMONT'S SETTLED ESTATES* (1888), 58 L. T. 916.

Annotation:—Distd. Re Radnor's Will Trusts (1890), 45 Ch. D. 402.

2949. To enable tenant for life to pay succession duties & pensions—and reside in mansion house.]—*Re FETHERSTONHAUGH'S ESTATE* (1898), 14 T. L. R. 167; 42 Sol. Jo. 198.

2950. Repair & renovation of unsold heirlooms.]—A settlement made by will included several large estates, with three mansion houses & the pictures, china, & furniture therein, which were settled as heirlooms. Two of the mansion houses were sold under orders of ct. made in pursuance of the provisions of the Settled Land Acts, & certain pictures, china & furniture removed therefrom, for which no room could be found in the remaining mansion house & the town house of the tenant for life for the time being, were warehoused. Of the other pictures for which room was found in the remaining mansion house, some were in a bad state of repair, & required the expenditure of a considerable sum for the preservation. On an originating summons taken out by the tenant for life, to which the trustees of the settlement were made defts. for authority to sell the warehoused heirlooms, & that the trustees might have liberty out of the proceeds of sale to repair the remaining heirlooms:—*Held*: the tenant for life might sell the warehoused heirlooms, & the trustees might out of the proceeds of sale, spend such a sum as was necessary in repairing the remaining heirlooms, with liberty to apply in chambers as to the amount to be spent for that purpose.—*Re WALDEGRAVE, WALDEGRAVE (EARL) v. SELBORNE (EARL)* (1899), 81 L. T. 632.

SUB-SECT. 8.—POWER TO MORTGAGE.

See MORTGAGE, Vol. XXXV., pp. 277, 278, Nos. 320–337.

SUB-SECT. 9.—COMPLETION OF SALE, MORTGAGE, ETC. BY CONVEYANCE.

See Settled Land Act, 1925 (c. 18), s. 72.

2951. Interests “subsisting or to arise” under settlement—Mortgage—On estate of tenant for life.]—*Re SEBRIGHT'S SETTLED ESTATES*, No. 2708, *ante*.

2952. ————.]—It appears to me that it would be rather a strange result to hold that the tenant for life can sell only subject to the mtge. created by himself of his own life interest, or rather (to use the exact term again), without prejudice to that, & can at the same time convey his own

mtgee.'s estate. It is clear that he can convey the fee simple, if the fee simple is comprised in the settlement, but without prejudice to the mtges. on his own life estate (*per CHITTY, J.*).—*CARDIGAN v. CURZON-HOWE* (1888), 40 Ch. D. 338; 58 L. J. Ch. 177; 60 L. T. 252; 37 W. R. 247; *on appeal* (1889), 41 Ch. D. 375, C. A.

Annotations:—Consd. Re Dickin & Kelsall's Contract, [1908] 1 Ch. 213; *Re Davies & Kent's Contract*, [1910] 2 Ch. 35; *Re Peel's S. E.*, [1910] 1 Ch. 389.

2953. ————.]—Where a life tenant sells settled land under the powers of Settled Land Acts, with the consent of the mtgee. of the life estate, the mtgee.'s estate passes by the exercise of the statutory power, & his concurrence in the conveyance is not necessary.—*Re DICKIN & KELSALL'S CONTRACT*, [1908] 1 Ch. 213; 77 L. J. Ch. 177; 98 L. T. 371.

Annotation:—Apprvd. Re Davies & Kent's Contract, [1910] 2 Ch. 35.

2954. ———— By remainderman.]—*Re DAVIES & KENT'S CONTRACT*, No. 3092, *post*.

2955. ———— Sale under compound settlement—Jointure charges.]—*Re AILESBUURY (MARQUIS) & IVEAGH (LORD)*, No. 3036, *post*.

2956. ————.]—*Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

2957. ———— Annuities.]—*Re PHILLIMORE'S ESTATE, PHILLIMORE v. MILNES*, No. 3042, *post*.

2958. ———— Jointure charges—Prior to estate of life tenant.]—By a will real estate was devised to A. for life with remainder to his first & other sons successively in tail male, with like remainder to B. & C. & then over. A. & C. were dead, & B. was tenant for life in possession. A., B. & C. had all executed jointure deeds under a power conferred by the settlement; that executed by A. was in operation & constituted an existing charge on the settled property. Trustees of the will had been appointed for the purposes of Settled Land Acts. B. having contracted, under the powers conferred upon him by those Acts, to sell a portion of the estate, the purchaser insisted that trustees should be appointed of the compound settlement created by the will & the several jointure deeds:—*Held*: (1) the jointures were not charges upon the estate of the tenant for life within Settled Land Act, 1890 (c. 69), s. 4; (2) the will by itself constituted a settlement within Settled Land Act, 1882 (c. 38), s. 2; (3) under Settled Land Act, 1882 (c. 38), s. 20, B. could convey the land discharged from the jointures, they being “estates, interests, or charges subsisting under settlement” within that sect.; & B. could make a good title to the property, & the trustees of the will could give a good discharge for the purchase-money.

If, for example, the settlement contained a power to charge portions, & those portions had been provided for by a mtge. of the property on the creation of a term or interest in the property, & such portions had been actually raised, then I apprehend they would fall within this exception [Settled Land Act, 1882 (c. 38), s. 20 (2)] (*STIRLING, J.*).—*Re KECK & HART'S CONTRACT*, [1898] 1 Ch. 617; 78 L. T. 287; 46 W. R. 389; 42 Sol. Jo. 380; *sub nom. Re POWYS-KECK & HART'S CONTRACT*, 67 L. J. Ch. 331.

Annotation:—As to (3) *Apld. Re Du Cane & Nettlefold's Contract*, [1898] 2 Ch. 96.

2959. Interests “having priority to” the settlement—Equitable right to redeem—Trustee for tenant for life.]—*GRAINGE v. WILBERFORCE* (1889), 5 T. L. R. 436.

2960. ———— Sale under compound settlement.]—*Re AILESBUURY (MARQUIS) & IVEAGH (LORD)*, No. 3036, *post*.

2961. Expressed or intended to operate—Lease by tenant for life acting as absolute owner.]—*MOGRIDGE v. CLAPP*, No. 2761, *ante*.

2962. — Invalid lease.]—A tenant for life of settled land cannot grant a valid building lease of the surface of the land under the Settled Land Act, 1882 (c. 38), with a reservation of the mines & minerals.

Where a tenant for life purports to grant such a lease, it will not be rendered a valid lease by virtue of Leases Act, 1849 (c. 26).

The defect is said to be remedied in two ways. In the first place Settled Land Act, 1882 (c. 38), s. 20, provides that on a lease the tenant for life may as regards land leased, as intended so to be, convey or create the same by deed to the user & in the manner requisite for giving effect to the lease, & such a deed, to the extent & in the manner to or in which it is expressed or intended to operate & can operate under the Act, is effectual to pass the land conveyed. But to pray this in aid of the lease begs the whole question. If the lease can operate under the Act there is no question at all.

In the second place, it is said that Leases Acts, 1849 (c. 26), 1850 (c. 17), apply to leases under Settled Land Act, 1882 (c. 38). But those Acts only apply to forms & ceremonies of leases under powers, & not to matters of substance. To hold that they make a lease of this kind valid would be tantamount to saying that the tenant for life may grant any lease he likes in total disregard of all the provisions of Settled Land Act, 1882 (c. 38). The Leases Acts do not touch a case like the present (*KEKEWICH, J.*).—*Re NEWELL & NEVILL'S CONTRACT*, [1900] 1 Ch. 90; *sub nom. Re NEVILL & NEWELL'S CONTRACT*, 69 L. J. Ch. 94; 81 L. T. 581; 48 W. R. 181; 44 Sol. Jo. 88.

Annotation:—Reffd. Re Gladstone, Gladstone v. Gladstone, [1900] 2 Ch. 101.

Reservation of minerals in lease of surface.]

—*See MINES*, Vol. XXXIV., p. 642, Nos. 391, 392.

2963. "Securing money actually" raised—Portions charge.]—*Re DU CANE & NETTLEFOLD'S CONTRACT*, No. 2842, *ante*.

2964. — — —.]—*Re KECK & HART'S CONTRACT*, No. 2958, *ante*.

2965. — Mortgage.]—*Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

2966. "Estate or interest the subject of the settlement" — Reversion.]—*Re HUNTER & HEWLETT'S CONTRACT*, No. 2594, *ante*.

SUB-SECT. 10.—ANCILLARY POWERS.

A. Power to Shift or Vary Provisions of Incumbrances.

Power to shift incumbrances.]—*See Settled Land Act*, 1925 (c. 18), s. 69.

Power to vary provisions of incumbrance.]—*See Settled Land Act*, 1925 (c. 18), s. 70.

2967. What incumbrances included — Rent-charge.]—"Incumbrance" in Settled Land Act, 1882 (c. 38), s. 5, includes a rentcharge created under Improvement of Land Act, 1864 (c. 114); & therefore where settled land is subject to such a

rentcharge, the tenant for life can, on a sale of part of the land, effectually exonerate the part sold by obtaining the consent of the owner of the rentcharge to charging the whole of it upon the unsold land under Settled Land Act, 1882 (c. 38), s. 5, & the intervention of the Board of Agriculture under Improvement of Land Act, 1864 (c. 114), ss. 68, 69, is unnecessary.

As the exoneration operates as an effectual discharge of the land sold, the purchaser is not liable under Improvement of Land Act, 1864 (c. 114), s. 63, & Tithe Act, 1842 (c. 54), s. 16, to contribution at the instance of owners of unsold land subject to the rentcharge.—*Re STRAFFORD (EARL) & MAPLES*, [1896] 1 Ch. 235; 65 L. J. Ch. 124; 73 L. T. 586; 44 W. R. 259; 40 Sol. Jo. 130, C. A.

Annotation:—Mentd. Re Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648.

2968. — Whether limited to incumbrances having priority over settlement.]—The beneficial operation of Settled Land Act, 1882 (c. 38), s. 5, is not limited to incumbrances having priority over the settlement under which a sale is made under the Act, but extends to incumbrances arising under the settlement which are overreached by the sale & attach to the proceeds of sale.

Therefore on a sale under the Act a tenant for life can under sect. 5, with the consent of a jointress, transfer her jointure rentcharge attaching to the proceeds of sale to the unsold part of the settled estates.

The words "on a sale" in sect. 5, are not limited to cases where a sale has been made, but also include a contemplated or intended sale.—*Re KNIGHT'S SETTLED ESTATES*, [1918] 1 Ch. 211; 87 L. J. Ch. 111; 118 L. T. 170; 62 Sol. Jo. 141.

2969. — Incumbrances overreached by sale—Attaching to proceeds of sale—Jointure rentcharge.]—*Re KNIGHT'S SETTLED ESTATES*, No. 2968, *ante*.

2970. Consent of Ministry of Agriculture — Necessity for.]—*Re STRAFFORD (EARL) & MAPLES*, No. 2967, *ante*.

2971. Meaning of "sale"—Includes contemplated sale.]—*Re KNIGHT'S SETTLED ESTATES*, No. 2968, *ante*.

Powers under Land Property Act, 1925 (c. 20), s. 50.]—*See SALE OF LAND*.

B. Power to deal with Minerals and Surface Separately.

See MINES, Vol. XXXIV., pp. 641, 642, Nos. 389–392.

C. Powers relating to Easements.

See Settled Land Act, 1925 (c. 18), s. 38 (i), & generally, *EASEMENTS*, Vol. XIX., pp. 24, 25, 82, Nos. 99–103, 492.

2972. Exchange—Apart from exchange or partition of land.]—Settled Land Act, 1890 (c. 69), s. 5, authorises an exchange of easements, apart from any exchange or partition of land.—*Re BRACKEN'S SETTLEMENT*, [1903] 1 Ch. 265; 72 L. J. Ch. 101; 87 L. T. 743; 51 W. R. 411.

Annotation:—Consd. Re Brotherton, Brotherton v. Brotherton, Re Markham's Settltmt. (1907), 77 L. J. Ch. 58.

2973. — Between two adjoining settled estates.]—The B. Settled Estate & the M. Settled

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2963 i. "Securing money actually" raised — Portions charge.]—By will, dated Oct. 17, 1854, testator resident in Scotland devised his real estate, including the lands of B. in Ireland, to his six daughters for life, with remainders over. Testator died in 1857, having prior to his death advanced the

sum of £1,500 to the husband of one of his daughters, & £475 to the husband of another daughter. In 1882, by deed of family arrangement, the real estate of testator was conveyed to trustees, to hold on the trusts of the will, charged, as to the life estates of the two daughters therein, with repayment of the sums of £1,500 & £475 advanced to their husbands respec-

tively. An order was subsequently made for administration of testator's real & personal estate in Ireland & the lands of B. were sold to a purchaser.—*Held*: the sums of £1,500 & £475 were not money "actually raised" within the exception to Settled Land Act, 1882, s. 20.—*CONNOLLY v. KEATING*, [1903] 1 I. R. 353.—*IR.*

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Estate adjoined one another, & each had appurtenant to some part of it a right of way or easement over some part of the other. It was to the advantage of the respective owners of the estates, for the purpose of developing the same, that these appurtenant rights of way should be released so that each estate might be no longer incumbered with any easement in favour of the other. The question arose whether under Settled Land Acts a tenant for life of a settled estate could by way of sale or exchange release an easement which was appurtenant to such estate, or could out of capital money purchase the discharge or release of a right of way or similar right to which the settled estate was subject:—*Held*: whether or not the proposed scheme for exchange of the easements could properly be carried out, the better course would be that cross sales of the easements should be effected, that course being within the powers conferred by Settled Land Acts.—*Re BROTHERTON, BROTHERTON v. BROTHERTON, Re MARKHAM'S SETTLEMENT* (1908), 77 L. J. Ch. 373; 98 L. T. 547, C. A.

Annotation:—*Reid, Re Westminster's S. E., Westminster v. Shaftesbury*, [1921] 1 Ch. 585.

2974. Cross sales of easements—Two adjoining settled estates.—*Re BROTHERTON, BROTHERTON v. BROTHERTON, Re MARKHAM'S SETTLEMENT*, No. 2973, *ante*.

2975. Release of easement.—*Re BROTHERTON, BROTHERTON v. BROTHERTON, Re MARKHAM'S SETTLEMENT*, No. 2973, *ante*.

D. Power to accept Surrender of Leases.

See Settled Land Act, 1925 (c. 18), s. 52.

2976. Duty of tenant for life—To act in interest of all persons concerned.—An equitable tenant for life accepted the surrender of a lease, which she had granted under the powers of Settled Land Acts & received from the lessee a certain sum as consideration for accepting the surrender:—*Held*: under Settled Land Act, 1882 (c. 38), s. 53, the tenant for life was a trustee, & if he accepted a surrender, he must do so for the interests not only of himself but for those of the remaindermen, & if he received a consideration for accepting it, then, on ordinary principles, a ct. of equity would distribute the money between the tenant for life & the remaindermen on principles which it thought fair.—*Re RODES, SANDERS v. HOBSON*, [1909] 1 Ch. 815; 100 L. T. 959; *sub nom. Re DE RODES, SANDERS v. HOBSON*, 78 L. J. Ch. 434.

Annotations:—*Consd. Re Wix, Hardy v. Lemon*, [1916] 1 Ch. 279. *Reid, Re Lacon's Settlt., Lacon v. Lacon*, [1911] 2 Ch. 17.

2977. Effect of invalid notice by lessees—On new lease granted by tenant for life.—Sect. 7 of the Settled Estates Act, 1877, does not authorise an equitable tenant for life, not being a lessor, to take a surrender which is not sanctioned by the court.

Certain customary freeholds were demised by a lease of June 15, 1877, to two lessees, for twenty-one years from Christmas, 1876, at a rental of £130. The lease was determinable at the expiration of the fourteenth year, on the lessor or lessees giving to the other of them, "or his or their representatives or assigns," a written notice of such intention. The lessor died in Dec. 1877, having devised & bequeathed his customary freeholds & leaseholds to trustees in trust for his wife, M., during her widowhood, & then to other beneficiaries. On Dec. 21, 1889, one of the two lessees gave notice to M. of his intention to quit & yield up possession

of the leasehold premises at Christmas, 1890. On Aug. 13, 1890, M. purporting to act under the provisions of Settled Estates Act, 1877 (c. 18), granted a lease of the same premises to one of the two original lessees for seven years from Christmas 1890, at the reduced rent of £100. The licence of the lord of the manor for this lease was not obtained. In an action by the trustees & beneficiaries of the original lessor against the two lessees:—*Held*: (1) the notice of Dec. 21, 1889, not having been served on the lessor's representatives or assigns, was not a good notice; (2) the old lease was not surrendered by operation of law, inasmuch as it was voidable if not void; (3) the granting of the new lease could not be supported under either Settled Estates Act, 1877 (c. 18), or Settled Land Act, 1882 (c. 38), & the lessees were liable to pay the full rent of £130 under the old lease.—*EASTON v. PENNY* (1892), 67 L. T. 290; 41 W. R. 72; 8 T. L. R. 779.

2978. Effect of grant of new lease—Operates according to its tenor.—Where a tenant for life of settled property accepts the surrender of a lease of the settled property & grants a new lease at an increased rent, then, if that new lease is not open to question on the ground of impropriety or otherwise, Settled Land Act, 1882 (c. 38), intends that it shall be operative in accordance with its tenor. Unless the lease is so improper as to amount to an unlawful exercise of his powers by the tenant for life, it is quite in accord with the spirit of the whole Act that the Legislature intended that the tenant for life should keep for himself everything which under the terms of the instrument he had succeeded in retaining for himself & therefore the excess rent is payable to the tenant for life, & is not to be capitalised or accumulated for the benefit of the remaindermen.—*Re WIX, HARDY v. LEMON*, [1916] 1 Ch. 279; 85 L. J. Ch. 192; 114 L. T. 455; 32 T. L. R. 257; 60 Sol. Jo. 291.

Rights as between tenant for life & remainderman.—See Part X., Sect. 4, *ante*.

E. Power to dedicate Land for Streets and Open Spaces.

See HIGHWAYS, Vol. XXVI., p. 289, Nos. 223 224; Settled Land Act, 1925 (c. 18), s. 56.

F. Conveyance in Pursuance of Contract of Predecessors in Title.

See Settled Land Act, 1925 (c. 18), s. 63.

2979. Whether includes leases.—Settled Land Act, 1890 (c. 69), s. 6, does not apply to leases (NORTH, J.).—*Re KEMEYS-TYNTE, KEMEYS-TYNTE v. KEMEYS-TYNTE*, as reported in [1892] 2 Ch. 211.

Annotation:—*Reid, Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

SUB-SECT. 11.—RELATION TO POWERS ARISING UNDER SETTLEMENT OR STATUTES OTHER THAN SETTLED LAND ACTS.

See Settled Land Act, 1925 (c. 18), ss. 108, 109, sched. V.

2980. Provisions in settlement & statutory provisions cumulative.—The settlement gave the trustees power during the minority of any person entitled to possession to receive & apply rents & profits in management of estate & maintenance of infant, & to accumulate & apply the surplus in paying off charges or in purchase of real estate to be settled to the same uses:—*Held*: (1) the rents & profits received by the trustees during the minority were to be treated in manner directed by the settlement & without regard to the Act.

Power in the settlement to the trustees with the consent of tenant for life, if of age, & if not of his guardians, to sell or exchange:—*Held*: (2) this power was exercisable by the trustees during the minority at the request & by the direction of the guardians of the infant tenant in tail.

Power in the settlement for the guardians during minority to grant leases for twenty-one years, building leases for ninety-nine years, & mining leases for sixty years:—*Held*: (3) this power was exercisable during minority by the guardians with the consent of the trustees; (4) rents derived from mining leases were to be applied by the trustees in manner directed by the settlement, as coming within the term "contrary intention" expressed in sect. 11 of the Act; (5) there being no power in the settlement to sell surface land apart from minerals the trustees could exercise that power under sect. 17 of the Act; & this being an execution of a statutory power, the consent of the guardians would not be necessary.

(6) The meaning of Settled Land Act, 1882 (c. 38), s. 56 (2), is that in all cases, notwithstanding anything contained in the settlement, the consent of the tenant for life shall by virtue of the Act be necessary to the exercise by the trustees of the settlement of any power conferred by the settlement for any purpose provided by the Act.

The meaning of sect. 60 is that where the tenant for life is an infant, the option of consenting given to the tenant for life is conferred upon the trustees of the settlement.

It is not intended to take away from the trustees named in any settlement powers given to them by that settlement . . . but if the powers in the settlement are more restricted than the powers in the Act, then the Act says that the provisions of the Act or the powers given by the Act are cumulative, that is to say, that the powers in the Act so far as they give larger authority than is given by the trusts of the settlement may be exercised in the manner prescribed by the Act (PEARSON, J.).—*Re NEWCASTLE'S (DUKE) ESTATES* (1883), 24 Ch. D. 129; 52 L. J. Ch. 645; 48 L. T. 779; 31 W. R. 782.

Annotations:—As to (4) *Appld. Re Rayer, Rayer v. Rayer*, [1913] 2 Ch. 210. *Reid. Re Hanbury's S. E.* (1913), 57 Sol. Jo. 646. As to (6) *Appld. Constable v. Constable* (1886), 32 Ch. D. 233.

2981. Conflict between powers in settlement & statutory powers—Necessity for consent of tenant for life to exercise of settlement powers—Infant tenant for life—Application of rents & profits.—*Re NEWCASTLE'S (DUKE) ESTATES*, No. 2980, *ante*.

2982. ——— **Sale or exchange.**—*Re NEWCASTLE'S (DUKE) ESTATES*, No. 2980, *ante*.

2983. ——— **Leasing.**—*Re NEWCASTLE'S (DUKE) ESTATES*, No. 2980, *ante*.

2984. ——— **Leasing.**—*Re ATHERTON*, [1891] W. N. 85.

2985. ——— **Absolute trust for sale.**—Testator devised all his real & personal estate to trustees upon trust after the death of his wife absolutely to sell the whole of his property in such manner as they should think fit, & to pay one-fourteenth part of the proceeds to each of his fourteen children at twenty-one or marriage, with further provisions under which his daughters' shares were settled on them for life with remainders over. A suit having been instituted for the administration of the estate, & the wife being dead, an order was made in the suit for sale of part of the estate by the trustees:—*Held*: the concurrence of the children constituting the tenant for life under Settled Land Act, 1882 (c. 38), was not necessary upon the sale by the trustees; but even if such concurrence would be necessary the order of the

ct. was sufficient to enable the trustees to sell without joining the fourteen children or any of them in the conveyance to the purchaser.—*TAYLOR v. PONCIA* (1884), 25 Ch. D. 646; 53 L. J. Ch. 409; 50 L. T. 20, 32 W. R. 335.

Annotation:—*Consd. Re Harding's Estate*, [1891] 1 Ch. 60.

2986. ——— **Tenants for life of undivided shares—Power of sale of entirety in trustees.**—*Re OSBORNE & BRIGHT'S, LTD.*, No. 2809, *ante*.

2987. ——— ————*Re MORRIS'* SETTLED ESTATES, No. 2610, *ante*.

2988. ——— ————*Re HONE & PARKER'S CONTRACT*, No. 2611, *ante*.

2989. ——— **Power of purchaser to insist on concurrence of tenant for life—Consent not evidenced in writing.**—Where the trustees & the tenant for life both have powers of sale, & the consent of the tenant for life is required under Settled Land Act, 1882 (c. 38), s. 56, a purchaser is not entitled to insist on the tenant for life concurring in the conveyance, if there is evidence that he in fact consented, though his consent was not in writing.—*Re POPE'S CONTRACT*, [1911] 2 Ch. 442; 80 L. J. Ch. 692; 105 L. T. 370.

Annotation:—*Reid. Re Wragg, Wragg v. Palmer*, [1919] 2 Ch. 58.

2990. ——— **Power of court to authorise sale by tenant for life.**—In a case where land was held on trust for sale & there were no trusts prior to the interest of tenants for life of the income, leave was given to the tenants for life under Settled Land Act, 1884 (c. 18), s. 7, to sell such of the land as remained unsold.—*Re HARDING'S ESTATE*, [1891] 1 Ch. 60; 60 L. J. Ch. 277; 63 L. T. 539; 39 W. R. 118.

2991. ——— **Trustee's power of sale over whole estate—Held in undivided shares—Some shares settled.**—*Re HONE & PARKER'S CONTRACT*, No. 2611, *ante*.

2992. ——— **Settlement supplemented by private Act—Containing powers relating to property.**—*Re CHAYTOR'S SETTLED ESTATE ACT*, No. 2796, *ante*.

2993. ——— ————Where land is by will vested in trustees in trust for persons by way of succession, a private Act of Parliament which merely confers upon the trustees powers of developing & managing the land as a building estate, but does not incorporate the will, nor itself create any limitations to or in trust for any persons by way of succession, is not part of "the settlement" within Settled Land Act, 1882 (c. 38), s. 56 (2); & no consent by the tenant for life to the exercise of those powers by the trustees is rendered necessary by that sub-sect.—*TALBOT v. SCARISBRICK*, [1908] 1 Ch. 812; 77 L. J. Ch. 436; 99 L. T. 46.

2994. ——— ————(1) The cost of reconstructing the drainage of leasehold houses, forming part of a residuary estate bequeathed to trustees upon trust for tenant for life & remaindermen:—*Held*: to be payable out of capital money, as an improvement within Settled Land Acts, notwithstanding a direction in the will that pending a sale the rents, after payment of "all incidental expenses & outgoings" were to be paid to the tenant for life.

(2) Moneys in the hands of the trustees available for investment under this will are capital moneys within Settled Land Acts, as being moneys liable to be laid out in the purchase of land to be made subject to the settlement (BYRNE, J.).—*Re THOMAS, WEATHERALL v. THOMAS*, [1900] 1 Ch. 319; 69 L. J. Ch. 198; 48 W. R. 409.

Annotation:—As to (1) *Reid. Re McClure's Trusts*, Carr v. Commercial Union Insce. Co. (1906), 76 L. J. Ch. 52.

2995. ——— **Whether statutory power paramount—Express power for improvement.**—The power of

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a tenant for life under Settled Land Act, 1882 (c. 38), to require capital moneys to be laid out under a proper scheme, in improvements on the settled land, is paramount to the powers of the trustees of the settlement, notwithstanding an express power in the settlement under which, had they been so minded, they could have executed & paid for the improvements out of income; the position & power of the tenant for life is not affected in this case by the fact that there are no trustees of the settlement, & that the capital moneys are in ct. at the time the expenditure is required.—*CLARKE v. THORNTON* (1887), 35 Ch. D. 307; 56 L. J. Ch. 302; 56 L. T. 294; 35 W. R. 603; 3 T. L. R. 299.

Annotations:—*Fold. Re Stamford's Estate* (1887), 56 L. T. 484. *Consd. Cardigan v. Curzon-Howe* (1893), 9 T. L. R. 244; *Re Gee, Pearson v. Pearson* (1895), 64 L. J. Ch. 606. *Distd. Re Partington, Leigh v. Kane*, [1902] 1 Ch. 711. *Expld. Re Keck's Settlement*, [1904] 2 Ch. 22. *Apld. Re Stamford & Warrington, Payne v. Grey*, [1916] 1 Ch. 404. *Refd. Stamford's S. E.* (1889), 43 Ch. D. 84; *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319; *Re Egmont's S. E., Lefroy v. Egmont*, [1906] 2 Ch. 151; *Re Tubbs, Dykes v. Tubbs*, [1915] 2 Ch. 137.

2996. — Express trust for improvements—Payable out of income.]—Properties, the leases of which contained covenants by the lessees to do works which would be repairs & improvements within the meaning of Settled Land Acts, were bequeathed to trustees upon trust out of the rents & profits to pay the rents reserved by the leases & perform the lessees' covenants, & subject thereto upon trusts under which K. was tenant for life, with remainders to other persons. Without any scheme being submitted under Settled Land Act, 1882 (c. 38), s. 26, money was expended in making improvements:—*Held*: as there was a trust, providing for improvements out of income, & trust came before the trust for K., the expenses must be borne by income.—*Re PARTINGTON, REIGH v. KANE*, [1902] 1 Ch. 711; 71 L. J. Ch. 472; 86 L. T. 194; 50 W. R. 388; 18 T. L. R. 387; 46 Sol. Jo. 337.

Annotations:—*Distd. Re Stamford & Warrington, Payne v. Grey*, [1916] 1 Ch. 404. *Refd. Re Keck's S. E.* (1904), 90 L. T. 113.

2997. Similar power derived from two sources—Land Clauses Acts & Settled Land Acts—Power of sale.]—*Re BENTINCK (LADY) & LONDON & NORTH WESTERN RY. CO.* (1895), 12 T. L. R. 100; 40 Sol. Jo. 130.

2998. — Settled Land Acts & power in settlement—Power in settlement more advantageous—Power to lease.]—(1) The provisions of Settled Land Act, 1882 (c. 38), s. 56 (2), are provisions connected with the execution of any power under the Act—e.g. the consent of a third person—and not with the results of such execution, & therefore where a tenant for life has a power of leasing under the settlement & also under the Act, & exercises the former & more advantageous power, the provisions of the Act will not override the provisions of the settlement under which the donee derives a greater benefit from the execution of the power than he would have done if he had exercised the power conferred upon him as tenant for life under Settled Land Act.

(2) When such a tenant for life grants the leases "in exercise of every power or authority enabling him," he will, in the absence of any contrary intention, be presumed to have exercised the power earlier in time & more favourable to himself.

(3) A power of leasing conferred by the settlement of each of several successive tenants for life "as & when he shall be entitled to the

possession or the receipt of the rents & profits," is referable to the falling into possession of the several life interests, & not to the unincumbered beneficial enjoyment thereof, & is exercisable by the donee notwithstanding that he has aliened his life interest.—*LONSDALE (EARL) v. LOWTHER*, [1900] 2 Ch. 687; 83 L. T. 312; *sub nom. LONSDALE (EARL) v. CRAWFURD*, 69 L. J. Ch. 686; 16 T. L. R. 509; 44 Sol. Jo. 626.

Annotation:—*Generally, Refd. Re Osborne & Bright*, [1902] 1 Ch. 335.

2999. Exercise of "every power enabling him"—Presumption as to exercise—Power most beneficial & earlier in time.]—*LONSDALE (EARL) v. LOWTHER*, No. 2998, *ante*.

3000. Settlement granting powers in addition to or in aid of statutory powers—What powers within such provision—Powers of permanent improvement—Duty of trustees.]—Under a deed of settlement the tenant for life was granted "in addition to & in aid" of his statutory powers special powers of sale, enfranchisement, exchange, & partition & power also "to apply any money to arise by or upon such sale, enfranchisement, exchange or partition . . . in or towards the permanent improvement as to him . . . shall seem advantageous" of the settled estates. There was also a provision in the settlement that capital moneys arising under Settled Land Acts might be applied upon improvements authorised by those Acts without any scheme being first approved by the trustees & without an order of the ct.:—*Held*: (1) the power to apply any money to arise under the special powers in permanent improvements as to the tenant for life seemed advantageous was not an "additional or larger" power within Settled Land Act, 1882 (c. 38), s. 57, & was not therefore exercisable "in the like manner" as if conferred by the Act. It was a separate independent power differing entirely from the provisions as to improvements in the Act & not a mere extension of them. The trustees were accordingly bound to apply money arising under the special powers on such permanent improvements as to the tenant for life seemed advantageous without having a scheme submitted to them & without an order of the ct.

(2) Capital moneys arising under the Act of 1882 were by virtue of s. 21 (xi), of the Act also applicable under the above power upon permanent improvements without the need for a scheme or an order of the ct.—*Re WESTMINSTER'S (DUKE) SETTLED ESTATES, WESTMINSTER (DUKE) v. SHAFESBURY (EARL)*, [1920] 2 Ch. 445; 90 L. J. Ch. 31; 124 L. T. 236; 65 Sol. Jo. 61.

3001. — Application of capital moneys.]—*Re WESTMINSTER'S (DUKE) SETTLED ESTATES, WESTMINSTER (DUKE) v. SHAFESBURY (EARL)*, No. 3000, *ante*.

3002. — Powers of exchange—Accumulations of income resulting therefrom.]—*Re WESTMINSTER'S (DUKE) SETTLED ESTATES, WESTMINSTER (DUKE) v. SHAFESBURY (EARL)*, No. 3000, *ante*.

3003. — Injury possible to existing incumbrancers by exercise—Protection of incumbrances—Non-statutory investment or application of capital moneys.]—By an 1888 settlement now only subsisting by virtue of jointures & a portion charged hereunder, additional powers in extension of the statutory powers were given to the person in whom Settled Land Act powers should for the time being be vested. By a 1914 resettlement other additional powers were given to the person for the time being entitled to exercise a life tenant's powers. Both sets of these additional powers might prejudicially affect the security of the

jointures & portion, but it was expressly provided that no non-statutory investment or application of capital money under the additional powers of the 1914 resettlement should be made without the consent of the 1914 resettlement trustees. The life tenant of the 1914 resettlement, though never a life tenant under the 1888 settlement, claimed as life tenant of the compound settlement, consisting of those deeds & an intermediate deed of disentail, to exercise both sets of additional powers without any consent:—*Held*: the life tenant was entitled to exercise both sets of additional powers, they having become statutory powers under Settled Land Act, 1925 (c. 18), s. 109, & the jointresses & portioner being fully protected by the fact that the life tenant being a trustee for them under sect. 107 (1), could only exercise his powers fiduciarily & after notice to the compound settlement trustees under sect. 101 (1); but any non-statutory investment or application of capital money under the additional powers of the 1914 resettlement required the consent of the 1914 resettlement trustees.—*Re COWLEY SETTLED ESTATES*, [1926] Ch. 725; 95 L. J. Ch. 477; 135 L. T. 568.

SUB-SECT. 12.—EXPENSES INCURRED IN EXECUTION OF POWERS.

A. In General.

See Settled Land Act, 1925 (c. 18), s. 73 (i) (xx).

3004. Future capital moneys — Not within powers.—Settled Land Act, 1882 (c. 38), s. 21, only provides as to capital moneys “when received,” & the ct. cannot charge the future purchase-money of the land to meet the expenses of the trustees until the sale is carried out.—*ROUND v. TURNER* (1889), 60 L. T. 379.

Annotations:—*Refd.* *Re Millard's S. E.*, [1893] 3 Ch. 116; *Re Norfolk's Parliamentary Estates*, *Norfolk v. Herries*, [1900] 1 Ch. 461.

B. Costs of Legal Proceedings.

See Settled Land Act, 1925 (c. 18), s. 73 (i), (xx), 113 (8), 114.

3005. Application for payment of income of fund.—Costs of an application by tenant for life to obtain payment of the income of funds paid into ct. under Trustee Relief Act, 1847 (c. 96), held to be payable out of the income & not out of the corpus.—*Re HAMERSLEY'S SETTLEMENT* (1856), 23 Beav. 267; 53 E. R. 104.

3006.—[On a petition by tenant for life under Trustee Relief Act, 1847 (c. 96), for payment of the income, her costs were ordered to be paid out of the income, & those of the trustee out of the corpus.—*Re HADLAND'S SETTLEMENT* (1856), 23 Beav. 266; 4 W. R. 690; 53 E. R. 104.

3007.—[Upon petition by the tenant for life of a trust fund which has been paid into ct. under Trustee Relief Act, for the payment of the dividends to them:—*Held*: though petitioner's costs were payable out of the income, the trustees' costs must come out of the corpus.—*Re GORDON'S TRUSTS* (1868), L. R. 6 Eq. 335; 37 L. J. Ch. 408.

Annotation:—*Fold.* *Re Knight's Trusts* (1868), 37 L. J. Ch. 409.

3008. Action to determine title—Costs as between party & party.—*SEBRIGHT v. THORNTON*, [1885] W. N. 176.

3009.—**Tenant for life & mortgagees—One set of costs.**—*SEBRIGHT v. THORNTON*, [1885] W. N. 176.

3010. Proceedings for protection of settled land—Establishment of claim to earldom.—Proceedings successfully prosecuted before the House of Lords Committee for Privileges to establish a claim to an earldom, the consequences of which was that petitioner afterwards recovered estates which were subject to similar limitations, held to be “proceedings taken from the protection of settled land,” the costs of which the ct. directed to be paid out of property subject to the settlement, under Settled Land Act, 1882 (c. 38), s. 36.—*Re AYLESFORD'S (EARL) SETTLED ESTATES* (1886), 32 Ch. D. 162; 55 L. J. Ch. 523; 54 L. T. 414; 34 W. R. 410.

3011. — Unsuccessful proceedings—Without sanction of court.—Where a tenant for life, without the previous sanction of the ct., institutes legal proceedings for the protection of the settled estate which ultimately prove unsuccessful, & subsequently applies to the ct. that the costs of the proceedings may be paid out of the estate, the ct. will consider the matter as though it were an application for leave to commence the proceedings at the cost of the estate.

On such an application the costs of unsuccessful litigation will not, as a rule, be allowed out of the estate where it appears that the proceedings were of a speculative nature, even although the tenant for life acted in good faith & under legal advice.—*Re YORKE, BARLOW v. YORKE*, [1911] 1 Ch. 370; 80 L. J. Ch. 253; 104 L. T. 134.

3012. — Proceedings abandoned—Costs paid by tenant for life—Action for recovery of land.—The ct. has jurisdiction under Settled Land Act, 1882 (c. 38), s. 36, to approve of proceedings once proposed to be taken for the recovery of land alleged to be subject to a settlement & to direct the costs to be re-imbursed out of capital notwithstanding that at the date of the application the proceedings have been abandoned & the costs paid by the tenant for life.—*Re WILKIE'S SETTLEMENT, WADE v. WILKIE*, [1914] 1 Ch. 77; 83 L. J. Ch. 174; 109 L. T. 927; 58 Sol. Jo. 138.

3013. Attempt by remainderman to restrain sale—Extra costs of tenant for life.—A tenant for life of an estate in strict settlement had power to cut certain timber & other trees, to sell the same & to apply the produce to his own use. In 1881 he contemplated a sale of the estate, but he was restrained from selling, either under the power in the will or under that contained in Settled Land Act, by an injunction granted in an action brought by persons entitled in remainder. In 1881 the action was dismissed with costs, & in 1885 the tenant for life sold the estate under conditions of sale which stated that the purchaser should in addition to the purchase-money pay for the timber according to a valuation. The tenant for life claimed to be paid the difference of his costs, as between party & party & solicitor & client, in the action which was dismissed:—*Held*: the tenant for life was entitled, in defending the action which was dismissed with costs, to be paid his extra costs of so much of the action as related to the exercise of the powers contained in Settled Land Act as incidental to the exercise of his power of sale under the provisions of Settled Land Act, 1882 (c. 38).—*Re LLEWELLIN, LLEWELLIN v. WILLIAMS* (1887), 37 Ch. D. 317; 57 L. J. Ch. 316; 58 L. T. 152; 36 W. R. 347; 4 T. L. R. 170.

Annotation:—*Fold.* *Re Smith's S. E.*, [1891] 3 Ch. 65.

3014. Unsuccessful application for declaration of

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—B.

30031. Action to determine title — J.—VOL. XL.

Costs as between party & party.—*HAMILTON v. TIGHE*, [1898] 1 I. R. 123.—IR.

1. Costs of application for compensation.—*Re WALSH'S TRUSTS* (1881), 7 L. R. Ir. 554.—IR.

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right to exercise powers.]—*Re HORNE'S SETTLED ESTATE* (1888), as reported in 39 Ch. D. 84; 37 W. R. 69, C. A.

Annotations:—Mentd. Re Crips, Crips v. Todd (1906), 95 L. T. 865; *Re Goodall's Settlement, Fane v. Goodall*, [1909] 1 Ch. 440; *Re Wagstaff's S. E.*, [1909] 2 Ch. 201; *Re Johnson, Cowley v. Public Trustee*, [1915] 1 Ch. 435.

Opposition of bill in Parliament by lunatic.]—*See LUNATICS*, Vol. XXXIII., p. 215, No. 1215.
See, generally, PRACTICE.

C. Other Expenses

See Settled Land Act, 1925 (c. 18), s. 73 (1) (xx).

3015. Costs of sale.]—*SEBRIGHT v. THORNTON*, [1885] W. N. 176.

3016. — Attempted sale.]—Settled property which had been put up for sale by auction by the tenant for life under Settled Land Act, 1882 (c. 38), but withdrawn for want of any sufficient offer, having been sold by private contract on the same day. On summons by the trustees for the decision of the ct.:—*Held*: one charge, according to the scale set out in Part I. of Schedule I. of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), was payable out of the purchase-money to the tenant for life's solr. for conducting the sale, including the conditions of sale, & one charge for deducting the title & completing the conveyance, including the preparation of the contract; & the costs of the concurrence in the sale by the mtgees. of the tenant for life, & a proper sum for the auctioneer's charges, were also payable out of the purchase-money.—*Re BECK, Re CARTINGTON ESTATE* (1883), 24 Ch. D. 608; 52 L. J. Ch. 815; 49 L. T. 95; 31 W. R. 910.
Annotations:—N.F. Cardigan v. Curzon-Howe (1888), 40 Ch. D. 338. *Reid. Re Peel's S. E.*, [1910] 1 Ch. 389.

3017. — — —.]—Where a tenant for life, acting honestly & with due diligence in the exercise of the powers conferred on him by Settled Land Act, 1882 (c. 38), attempts to sell the settled land, but the sale is unsuccessful, the costs or expenses properly incurred by him in respect of such attempted sale are payable out of capital money under Settled Land Act, 1882 (c. 38), s. 21 (x).

Upon an application by the tenant for life in such a case in reference to costs or expenses so incurred, the ct., under sects. 46 (6), 47 & 55 (3), of the Act, has power to order that such costs or expenses be paid out of the property subject to the settlement, & raised by a charge on the settled land.—*Re SMITH'S SETTLED ESTATES*, [1891] 3 Ch. 65; 60 L. J. Ch. 613; 64 L. T. 821; 39 W. R. 590; 7 T. L. R. 517.

3018. — Auctioneer's charges.]—*Re BECK, Re CARTINGTON ESTATE*, No. 3016, *ante*.

3019. — Several persons constituting tenant for life—Separate solicitors.]—Upon a sale of settled land by twenty-five persons, who together constituted the tenant for life for the purposes of Settled Land Act, 1882 (c. 38), all the vendors employed the same solr. to conduct the sale & to deduce title to the property, but four of them employed separate solrs. to peruse & complete on their behalf the conveyances to the purchasers:—*Held*: the costs incurred by these separate solrs. must be paid out of the proceeds of sale.—*SMITH v. LANCASTER*, [1894] 3 Ch. 439; 63 L. J. Ch. 842; 10 T. L. R. 665; *sub nom. Re SMITH, SMITH v. LANCASTER*, 71 L. T. 511; 43 W. R. 17; 38 Sol. Jo. 680; 7 R. 465, C. A.

3020. — Form of order.]—*Re RUDD*, [1887] W. N. 251.

3021. — Sale in lots.]—(1) In giving a direction under Settled Land Act, 1882 (c. 38), s. 22 (2), the tenant for life is bound to act as a trustee.

(2) The rule laid down in *Cardigan v. Curzon-Howe*, No. 3025, *post*, that on a sale by a tenant for life under Settled Land Act, 1882 (c. 38), the costs of obtaining the consent & concurrence of the mtgees. on his life estate ought not, as a general rule, to be paid out of capital moneys, applies as well where the capital moneys are in the hands of trustees as where they are in ct.

(3) Where a tenant for life, who has sold under Settled Land Act, 1882 (c. 38), directs capital moneys in the hands of the trustees to be applied in payment of the costs, charges, & expenses of his solrs. in relation to the sale, the trustees are not bound to have such costs, charges, & expenses taxed, but are entitled to have an opportunity of considering their propriety, if satisfied may without taxation pay them out of capital moneys.

(4) The same rule applies to the payment out of capital moneys of the costs of procuring the concurrence in the sale of the incumbrances on the fee.

(6) Where property is offered by a tenant for life for sale in lots the tenant for life is vendor in respect of each contract of sale into which he eventually enters, & in such a case it is competent to the vendor's solr., who, before entering upon the business, has given the necessary notice under r. 6 of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), of his intention to charge the ordinary detailed charges & not the scale fee in the case of sales under a certain amount, to treat the sale of each lot as a separate transaction, & to charge his costs accordingly.—*Re PEEL'S (SIR ROBERT) SETTLED ESTATES*, [1910] 1 Ch. 389; 79 L. J. Ch. 233; 102 L. T. 67; 26 T. L. R. 227; 54 Sol. Jo. 214.

3022. — Taxation.]—*Re PEEL'S (SIR ROBERT) SETTLED ESTATES*, No. 3021, *ante*.

3023. Costs of procuring concurrence of mortgagees in sale—Mortgage of life interest.]—*Re BECK, Re CARTINGTON ESTATE*, No. 3016, *ante*.

3024. — — —.]—*SEBRIGHT v. THORNTON*, [1885] W. N. 176.

3025. — — —.]—On a sale by a tenant for life under Settled Land Act, 1882 (c. 38), the costs of obtaining the consent & concurrence of mtgees. of the life estate, although they are costs incidental to the exercise of the statutory power of sale, ought not as a general rule to be paid out of capital money produced by the sale, though there may be special cases in which they can properly be so paid.—*CARDIGAN v. CURZON-HOWE* (1889), 41 Ch. D. 375; 58 L. J. Ch. 436; 60 L. T. 723; 37 W. R. 521; 5 T. L. R. 412, C. A.

Annotation:—Consd. Re Peel's S. E., [1910] 1 Ch. 389.

3026. — — — Purchase-money in hands of trustees or court.]—*Re PEEL'S (SIR ROBERT) SETTLED ESTATES*, No. 3021, *ante*.

3027. — Taxation.]—*Re PEEL'S (SIR ROBERT) SETTLED ESTATES*, No. 3021, *ante*.

3028. Appointment of guardian—Proceedings by infant.]—*Re RUDD*, [1887] W. N. 251.

3029. Costs of survey of estate preliminary to sale.]—*Re EYTON'S SETTLED ESTATES*, [1888] W. N. 254.

3030. Costs of preparing scheme for improvements.]—*Re STAMFORD'S (LORD) SETTLED ESTATES*, No. 2714, *ante*.

3031. Commission to estate agent—Procuring lease.]—The commission charged by an estate agent for procuring a lease of settled land for a tenant for life under Settled Land Act, 1882 (c. 38), is payable out of capital money arising

under the Act.—*Re MARYON WILSON'S SETTLED ESTATES*, [1901] 1 Ch. 934; 70 L. J. Ch. 500; 84 L. T. 708.

Annotation.—*Re L. Leveson-Gower's S. E.*, [1905] 2 Ch. 95.

3032. — Short occupation lease.—An estate agent's commission for obtaining a tenant for a short occupation lease granted by the life tenant under Settled Land Act, 1882 (c. 38), is an income charge, & is not thrown on capital by s. 21 (x).—*Re LEVESON-GOWER'S SETTLED ESTATE*, [1905] 2 Ch. 95; 74 L. J. Ch. 540; 92 L. T. 836; 53 W. R. 524; 49 Sol. Jo. 482.

3033. Fees of surveyors consulted as to sufficiency of price offered—Sale by request of assignee of tenant for life.—A tenant for life assigned his life interest in settled estates to an insurance co., & it was provided that he should receive an annuity out of the estates, which annuity was to be forfeited if he refused or neglected to exercise his powers under Settled Land Acts when reasonably requested to do so by the co. He also covenanted not to exercise his powers as tenant for life without the co.'s consent, & to do all things reasonably required by them in relation to the exercise of his powers. On being requested by the co. to sell a part of the settled estate he consulted surveyors as to the sufficiency of the price offered, & claimed that their fees were payable out of capital moneys:—*Held*: (1) those fees were incurred by the tenant for life in relation to the proposed exercise of his power of sale & on account of his position as a trustee for all parties entitled under the settlement, & were payable out of capital moneys; (2) when the co. required the tenant for life to exercise his powers in the future he was entitled to obtain proper advice, but he was not entitled to initiate a scheme for the exercise of his powers, & if, when asked to exercise his powers, he was afforded, at the expense of the estate, reasonable information & advice, that fact would have an important bearing upon the question whether further costs were properly incurred by him.—*Re HOPE, TABLETON v. HOPE* (1911), 28 T. L. R. 93.

3034. Compensation to secure vacant possession.—Settled land was about to be developed as a building estate, & as a necessary preliminary to carrying out the approved scheme of improvements authorised by Settled Land Act, 1882 (c. 38), it was essential to obtain vacant possession of a farm let to a yearly tenant, & forming an important part of the settled land in question. The tenancy was determined by notice & compensation was awarded to the tenant in respect of tenant right & improvements not coming within the First or Second Schedules to the Agricultural Holdings Act, 1908 (c. 28):—*Held*: neither under Settled Land Act, 1882 (c. 38), s. 21 (iii) or (x), nor under s. 25 could payment of the compensation in question be allowed out of capital moneys in the hands of the trustees; & to allow such an expenditure out of capital moneys would be entirely inconsistent with the whole purpose & scheme of the Settled Land Acts.—*Re DE LA WARR'S (EARL) COODEN BEACH SETTLED ESTATE*, [1913] 1 Ch. 142; 82 L. J. Ch. 174; 107 L. T. 671; *sub nom. Re COODEN BEACH ESTATE*, 29 T. L. R. 30; 57 Sol. Jo. 42, C. A.

3035. Ascertainment & payment of duties.—Where a tenant for life of settled estates has made various sales & granted leases of parts of the settled estate, & incurred expenditure in the preparation of accounts, returns, & valuations necessary to enable the comrs. to assess the increment value duty payable on sales & the reversion duty payable on the determination of

leases:—*Held*: the expenses incurred in the ascertainment & payment of duties so far as these expenses arose in respect of a transaction involving the exercise of any of the statutory powers conferred upon the limited owner, were expenses incidental to the exercise of these powers within Settled Land Act, 1882 (c. 38), s. 2 (x), & payable out of capital. Included in such cases would be the expenses incurred in respect of increment value duty, & of the reversion duty payable on the acceptance of a surrender of a lease; but in cases where reversion duty became payable on the determination of a lease by effluxion of time the expenses would not come within s. 2 (x), & if the tenant for life desired to throw them upon the settled land he must exercise his statutory power of charging for that purpose.—*Re MARYON-WILSON'S SETTLED ESTATES, MARYON-WILSON v. DU CANE*, [1915] 1 Ch. 29; 84 L. J. Ch. 121; 112 L. T. 111.

Costs of petition for faculty.—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 360, No. 1781.

SUB-SECT. 13.—COMPOUND SETTLEMENTS.

A. Nature of.

See Settled Land Act, 1925 (c. 18), s. 1 (1).

3036. Series of instruments forming one settlement—Instruments exercising powers of appointment—Disentail & resettlement.—(1) By indentures of settlement dated respectively in 1796, 1826, 1863, & 1885, the A. family estates became limited in 1885 to the use of E., Marquis of A., for life, with remainder to uses (*inter alia*), to secure the payment of certain jointure rentcharges, & then to the use of the present Marquis of A. for life, with remainders over. The first jointure was created under powers contained in the indentures of 1796 & 1826; the last jointure by the indenture of 1863; while the existing life estate was created by the indenture of 1885. Upon a sale by the tenant for life under the powers of Settled Land Act:—*Held*: the whole series of deeds constituted a "settlement" within Settled Land Act, 1882 (c. 38), s. 20, & consequently by virtue of that sect. the tenant for life had power to convey the estates freed & discharged from the jointure rentcharges; the purchaser was not entitled to require the concurrence in the conveyance either of the jointresses or the trustees of the terms by which the jointures were secured; & upon payment of the purchase-money to trustees for the purposes of Settled Land Act of the settlement created by the series of instruments, the income of the investments of such purchase-money would be applicable first in payment of the jointure rentcharges, as the income of the estates, if not sold, would have been applicable.

(2) The Marquis of A. does not desire that the money should be paid into ct. & there are at present no trustees for the purposes of Settled Land Acts except those nominated by the deed of July 16, 1885. They are trustees only of the settlement created by that deed & are not trustees of the settlement made by the deeds of 1863 & 1885, still less of that made by a series of instruments beginning in 1796 & ending in 1885. I understand, however, that they do not object to be appointed such trustees, & if so I am willing to appoint them on the present application (STIRLING, J.).—*Re AILESBUURY (MARQUIS) & IVEAGH (LORD)*, [1893] 2 Ch. 345; 69 L. T. 101; 9 T. L. R. 324; 37 Sol. Jo. 326; 3 R. 440: *sub nom. Re AILESBUURY*

Sect. 1.—Under Settled Land Acts: Sub-sect. 13, A.]

(MARQUIS) & IVEAGH (LORD), RIDDELL v. RIDDELL, 62 L. J. Ch. 713; 41 W. R. 644.

Innotations:—As to (1) Exptd. Re Du Cane & Nettlefold's Contract, [1898] 2 Ch. 96. Apprvd. Re Mundy & Roper's Contract, [1899] 1 Ch. 275. Apld. Re Phillimore's Estate, Phillimore v. Milnes, [1904] 2 Ch. 460; Re Trafford's S. E., [1915] 1 Ch. 9. Refd. Re Cope & Wadland's Contract, [1919] 2 Ch. 376. As to (2) Refd. Stamford, Payne v. Stamford, [1896] 1 Ch. 288; Re Spencer's S. E., [1903] 1 Ch. 75; Re Allington & L. C. C.'s Contract, [1927] 2 Ch. 253. Generally, Refd. A.-G. v. Owen, A.-G. v. Coulson (1899), 68 L. J. Q. B. 779.

3037. ————.]—Testator by his will made in 1828 gave his real estate to his granddaughter for her life, with remainder to her first & other sons successively in tail male; & he empowered her, either before or after her marriage with any husband, by deed or will to appoint to such husband for his life, to take effect immediately after her decease, a yearly rentcharge not exceeding £600 to be charged on the devised property, with power to limit a term for securing the same; & also by deed or will to charge the property with portions for the younger children of the granddaughter to the extent of £10,000 with power to limit a term for the raising & securing of the portions. After the death of testator the granddaughter married three times. By the settlement made on her first marriage, she exercised the power of charging the estates with portions for younger children, & limited a term of one hundred years to trustees for the purpose. By the settlement made on her second marriage, she demised the property to trustees for ninety-nine years, if she should so long live, on trust out of the income to raise an annual sum of £1,500 for her benefit, & then to pay the premiums on some policies of assurance on her own life, which policies were thereby settled. She also charged the property with an annual rentcharge of £600 for the benefit of her second husband. By a settlement made after her third marriage she appointed a yearly rentcharge of £600 to her third husband during his life, if he should survive her, & limited to trustees a term of three hundred years from her own death to secure the rentcharge; & by the same deed she demised the property to trustees for ninety-nine years if she should so long live, upon trust out of the income to pay £1,500 a year to her, & then to pay the premiums on some policies of assurance & subject as aforesaid to permit her third husband, during the joint lives of himself & herself, to receive the income. In 1866, the entail created by the will was barred & the property was resettled to such uses as the third husband, the wife & her son by the first husband should appoint, & in default of appointment to the uses of testator's will. By a settlement made in 1871 on the marriage of the daughter of the granddaughter by her second husband, the third husband & his wife demised part of the settled property to trustees for one hundred years from the date of the daughter's marriage, if her mother should so long live, upon trust to raise out of the income two annual sums, to be held respectively on the trusts of a settlement of even date. In 1894 the ct. appointed two trustees for the purposes of Settled Land Act of the will of testator & the resettlement of 1866. The granddaughter & her third husband, as tenants for life, desired to sell part of the settled estates. The married daughter was still living:—*Held:* the will of original testator, the three settlements made by the granddaughter, the deed of resettlement & the settlement made on the marriage of the daughter, together constituted the settlement of the estates, & in order that the tenants for life might be able

to exercise the powers conferred by Settled Land Act, trustees for the purposes of the Act must be appointed of that compound settlement. The trustees appointed in 1894 were accordingly so appointed.—*Re TIBBITTS' SETTLED ESTATES*, [1897] 2 Ch. 149; 66 L. J. Ch. 660; 77 L. T. 88; 46 W. R. 3; 41 Sol. Jo. 640.

Annotations:—Distd. Re Du Cane & Nettlefold's Contract, [1898] 2 Ch. 96; Re Keck & Hart's Contract, [1898] 1 Ch. 617.

3038. ————.]—*Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

3039. ————.]—*Re CORNWALLIS-WEST & MUNRO'S CONTRACT*, No. 3054, *ante*.

3040. ————.]—*Jointure & portions.*—*Re MONCKTON'S SETTLEMENT*, *MONCKTON v. CALDER*, No. 2584, *ante*.

3041. ————.]—*Will charging annuities—Disentail & resettlement.*—(1) A disentailing deed executed by a tenant in tail in possession of settled land is not an "assignment, by operation of law or otherwise, of his estate or interest under the settlement" within Settled Land Act, 1882 (c. 38), s. 50 (1).

(2) The words "stands for the time being limited to or in trust for any persons by way of succession" in s. 2 (1) of the Act of 1882 include the case of annuities charged on the settled land followed by subsequent limitations although not secured by any term or trust.

E. by his will, dated in 1889, devised certain freehold estates to the use of his son S. for life & from & after the decease of S. to the use of his first & other sons successively, according to their respective seniorities, in tail male with remainders over, & he charged his settled estates with the payment of certain annuities, some of which were still subsisting. E. died in 1892. S., the tenant for life, died in 1912, & his eldest son, W., thereupon became tenant in tail in possession of the settled estates on Apr. 8, 1914. W. executed a disentailing deed, which was duly enrolled, limiting the settled estates to his own use in fee simple. On Apr. 17, 1914, he executed a resettlement on his marriage of a part of the estates originally settled by the will to the use of himself for life with remainders over:—*Held:* (3) W. having ceased to be tenant in tail of the estates not comprised in the resettlement, could no longer exercise the powers of a tenant for life in respect of them; (4) as regarded the estates comprised in the resettlement, by reason of the subsistence of the annuities there was a compound settlement consisting of the will, the disentailing deed, & the resettlement, although there was no term limited to secure them nor any trust for their payment.—*Re TRAFFORD'S SETTLED ESTATES*, [1915] 1 Ch. 9; 84 L. J. Ch. 351; 112 L. T. 107.

Annotations:—As to (2) N.F. Re Allington & L. C. C.'s Contract, [1927] 2 Ch. 253. As to (3) Consd. Re Carnarvon's Chesterfield S. E., Re Carnarvon's, Highclere S. E., [1927] 1 Ch. 138. Refd. Re Ogile's S. E., [1927] 1 Ch. 229. Generally, Refd. Re Monckton's Settlement, Monckton v. Calder (1916), 115 L. T. 899.

3042. ————.]—*Settlement in exercise of power—Ultimate limitations declared by will.*—By a deed dated Aug. 3, 1880, certain real & leasehold property was assured to trustees upon trust for such persons as P. should by deed appoint. By deed dated Aug. 4, 1880, P. appointed that this property should be held upon trust for himself for life, & subject thereto to pay certain annuities to five persons for their respective lives, & subject thereto in trust for P. absolutely. P. died in Feb. 1887, having by his will given his residuary estate, which included the interest he had retained in the property subject to the annuities, upon trusts equivalent to a strict settlement, under which pltf. was

tenant for life & his infant son tenant in tail in remainder :—*Held* : the deeds of Aug. 3 & 4, 1886, & the will formed a compound settlement under Settled Land Acts, & *pltf.*, as tenant for life under this compound settlement, could sell the property discharged from the annuities.—*Re PHILLIMORE'S ESTATE, PHILLIMORE v. MILNES*, [1904] 2 Ch. 460 ; 73 L. J. Ch. 671 ; 91 L. T. 256 ; 52 W. R. 682 ; 48 Sol. Jo. 640.

Annotations :—*Apld. Re Marshall's Settlement, Marshall v. Marshall*, [1905] 2 Ch. 325 ; *Re Trafford's S. E.*, [1915] 1 Ch. 9. *Consd. Re Carnarvon's Chesterfield S. E., Re Carnarvon's Highclere S. E.*, [1927] 1 Ch. 138.

3043. — Will creating original settlement—Disentail & conveyance on trust to sell—Intervening disentailing deed & resettlement.—A tenant for life to whom under a resettlement a life estate is limited in restoration of his life estate under a preceding will, is for the purposes of Settled Land Act, 1925 (c. 18), a tenant for life under the original will ; & as such can by virtue of sect. 22 (2) of the Act exercise not only the powers conferred upon him as tenant for life under the will but also any additional powers conferred on a tenant for life by the resettlement. Where therefore under the original will constituting a settlement, a subsequent disentailing deed, a resettlement, another disentailing deed, whereby the tenant in remainder became tenant in fee simple in remainder, & a conveyance of the remainder to trustees upon trust to sell & hold the proceeds upon the trust of a deed of even date, being a settlement executed on the marriage of the remainderman, lands stand limited in trust for persons by way of succession, all the aforesaid instruments constitute a compound settlement within Settled Land Act, 1925 (c. 18), s. 1, & by virtue of sect. 31 (1) the trustees of the settlement under the will, when appointed for the purposes of the Act, become trustees of such compound settlement for the purposes of the Act & as such are the proper persons to execute the principal vesting deed required by the second sched. para. 1, sub-para. 2.—*Re CRADOCK'S SETTLED ESTATES*, [1926] Ch. 914 ; 95 L. J. Ch. 364 ; 135 L. T. 370.

Annotation :—*Consd. Re Cowley S. E.*, [1926] Ch. 725.

3044. — Resettlement pending sale.—*Re LEIGH'S SETTLED ESTATES*, No. 2678, *ante*.

3045. — Settlements of several estates—First instrument the same in each case.—S., by his will, made in 1873, settled his freehold lands in the county of S., hereinafter called the S. estates, to the use of J. for life, with remainder to such uses for the benefit of the children or remoter issue of J. as F. should by deed or deeds or by will appoint, with remainders over in default of appointment.

Testator died in 1878, & about the year 1910 freehold lands at R., hereinafter called the R. estate, were purchased out of proceeds of sale of parts of the S. estates. The R. estate together with the remaining unsold parts of the S. estates & the capital moneys settled by the will of S. were appointed by J. in exercise of his power, as follows : (a) by deed dated Feb. 25, 1924, the R. estate was appointed to the use of his son B. for life, with remainders to B.'s sons & daughters in tail, with remainders over, which did not exhaust the fee simple ; (b) by a codicil to his will, dated May 8, 1924, the property then remaining unappointed which comprised the parts of the S. estates then remaining unsold & capital moneys were appointed upon limitations identical with those upon which the R. estate was settled by the deed of Feb. 25, 1924. The whole of the R. estate & parts of the S. estates settled by the codicil & specific parts of the capital moneys had, before

those appointments, been charged under a deed dated June 23, 1913, by J. in exercise of his power of appointment, with a sum of £10,000 in favour of his daughter, & had by the same deed been demised to trustees for a term of years to secure that sum :—*Held* : (1) each of the estates was settled by a compound settlement consisting, in the case of the R. estate, of the will of S. & the deed of appointment of Feb. 25, 1924, & in the case of the S. estates of the will of S., & the codicil of J. notwithstanding that the first instrument in each case was the same ; (2) the trustees of the will of S., who were trustees of the settlement thereunder for the purposes of Settled Land Act, 1925 (c. 18), were by virtue of s. 31 of that Act, trustees for those purposes of each of the compound settlements ; (3) by force of s. 91 (1) (ii), as " trustees of the settlement of the aggregate estate for all the purposes of the Act," they had power, at the direction of B., the tenant for life, to discharge the £10,000, which was charged upon the whole of the R. estate & on part of the S. estate out of capital moneys, whether already charged or not, in exoneration of those estates ; (4) no order of the ct. was required, because both settlements were without the provisions of s. 91 (2), the lands comprised in neither settlement being subject to a charge to which the lands in the other settlement were not subject ; (5) the transaction being one which was " otherwise authorised by the Act," no order of the ct. was required under s. 64 of the Act ; (6) the trustees of the compound settlements were the proper persons to execute vesting deeds in favour of B., the tenant for life, of the settled lands respectively comprised in those settlements.—*Re SYMONS, SYMONS-JEUNE v. BUNBURY*, [1927] 1 Ch. 344 ; 96 L. J. Ch. 220 ; 136 L. T. 441.

3046. — Effect of trust for sale—Under Law of Property Act, 1925 (c. 18), sched. I.—Three vendors to whom land had been conveyed in 1924 in fee simple as tenants in common subject to but with an indemnity against a jointure rentcharge, charged thereon & on other lands in 1869, contracted in 1926 to sell the same land subject to the rentcharge but with the benefit of the indemnity, & proposed to convey the same as being the persons in whom the land " not being settled land " had vested as joint tenants upon the statutory trusts by virtue of the transitional provisions of para. 1 (2) of Part IV., sched. I., of Law of Property Act, 1925 (c. 18).

The purchaser took the objection that by reason of the rentcharge the land became settled land on Jan. 1, 1926, within sect. 1 (1) (v) of Settled Land Act, 1925 (c. 18), & that para. 1 (3), & not para. 1 (2) of Part IV., sched. I., of Law of Property Act, 1925 (c. 18), applied, & that the land was vested, not in the vendors, but in the other persons or person specified in para. 1 (3) :—*Held* : (1) in sched. I., Part IV., of Law of Property Act, 1925 (c. 18), para. 1 (2), & para. 1 (3) constituted alternative provisions, the former applying to land which was not, & the latter to land which was, settled land under the law existing previously to the commencement of the Act ; (2) inasmuch as the rights of the jointress were undisturbed by the sale, she was not a person interested in the land within Law of Property Act, 1925 (c. 18), s. 35, whose incumbrance would attach to the net proceeds of sale, & the vendors, therefore, were not bound to exercise the statutory powers of a tenant for life vested in them by sect. 28 of the same Act so as to convey free from the rentcharge, even if they could do so as trustees of a compound settlement, which was doubtful, & that even if the land

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were held from & after Jan. 1, 1926, under a compound settlement, they could, in the circumstances of this case, convey subject to the rentcharge by virtue of Law of Property (Amendment) Act, 1926 (c. 11), s. 1; (3) the land in question, "not being settled land," vested by virtue of para. 1 (2) of Part IV. of sched. I. of Law of Property Act, 1925 (c. 20), in the vendors as joint tenants upon the statutory trusts, & they had shown a good title according to the contract.

Qu.: whether the documents creating the rentcharge could be coupled with the statutory trust for sale under Law of Property Act, 1925, sched. I., Part IV., para. 1 (2) so as to form a compound settlement within s. 1 of Settled Land Act, 1925 (c. 18), especially in view of sub-sect. 7, added to that sect. by Law of Property (Amendment) Act, 1926 (c. 11).—*Re RYDER & STEADMAN'S CONTRACT*, [1927] 2 Ch. 62; 90 L. J. Ch. 388; 137 L. T. 281; 43 T. L. R. 578; 71 Sol. Jo. 451, C. A.

Annotations:—*As to (1) Consd.* *Re Pedley*, *Wallace v. Wallace*, [1927] 2 Ch. 168. *As to (3) Refd.* *Re Alington & L. C. C.'s Contract*, [1927] 2 Ch. 253.

3047. ———.—*Under the will of testator who died in 1888 an estate was settled on A. for life, with remainder to his first & other sons in tail, with power to A. to jointure & charge portions. In 1901 A., on his marriage, appointed by deed a jointure rentcharge to his wife, if she survived him, without power of anticipation, & subject thereto, he charged the land with payment of certain portions to the younger children of the marriage, & limited to trustees a term of a thousand years from his death to support the portions charge. There was one younger child only, & he was an infant on Jan. 1, 1926. A.'s elder son B. disentailed in 1924, & two further deeds were executed in that year. By one, A. & B. & A.'s wife, notwithstanding her restraint on anticipation & the trustees of the portions term, who had no power to release their term, conveyed the land to trustees on trust at A.'s request to sell the same. The trusts of the proceeds of sale were declared by a second deed, the income being payable during A.'s life in each year, as to the first £500 to A., as to the surplus up to a specified sum to B., & as to the balance to A. Provision was also made for A.'s wife & the younger children:—*Held*: (1) notwithstanding the trust for sale, on the coming into operation of Law of Property Act, 1925 (c. 20), & Settled Land Act, 1925 (c. 18), the land was settled land under a compound settlement constituted by the will, the deed of 1901, & the three deeds of 1924; (2) A. was the sole tenant for life; (3) so long as the land remained so settled no order appointing or approving the trustees for sale would affect the position.*—*Re PARKER'S SETTLED ESTATES*, *PARKER v. PARKER*, [1928] 1 Ch. 247; 138 L. T. 360; 71 Sol. Jo. 981.

3048. ———. *Disposition by reference to trusts of other estate.—Will settling property on limitation of earlier will.*—Where estates were settled by one will on the limitations & trusts of an earlier will of some other person, such earlier will did not form part of a compound settlement, consisting of the later will, a subsequent disentailing deed & a resettlement.—*Re ADAIR*, *ADAIR v. TREHERNE* (1927), 71 Sol. Jo. 844.

3049. ———. *Trusts not set out at length.*—*Re SHELTON'S SETTLED ESTATES*, [1928] W. N. 27.

3050. *Original settlement at an end.—No in-*

terests or charges prior to settlement.—By his will dated in 1891 testator appointed trustees, & empowered his wife by deed, will, or codicil to appoint as she might think fit all or any part of his property, & in default he gave all his freehold estates to the use of his wife for life, with remainder to the use of G. for life, with divers remainders over; & testator empowered his trustees to sell any part of his freehold estates thereinbefore given. Testator died in 1891, & by her will his widow appointed G. her sole exor., & in exercise of her power of appointment appointed the real estate devised by her husband's will to the use of G. for life with remainder to the use of his first & every other son successively in tail male, with remainders over. Testatrix died in 1892. In 1912 G., in exercise of his powers as tenant for life in possession, contracted to sell part of the settled estate. The purchaser objected that, there being no trustees for the purposes of Settled Land Acts, the vendor could not make a good title:—*Held*: the general power of appointment having been fully exercised by the widow, there was a resettlement of the estate, & there being no existing interests or charges having priority over that resettlement, the original settlement created by testator's will was at an end, & consequently there were no trustees having a power of sale, & trustees for the purposes of Settled Land Acts of the widow's will must be appointed.—*Re GORDON & ADAMS' CONTRACT*, *Re PRITCHARD'S SETTLED ESTATE*, [1914] 1 Ch. 110; 83 L. J. Ch. 172; 109 L. T. 725; 58 Sol. Jo. 67, C. A.

B. Co-Existing Settlements.

3051. *General rule.*—*Re DU CANE & NETTLEFOLD'S CONTRACT*, No. 2842, *ante*.

3052. ———.—*Re MUNDY & ROPER'S CONTRACT*, No. 3171, *post*.

3053. ———.—*Re WIMBORNE (LORD) & BROWNE'S CONTRACT*, No. 2845, *ante*.

3054. *Restoration of life estate on resettlement.—Exercise of powers under compound settlement.*—In 1850 lands stood limited under a will to the use of A. for life with remainder to his first & other sons successively in tail male. In 1872 A. upon his marriage & in exercise of a power given by the will by deed charged the lands with a jointure in favour of his wife. He also created mtges. on his life estate. In 1895 A. & his only son by a disentailing assurance conveyed the lands to such uses as A. & his son should by deed jointly appoint; & by a deed of even date they appointed the lands to the use of A. for life "in restoration & continuation of his former life estate under the will," with remainder to the son in fee simple, & by this deed trustees were appointed for the purposes of Settled Land Acts. A., as tenant for life under the resettlement of 1895, contracted to sell part of the lands, the jointress & mtgees. being willing to concur & release their interests in the conveyance to the purchaser:—*Held*: A.'s life estate under the will was still subsisting; the will, jointure deed, disentailing assurance, & resettlement together constituted one compound settlement of which there were no trustees for the purposes of the Settled Land Acts, & therefore A. could not make a good title.

It seems clear that the settlement within the meaning of the Settled Land Acts—the only settlement in short under which the vendor is able to exercise his statutory power of sale—must be the compound settlement (FARWELL, J.).—*Re CORNWALLIS-WEST & MUNRO'S CONTRACT*, [1903] 2 Ch.

150; 72 L. J. Ch. 499; 88 L. T. 351; 51 W. R. 602; 47 Sol. Jo. 418.

Annotations:—*Distd. Re Wimborne & Browne's Contract*, [1904] 1 Ch. 537. *Consd. Re Constable's S. E.*, [1919] 1 Ch. 178. *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523; *Parr v. A.-G.*, [1926] A. C. 239.

3055. ———.]—At the date of a disentailing deed lands were settled by a will to the use of G. for life, with remainder to his son C. in tail male. In 1895 G., under powers in the will, appointed a jointure to his wife & portions for his younger children. In July, 1912, G. & C. disentailed the estate by a deed by which it was conveyed, subject to charges & incumbrances & to G.'s life estate to such uses as G. & C. should jointly appoint, & in default of appointment to the uses & upon the trusts of the will. In Oct. 1912, a deed of resettlement was executed by G., C., & the trustees, by which the property was appointed & conveyed, subject to the mtges. on the inheritance & the same jointure & portions, to such uses & subject to such powers & provisions as G. & C. should jointly appoint, & subject to any such appointment to the use of G. for life "in restoration & by way of confirmation of" his life estate under the will & all powers of jointuring & charging portions & all other statutory powers annexed to or exercisable during the continuance of that life estate, & so that they might be exercisable with the same overreaching effect as if the disentailing deed & the deed of appointment had not been executed, with remainder to the use of C. for life with remainder to the use of his sons successively in tail male. This deed also declared that the persons or person who should for the time being be constituted or be the tenant for life of the settlement under Settled Land Acts might exercise over the settled lands certain specified powers by way of extension or enlargement of the powers & provisions of those Acts as if conferred thereby, the facts being admittedly indistinguishable from those in *Re Cornwallis-West & Munro's Contract*, No. 3054, *ante*:—*Held*: (1) G. was tenant for life under the resettlement of the property thereby settled, & as such could exercise over that property the powers by Settled Land Acts, 1882 to 1890, & by the resettlement conferred on a person for the time being tenant for life within the meaning of those Acts.

(2) The object of inserting the clause containing the words "in restoration & by way of confirmation" of a previous life estate was to keep alive the powers incident to the estate & conferred on the tenant for life by the original instrument. Such a clause showed an intention to keep alive the old powers, but was ineffectual to restore the original life estate when the operative words of the deed were sufficient to pass it. *Alexander v. Mills*, No. 2396, *ante*, showed that it was unnecessary to restore the old life estate in order to keep alive the powers. If & so far as *Re Cornwallis-West & Munro's Contract*, No. 3054, *ante*, determined that the vendor in that case was tenant for life under the will & not under the resettlement, & that he could not, as tenant for life under the resettlement with concurrence of the jointress & mtgees. joining to release their interests, convey the property in fee to a purchaser, that decision was erroneous.—*Re CONSTABLE'S SETTLED ESTATES*, [1919] 1 Ch. 178; 88 L. J. Ch. 89; 120 L. T. 326; 35 T. L. R. 144; 63 Sol. Jo. 135, C. A.

Annotations:—As to (1) *Consd. Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523; *Parr v. A.-G.*, [1926] A. C. 239. As to (2) *Apld. Re Copo & Wadland's Contract*, [1919] 2 Ch. 376.

3056. ———.]—Exercise of powers under resettlement.]—*Re CORNWALLIS-WEST & MUNRO'S CONTRACT*, No. 3054, *ante*.

3057. ———.]—*Re CONSTABLE'S SETTLED ESTATES*, No. 3055, *ante*.

3058. ———.]—*Re CRADOCK'S SETTLED ESTATES*, No. 3043, *ante*.

3059. ———.]—Exercise of powers under original settlement.]—*Re CONSTABLE'S SETTLED ESTATES*, No. 3055, *ante*.

3060. ———.]—No portions or jointure existing thereunder.]—*Re COPE & WADLAND'S CONTRACT*, No. 3118, *post*.

3061. ———.]—Including additional powers of resettlement.]—*Re CRADOCK'S SETTLED ESTATES*, No. 3043, *ante*.

———.]—*See Settled Land Act*, 1925 (c. 18), s. 22 (2).

3062. Original settlement still subsisting—In respect of jointure & charges—Original life interest not restored—Powers of life tenant under original settlement.]—*Re WIMBORNE (LORD) & BROWNE'S CONTRACT*, No. 2845, *ante*.

Effect of assignment of life interest.]—*See Part XIII.*, Sect. 1, sub-sect. 2, B., *ante*.

C. Settlements to same Uses by different Instruments.

See Settled Land Act, 1925 (c. 18), s. 91.

3063. Whether compound settlement effected—Will & deed—Limitations almost identical.]—Land was devised by will on limitations in strict settlement. Testator also by a deed declared that the trustees, to whom he had transferred a money fund, should hold it on trust to lay it out in the purchase of land, which was to be settled on limitations identical with those of the will, except that two terms of years were interposed. The trusts of these two terms had become satisfied. The powers conferred by the two instruments were not precisely the same. The same persons were trustees of both the will & the deed. Upon the application of the tenant for life in possession under both instruments:—*Held*: although the limitations of the one instrument were not declared by reference to those of the other, but each set of limitations was stated independently, the principle of *Re Mundy's Settled Estates*, [1891] 1 Ch. 399, applied, & the will & the deed constituted one compound settlement, so that capital money arising under the deed could be applied in paying the cost of improvements executed upon land devised by the will.—*Re BYNG'S SETTLED ESTATES*, [1892] 2 Ch. 219; 61 L. J. Ch. 511; 66 L. T. 754; 40 W. R. 457.

Annotations:—*Consd. Re Monson's S. E.*, [1898] 1 Ch. 427. *Apld. Re Stafford's Settmt. & Will*, *Gerard v. Stafford*, [1901] 2 Ch. 72. *Consd. Re Coull's S. E.*, [1905] 1 Ch. 712.

3064. ———.]—Identical limitations.]—The tenant for life of estate A., which was unincumbered, settled estate B., subject to a mtge., upon trusts, which in the events which happened were identical with those upon which estate A. was settled. The mtgee. of estate B. having given notice requiring payment off of the mtge., the tenant for life took out a summons asking for a declaration that he had power to raise the sum required by a mtge. of both estates:—*Held*: the tenant for life had power to raise the sum required by a mtge. of both estates.—*Re MONSON'S (LORD) SETTLED ESTATES*, [1898] 1 Ch. 427; 67 L. J. Ch. 176; 78 L. T. 225; 46 W. R. 330; 14 T. L. R. 247; 42 Sol. Jo. 289.

Annotation:—*Consd. Re Coull's S. E.*, [1905] 1 Ch. 712.

PART XIII. SECT. 1, SUB-SECT. 13.—C.

n. Whether compound settlement effected.]—*BLACK v. WATSON* (1841), 3 Durl. (Ct. of Sess.) 522; 16 Fac. Coll. 508.—*SCOT.*

Sect. 1.—Under Settled Land Acts: Sub-sect. 13, C., D. & E.; sub-sects. 14 & 15. Sect. 2. Part XIV. Sect. 1.]

3065. ———.]—*Re COULL'S SETTLED ESTATES*, No. 3129, *post*.

Application of capital moneys—Improvements.]—*See LAND IMPROVEMENT*, Vol. XXX., pp. 287–292, Nos. 135–185.

Discharge of incumbrances.]—See Nos. 2800–2802, ante.

D. Effect of Derivative Settlements and Assignment of Life Tenancy.

See Settled Land Act, 1925 (c. 18), s. 104.

3066. Effect of derivative settlement—Powers under original settlement—Derivative settlement by persons in remainder.]—Re KNOWLES' SETTLED ESTATES, No. 3100, *post*.

3067. ———.]—*Re DU CANE & NETTLEFOLD'S CONTRACT*, No. 2842, *ante*.

3068. Effect of assignment of life interest—In consideration of marriage—Or as part of family arrangement—Proposed sale by tenant for life.]—Re DU CANE & NETTLEFOLD'S CONTRACT, No. 2842, *ante*.

—————.]—*See, also, Part XIII., Sect. 1, sub-sect. 2, ante.*

3069. Jointure charges—Not charges on estate of tenant for life.]—Re KECK & HART'S CONTRACT, No. 2958, *ante*.

E. Appointment of Trustees.

See Part XIV., Sect. 2, post.

SUB-SECT. 14.—VESTING DEEDS.

See Settled Land Act, 1925 (c. 18), ss. 4, 5, 7, 9, 13. sched. II., para. 1.

3070. Expression includes vesting deeds—Different parcels of settled land in separate deeds.]—Interpretation Act, 1889 (c. 63), s. 1, provides that in every Act passed after 1850, unless the contrary intention appears, words in the singular shall include the plural. As no contrary intention appears in Settled Land Act, 1925 (c. 18), the expression “vesting deed” includes vesting deeds, & therefore, in the case of a settlement subsisting at the date of the commencement of the Act, it is not necessary that the whole of the settled land should be comprised in one single principal vesting deed. Different parcels of the settled land may be comprised in separate principal vesting deeds. No vesting deed is required in respect of capital moneys subsisting at the date of the commencement of the Act. The Act only contemplates a vesting deed in respect of land, & capital moneys are not land within the Act.—*Re CLAYTON'S SETTLED ESTATES*, [1926] Ch. 279; 95 L. J. Ch. 169; 134 L. T. 568; 70 Sol. Jo. 427.

3071. Necessity for—Not for capital moneys.]—Re CLAYTON'S SETTLED ESTATES, No. 3070, *ante*.

3072. — Legal tenant in tail in possession—Remainders over—No overriding trusts or incumbrances.]—On Dec. 16, 1925, deft. A. became entitled to settled estates as adult legal tenant in tail in possession, with remainders over, but without any overriding trusts or incumbrances. On

Jan. 1, 1926, when the new property legislation came into force, he automatically became estate owner, holding the legal fee simple in trust for himself as equitable tenant in tail with remainders over, but still without any overriding trusts or incumbrances:—*Held*: if he barred his equitable entail, & so put an end to the settlement, he could make a valid disposition of the property as absolute legal owner in fee simple, without first obtaining a vesting deed pursuant to Settled Land Act, 1925 (c. 18), s. 13, which sect., having regard to sect. 112, sub-sect. 2, applies only to dispositions under that Act.—*Re ALEFOUNDER'S WILL TRUSTS*, *ADNAMS v. ALEFOUNDER*, [1927] 1 Ch. 360; 96 L. J. Ch. 264; 137 L. T. 16; 71 Sol. Jo. 123.

3073. Right to have executed—Tenant for life under Settled Land Act, 1884 (c. 18), s. 7—Otherwise entitled under Settled Land Act, 1925 (c. 18), s. 20 (1) (viii).]—Re LEIGH'S SETTLED ESTATES, No. 2678, *ante*.

3074. Compound settlement—Execution by trustees of original will—Settled Land Act, 1925 (c. 18), Schedule II., 1 (2).]—Re CRADOCK'S SETTLED ESTATES, No. 3043, *ante*.

SUB-SECT. 15.—PROTECTION OF PURCHASERS AND PERSONS DEALING WITH TENANT FOR LIFE.

See Settled Land Act, 1925 (c. 18), s. 110.

3075. Lease at insufficient rent—Mala fides—Lessee party to transactions.]—SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE), No. 2887, *ante*.

3076. ——— Assignee for value not protected.]—Re HANDMAN & WILCOX'S CONTRACT, No. 2902, *ante*.

3077. Shifting of incumbrance—Exoneration of land sold from rentcharge.]—Re STRAFFORD (EARL) & MAPLES, No. 2967, *ante*.

3078. Sale at undervalue—Whether sufficient by itself to invalidate sale.]—In the case of a sale by a tenant for life under Settled Land Act, the mere fact that the purchaser has acquired the property at an undervalue is not, by itself, sufficient to invalidate the sale. If he has acted in good faith he is protected by Settled Land Act, 1882 (c. 38), s. 54, & he is not bound to inquire whether the tenant for life or the trustees have had the property valued.

The tenant for life of a freehold public-house which was let to a firm of brewers at a rent of £63 for a term of which there were twelve years to run, sold the property, subject to the lease, for £2,000. Immediately after the sale the purchaser contracted to resell the property for £3,000 to the brewers, to whom it had previously been offered for £2,750, but in vain. The remainderman brought an action to set aside the sale on the ground that the best price had not been obtained. There was no evidence that the purchaser had acted otherwise than in good faith:—*Held*: he was protected by Settled Land Act, 1882 (c. 38), s. 54.—*HURRELL v. LITTLEJOHN*, [1904] 1 Ch. 689; 73 L. J. Ch. 287; 90 L. T. 260; 20 T. L. R. 198.

3079. — Purchaser not bound to inquire.]—HURRELL v. LITTLEJOHN, No. 3078, *ante*.

Assignment of life interest by tenant for life—Protection of purchaser under exercise of statutory powers.]—See Nos. 2721–2727, ante.

PART XIII. SECT. 1, SUB-SECT. 13.—D.

o. Jointure charges.]—Re MEADE'S SETTLED ESTATES, [1897] 1 I. R. 121.—**IR.**
p. —.]—Re HAYES' SETTLED ESTATES, [1907] 1 I. R. 88.—**IR.**

SECT. 2.—UNDER STATUTES OTHER THAN SETTLED LAND ACTS.

Purchase under compulsory powers.—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 93 *et seq.*

Improvement under Improvement of Lands Acts.—*See* LAND IMPROVEMENT, Vol. XXX., pp. 281, 282, Nos. 62–67.

Judicial powers over estate of lunatic.—*See* LUNATICS, Vol. XXXIII., pp. 189–230.

Settlements of property in connection with matrimonial causes.—*See* HUSBAND & WIFE, Vol. XXVII., pp. 514–533.

Property of infant.—*See* INFANTS, Vol. XXVIII., pp. 181–215.

Part XIV.—Trustees of Settlements.

SECT. 1.—WHO ARE TRUSTEES FOR PURPOSE OF SETTLED LAND ACTS.

See Settled Land Act, 1925 (c. 18), ss. 30–33.

3080. Existing trustees of settlement—With power of sale—Power to vary investments.—By settlement (a), executed upon the marriage of A. & B., it was declared that the trustees C. & M. should stand possessed of money upon trust that they & the survivor of them, his exors., administrators, & assigns, should continue the money on the present investments, or with the consent in writing of A. & B. or the survivor, & after the death of the survivor then of the proper authority of such trustees or trustee, to sell & transfer the securities & lay out & invest the proceeds, with power from time to time with such consent as aforesaid to vary the securities. All after-acquired property, both real & personal, to be assured & settled upon the same trusts, etc., as the principal sum. Power to appoint new trustees, & to maintain, enlarge, or diminish the original number; ever new trustee to have the power, etc., of the trustee in whose place he was appointed. By settlement (b), executed upon the marriage of C. & D., the sister of B., it was declared that the trustees M. & N. should stand possessed of money upon trust to continue same upon its then present security, or with the consent in writing of C. & D. or the survivor, & after the death of the survivor, of the proper authority of such trustees or trustee, to call in the principal money & again lay out same in their or his names or name upon the securities therein mentioned, with power for the trustees or trustee for the time being with such consent or at such discretion as aforesaid to alter, vary, & transpose the stocks, funds, or investments to be from time to time made under the authority of the aforesaid power in any other stocks, etc., of the nature or description contemplated by the trust for investment. Covenant to settle after-acquired property similar in terms to that in settlement (a). M. had died, & three new trustees of settlement (a) had been appointed by A. & B. N. was the sole present trustee of settlement (b). Real estate had descended during their coverture upon B. & D. as coheireses in undivided moieties. A contract for the sale of this real estate having been entered into by A. & B. & C. & D. as vendors. Upon summons under Vendor & Purchaser Act, 1871 (c. 78):—*Held*: under the express power contained in settlement (a), & the implied power in settlement (b), the existing trustees of both settlements had full power within Settled Land Act,

1882 (c. 38), s. 2 (8), to act as trustees under the Act, & it was not necessary to apply to the ct. under Settled Land Act, 1882 (c. 38), s. 38, for the appointment of new trustees for the purposes of the Act.

In the second settlement there is only one trustee surviving, but power is given to the trustees or trustee to act, & to receive & give receipts for capital given to him by the settlement. I cannot doubt, therefore, that this surviving trustee comes within the exception to Settled Land Act, 1882 (c. 38), s. 39 (1) . . . & the exception to sect. 45 (2) (BACON, V.-C.).—*Re* GARNETT ORME & HARGREAVES' CONTRACT (1883), 25 Ch. D. 595; 53 L. J. Ch. 196; 49 L. T. 655; 32 W. R. 313.

Annotations:—*Re*fd. *Re* Gent & Eason's Contract, [1905] 1 Ch. 386; *Re* Johnson's S. E. (1913), 57 Sol. Jo. 717.

3081. ————*Under a marriage settlement the trustees were directed to stand possessed of certain scheduled shares, stock, & securities upon trust at any time, with the usual consents, to sell the same & invest the proceeds in various investments, including "the purchase of freehold ground rents," with power from time to time "to vary or transfer such stocks, funds, shares or securities into or for others of the same or a like nature."* The trustees purchased freehold ground rents, & in 1901 the tenant for life under the settlement agreed to sell the same. The purchasers objected to the title on the ground that the trustees were not trustees for the purposes of Settled Land Acts: *Held*: the word "securities" in this settlement meant anything to be purchased under the power, & having regard to the power, to vary & transfer the "securities," the trustees had power to sell the ground rents, & were consequently trustees for the purposes of Settled Land Acts.—*Re* TAPP & LONDON & INDIA DOCKS CO.'S CONTRACT (1905), 71 L. J. Ch. 523; 92 L. T. 829.

3082. ——— Power must be general.—*Re* COULL'S SETTLED ESTATES, No. 3129, *post*.

3083. ——— With consent of tenant for life—Whether power extends to sale of heirlooms.—C., who was tenant for life under his father's will of large estates, desiring to exercise the power given by Settled Land Act to sell certain heirlooms given by the will, applied for the appointment of trustees for the purposes of the Act. The trustees of the will had a power of sale under the will, but only with the consent of the tenant for life; the power of sale did not extend to the heirlooms:—*Held*: the trustees of the will were "trustees with power of sale of settled land" within Settled

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g. Existing trustees of settlement—With power of sale—Power exercisable only by concurrence of person whose consent cannot be obtained.—Trustees

having a power of sale, which can only be exercised with the concurrence of a person whose consent cannot be obtained are not trustees within the meaning of Settled Land Act, 1882.

In such cases, if a sale be desirable, it is expedient to appoint such persons as trustees for the purposes of the Act.—*Re* JOHNSTONE'S SETTLEMENT (1886), 17 L. R. Ir. 172.—*IR*.

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Land Act, 1882 (c. 38), s. 2 (8), though the power was only exercisable with the consent of the tenant for life, & were also trustees to receive notices under the Act with respect to the heirlooms, though their power of sale only extended to the land, & therefore it was unnecessary to appoint trustees.—*CONSTABLE v. CONSTABLE* (1886), 32 Ch. D. 233; 55 L. J. Ch. 491; 51 L. T. 608; 34 W. R. 470.

3084. ——— **Exercisable after death of tenant for life.]—***Re COX & SEADON'S CONTRACT* (1891), 91 L. T. Jo. 241.

Annotation:—Folld. Re Jackson's S. E., [1902] 1 Ch. 258.

3085. ——— **—.]—***Re NIEUWENHUY'S* (1892), 43 Sol. Jo. 326.

Annotation:—Dbtd. Re Jackson's S. E., [1902] 1 Ch. 258.

3086. ——— **—.]—**A tenant for life of settled land which is subject to a trust for sale exercisable after his death can be a trustee of the settlement for the purposes of Settled Land Acts.

Testator gave his wife a life interest in an estate & appointed her & another trustees of the estate with a trust for sale exercisable after her death:—*Held*: they were trustees for the purposes of Settled Land Acts.—*Re JACKSON'S SETTLED ESTATE*, [1902] 1 Ch. 258; 71 L. J. Ch. 154; 85 L. T. 625; 50 W. R. 235; 18 T. L. R. 168; 46 Sol. Jo. 136.

Annotation:—Folld. Re Davies & Kents' Contract, [1910] 2 Ch. 35.

3087. ——— **Exercisable after death of trustee.]—***Re EARP* (1899), cited in [1902] 1 Ch. at p. 260.

Annotation:—Folld. Re Jackson's S. E., [1902] 1 Ch. 258.

3088. ——— **Of land "comprised in settlement"—Land subsequently purchased.]—**M., who died in 1885, by will devised land to trustees upon trust for S. for life, then for his eldest son for life, & afterwards upon trusts corresponding to a strict settlement. He gave all his personal estate to the same trustees upon trust to invest in land, to be conveyed to them upon the same trusts as the land devised. He gave the trustees a power of sale over all the land except his mansion house & lands in the same parish. The trustees had invested part of the personal estate in the purchase of lands which were conveyed to them upon the trusts of the will. They had afterwards sold all the lands originally comprised in the will other than those excepted from the power of sale. The equitable tenant for life had entered into a contract for the sale of the mansion house:—*Held*: the purchased lands were "comprised in the settlement, & subject to the same limitations, as the land agreed to be sold" within Settled Land Act, 1890 (c. 69), s. 16 (1), & the trustees were trustees for the purposes of Settled Land Acts.—*Re MOORE, MOORE v. BIGG*, [1906] 1 Ch. 789; 75 L. J. Ch. 342; 95 L. T. 521; 54 W. R. 434; 22 T. L. R. 342; 50 Sol. Jo. 310.

3089. ——— **Trustees of term—With power to raise money by any reasonable means.]—***Re CARNE'S SETTLED ESTATES*, No. 2647, *ante*.

3090. ——— **Trustees appointed by Irish court—Land subsequently acquired in England.]—**The vendor contracted to sell land in England under a contract fixing the commencement of title in 1874 & stating that he was selling as tenant for life under his statutory power under Settled Land Acts. The settlement in question was a compound settlement created by several instruments, some of which, including a will made in 1836, were dated or made prior to the time fixed for the commencement of title, & the last of which was a

resettlement made in 1902. The vendor had, however, voluntarily furnished an abstract of all the earlier documents constituting the compound settlement except the will of 1836, which was recited in one of these documents dated in 1860. The compound settlement originally comprised land in Ireland alone, & by an order of the High Ct. of Justice in Ireland, made in 1908, the present trustees were appointed trustees of the compound settlement for the purposes of Settled Land Acts. In 1910 the land in England, the subject of the contract, was conveyed to the trustees & their heirs to the uses, upon the trusts, & subject to the powers, charges, & provisions to, upon, & subject to which under the compound settlement the freehold lands therein comprised stood limited. The conveyance contained a statement to the effect that the purchase was made at the direction of the tenant for life out of capital moneys in the hands of the trustees arising under the compound settlement:—*Held*: under the order of the Ct. in Ireland the trustees were in the position of trustees of the settlement for the purposes of Settled Land Acts in relation to the subsequently acquired land in England without being reappointed by the Ct. in England.—*Re ARRAN (EARL) & KNOWLESDEN & CREEK'S CONTRACT*, [1912] 2 Ch. 141; 81 L. J. Ch. 517; 106 L. T. 758.

Annotation:—Mentd. Re Charteris, Charteris v. Kenyon, [1917] 2 Ch. 257.

3091. Tenant for life.]—*Re NIEUWENHUY'S* (1892), 43 Sol. Jo. 326.

Annotation:—Dbtd. Re Jackson's S. E., [1902] 1 Ch. 258.

3092. ——— **—.]—**(1) Testator devised his real estate to trustees upon trust to pay the income to his three children, & in the events which happened, to the survivors & survivor of them for their lives, with power for any child to appoint by will a life interest to his or her wife or husband, & directed that upon the death of the last survivor of all his children & any husband or wife to whom an appointment had been made, his trustees should sell his real estate & divide the proceeds equally between all his grandchildren then living. No appointment had been made to any husband or wife not born in testator's lifetime. One child died without issue, & the other two had become trustees of the will as well as tenants for life; they had sold part of testator's estate in 1898 as tenants for life, exercising the statutory power, & had also received the purchase-money as trustees:—*Held*: the tenants for life were good trustees for the purposes of Settled Land Acts.

(2) Where a tenant for life sells settled land by virtue of Settled Land Acts, the exercise of the statutory power overreaches a mtge. by a remainderman, & his concurrence in the conveyance is not necessary.—*Re DAVIES & KENT'S CONTRACT*, [1910] 2 Ch. 35; 79 L. J. Ch. 689; 102 L. T. 622, C.A.

Annotation:—As to (1) Refd. Re Johnson's S. E. (1913), 57 Sol. Jo. 717.

3093. ——— **With conditional power of sale.]—***Re JOHNSON'S SETTLED ESTATES*, No. 2860, *ante*.

3094. Personal representatives of testator.]—*Re SHELTON'S SETTLED ESTATES*, [1928] W. N. 27.

Trustees of compound settlement.]—*See* Sect. 2, sub-sect. 3, *post*.

SECT. 2.—APPOINTMENT.

SUB-SECT. 1.—IN GENERAL.

See Settled Land Act, 1925 (c. 18), ss. 30, 34, 35; Trustee Act, 1925 (c. 19), s. 64; & generally, TRUSTS & TRUSTEES.

3095. Who should be represented at hearing of application—Persons entitled in remainder.]—PRACTICE NOTE, [1921] W. N. 222.

3096. Effect of order—Interests of infant not prejudiced.]—The interest of an infant, as one of the next of kin of his father, in land which formerly belonged to a partnership of which the father was a member, & has been retained by the administrator *in specie*, is settled land within Settled Land Act, 1882 (c. 38), s. 59, so as to enable the ct. under sect. 38, to appoint trustees to exercise the powers conferred by the Act. The order appointing new trustees will, however, be made without prejudice to any question as to the interests of the infants.—*Re WELLS* (1883), 48 L. T. 859; 31 W. R. 764.

3097. — Where separate settlements created by one instrument.]—*Re SKERRITT'S ESTATE*, [1899] W. N. 240.

3098. —.]—*Re OGLE'S SETTLED ESTATES*, No. 2572, *ante*.

Necessity for appointment—For purpose of sale.]—See Part XIII., Sect. 1, sub-sect. 5, B., *ante*.

— For purpose of leasing.]—See Part XIII., Sect. 1, sub-sect. 6, B (a), *ante*.

SUB-SECT. 2.—WHO MAY BE APPOINTED.

See Settled Land Act, 1925 (c. 18), ss. 30, 34, 35; Trustee Act, 1925 (c. 19), s. 64; & *generally*, TRUSTS.

3099. Appointee must be indifferent—To protect interest of remaindermen.]—In appointing trustees under Settled Land Act, 1882 (c. 38), the ct. will be most careful to protect the interest of remaindermen, so far as possible, by appointing indifferent persons as trustees, & will not, if it can be helped, appoint a tenant for life of the settled property to be a trustee.—*Re HARROP'S TRUSTS* (1883), 24 Ch. D. 717; 53 L. J. Ch. 137; 48 L. T. 937.

*Annotations:—*Consd. *Tempest v. Camoys* (1888), 58 L. T. 221. *Refd. Re Wright's Trusts* (1883) 24 Ch. D. 662; *Re Wootton's Estate*, [1890] W. N. 158.

3100. Two appointees must be independent—Not nearly related to each other.]—(1) When a complete settlement of land has been made, & derivative settlements have been afterwards made by persons who take interests, not yet in possession, under the original settlement, the original settlement alone is the settlement for the purposes of Settled Land Act.

(2) The ct. will not in general appoint as trustees of a settlement for the purposes of the Act two persons who are near relatives to each other. There ought to be two independent trustees.—*Re KNOWLES' SETTLED ESTATES* (1884), 27 Ch. D. 707; 54 L. J. Ch. 264; 51 L. T. 655; 33 W. R. 364. *Annotation:—As to (1) Refd. Re Du Cane & Nettlefold's Contract*, [1898] 2 Ch. 96.

3101. Tenant for life.]—*Re HARROP'S TRUSTS*, No. 3099, *ante*.

3102. —.]—*Re PRICE'S SETTLEMENT*, [1883] W. N. 202.

Annotation:—Refd. Re Truboe's Trusts, [1892] 3 Ch. 55.

3103. Existing trustees of settlement—Subject to affidavits of fitness.]—*Re STONELEY'S WILL* (1883), 27 Sol. Jo. 554.

3104. —.]—*Re MORGAN*, No. 2621, *ante*.

3105. —.]—*Re NICHOLAS*, [1894] W. N. 165.

3106. Solicitor to tenant for life.]—J., by his will, devised an estate to trustees upon trust to receive & pay the rents to his grandson for life, & after his decease to sell & to stand possessed of the moneys for all the grandson's children. The tenant for life was upwards of seventy years of age, & a widower. He had one child only, a daughter, & she & her husband in July, 1880, contracted to sell her reversion in the estate to pltf. Settled Land Act, 1882 (c. 38), came into operation in Jan. 1883, & the tenant for life at the end of that month advertised the estate for sale under the powers of Settled Land Act, 1882 (c. 38). Pltf. brought an action for an injunction to restrain the tenant for life from selling; & to restrain the other defts., devisees of the legal estate under the will of the survivor of trustees of J.'s will appointed by the ct., from executing any assurance of the estate, & on motion for that purpose:—*Held*: (1) the tenant for life had power under Settled Land Act, 1882 (c. 38), to sell the fee simple & inheritance of the property if he should comply with the provisions of Settled Land Act, 1882 (c. 38); (2) there were no trustees to whom he could, under Settled Land Act, 1882 (c. 38), s. 45, give notice; & an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of Settled Land Act, 1882 (c. 38); (3) pltf. was entitled to be served with any summons for the appointment of new trustees, & pltf. objecting, defts. solr. ought not to be appointed. —*WHEELWRIGHT v. WALKER* (1883), 23 Ch. D. 752; 52 L. J. Ch. 274; 48 L. T. 70; 31 W. R. 363; *sub nom. Re WALKER'S TRUSTS*, 48 L. T. 632; 31 W. R. 716; *subsequent proceedings*, 48 L. T. 867.

Annotations:—As to (1) Refd. Re Dickin & Kelsall's Contract [1908] 1 Ch. 213. *As to (2) Apld. Re Fisher & Grazebrook's Contract*, [1898] 2 Ch. 660. *Refd. Mogridge v. Clapp*, [1892] 3 Ch. 382.

3107. —.]—Testator devised his real estate to the use of G. & W. in fee upon trusts in strict settlement, & bequeathed to them his residuary personal estate upon trust to invest it in the purchase of land to be conveyed to them upon the same trusts. The will contained no power of sale. W. was the family solr., a person of good position & high character, & after the death of testator he acted as solr. to the trustees & also to the tenant for life. The tenant for life being desirous of selling part of the estates under the powers of Settled Land Act, applied to the ct. to appoint G. & W. trustees for the purposes of the Act:—*Held*: W. ought not to be appointed, for that although he was in all other respects a most proper person, his being solr. to the tenant for life made him unsuitable for an office the duties of which required him to check the proceedings of the tenant for life.—*Re KEMP'S SETTLED ESTATES* (1883), 24 Ch. D. 485; 52 L. J. Ch. 950; 49 L. T. 231; 31 W. R. 930, C. A.

*Annotations:—*Consd. & *Expld. Re Stamford, Payne v. Stamford*, [1896] 1 Ch. 258. *Refd. Re Ray's S. E.* (1884), 25 Ch. D. 464; *Re Spencer's S. E.*, [1903] 1 Ch. 75; *Re Cotter, Jennings v. Nye*, [1915] 1 Ch. 307.

3108. —.]—It is the rule of the ct. not to appoint as trustee of a settlement for the purposes of Settled Land Act, the person who is solr. to the tenant for life under the settlement, nor to

PART XIV. SECT. 2, SUB-SECT. 1.

*r. Separate settlements created by one instrument—Separate applications necessary.]—*Where application is made under Settled Estates & Settled Land Acts, 1915, s. 97, for the appointment as trustee of the settlement of the same trustee co. in respect of two

separate settlements created by the will, there being two separate appcts. & the persons who are beneficially interested in the two cases being different, although the ultimate remainderman may possibly be the same, there ought to be separate applications in regard to the respective settlements.—*Re FIELD'S SETTLE-*

MENTS, [1925] V. L. R. 143; 31 Argus L. R. 141.—AUS.

PART XIV. SECT. 2, SUB-SECT. 2.

3104 i. Existing trustees of settlement.]—*Re BELFAST IMPROVEMENT ACTS*, *Ex p. REID*, [1898] 1 I. R. 1; 50 I. L. T. 171.—IR.

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sanction such an appointment; but that rule of practice does not prevent a tenant for life who is the donee of the power of appointment of new trustees from so exercising the power, & the ct. will not declare such an appointment invalid merely because the person appointed is solr. to the tenant for life.—*Re STAMFORD (EARL), PAYNE v. STAMFORD*, [1896] 1 Ch. 288; 65 L. J. Ch. 134; 73 L. T. 559; 44 W. R. 249; 12 T. L. R. 78; 40 Sol. Jo. 114.

Annotations:—Distd. Re Spencer's S. E., [1903] 1 Ch. 75. *Apld. Re Cotter, Jennings v. Nye*, [1915] 1 Ch. 307.

3109. ——*Re SPENCER'S SETTLED ESTATES*, No. 3124, *post*.

3110. Persons resident abroad.—Acting under invalid appointment.]—All the persons interested under a settlement of land in Wales, some of whom were infants, were resident in America. The settlement contained a power of sale exercisable by the trustees with the consent of the tenant for life. All the trustees were dead, & the power of appointing new trustees was vested by the settlement in the heir of the last surviving trustee, who could not be found. All the *cestuis que trust* presented a petition asking for the appointment as trustees of three persons, of whom two were resident in America & had been acting as trustees of the settlement under an invalid appointment, & the third, L., who was in this country, had collected the rents as their agent at a remuneration, the continuance of which the ct. was asked to authorise. No other persons could be found to act as trustees, & L. would not act without remuneration:—*Held*: under the circumstances the three proposed trustees might be appointed & the remuneration allowed, subject, however, to the production by L. of evidence as to the number & nature of the tenancies & the propriety of the proposed remuneration, & to an undertaking by the trustees who were out of the jurisdiction that in case of the death of L. they would not appoint any one out of the jurisdiction without the leave of the ct.—*Re FREEMAN'S SETTLEMENT TRUSTS* (1887), 37 Ch. D. 118; 57 L. J. Ch. 160; 57 L. T. 798; 36 W. R. 71.

3111. ——Where an infant domiciled in Australia was entitled under a will to a small share of real property in this country which the co-owners proposed to sell, & in order to effectuate the sale of the infant's interest it was necessary to apply to the ct. for the appointment of trustees under Settled Land Act, 1882 (c. 38), the ct., upon proof that the sale was for the benefit of the infant, appointed two persons domiciled in Australia trustees of the settlement effected by the will for the purposes of the Act.—*Re SIMPSON, Re WHITCHURCH*, [1897] 1 Ch. 256; 66 L. J. Ch. 166; 76 L. T. 131; 45 W. R. 277; 41 Sol. Jo. 210; 7 C. A.

3112. Agent of trustees—Collector of rents on commission.]—*Re FREEMAN'S SETTLEMENT TRUSTS*, No. 3110, *ante*.

3113. Nominee of tenant for life.]—*WILLIAMS v. JENKINS*, No. 2658, *ante*.

3114. ——*Re NICHOLAS*, [1894] W. N. 165.

3115. Public Trustee.]—*Re LESLIE'S HASSOP ESTATES*, No. 3132, *post*.

3111 i. Persons resident abroad.]—Where estates in England & Ireland were devised upon similar limitations & all the persons beneficially interested resided in England, the ct. appointed as trustees of the Irish Estates for the purposes of Settled Land Act, 1882, two persons who had been appointed by the Chancery Division in England trustees of the English estates, for the

purposes of the Act, notwithstanding their residence in England.—*Re MABERLEY'S SETTLED ESTATE* (1887), 19 L. R. Ir. 341.—**IR.**

3115 i. Public Trustee.]—*Re ARDAGH'S ESTATE*, [1914] 1 I. R. 5.—**IR.**

t. Trustee company.—Appointment as sole trustee — Where two trustees at

3116. — Scottish settlement.]—It is not competent to the Public Trustee to accept the trusteeship of any settlement other than an English one.

Where, therefore, the trustees of a marriage contract, which, when executed, was in form & substance a Scottish settlement, desired to appoint the Public Trustee to be sole trustee of the settlement, on the ground that the matrimonial domicile, the present trustees, the beneficiaries, & the trust investments were all English:—*Held*: the settlement still remained a Scottish settlement to be construed according to Scottish law, & there was no statutory power enabling the Public Trustee to accept the trusteeship of what was a foreign settlement.—*Re HEWITT'S SETTLEMENT, HEWITT v. HEWITT*, [1915] 1 Ch. 228; 84 L. J. Ch. 358; 112 L. T. 287; 31 T. L. R. 81; 59 Sol. Jo. 177.

Compound settlement.]—*See Sub-sect. 3, post.*

SUB-SECT. 3.—COMPOUND SETTLEMENTS.

See Settled Land Act, 1925 (c. 18), ss. 31–33, 91; Law of Property Amendment Act, 1926 (c. 11), sched.

3117. Necessity for appointment of trustees.]—*Re DU CANE & NETTLEFOLD'S CONTRACT*, No. 2812, *ante*.

3118. — Where trustees of original settlement existing.]—Where there has been a settlement of land on a tenant for life & a tenant in tail in remainder, & they have concurred in executing a disentailing assurance, conveying their estates to a grantee to uses, & limiting to themselves a joint power of appointment, & limiting the settled land, in default of appointment, to the use of the tenant for life in restoration of his former life estate & of the powers annexed thereto, with remainder over, the tenant for life can sell the land under Settled Land Acts & make title thereto as tenant for life under the original settlement, & can require the purchase-money to be paid to the persons appointed by the original instrument of settlement to be the trustees of the settlement thereby made for the purposes of those Acts; & it is not necessary for the trustees of the compound settlement, consisting of the original settlement & the disentailing assurance, to be appointed. This is the case, notwithstanding the judgment of the Ct. of Appeal, *Re Constable's Settled Estates*, No. 3055, *ante*, that words in a deed purporting to restore a life estate thereby or previously parted with are themselves ineffectual actually to give back to the tenant for life the very same estate he originally had.

Inasmuch as, under Settled Land Act, 1882 (c. 38), s. 50, the powers under that Act of a tenant for life are not capable of assignment or release, & remain exercisable by him notwithstanding any assignment of his life estate, it follows that in the above case the original "settlement," as defined in that Act, is not brought to an end by the tenant for life so conveying away his life estate, but continues to subsist so long as the powers given by the Act to the tenant for life under that settlement remain exercisable, notwithstanding that no portion charged under that settlement may remain

will already appointed by testator.]—The ct. has power, under Settled Estates & Settled Lands Act, 1915, s. 97, to appoint a trustee co. as sole trustee of the settlement, although the testator has appointed two trustees of the will by which the settlement is constituted.—*Re JONES' SETTLEMENT*, [1926] V. L. R. 369; 48 A. L. J. 38; [1926] *Argus* L. R. 323.—**AUS.**

to be raised & no rentcharge thereby created continues payable.—*Re COPE & WADLAND'S CONTRACT*, [1919] 2 Ch. 376; 88 L. J. Ch. 489; 122 L. T. 156.

Annotation.—*Folld. Re Curwen & Frame's Contract*, [1924] 1 Ch. 581.

3119. ———.]—By a settlement made in 1892, land was settled to the use of trustees upon certain trusts during the life of C., with remainder to his first & other sons successively in tail, with power for him by deed or will to appoint the rents & profits to any wife surviving him for her life; & trustees were appointed of the settlement for the purposes of Settled Land Acts. By deed poll C., on his marriage, exercised that power & appointed that the settled land should upon his death remain to the use of the trustees of the settlement during the life of his wife upon trust to pay the rents & profits thereof to her. The appointor died in 1897, & his widow & his eldest son, the first tenant in tail, joined in disentailing the settled land & conveyed the same to uses for raising certain charges, & subject thereto, to the use of the settlement trustees during the life of the widow in restoration of the estate limited to them by the deed of appointment, with all powers annexed to such estate or vested in them or the widow during the continuance thereof, with remainder to the eldest son in fee simple. On the sale of part of the settled land by the widow, as tenant for life under Settled Land Acts, the purchasers raised an objection to the title on the ground that there were no trustees for the purposes of those Acts of the compound settlement consisting of all three deeds, or at any rate of the settlement created by the original settlement & the deed of appointment.—*Held*: the land stood limited in trust for persons by way of succession under or by virtue of a deed, namely, the settlement of Sept. 5, 1892, within Settled Land Act, 1882 (c. 38), s. 2 (1); & as there existed trustees of that settlement for the purposes of Settled Land Acts, it was not necessary to have trustees for those purposes of either of the compound settlements aforesaid, & consequently, the purchasers' objection to the title failed.—*Re CURWEN & FRAMES' CONTRACT*, [1924] 1 Ch. 581; 93 L. J. Ch. 290; 131 L. T. 220; 68 Sol. Jo. 459.

— *For purpose of sale by tenant for life.*—*See* Part XIII., Sect. 1, sub-sect. 5, B., *ante*.

3120. Who are trustees under Settled Land Act — Trustees of single instrument in series.]—*Re AILESBUURY (MARQUIS) & IVEAGH (LORD)*, No. 3036, *ante*.

3121. ——— Trustees of original settlement—Where declaration in vesting deed.]—*Re ALINGTON (LORD) & LONDON COUNTY COUNCIL'S CONTRACT*, No. 2596, *ante*.

3122. ——— Where reference to previous instrument.]—*Re ADAIR, ADAIR v. TREHERNE* (1927), 71 Sol. Jo. 844.

3123. ——— Different settlements on same limitations—Same persons trustees of both settlements—Trustees for aggregate estate.]—*Re SYMONS. SYMONS-JEUNE v. BUNBURY*, No. 3045, *ante*.

—.]—*See, generally*, Sect. 1, *ante*.

3124. Who may be appointed — Trustees of original settlement.]—(1) A compound settlement consisted of a settlement made in 1863 & a disentailing deed & a resettlement made in 1898. The resettlement deed contained a declaration that the trustees of it should be trustees of the compound settlement for the purposes of Settled Land Acts. A jointress & portioners, whose interests arose under the settlement of 1863 & were outstanding, were not parties to the re-

settlement deed.—*Held*: the trustees of the resettlement deed were not validly appointed trustees of the compound settlement. *Semble*: if all the persons interested under the settlement had been parties to the resettlement deed, the declaration of appointment would have been effectual.

(2) The trustees purported to be appointed were the existing trustees of the original settlement, one being the tenant for life's solr. The ct., being asked to appoint trustees of the compound settlement, declined to appoint the tenant for life's solr. to be one, in accordance with the ordinary rule that it will not, in the absence of special reason, appoint the tenant for life's solr. to be a trustee of the settlement.—*Re SPENCER'S SETTLED ESTATES*, [1903] 1 Ch. 75; 88 L. T. 159; 51 W. R. 262; *sub nom. Re HAMMOND SPENCER'S SETTLED ESTATES*, 72 L. J. Ch. 59.

Annotation.—*As to* (1) *Distd. Re Spearman S. E.*, [1906] 2 Ch. 502.

3125. ———.]—Limited owners with joint absolute dominion over the estates comprised in a strict settlement, e.g., the life tenant & tenant in tail male in immediate remainder of estates unfettered by any charges or powers of charging, can resettle the estates as they please, & if they choose to keep the original settlement alive by a sufficient partial restoration of the subsisting uses, trusts & powers, they can appoint Settled Land Act trustees of the compound settlement constituted by the settlement and resettlement.—*Re SPEARMAN SETTLED ESTATES*, [1906] 2 Ch. 502; 75 L. J. Ch. 829; 95 L. T. 605.

Annotation.—*Expld. Re Cope & Wadland's Contract*, [1919] 2 Ch. 376.

3126. ———.]—*Re CRADOCK'S SETTLED ESTATES*, No. 3043, *ante*.

3127. ——— Trustees declared in resettlement deed—Where all interested persons not parties.]—*Re SPENCER'S SETTLED ESTATES*, No. 3124, *ante*.

3128. ———.]—*Re SPEARMAN SETTLED ESTATES*, No. 3125, *ante*.

3129. ——— Trustees of subsequent instrument.]—Testator by his will dated in 1870 devised a residential estate in settlement. In the midst of & surrounded by the estate & near to the mansion house there was a smaller property which belonged to other persons. The tenant for life under the will purchased this property for £7,800, & having mortgaged it for £7,000, himself providing the balance, he by deed in 1904 settled it on the subsisting uses of the will, but subject to the mtge. & to repayment to himself of his costs, charges, & expenses arising out of the transaction. It was proved that the acquisition of this additional property was most desirable & beneficial. Neither in the will nor in the deed of 1904 was any general power of sale conferred on the trustees of those instruments, but the deed contained a proviso that the trustees thereof should have power, by sale or mtge. of the property thereby assured, to raise the amount of the costs, charges, & expenses above referred to. The tenant for life applied to the ct. for its sanction to his raising the amount of the incumbrance & costs, charges, & expenses by a mtge. of the entirety of the estate, & that the trustees of the deed of 1904 might be appointed trustees for the purposes of Settled Land Acts of the settlement created by the will & the deed of 1904.—*Held*: (1) the trustees of the deed of 1904 ought to be appointed trustees of the compound settlement for the purposes of Settled Land Acts, as otherwise there would be no one to whom notice could be properly & adequately given under Settled Land Act, 1882 (c. 38), s. 45 (1); (2) the proviso contained in the deed of 1904 had not the effect of making the

Sect. 2.—Appointment: Sub-sects. 3 & 4. Sects. 3 & 4. Part XV.]

trustees of that instrument trustees for the purposes of Settled Land Acts, as those Acts contemplated trustees having a general & not a limited power, that is, a power exercisable at any time & for any purpose, & not a power exercisable in a contingency & for a particular purpose.—*Re COULL'S SETTLED ESTATES*, [1905] 1 Ch. 712; 74 L. J. Ch. 378; 92 L. T. 616; 53 W. R. 504.

—*Sec. generally*, Sub-sect. 2, *ante*.

SUB-SECT. 4.—APPOINTMENT OF NEW TRUSTEES.

See Settled Land Act, 1925 (c. 18), ss. 34, 35; & *generally*, TRUSTS & TRUSTEES.

3130. Necessity for application to court—Original trustees appointed by court.]—Where trustees of a settlement for the purposes of Settled Land Acts have been appointed by the ct., & one of them is desirous of retiring, it is doubtful whether the continuing trustee can appoint a new trustee in his place under Conveyancing Act, 1881 (c. 41), s. 31, & it is proper for application to be made to the ct. to appoint a new trustee under Settled Land Act, 1882 (c. 38), s. 38.—*Re WILCOCK* (1887), 34 Ch. D. 508; 56 L. J. Ch. 757; 56 L. T. 629; 35 W. R. 450.

3131. Notice of application to court—Service as “trustees.”]—*Re LEGGETT'S SETTLEMENT*, [1920] W. N. 212.

Appointment under power in instrument.]—*See* TRUSTS & TRUSTEES.

SECT. 3.—NUMBER.

See Settled Land Act, 1925 (c. 18), s. 94 (1); Trustee Act, 1925 (c. 19), s. 41, & *generally*, TRUSTS & TRUSTEES.

3132. Authority to appoint sole trustee—In spite of contrary direction by settlor.]—The ct. has express jurisdiction under Public Trustee Act, 1906 (c. 55), s. 5, to appoint the Public Trustee sole trustee of a settlement, although it contained a provision that the trustees should not at any time be less than three.—*Re LESLIE'S HASSOP ESTATES*, [1911] 1 Ch. 611; 80 L. J. Ch. 486; 27 T. L. R. 352; 55 Sol. Jo. 384; *sub nom.* *Re HASSOP SETTLED ESTATES*, *Re LESLIE'S WILL*, *Re TRUSTEE ACT*, 1893, 104 L. T. 563.

Annotation:—Reid. Re Moxon, [1916] 2 Ch. 595.

3133. ——— By persons with statutory power.]—Persons having the statutory power to appoint new trustees may appoint the Public Trustee to be sole trustee although the trust instrument expressly provides that upon any appointment of new trustees the number is not to be reduced below three.—*Re MOXON*, [1916] 2 Ch. 595; 86 L. J. Ch. 33; 115 L. T. 673; 61 Sol. Jo. 42.

SECT. 4.—ADMINISTRATIVE POWERS AND DUTIES.

See, generally, TRUSTS & TRUSTEES.

Maintenance & advancement of infants.]—*See* INFANTS, Vol. XXVIII., pp. 216-255.

Part XV.—Land Held in Undivided Shares.

See Law of Property Act, 1925 (c. 20), sched. I., Part IV.; Law of Property (Amendment) Act, 1926 (c. 11), sched.

3134. Sale by tenant for life of one share—Necessity for concurrence of owner of other share.]—The tenant for life of an undivided moiety of land, where the other undivided moiety is out of settlement, cannot sell the moiety of which he is tenant for life without the concurrence of the owner of the other undivided moiety.—*Re COLLINGE'S SETTLED ESTATES* (1887), 36 Ch. D. 516; 57 L. J. Ch. 219; 57 L. T. 221; 36 W. R. 264.

Annotations:—Consd. Williams v. Jenkins (1894), 13 R. 92. *Overd. Cooper v. Belsey*, [1899] 1 Ch. 639.

3135. ———.]—Where under a will land is devised in moieties & each moiety is separately settled by the will itself the tenant for life of one undivided moiety can sell his moiety under the powers of Settled Land Act, 1882 (c. 38), without the concurrence of the person or persons entitled to or having the power or right of disposition over the other undivided moiety.—*COOPER v. BELSEY*, [1899] 1 Ch. 639; 68 L. J. Ch. 258; 80 L. T. 69; 47 W. R. 443; 43 Sol. Jo. 295, C. A.

See, now, Settled Land Act, 1925 (c. 18), s.

117 (1) (ix); Law of Property Act, 1925 (c. 20), s. 34 (4).

3136. Application of Law of Property Act, 1925 (c. 20), sched. I., Part IV.—Necessity for two elements—No antecedent freehold estate—Present beneficial enjoyment by possession.]—*Re STAMFORD & WARRINGTON (EARL)*, *PAYNE v. GREY*, No. 2679, *ante*.

3137. ——— Alternative provisions—Land not “settled land”—Conveyance of land subject to rentcharge.]—*Re RYDER & STEADMAN'S CONTRACT*, No. 3046, *ante*.

3138. ——— Settled land.]—*Re DAWSON*, [1928] W. N. 47.

3139. ——— One trustee only—Three of the persons entitled to undivided shares life tenants.]—Immediately before the commencement of Law of Property Act, 1925 (c. 20), certain freehold land stood vested in J. as personal representative of the last surviving trustee of a will in trust as to three undivided fourths for three life tenants with remainders to their respective children & as to one-fourth for a deceased life tenant's children absolutely.—*Held*: although there was only one trustee or personal representative, & three

PART XIV. SECT. 2, SUB-SECT. 4.

a. Appointment must be beneficial.]—*BURKE v. GORE* (1884), 13 L. R. Ir. 367.—**IR.**

b. Jurisdiction to appoint—Registrar.]—A registrar has no jurisdiction in the absence of a judge of the Supreme Ct. to appoint new trustees under Settled Land Act, 1886, s. 13.—*Re LUXTON* (1905), 24 N. Z. L. R. 687.—**N.Z.**

c. Who may be appointed—New

appointee must be independent—Not partner of continuing or surviving trustee.]—The ct. will not, on a motion for the appointment of a new trustee under Settled Land Act, 1908, in lieu of a trustee who has died, or *semlie* retired, appoint as trustee the partner of a surviving or continuing trustee, the *cestuis que trust* being entitled to the benefit of the solvency as well as the assistance of two independent persons in the administration of the

trust.—*Re THOMPSON (DECEASED)* (1909), 28 N. Z. L. R. 358.—**N.Z.**

d. Grounds for—Trustee taking up residence abroad.]—One of three trustees appointed by the ct. under Settled Land Act, 1882, s. 38, having gone to reside abroad, the ct. appointed a new trustee, for the purposes of that Act, in his place, under sect. 38.—*Re KANE'S TRUSTS* (1888), 21 L. R. Ir. 112.—**IR.**

of the persons entitled in undivided shares were only life tenants, the case fell within sub-para. 1 of para. 1 of sched. I. Part IV., of the above Act, so J. held the land upon the statutory trusts, & on appointing a new or additional trustee to act with him, he and the new or additional trustee could make a good title & give a good receipt to a purchaser.—*Re MYHILL, HULL v. MYHILL*, [1928] 1 Ch. 100; 97 L. J. Ch. 81; 138 L. T. 486.

3140. — What amounts to incumbrance—Right of pre-emption.]—Testator who died in 1920 gave his property to trustees, & settled the entirety upon trusts for various beneficiaries in undivided shares. He empowered the trustees at any time to sell any part of his estate, subject to a right of pre-emption thereby given to his son A. over property B. at a price to be fixed by the trustees' valuer before sale. On Jan. 1, 1926, the land vested in the trustees on the statutory trusts for sale, etc., under Law of Property Act, 1925 (c. 20), s. 1 (3), sched. I., Part IV.:—*Held*: (1) on the construction of the will, the right of pre-emption was only intended to attach to an exercise of the power of sale under the will, & not to a sale under the statutory trusts or any other extraneous powers; (2) even if the right of pre-emption was intended to attach to any sale whatever by the trustees, it was not enforceable against the statutory trusts of s. 35 either as an "equitable interest or power" within sect. 3 & sect. 205 (1) (1c); or as an "additional or larger power" conferred by the will on the trustees within sect. 28, sub-sect. 1, as amended by the 1926 Act Schedule; or as an "incumbrance" within Sched. I., Part IV., sect. 1, sub-sect. 9; the trustees on executing the statutory trusts could disregard the right of pre-emption.—*Re FLINT, FLINT v. FLINT*, [1927] 1 Ch. 570; 96 L. J. Ch. 248; 137 L. T. 178.

3141. — Annuity.]—(1) By his will, dated Nov. 13, 1909, testator directed that from & after the death of his wife his trustees should stand possessed of certain hereditaments, which he described as the share of his daughter E., upon trust to pay to her husband an annuity of £500 for life, which in certain events might be determined, & he empowered the husband by will or codicil to charge the share with the payment of any sum not exceeding £10,000 for the benefit of one or more of the issue of his daughter, & directed his trustees to raise the money by a sale or mtge. of the share & hold it in trust for the person or persons entitled. Subject as aforesaid, the trustees were to stand possessed of the share & the net income thereof in trust, in the events that happened, for the children of E. in equal shares. Testator died in 1910, his wife in 1911, & E. before the date of the will, leaving a husband surviving. E. had four children who all survived testator & attained vested interests. The trustees, who were also exors., were given no power of sale by the will & were not trustees of the will for the purposes of Settled Land Acts, 1882 to 1890. Testator declared that any exor. or trustee of his will who was a solr., or a person engaged in any profession or business, might individually, or through his firm, act in the course of his profession or business on behalf of the exors. & trustees, & charge for so doing:—*Held*: immediately before Law of Property Act, 1925 (c. 20), came into operation the legal estate in E.'s share was vested in the trustees of the will, & subject to the annuity of £500 & the power to charge, the land was held in four undivided shares vested in possession. The case therefore fell within Law of Property Act, 1925 (c. 20), sched. I., Part IV., para. 1, sub-

para 1, & the land was vested in the trustees upon the statutory trusts, the incumbrances being divested under para. 1 (1) (a). The annuity was an incumbrance within Law of Property Act, 1925 (c. 20), s. 205 (1) (vii), & the consent of the annuitant to any sale would have to be obtained under para. 1 (9) of Part IV. The power to charge, which might never be exercised, was not an incumbrance. If & when exercised it would operate on the proceeds of sale in the hands of the trustees.

(2) Any exor. or trustee of the will who was a solr. or a person engaged in a profession or business was entitled under the will to charge for work or business done in the execution of the statutory trusts, because such work or business would be done on behalf of the exors. & trustees.—*Re PEDLEY, WALLACE v. WALLACE*, [1927] 2 Ch. 168; 96 L. J. Ch. 438; 137 L. T. 636; 71 Sol. Jo. 583.

3142. — Right of executor or trustee to charge for services.]—*Re PEDLEY, WALLACE v. WALLACE*, No. 3141, *ante*.

3143. — Land settled upon trust for sale—After happening of future event.]—*Re ROBINS, HOLLAND v. GILLAM*, [1928] W. N. 170.

3144. Application of Law of Property (Amendment) Act, 1926 (c. 11), sched.—Limitations subsisting before commencement of Act to be regarded—Not subsequent dealings or devolution.]—By the Schedule to Law of Property (Amendment) Act, 1926 (c. 11), the following paragraph was added to Law of Property Act, 1925 (c. 20), sched. I., Part IV.: "Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, & after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together, not in undivided shares, their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, & the joint tenants & the survivor of them shall, until the said cesser occurs, constitute the tenant for life for the purposes of Settled Land Act, 1925 (c. 18), & this Act":—*Held*: (1) in ascertaining whether the paragraph applies, regard must be had to the limitations of the settlement subsisting immediately before the commencement of the Act but not to any dealing with or devolution of the interest of any person taking under the limitations of the settlement; (2) the paragraph only applies where the interest of the tenants for life are followed by a vested indefeasible limitation not in undivided shares.

Where testator by his will gave his residuary real estate to trustees upon trusts under which the property was immediately before Jan. 1, 1926, held upon trust for two persons during their lives in undivided shares & subject thereto upon such trusts for the benefit of testator's sons & grandsons as L. should by deed or will appoint & in default of and subject to any such appointment in trust for testator's heir:—*Held*: the paragraph did not apply, but the property was vested in the trustees of the will upon the statutory trusts pursuant to Law of Property Act, 1925 (c. 18), sched. I., Part IV., para. 1 (3).—*Re COLYER'S FARNINGHAM ESTATE*, [1927] 1 Ch. 677; 96 L. J. Ch. 348; 137 L. T. 413; 71 Sol. Jo. 351.

3145. — Necessity for estates for life in undivided shares—Followed by vested indefeasible limitations not in undivided shares.]—*Re COLYER'S FARNINGHAM ESTATE*, No. 3144, *ante*.

3146. — Land settled upon trust for sale & division of proceeds.]—By his will, W. directed that, after the death of his wife, which took place

in 1922, his trustees should receive the whole income arising from his trust estate, & should divide the same equally between all his children & the child or children of any child who might be dead, such child or children taking between them the share their deceased parent would have been entitled to if living; & when & so soon as all his children should be dead except two, his trustees should sell & convert all his trust estate, & divide the proceeds equally between his two surviving children & the child or children of deceased sons & daughters, such last-mentioned children, if more than one, to take equally between them one equal share of the proceeds of sale. On Dec. 31, 1925, the property was held upon trust to divide the income arising therefrom amongst ten children, seven grandchildren, & the legal personal representative of a deceased grandchild of testator:—*Held*: the entirety of the land being settled land held under one & the same settlement in equity in undivided shares, the property was vested in the trustees of the will of W. in fee simple upon the statutory trusts referred to in the Law of Property Act, 1925 (c. 18), sched. I., Part IV., para. 1 (3), & it was not affected by para. 4, added to Part IV., of sched. I. to the Act of 1925, by the Schedule to Law of Property (Amendment) Act, 1926 (c. 11).

In my opinion, land settled upon trust for sale & division of the proceeds cannot by any stress of imagination be described with accuracy as land so limited as to devolve or descend—for that, I take it, is what is meant by the word “devolve”—as an undivided whole (*EVE, J.*).—*Re Higgs' & MAY'S CONTRACT*, [1927] 2 Ch. 219; 96 L. J. Ch. 413; 137 L. T. 803; 71 Sol. Jo. 761.

3147. Appointment of new trustees—Land vested in Public Trustee—Who may appoint—Trustees for sale.—Where land was held in four equal undivided shares, the owner of one share & the trustees for sale of the three remaining shares appointed new trustees in the place of the Public Trustee:—*Held*: the trustees for sale were “persons interested in more than an undivided half of the land or the income thereof,” & the appointment of new trustees was valid.—*Re CLIFF CONTRACT*, [1927] 2 Ch. 94; 96 L. J. Ch. 278; 137 L. T. 372; 71 Sol. Jo. 389.

Annotation:—*Folld. Re Hayward, Merson v. Hayward* (1927), 71 Sol. Jo. 815.

3148. — — — — —.]—The words “persons interested” in Law of Property Act, 1925 (c. 20), s. 1 (4) (iii), sched. I., Part IV., where the question of shares is under consideration, are not confined to persons beneficially interested, but include persons interested by being trustees for sale.—*Re HAYWARD, MERSON v. HAYWARD*, [1928] 1 Ch. 367; 71 Sol. Jo. 845.

3149. Power of sale given by will—Subject to right of pre-emption—Right of pre-emption attaches to sale under power—Not to sale under statutory trust for sale.—*Re FLINT, FLINT v. FLINT*, No. 3140, *ante*.

3150. — — — — — Power of trustees to disregard right of pre-emption—On sale under statutory power.]—*Re FLINT, FLINT v. FLINT*, No. 3140, *ante*.

3151. Possibility of future estate in undivided shares—Land remains settled land—Where subject-matter of “settlement within Law of Property Act, 1925 (c. 20), s. 1 (1).”—*Re BIRD, WATSON v. NUNES*, No. 2579, *ante*.

Part XVI.—Resettlements.

SECT. 1.—IN GENERAL.

See Settled Land Act, 1925 (c. 18), s. 22, Sched. IV. (8); & generally, FAMILY ARRANGEMENTS, Vol. XXIV., pp. 945 et seq.

What amounts to—Mortgage in exercise of power.—*See MORTGAGE, Vol. XXXV., pp. 209–301, Nos. 501–508.*

3152. Validity—Settlement on trusts of will—Trust in default of appointment void.—All testator's children had executed a settlement reciting that the trust in default of appointment was void, & declaring that the son's shares should be held on the trusts of the will:—*Held*: this was a valid resettlement, by the sons on themselves until bkpcy., & their children at twenty-five.—*Re SPRAGUE, MILEY v. CAPE* (1880), 43 L. T. 236.

3153. — Effect of failure to understand nature of instrument.—Pltf. was entitled to a settled estate as tenant in tail male in remainder, subject to two preceding life interests of his aunt, the protector of the settlement, & his mother.

Pltf. attained twenty-one on Dec. 10, 1878, & shortly after that date it was thought by his mother very desirable & important that some resettlement of the estate should be made. Accordingly he executed two deeds, both dated Jan. 2, 1879, to which the protector of the settlement was a party, one being the usual disentailing deed & the other a resettlement. The estate was thereby relimited to the use of pltf. for life, with remainder to uses in favour of the issue of pltf., & in default of issue, then in favour of his cousins, children of

the protector of the settlement, as tenants in common, with ultimate remainder to pltf. in fee.

An action was brought by pltf. claiming to have the resettlement cancelled & set aside or modified in effect.

The question was whether pltf. had been made sufficiently aware of the nature & effect of the deed, & had had the proper amount of independent advice which is necessary, in order that such a resettlement, executed by a person who has just attained his majority, should be upheld.

The pltf. admitted in his evidence he understood that by the deed he was giving his property to his cousins in the event of his death without issue; but he stated that he did not understand, & it was not explained to him, that the deed was an irrevocable instrument, & he believed that it was something in the nature of a will which he supposed it was his duty to execute upon attaining twenty-one. He had a short time previously executed a disentailing deed, & made a will in favour of his cousins in reference to another estate belonging to him.

On the other hand, the evidence of defts. went to show that pltf. understood generally what he was executing, but that he declined an offer made by his legal adviser to have the deed read over to him, on the ground that he should not understand it if it was read. It did not appear that pltf.'s attention had been specifically called in detail to the nature & effect of the several clauses of the deed:—*Held*: as pltf. had an accurate general

knowledge of what he was doing, & only refused to receive a detailed explanation of the provisions of the deed because he trusted his solr. to look into those details on his behalf, he was as much bound as if he were himself a lawyer, & had drawn the deed with his own hand.—*LOVELL v. WALLIS* (No. 2) (1884), 50 L. T. 681.

Annotation:—*Reid, Bonhote v. Henderson*, [1895] 1 Ch. 742.

3154. — Effect of misrepresentation—To heir in tail.—The House of Lords set aside deeds & documents by which the entailed estates of M. & R. were disentailed & resettled on the ground that the heir in entail had been induced to enter into the transactions by representations inconsistent with the facts made to him, not fraudulently nor with intent to deceive by his father's legal adviser.—*MENZIES v. MENZIES* (1893), 9 T. L. R. 347, H. L.

3155. — Re-settlement under power in will—In favour of infant.—Testator by his will settled a legacy of £50,000 upon usual trusts for A., his wife & issue, & declared that if no issue of A. should attain a vested interest then the legacy should fall into & form part of his, testator's, residuary estate, & testator empowered the trustees on A.'s marriage & with his consent to revoke the trusts & to resetttle the legacy upon such trusts for the benefit of A., his wife & issue, & with such powers & provisions as the trustees should deem proper. By a codicil testator bequeathed a sum of £50,000 to his trustees to be held by them upon the trusts & with powers for the benefit of B., her husband & issue, similar to those for the benefit of A., his wife & issue, declared in his will concerning the £50,000 thereby settled, except that no part of the capital was to be paid or advanced to or for the benefit of B.

Both A. & B. were infants at the date of the will. After the death of testator B. married, being still an infant, & by a deed executed in contemplation of her marriage the trustees with her consent & in exercise of the power conferred on them by the will & codicil revoked the trusts of her legacy & resettled the same upon trusts for her benefit, & her husband & issue, which varied somewhat from those declared in the will; in particular the ultimate trust in default of her issue was for her absolutely. On the question whether the resettlement was valid having regard to the fact that B. was an infant:—*Held*: (1) upon the true construction of the will & codicil testator intended to confer a power on B. during her minority to consent to an exercise by the trustees of their power of revocation & resettlement, & he could lawfully confer such a power upon her; (2) the ultimate trust in the resettlement, in default of B.'s issue for B. absolutely, was prohibited by the codicil, & therefore not authorised by the power to resetttle.—*Re SUTTON, BOSCAWEN v. WYNDHAM*, [1921] 1 Ch. 257; 90 L. J. Ch. 71; 124 L. T. 526; 65 Sol. Jo. 155.

—*See* FAMILY ARRANGEMENTS, Vol. XXIV., pp. 951–965, Nos. 46–165.

Consideration for.—*See* Part V., Sect. 4, *ante*.

Rectification of.—*See* Part VI., Sect. 1, *ante*.

Revocation of settlements.—*See* Part VII., Sect. 1, *ante*.

SECT. 2.—EFFECT OF RESETTLEMENT.

3156. On charge created by settlement — In favour of volunteer.—Three powers by settlement,

first to husband & wife jointly to raise & appoint £3,000, secondly to husband alone to raise & appoint £2,000, thirdly to survivor to raise & appoint such sum as would with the sum before raised make £5,000. The wife joining in raising £3,000, under the joint power for the husband, he covenanted not to charge by the power reserved to him alone or any other power whatsoever during her life, & so long as said £3,000 should remain unpaid, without her consent. After her death he by deed poll did charge with £2,000 more, to be paid to his exors. for debts, etc., & otherwise in performance of his will, or as he should appoint by it; & died, leaving his second wife extrix., without taking notice by his will of the charge: but the deed poll was found uncanceled among his papers: the £2,000 well charged, & went to the extrix. without a special appointment. Charge well created by settlement, though for a volunteer, not revoked by general revocation of the uses under a power for the mere purpose of partition of joint estate, & resettling to the same uses the separate part to be taken on partition.—*UXBRIDGE (EARL) v. BAYLY (LADY)* (1792), 4 Bro. C. C. 13; 1 Ves. 499; 29 E. R. 753.

3157. On powers in original settlement—Whether extinguished—Power of sale—Where new powers created.—Lands were settled, subject to a power of sale in trustees, with the consent of the tenant for life. A recovery was afterwards suffered, in which the tenant in tail under the settlement was vouched, & by the recovery deed it was agreed that the recovery should enure in confirmation of the estates created by the settlement, which were antecedent to the estate tail, & in confirmation of the powers annexed to those estates, & subject thereto, to such uses as the tenant for life & tenant in tail should appoint. The tenant for life & tenant in tail afterwards exercised their power of appointment, & the trustees concurred with them in a conveyance of the lands, & they thereby created new powers of sale:—*Held*: the power of sale in the original settlement was not destroyed.—*ROPER v. HALLIFAX* (1817), 8 Taunt. 845; 129 E. R. 612.

Annotations:—*Consd. Hill v. Pritchard* (1851), Kay, 394. *Reid, Doe d. Lumley v. Scarborough* (1835), 3 Ad. & El. 2; *Scarborough v. Doe d. Savile* (1836), 3 Ad. & El. 897; *Milbank v. Vane*, [1893] 3 Ch. 79.

3158. — — — — ——By marriage settlement, dated Dec. 1806, certain manors & lands were limited to the husband for life; remainder to the wife for life; remainder to the use of the first & other sons of the marriage successively in tail male; remainder in case the wife should survive the husband, to her in fee; but if she should die in the lifetime of her husband, remainder to the daughters successively in tail male; remainder to the use of such persons related by blood or consanguinity, & in such estates or interests, & in such manner, & charged with such sums of money in favour of such persons so related, as she by her will might appoint; & in case of no such appointment to her in fee. The settlement also contained a power for the trustees there named, at the request, & by the direction of the husband & wife, or the survivor, to sell or exchange the settled estates, & for that purpose, to revoke all & any of the uses contained in the settlement; & also a covenant by the husband for further assurance on his part, & that of his wife, & all persons claiming under him. In pursuance of this settlement, certain fines were levied. By deed dated Mar. 1807, reciting the

PART XVI. SECT. 2.

e. On powers in original settlement—Whether extinguished—Power to make advances.—*STEWART v. DONEGAL (MARQUIS)* (1845), 8 L. Eq. R. 621; 2 Jo. & Lat. 636.—*IR.*

Sect. 2.—Effect of resettlement. Part XVII. Sects. 1 & 2: Sub-sects. 1 & 2.]

settlement, & the fines levied in pursuance thereof & the limitations therein contained, & further, that the wife was desirous of acquiring an absolute power of appointment over the manor, etc., comprised in the settlement, in the event of her surviving, or dying in the lifetime of her husband, & there being a general failure of issue of her body, inheritable to the manors, etc., under the settlement, the husband & wife covenanted to levy certain fines, *sur conuissance de droit come ceo*, with proclamations, to J. G. & his heirs, of all the manors, etc., comprised in the settlements: which fines were to operate, & to be taken to operate first for corroborating the uses contained in the settlement antecedently to the limitations to the use of the wife in fee simple, & subject thereto to the use of such persons, etc. as the wife by will or deed might appoint. In pursuance of this latter deed, several fines *come ceo* were levied by the husband & wife:—*Held*: under these circumstances, these latter fines did not operate to extinguish, destroy, or suspend the right or power of the husband & wife, & the survivor of them, to request & direct a sale or exchange of the settled estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees.—*JERSEY (EARL) v. DEANE* (1822), 5 B. & Ald. 568; 106 E. R. 1298.

Annotations.—*Consd.* *Davies v. Bush* (1825), *M'Cle. & Yo.* 58; *Tyrrell v. Marsh* (1825), 3 Bing. 31. *Refd.* *Doe d. Brune v. Martyn* (1828), 7 L. J. O. S. K. B. 60.

3159. ——— **Where powers expressed to be preserved.]**—An estate was devised to uses to secure certain annuities, & subject thereto in strict settlement, with power for trustees to sell at the request of the tenant for life under the will. The estate was disentailed & resettled, the existing life estate being postponed to certain charges & the powers of the will being expressed to be kept alive:—*Held*: the trustees for sale & the tenant for life could make a good title.—*Re WRIGHT'S TRUSTEES & MARSHALL* (1884), 28 Ch. D. 93; 54 L. J. Ch. 60; 51 L. T. 781; 33 W. R. 304.

Annotations.—*Consd.* *Re Cornwallis-West & Munro's Contract*, [1903] 2 Ch. 150; *Re Constable's S. E.*, [1919] 1 Ch. 178; *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523; *Parr v. A.-G.*, [1926] A. C. 239. *Refd.* *Re Du Cane & Nettlefold's Contract*, [1898] 2 Ch. 96.

3160. ——— **—[Re WIMBORNE (LORD) & BROWNE'S CONTRACT, No. 2845, ante.**

3161. ——— **Where life estate extinguished.]**—*Re COPE & WADLAND'S CONTRACT, No. 3118, ante.*

3162. ——— **Power to charge.]**—A., tenant for life, & B., tenant in tail, of estates subject to prior charges, suffered a recovery, & by a deed of 1793, resettled the estates in strict settlement, & power was given to A. to charge the estates with £3,000, & to B. to charge the estates with £6,000 respectively, for their own benefit. The deed contained a joint power to A. & B. of revocation & new appointment. A. & B. by deed revoked "all the uses, trusts, limitations, intents & purposes," by the deed of 1793 limited; & declared that the estates, "subject to the several charges & incumbrances created," should enure to the new uses:—*Held*: the power to charge the £3,000 & £6,000 was not thereby revoked.—*EVANS v. EVANS* (1853), 22 L. J. Ch. 785; 21 L. T. O. S. 14; 1 W. R. 215, L. C. & L. JJ.

3163. ——— **—[Re CONSTABLE'S SETTLED ESTATES, No. 3055, ante.**

3164. On proviso in original settlement—Condition for determination of limitations—Of one of two estates.]—*HARRISON v. ROUND, No. 3178, post.*

3165. On restraint on anticipation—Insertion of clause ordered—On application for payment out of trust funds.]—Under a marriage settlement trusts funds, in the events which had happened & by virtue of an appointment, stood limited upon trusts for A. for life, for her separate use without power of anticipation, remainder to B. absolutely. The trust funds had been paid into ct. in a suit instituted to carry out the trusts of the settlement. On B. attaining twenty-one, A. & B. executed a resettlement by which the trust funds were limited upon trusts for A. for life, remainder to B. absolutely. On a petition for payment out of the trust funds to the trustees of the resettlement, the ct. made the order subject to the insertion in the resettlement of a clause, similar to that contained in the original settlement, restraining A. from anticipating her life interest.—*DE MARTANA v. DE MARTANA* (1875), 33 L. T. 685; 24 W. R. 200.

3166. On estate under original settlement—Life estate.]—*Re WRIGHT'S TRUSTEES & MARSHALL, No. 3159, ante.*

3167. ——— **—[Re CORNWALLIS-WEST & MUNRO'S CONTRACT, No. 3054, ante.**

3168. ——— **—[Re CONSTABLE'S SETTLED ESTATES, No. 3055, ante.**

3169. ——— **—[Under the will of testator, who died in 1870, real estate was devised to the use of A. for life, & after his death to the use of his sons successively in tail male. On Nov. 4, 1895, A. & his son B., then tenant in tail, concurred in executing a disentailing assurance conveying the property to a grantee to hold to such uses as A. & B. should jointly appoint. By a settlement dated Dec. 19, 1895, the property was appointed & conveyed to such uses & upon such trusts & subject to such powers as A. & B. should jointly appoint, & in default of such appointment to the use of A. for life by way of restoration & confirmation of his life estate under testator's will, & subject thereto to the use of B. for life with remainder to the use of his sons successively in tail male. A. died in 1920 possessed in his own right of real & personal estate. The Crown claimed that on A.'s death his own estate & the settled property fell to be aggregated under Finance Act, 1894 (c. 30), s. 4, so as to form one estate for the purposes of estate duty. Defts. contended that the settled property passed on the death of A., not under the resettlement, but under the will of testator, who died before Aug. 1, 1894, & that by virtue of s. 12, sub-s. 2 of the Finance Act, 1900 (c. 7), s. 12 (2), & Finance Act, 1907 (c. 13), s. 16, the settled property did not fall to be aggregated with A.'s own estate, but was liable to estate duty as an estate by itself:—*Held*: (1) the life estate devised to the use of A. for life by the will of testator was not disturbed by the resettlement; but the settled estate passed on the death of A. under the resettlement, & therefore A.'s free estate, & the settled estate of which he was tenant for life fell to be aggregated.—*PARR v. A.-G.*, [1926] A. C. 239; 95 L. J. K. B. 417; 134 L. T. 321; 42 T. L. R. 217, H. L.; *affg.* *S. C. sub nom. A.-G. v. PARR*, [1924] 1 K. B. 916, C. A.**

3170. ——— Tenancy in tail—Right to rent-charge.]—By his will dated June 16, 1910, testator settled the B. estates to the same uses as were limited by a settlement of July 21, 1893, of other estates under which they stood limited at testator's death to the use of his daughter V. in tail male with remainder to her sister F. in tail male with divers remainders over. He also devised other property to the use that his trustees should receive a rent-charge "during such period or periods continuous or discontinuous" as either of them, the said V. &

F., "shall be tenant for life in possession or tenant in tail male or in tail in possession under this my will" of the B. estates & pay the same to such one of them, the said V. & F., "as shall for the time being be tenant for life in possession or tenant in tail male or in tail in possession under this my will" of the B. estates. By a disentailing assurance dated July 22, 1918, V. disentailed the B. estates & resettled them to such uses as she should appoint or in default of & until & subject to any such appointment to the uses which immediately before the execution of the disentailing assurance were subsisting or capable of taking effect:—*Held*: V. did not as a result of the disentailing assurance cease to be tenant in tail male in possession of the B. estates under testator's will, & therefore, the rentcharge given to her by the same will had not been determined by the execution of the disentailing assurance.—*Re MEEKING, MEEKING v. MEEKING*, [1922] 2 Ch. 523; 92 L. J. Ch. 68; 128 L. T. 585.

3171. On statutory power of sale.—By deed dated in 1861, lands were settled to the use of A. for life with remainder to his first & other sons successively in tail male. In exercise of a power reserved to him by this deed, A., upon his marriage in 1865, by deed charged the lands with a jointure rentcharge for his wife, & with portions for his younger children, both charges being secured by terms of years in the usual way. In 1889, in order to carry out a family arrangement, A. & B., his eldest son, by deed No. 1 disentailed the lands, & by deed No. 2, in exercise of a power contained in deed No. 1, appointed them to the use of A. for life, with remainders over, without, however, in terms expressing that this life estate was limited to A. in restoration or continuation of his former life estate:—*Held*: (1) deed No. 2 of 1889 should not under the circumstances be treated as the only settlement of the property, but should be treated as constituting, together with the previous deeds of 1861, 1865 & 1889, a "settlement" within Settled Land Act, 1882 (c. 38), ss. 2 & 20; & accordingly it was competent for A. to sell & make good title to the lands discharged from the jointure & portions, upon trustees of the settlement being appointed to receive the purchase-money.

(2) The words in Settled Land Act, 1882 (c. 38), s. 2 (1), "stands for the time being limited to or

in trust for any persons by way of succession," have no technical force, & according to their natural meaning, include the case of a jointure & portions for younger children limited to arise on or after the death of a tenant for life & the terms of years limited to trustees to secure them.

(3) There may be at the same time a more comprehensive settlement consisting of several deeds, & a less comprehensive settlement constituted by one only of the deeds.

(4) The effect of Settled Land Act, 1882 (c. 38), s. 50, is that the statutory power of sale given to a tenant for life by the Act of 1882 is not annexed to his estate as in ordinary conveyancing, but is vested in him once for all by the Act, is incapable of being assigned or released, & continues exercisable by him notwithstanding assignment by him of his estate: so that, although the life estate of A. must be treated as a new life estate arising under the resettlement, the statutory power of sale vested in A. before the resettlement was not affected by it.

(5) Mtgees. who have actually lent their money on the security of the land are regarded as strangers to the settlement & are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life (*per CUR.*).—*Re MUNDY & ROPER'S CONTRACT*, [1899] 1 Ch. 275; 68 L. J. Ch. 135; 79 L. T. 583; 47 W. R. 226; 43 Sol. Jo. 151, C. A.

Annotations:—*As to* (1) *Apld.* *Re Wimborne & Browne's Contract*, [1901] 1 Ch. 537; *Re Monckton's Settlement*, *Monckton v. Calder*, [1917] 1 Ch. 224. *Consd.* *Parr v. A.-G.*, [1926] A. C. 239. *Reid.* *Re Cornwallis-West & Munro's Contract*, [1903] 2 Ch. 150; *Northumberland v. I. R. Comrs.*, [1911] 2 K. B. 343; *Re Constable's S. E.*, [1919] 1 Ch. 178; *Re Alington & L.C.C.'s Contract*, [1927] 2 Ch. 253. *As to* (2) *Apld.* *A.-G. v. Owen, A. G. v. Coulson*, [1899] 2 Q. B. 253; *Re Campbell*, [1902] 1 K. B. 113. *Consd.* *Re Carnarvon's Chesterfield S. E.*, *Re Carnarvon's Highclere S. E.*, [1927] 1 Ch. 138. *As to* (4) *Apld.* *Re Cope & Wadland's Contract*, [1919] 2 Ch. 376. *As to* (5) *Consd.* *Re Dickin & Kelsall's Contract*, [1908] 1 Ch. 213. *Expld.* *Re Davies & Kent's Contract*, [1910] 2 Ch. 35. *Generally, Reid.* *Re Bath & Wells (Bp.)*, [1899] 2 Ch. 138; *Re Barlow's Contract*, [1903] 1 Ch. 382; *Re Phillimore's Estate*, *Phillimore v. Milnes*, [1901] 2 Ch. 460; *Re Marshall's Settlement*, *Marshall v. Marshall*, [1905] 2 Ch. 325; *Re De Crespigny's S. E.*, [1914] 1 Ch. 227; *Re Trafford's S. E.*, [1915] 1 Ch. 9; *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523.

3172. —.—*Re Cornwallis-West & Munro's CONTRACT*, No. 3054, *ante*.

Conversion & reconversion.—*See, generally*, *EQUITY*, Vol. XX., pp. 335 *et seq.*

Part XVII.—Miscellaneous Clauses in Settlements.

SECT. 1.—PROTECTOR OF THE SETTLEMENT.

See, generally, *REAL PROPERTY*, Vol. XXXVIII., pp. 718–720, Nos. 651–665.

Protector insane.—*See LUNATICS*, Vol. XXXIII., pp. 212, 213, Nos. 1192–1201.

SECT. 2.—SHIFTING CLAUSES.

SUB-SECT. 1.—IN GENERAL.

3173. Construction of shifting clauses—Strictly construed.—Shifting clauses, which take away an estate from the owner, are construed strictly.—*WALMESLEY v. GERARD* (1861), 29 Beav. 321; 30 L. J. Ch. 435; 7 Jur. N. S. 1041; 54 E. R. 651.

SUB-SECT. 2.—ON HAPPENING OF DESIGNATED CONTINGENCY.

3174. Construction—Will of "even date"—Will referred to of later date.—Under a proviso in a settlement, to which A. & his eldest son B. were parties, a use which was limited to a younger son P. & his issue, was made to shift to B., in the event of P. becoming entitled in possession to the manor of S., under certain limitations, which in the settlement were described as being contained in the will of A., bearing "even date" therewith. The will of A. contained the limitations mentioned in the settlement, but did not bear even date therewith, but a posterior date, which was written upon an erasure not accounted for:—*Held*: inasmuch as, under the circumstances of the case,

PART XVII. SECT. 2, SUB-SECT. 2.
1. *Validity of gift over—Gift over on sale or exchange of estate.*—*Re*

BELLEW, O'REILLY v. BELLEW, [1924] 1 I. R. 1.—*IR.*
Gift over on allowing

certain forbidden persons to reside on estate.—*WEMYSS v. WEMYSS'S TRUSTEES*, [1921] S. C. 30.—*SCOT.*

Sect. 2.—Shifting clauses: Sub-sect. 2.]

the variance between the real date of the will that mentioned in the settlement did not affect the substantial intention of the parties, the arrangement between them could in equity be carried into execution notwithstanding such variance.—*HONYWOOD v. HONYWOOD* (1843), 2 Y. & C. Ch. Cas. 471; 63 E. R. 211.

3175. — Clause excluding eldest son—"For time being entitled in tail"—Time for ascertaining.—In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund.—*COLLINGWOOD v. STANHOPE* (1869), L. R. 4 H. L. 43; 38 L. J. Ch. 421 17 W. R. 537, H. L.

*Annotations:—***Consd.** *Domville v. Winnington* (1884), 26 Ch. D. 382; *Reid v. Hoare* (1884), 26 Ch. D. 363. **Distd.** *Re Fitzgerald's S. E., Saunders v. Boyd*, [1891] 3 Ch. 394. **Consd.** *Re Stawell's Trusts, Poole v. Riversdale*, [1909] 1 Ch. 534. **Refd.** *Re Bayley's Settlement*, (1871), 6 Ch. App. 590; *Carter v. Ducie* (1871), 41 L. J. Ch. 153; *Re Prytherch, Prytherch v. Williams* (1889), 42 Ch. D. 590. *Law Union & Crown Insce. v. Hill*, [1902] A. C. 263. *Re Bankes, Alison v. Bankes* (1909), 101 L. T. 778. *Re Cavendish's Settlement, Grosvenor v. Butler* (1912), 106 L. T. 510.

3176. — "Succession" to "devolve upon" next heir to barony—Settlement following patent of peerage.—By letters patent the barony of B. was conferred on E. for life, with successive remainders to her second & other sons & the heirs male of their respective bodies. The patent contained a proviso that if the second son of E. or any other person taking under the letters patent should succeed to the earldom of D. the "succession to" the dignity of B. should "devolve upon" the son of E. or the heir who should be next entitled to succeed to the barony of B., if the person so succeeding to the earldom of D. was dead without issue male. Lands having been devised by testatrix to trustees & their heirs, upon trust "to convey, settle, & assure" the same "in a course of entail to correspond as nearly as may be with the limitations of "the barony of B.," "& the provisos affecting the same contained in the letters patent" a settlement was executed in which was inserted a clause providing that, if the second son of E., who had then by the death of E. become Baron B., or any other person taking under the limitations therein contained should succeed to the earldom of D., the "succession to" the lands thereby settled should "devolve upon" the son of E. or the heir who would be next entitled to succeed to the barony of B., if the person so succeeding to the earldom of D. was dead without issue male. The second son of E. afterwards succeeded to the earldom of D. He had issue male:—*Held*: upon the construction of the clause, that upon the second son of E. succeeding to the earldom of D. the third son of E. became entitled in possession to the settled estates.—*COPE v. DE LA WARR (EARL)* (1873), 8 Ch. App. 982; 42 L. J. Ch. 870; 29 L. T. 565; 22 W. R. 8, L. J.

*Annotation:—***Refd.** *Cogan v. Duffield* (1876), 34 L. T. 593.

3177. — "Tail male"—Construed as "tail general."—By a marriage settlement made in 1886 it was provided that if the eldest son of the settlor should become entitled to M.'s real estate under his will for an estate in tail male he should be excluded from all share in the trust funds subject to the settlement. E. was the settlor's eldest son, & under the limitations of the will of M. who died in 1868, he became entitled to testator's real estate for an estate in tail general. The

trustees of the settlement took out a summons to determine whether he had lost his right to a share in the settlement funds:—*Held*: inasmuch as the intention of the settlor was clear & at the date of the settlement she must have known that if E. came into testator's real estate it must be for an estate in tail general, not an estate in tail male, the insertion of the word "male" in the settlement must be treated as a misdescription, & the settlement construed as if the word were omitted; & E. was excluded from sharing in the settlement moneys, without prejudice to his claims if the younger son died.—*Re ALEXANDER'S SETTLEMENT, JENNINGS v. ALEXANDER*, [1910] 2 Ch. 225; 79 L. J. Ch. 656; 102 L. T. 909; 54 Sol. Jo. 602.

3178. Operation—Limitations of estate extrinsic to settlement—& charge created.—By indenture of settlement, two estates, A. & B., were limited to the father for life & subject thereto, the estate A. was limited to the first & other sons in tail male, & the estate B. was limited to the second & other sons in like manner; & it was provided that if the second son should become an eldest son, & as such should become entitled to the actual possession or to the receipt of the rents & profits of the estate A., the limitations of the estate B. should cease & determine as if such second son were dead without issue. The second son, by the death of his elder brother, became the eldest son, & joined his father in suffering a recovery of the estate A., the uses of which were declared to the joint appointment of the father & son & subject thereto to the old uses: in exercise of this power the father & son, by a mtge. in fee of the estate A., raised a sum of money which was paid to the father & son:—*Held*: (1) on the death of the father, the estate B. shifted from the second son under the terms of the proviso contained in the settlement; (2) the recovery suffered by the father & son did not by itself prevent the operation of the proviso, & the mtge. had not that effect, but notwithstanding both the recovery & the mtge., the second son came on the death of his father into possession of the estate A. within the meaning of the terms of the settlement; (3) the party entitled to the estate A. might, previously to the happening of the event mentioned in the proviso, have so exercised his rights over the estate as to have prevented it from ever coming into the possession of the second son within the meaning of the terms of the settlement.

I take the law to be settled that, generally speaking, where, as in that case [*Fazakerly v. Ford* (1831), 4 Sim. 300] the limitations of the estate are extrinsic to the settlement containing the shifting clause, if a charge is created, for a charge is just as much taken from the estate as if a portion of the estate were taken from it, the clause will not operate (*LORD ST. LEONARDS, C.*).—*HARRISON v. ROUND* (1852), 2 De G. M. & G. 190; 22 L. J. Ch. 322; 20 L. T. O. S. 118; 17 Jur. 563; 1 W. R. 26; 42 E. R. 844, L. C.

*Annotations:—**As to* (1) **Consd.** *Langdale v. Briggs* (1856), 3 Sim. & G. 255; *Macoubroy v. Jones* (1856), 2 K. & J. 684; *Re Wright's Trustees & Marshall* (1884), 28 Ch. D. 93. **Refd.** *Collingwood v. Stanhope* (1869), L. J. 4 H. L. 43. *As to* (2) **Consd.** *Meyrick v. Laws, Meyrick v. Mathias* (1874), 9 Ch. App. 237; *Re Constable's S. E.*, [1919] 1 Ch. 178. **Distd.** *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523. **Consd.** *Parr v. A.-G.*, [1926] A. C. 239. *Generally, Refd.* *Wyndham v. Fane* (1853), 11 Hare, 287; *Curzon v. Curzon* (1859), 1 Giff. 248; *Re Fitzgerald's S. E., Saunders v. Boyd*, [1891] 3 Ch. 394; *Shuttleworth v. Murray*, [1900] 1 Ch. 795.

3179. — Effect of disentail—Followed by resettlement & mortgage—Second son "coming into possession."—*HARRISON v. ROUND*, No. 3178, ante.

3180. — Effect of accession to part of property.]
—*HARRISON v. ROUND*, No. 3178, *ante*.

3181. — —.]—A. so devised his estate of G. that no female issue of any son of B., his first devisee, could take or inherit. B. being himself possessed of another estate of C., & having succeeded to the G. estate, made a will by which he devised his original estate C. to his sons successively in tail male; then to the children of his sons in tail general; then to his own eldest daughter for life. He added a shifting clause, declaring that his own devised estates should not be held or enjoyed by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, should have come into possession of the estate devised by A.; but that as often as such estate of A. should come to the possession of any of his, B.'s, sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his, B.'s, will, should be entitled to the C. estate; & so from time to time, as often as the event might happen, in such manner & as if the person so becoming possessed of the G. estate had died, or was then dead, without issue:—*Held*: "issue" here only meant those who would take under the limitations anterior to the devise "to the person next in remainder," & excluding them alone from taking under those limitations. The effect of the shifting clause was therefore simply to propel or accelerate the next remainder, but not to carry over the estate in a different class of remainder.—*JELlicoe v. GARDINER* (1865), 11 H. L. Cas. 323; 5 New Rep. 465; 34 L. J. C. P. 282; 13 L. T. 127; 11 Jur. N. S. 249; 13 W. R. 528; 11 E. R. 1357; *sub nom.* *GARDINER v. JELlicoe*, 20 C. B. N. S. 198, 11 L.

Annotation:—*Reid*. *Meyrick v. Laws*, *Meyrick v. Mathias* (1874), 9 Ch. App. 237.

3182. — Effect of statement that divested party "otherwise provided for"—Where provision referred to invalid.]—By a marriage settlement a sum of stock was settled, subject to the husband's & wife's life interests therein, upon trusts for the children & issue of the marriage, except an eldest son entitled to certain settled estates, as the husband & wife, or the survivor of them, should appoint, & in default of appointment, for the children, except as aforesaid, in equal shares, the shares of sons to be vested at twenty-one, of daughters at twenty-one or marriage, & it was provided that if the husband should die in his his wife's lifetime, leaving an only child, a son, such son should be entitled to the whole trust fund, but if the wife should survive the husband, & there should be only two children or only one child, except as aforesaid, who should attain twenty-one or marry, such two only children or one only child, except as aforesaid, should not be entitled to any part of the trust fund, but it should go to the husband absolutely, as in that event such two children or one child, except as aforesaid, were otherwise provided for by a deed of even date creating a charge upon the settled real estates. There were two children of the marriage, a son who died an infant & a daughter who married, & became, on her brother's death, entitled to the settled estates. The wife survived the husband. The deed purporting to create a charge upon the settled estates, turned out to be invalid:—*Held*: upon the construction of the settlement, & without resting the decision upon the invalidity of the charge, the daughter took an absolutely vested interest in the trust fund, & it did not go to the husband's representative. *Semble*: if it had been otherwise, the invalidity of the charge would have

been sufficient to displace the claim of the husband's representative.—*CARTER v. DUCIE* (EARL) (1871), 41 L. J. Ch. 153; 25 L. T. 656; 20 W. R. 228.

3183. — Provisoes avoiding jointures & portions.]—Testatrix, by will dated in 1860, devised freeholds to the use of trustees & their heirs, upon trust for E. for life, remainder to the use of C., the first son of E., for life, without impeachment of waste, remainder to the use of his first & other sons successively in tail male; with remainders in like form to the use of the third, passing over the second, fourth, & other younger sons of E. for life, & their respective first & other sons in tail male, with divers remainders over. The settlement contained powers to the sons of E. thereinbefore named of jointuring & of charging portions. By letters patent, dated in Apr. 1864, the barony of B. was conferred upon E. for life; & after her death, upon R., the second son of E., & the heirs male of his body; & in default of such issue, to the third, fourth, & fifth sons of E., & the heirs male of their bodies respectively. The letters patent contained a proviso, that if any person taking thereunder should succeed to the earldom of D., & there should then or thereafter be a younger son, or heir male of a younger son, then the succession to the barony should devolve upon the son of E., or the heir who would be next entitled to the barony. Testatrix, by a codicil, dated in May, 1864, revoked the devise contained in her will & in lieu thereof devised the freeholds to trustees, upon trust, as soon as conveniently might be after her decease, to "convey, settle, & assure" the same "in a course of entail, to correspond as nearly as may be with the limitations" of the barony, & "the provisos affecting the same contained in the letters patent," . . . & with all such "powers, provisos, declarations, & agreements" as the trustees should consider proper, or as their counsel should advise. E. died; & the House of Lords having declared that the estates devised by the codicil ought to be limited in strict settlement to R. & the younger sons of E. for their respective lives, without impeachment of waste, with remainder to their first & other sons in tail male: that such settlement ought to contain powers of jointuring & charging portions for younger children to the limits contained in the will; & that in the settlement there ought to be inserted a shifting clause in the words of the letters patent:—*Held*: (1) the settlement ought not to contain a clause postponing the vesting of portions until the death of the person creating them; (2) the settlement ought not to contain a proviso avoiding jointures & portions in the event of the estates shifting on the accession of the earldom.—*HOLMESDALE (VISCOUNT) v. WEST* (1871), L. R. 12 Eq. 280; 40 L. J. Ch. 795.

3184. Validity of gift over—Gift over on marriage without consent.]—A condition subsequent causing the forfeiture of a previous gift in the event of the marriage of the donee at any time without the consent of a specified person is a valid condition provided that there is a good & effectual gift over.—*Re WHITING'S SETTLEMENT*, *WHITING v. DE RUTZEN*, [1905] 1 Ch. 96; 74 L. J. Ch. 207; 91 L. T. 821; 53 W. R. 293; 21 T. L. R. 83; 49 Sol. Jo. 83, C. A.

Annotation:—*Reid*. *Re Hewett*, *Eldridge v. Hles*, [1918] 1 Ch. 458.

Application of rule against perpetuities.]—*See PERPETUITIES*, Vol. XXXVII., pp. 85, 86, Nos. 237–242.

Settlement of Infant's property—Shifting clause

Secl. 2.—Shifting clauses: Sub-sects. 2 & 3. Sect. 3: Sub-sect's. 1, 2 & 3, A. (a).]

on becoming Roman Catholic.]—See INFANTS, Vol. XXVIII., p. 215, No. 752.

Shifting clause in will.]—See WILLS.

SUB-SECT. 3.—NAME AND ARMS CLAUSE.

See NAME & ARMS, Vol. XXXV., pp. 705–709, pp. 711–712, Nos. 55–80, 95–99.

Effect of Real Property Limitation Acts.]—See LIMITATION OF ACTIONS, Vol. XXXII., p. 450, No. 1178.

Condition imposed by will.]—See WILLS.

SECT. 3.—RENEWABLE LEASEHOLDS.

SUB-SECT. 1.—OBLIGATION TO RENEW.

Conversion of perpetually renewable leaseholds.]—See Law of Property Act, 1922 (c. 16), s. 145.

3185. Absence of direction in settlement—Tenant for life not bound to renew.]—The tenant for life in general cases must contribute beyond the interest, in proportion to the benefit he takes.

A person entitled for his own life is not bound to renew, except from the terms of the will or the nature & formation of the gift to him you can imply an intention, that he should be obliged to renew (LORD ELDON, C.).—WHITE v. WHITE (1804), 9 Ves. 554; 32 E. R. 718, L. C.

*Annotations:—*Reid. Allan v. Backhouse (1813), 2 Ves. & B. 65; Shaftesbury v. Marlborough (1833), 2 My. & K. 111; Criddle v. Luxton (1831), 4 L. J. Ch. 65; Hales v. Darell (1812), 6 Jur. 187; Jones v. Jones (1846), 5 Hare. 440; Hudleston v. Whelpdale (1852), 9 Hare. 775; Bradford v. Brownjohn (1868), 3 Ch. App. 711. *Mentd.* Slade v. Pattison (1835), 5 L. J. Ch. 51.

3186. Direction in settlement—Default by trustees—Liability as for breach of trust.]—Settlement of a renewable lease in trust out of the rents & profits to pay the charges of renewal, & subject thereto for husband & wife successively for life, remainder to the first son at twenty-one. The trustees, having neglected to renew, are answerable as for a breach of trust, & liable to pay to the son the amount of what he had laid out in procuring a renewal; to be repaid to them out of the estates of the tenants for life, with reference, not to the duration of their respective possession, but to the proportions in which they would actually have suffered a diminution of rent in case the rents had been properly applied towards the renewals. The assignee of one of the tenants for life, with notice of the settlement neither primarily liable, nor to be called upon by the trustees to contribute towards their repayment; but only, in case of all the other estates proving insufficient, to make good to the son the deficiency.—MONTFORD (LORD) v. CADOGAN (LORD) (1816), 2 Mer. 3; 19 Ves. 635; 35 E. R. 841, L. C.

*Annotations:—*Apld. Shaftesbury v. Marlborough (1833), 3 L. J. Ch. 30. *Reid.* Jones v. Jones (1846), 7 L. T. O. S. 157; Jenkins v. Robertson (1853), 1 Eq. Rep. 123; Isaac v. Wall (1877), 46 L. J. Ch. 576. *Mentd.* Adey v. Arnold (1852), 2 De G. M. & G. 432; Hughes v. Wells (1852), 9 Hare. 749; Richardson v. Jenkins (1853), 1 Drew. 477; Holland v. Holland (1869), 4 Ch. App. 450, n.; *Re* Parker, *Ex p.* Sheppard (1887), 19 Q. B. D. 84.

3187. —“Should be lawful”—Implies discretion as to mode of renewal.]—MILSINTOWN

(VISCOUNT) v. PORTMORE (EARL) (1821), 5 Madd. 471; 56 E. R. 976.

Renewable leaseholds bequeathed by will.]—See WILLS.

SUB-SECT. 2.—RENEWAL ENURING FOR BENEFIT OF PERSONS ENTITLED UNDER SETTLEMENT.

3188. Renewal by tenant for life.]—Tenant for life, under a settlement of a Crown lease, gets a renewal in reversion: it shall go to the uses of the settlement.—TASTER v. MARRIOTT (1768), Amb. 668; 27 E. R. 433.

*Annotations:—*Reid. Randall v. Russell (1817), 3 Mer. 190; *Re* Biss, Biss v. Biss, [1903] 2 Ch. 40.

3189. —.]—A., under a voluntary settlement of which it did not appear that she had notice, was entitled to certain leaseholds held for lives, for the term of her life with remainder to B. Under a subsequent voluntary settlement she took a life interest in the same leaseholds with an absolute power of appointment over the residue of the leasehold interest. While in possession of the property she took a renewed lease of it, & died having appointed all her interest to C.:—*Held*: the renewal enured to the benefit of B.—WATERS v. BAILEY (1843), 2 Y. & C. Ch. Cas. 219; 63 E. R. 96.

3190. —.]—There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested: as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mtgee. of a mtged. lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.

A lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term, the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During that tenancy the lessee died intestate, leaving a widow & three children, one being an infant. The widow took out administration to her husband's estate, & she & the two adult children, one of whom was a son, continued to carry on the business under the existing yearly tenancy. The widow & son each applied to the lessor for a new lease for the benefit of the estate, which he refused to grant, but, having determined the yearly tenancy by notice, he granted to the son “personally” a new lease for three years at a still further increased rent.

In an action which had in the meantime been instituted by the three children, including the infant, against the administratrix for administration of intestate's estate, the administratrix applied to have the new lease treated as having been taken by the son for the benefit of the estate & for an account of the rents & profits received by him:—*Held*: the evidence took the case out of *Ex p. Grace*, 1799, 1 Bos. & P. 376, in that it

PART XVII. SECT. 3, SUB-SECT. 1.

3185 i. Absence of direction in settlement—Tenant for life not bound to renew.]—G. being possessed of a chattel interest under a leasee of the See of

Dublin, with a *toties quoties* covenant for renewal, bequeathed it to trustees, to the use of E. for life with divers limitations over, & with a power to the trustees to sell the same, & invest the produce in the purchase of freehold

lands, to be settled to the same uses:—*Held*: there was no obligation imposed on E., the tenant for life, to renew.—O'FERRALL v. O'FERRALL (1834), L. & G. temp. Plunk. 79.—*IR.*

showed that the right or hope of renewal had been determined by the lessor himself before the son intervened, so that the new lease could not be treated as an accretion to the estate of the deceased, & also the son had in no way abused his position nor stood in any fiduciary relation towards nor owed any duty to the other persons interested in the estate; & he was therefore entitled to retain the lease for his own benefit.

The cases which really demand full consideration are those where the person renewing the lease does not clearly occupy a fiduciary position. On inquiry into those cases it appears to me, as a result, that a person renewing is only held to be a constructive trustee of the renewed lease if, in respect of the old lease, he occupied some special position & owed, by virtue of that position, a duty towards the other persons interested.

Take, for example, the case of a tenant for life under a settlement of leaseholds. Although not a trustee for the remaindermen, yet his position is not that of a stranger as regards them. He owes, by virtue of his position, certain duties towards them in respect of the settled property; & if, by virtue of his position, he is enabled to obtain a renewal of the lease, equity clearly demands that the new right obtained in virtue of the old should be regarded as a graft on the old, & be treated accordingly as settled property (ROMER, L.J.).—*Re Biss, Biss v. Biss*, [1903] 2 Ch. 40; 72 L. J. Ch. 473; 88 L. T. 403; 51 W. R. 504; 47 Sol. Jo. 383, C. A.

Annotation:—*Mentd.* Griffith v. Owen, [1907] 1 Ch. 195.

3191. — No direction for renewal—Effect of special provision.]—Where the tenant for life of leaseholds in settlement, being under no obligation to renew obtains an extension of the term, he is a trustee, for those claiming under the settlement; & the fact of the settlement containing a special provision that a particular renewal shall enure to the benefit of the trust, does not prevent the application of this general rule.

Leaseholds were settled on A. B. for life, with remainder to his wife for life, with remainder to such child or children as he should appoint, & in default amongst them equally. A. B. renewed the leases in his own name, & by his will confirmed the settlement, & gave all "his freeholds & leaseholds" to his son, & a legacy to his daughter; he died, having other leaseholds besides those settled:—*Held*: the will was not an execution of the power; & the daughter was not to be put to her election.—*TANNER v. ELWORTHY, ELWORTHY v. TANNER* (1811), 4 Beav. 487; 5 Jur. 1099; 49 E. R. 427.

3192. Extent of doctrine—Confined to persons in fiduciary position.]—*Re Biss, Biss v. Biss*, No. 3190, *ante*.

Renewal of lease in which infant interested.]—*See* INFANTS, Vol. XXVIII., pp. 198, 199, Nos. 568–575.

SUB-SECT. 3.—EXPENSES OF RENEWAL.

A. As between Tenant for Life and Remainderman. (a) In General.

See Law of Property Act, 1925 (c. 16), sched. XV., & also LANDLORD & TENANT, Vol. XXXI., pp. 84–86, Nos. 2283–2293.

3193. General rule—Contribution proportionate to actual enjoyment.]—The rule as to a tenant for life contributing one-third does not now prevail. No contribution from an annuitant for life out of leasehold renewable interests.

It must be done in an equitable way, by a

contribution of every one who is to take a chance in the benefit of the succession provided for by the will (LORD HARDWICKE, C.).—*VERNEY v. VERNEY* (1750), 1 Ves. Sen. 428; Amb. 88; 27 E. R. 1123, L. C.

Annotation:—*Refd.* White v. White (1804), 9 Ves. 554.

3194. — — —.]—Tenant for life renews & pays fines, what proportion he shall bear with the remainderman, etc.

As to the idea that it is to be upon the payment of two-thirds or any other proportion, that cannot be the rule (LORD THURLOW, C.).—*NIGHTINGALE v. LAWSON* (1785), 1 Bro. C. C. 410; 1 Cox, Eq. Cas. 181; 28 E. R. 1227, L. C.

Annotations:—*Consd.* White v. White (1804), 9 Ves. 554; *Shaftsbury v. Marlborough* (1833), 2 My. & K. 111 *Apld.* *Cridland v. Luxton* (1834), 4 L. J. Ch. 65; *Bradford v. Brownjohn* (1868), 3 Ch. App. 711.

3195. — — —.]—*WHITE v. WHITE*, No. 3185, *ante*.

3196. — — —.]—*HUDLESTON v. WHELPDALE*, No. 3221, *post*.

3197. — — —.]—Under a trust to renew leaseholds out of the rents or by mtge. thereof:—*Held*: the fines for renewal must be borne by the successive tenants for life, etc., of the estate, in proportion to their actual enjoyment of the property.

Under a trust to renew leaseholds by sale or by mtge. of an independent estate:—*Held*: the fines must be raised by sale or mtge. of that estate, & the successive tenants for life were only bound to keep down the interest on the mtges.—*AINSLIE v. HARCOURT* (1860), 28 Beav. 313; 30 L. J. Ch. 686; 54 E. R. 386.

Annotation:—*Refd.* *Bradford v. Brownjohn* (1868), 3 Ch. App. 711.

3198. — — —.]—Where a tenant for life of renewable estates of leases for lives has renewed the lives, the proportions of the fines & expenses of the renewals, payable as between his estate & that of the remainderman entitled to the property are to be estimated with regard to the actual enjoyment of the property; & compound interest at 4 per cent *per annum* with annual rests on the amount payable by the remainderman will be allowed to the estate of the tenant for life for the period between the renewal & his death; simple interest only after that event.—*BRADFORD v. BROWNJOHN* (1868), 3 Ch. App. 711; 38 L. J. Ch. 10; 19 L. T. 248; 16 W. R. 1178, L. J.

Annotation:—*Consd.* *Isaac v. Wall* (1877), 6 Ch. D. 706.

Compare No. 3232, *post*.

3199. — — — Contribution by tenant for life not confined to keeping down interest.]—*ALLAN v. BACKHOUSE*, No. 3224, *post*.

3200. — — — Contribution not determined speculatively.]—*JONES v. JONES*, No. 3218, *post*.

3201. — — — Death of tenant for life in lifetime of original life.]—*ADDERLEY v. CLAVERING*, No. 3217, *post*.

3202. — — —.]—Certain property held upon lives was in settlement, & the surviving original life being advanced in years, a renewal was obtained under which two new lives were added, the tenant for life advancing the money necessary to pay fines on such renewal. The tenant for life afterwards died in the lifetime of the surviving original life:—*Held*: as he had obtained no benefit from the renewal, the estate of the tenant for life, was not bound to contribute towards the expenses of the renewal, but was entitled to be recouped out of the corpus of the settled property the amount paid for the fines on the renewal.—*HARRIS v. HARRIS* (No. 3) (1863), 32 Beav. 333; 11 W. R. 451; 55 E. R. 130.

Sect. 3.—Renewable leaseholds: Sub-sect. 3, A. (a), (b) & (c), & B.: sub-sect. 4.]

3203. Application of rule—Leases for lives.]—JONES v. JONES, No. 3218, *post*.

3204. ——— Interests by will.]—JONES v. JONES, No. 3218, *post*.

3205. Liability of annuitant for life.]—VERNEY v. VERNEY, No. 3193, *ante*.

Effect of direction in settlement.]—*See* Sub-sect. 3, B., *post*.

(b) Method of Apportionment.

See Law of Property Act, 1922 (c. 16), sched. XV., & *see, also*, LANDLORD & TENANT, Vol. XXXI., pp. 84–86, Nos. 2283–2293.

3206. How proportion calculated—Allowance of compound interest.]—NIGHTINGALE v. LAWSON, No. 3194, *ante*.

3207. ——— Between time for renewal & death of tenant for life—Simple interest thereafter.]—BRADFORD v. BROWNJOHN, No. 3198, *ante*.

3208. ——— Leases for lives.]—REEVES v. CRESWICK (1839), 3 Y. & C. Ex. 715; 160 E. R. 889. *Annotation:—*Refd. Jones v. Jones (1846), 5 Hare, 440.

3209. ———.]—JONES v. JONES, No. 3218, *post*.

3210. Cost raised by mortgage—Liability of tenant for life for mortgage interest.]—ALLAN v. BACKHOUSE, No. 3224, *post*.

3211. ———.]—JONES v. JONES, No. 3218, *post*.

3212. ———.]—Where the trustees of a settlement, having power to raise a sum of given amount out of the rents & profits, or by assignment or other disposition of the settled estates, as a provision for the fines & expenses payable on the renewal of leases comprised in the settlement, exercised that power by mtge., & also paid further sums for renewals out of the rents of the settled estates:—*Held*: the tenant for life under the settlement was bound to keep down, out of the rents & profits, the interest only of the sum raised by mtge.; but the further sums paid for renewals must be apportioned between the tenant for life & the remaindermen, according to the ordinary rule of the ct. in such cases.—PLUMTRE v. OXENDEN (1855), 25 L. J. Ch. 19; 26 L. T. O. S. 55; 1 Jur. N. S. 1037; 4 W. R. 29.

3213. ———.]—AINSLIE v. HARCOURT, No. 3197, *ante*.

Effect of direction in settlement.]—*See* Sub-sect. 3, B., *post*.

(c) Protection of Respective Interests.

See Law of Property Act, 1922 (c. 16), sched. XV.; & *also*, LANDLORD & TENANT, Vol. XXXI., pp. 84–86, Nos. 2283–2293.

3214. Right of remainderman—Renewal on default by tenant for life—Remedy against estate of tenant for life.]—A., being possessed of a lease of a manor, lands, & hereditaments for twenty-one years, granted by the warden of an hospital, assigned, by his marriage settlement, the premises & all his interest, benefit, & advantage of renewal therein, etc., to trustees, upon trust, out of the rents & profits, to pay the rents, perform the covenants, raise a competent sum for renewing the lease from time to time as should be customary, & renew the lease accordingly; & subject thereto, to pay the rents to A. during his life, & after his death, to stand possessed of the leasehold premises on certain trusts for the sons of the marriage, & on failure of those trusts, for A. absolutely: A. by his will devised "his manor, hospital, lands, & hereditaments situate in, etc., held by lease

from," etc., to the same persons who were trustees of his marriage settlement, with directions to perform the covenants contained "in the new lease, or any leases hereafter" to be procured, to collect out of the rents a competent sum for renewing the lease, & to renew same from time to time. After the date of his will, A. surrendered the existing lease, & obtained a renewed lease. The lease had been usually renewed every seven years, & in Feb. 1805, was renewed by the tenant for life under the will of A.: in 1812, an exorbitant fine was demanded, & no renewal took place; & in 1817, the warden of the hospital expressly refused to renew: the tenant for life died in Jan. 1819; & in the following Feb., the remainderman renewed:—*Held*: the remainderman was entitled to receive out of the assets of the tenant for life the amount of what would have been reasonable fines for renewal in Feb. 1812, & Feb. 1819, subject to a proportional abatement for the period which intervened between the death of the tenant for life & the renewal in Feb. 1819.—COLEGRAVE v. MANBY (1826), 2 Russ. 238; 38 E. R. 325, L.

*Annotations:—*Consd. Bennett v. Colley (1833), Coop. temp. Brough. 248. Refd. Blake v. Peters (1862), 31 L. J. Ch. 884.

3215. ——— Set-off of costs against portions.]—Remainderman renewing leaseholds on default of tenants for life, cannot set off his costs against portions.—GEORGE v. TUCKER (1837), 1 Jur. 771.

3216. Right of tenant for life—Renewal by husband by putting in wife's life.]—Where a leasehold estate for lives was settled upon the husband for life; remainder to the wife for life, with remainders to the children, the husband having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine & charges of renewal. Limitation of a leasehold estate in a marriage settlement after the decease of husband & wife, in trust for such child & children as they should appoint; & in default of appointment, to all & every the child & children equally:—*Held*: to be a vested remainder, which opened to take in the issue, as they came *in esse*.—LAWRENCE v. MAGGS (1759), 1 Eden, 453; 28 E. R. 760. *Annotation:—*Refd. Pickering v. Vowles (1783), 1 Bro. C. C. 197.

3217. ——— Renewal by last life in lease for lives—Death before expiration of original lease.]—Money paid as a fine, by the last life in a lease, for a renewal, ordered to be a charge on the estate.—ADDERLEY v. CLAVERING (1789), 2 Bro. C. C. 659; 2 Cox, Eq. Cas. 192; 29 E. R. 365, L. C. *Annotation:—*Refd. Verney v. Verney (1750), 1 Amb. 88.

3218. ——— Payment of whole cost of renewal—Lien for proportionate share.]—(1) On a devise of successive interests in leases for lives or years, where testator directs that the leases are from time to time to be renewed, without more, the fines & expenses of renewal are to be borne by the tenant for life & remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, & not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities.

There is no difference in the rule as to the apportionment of fines for renewal between the devisees of successive interests in the estate, whether the leases are for lives or for years.

(2) If testator provides a specific fund for the renewals, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supercedes the general rule; but if trustees, having

power to direct the manner in which the fines shall be raised, do not exercise the power, the ct. will pursue the general rule which would be adopted in the absence of any direction as to the manner of providing for the fines.

Qu. : whether there is any difference in the rule of apportionment in cases where the parties take successive interests under wills, & in cases where such interests are taken under settlements by deed.

Qu. : whether trustees, having power to raise the fines out of the rents & profits, or by mtge., or otherwise, as they should think fit, might so act as to throw the burden on the parties, in proportions different from those in which it would be distributed by the general rule of the ct.

(3) Where the tenant for life pays the whole fine or renewal, he will have a lien on the estate for the proportion which shall ultimately appear to be chargeable on the remainderman, or parties entitled in succession; & where the remainderman renews, or the renewal is effected by means of a mtge. of the estate, the tenant for life may be required to give security to the remainderman for a proportionate part of the fine, calculated upon the assumed duration of the life interest; & if that interest should endure longer than such assumed period, he may be required to give further security, without prejudice in either case to the actual amount which, at the determination of his interest, shall appear to be his due proportion of the fine. —*JONES v. JONES* (1846), 5 Hare, 440; 7 L. T. O. S. 157; 10 Jur. 516; 67 E. R. 984.

Annotations :—*As to* (1) *Foll.*, *Ainslie v. Harcourt* (1860), 28 Beav. 313. *Apld.* *Bradford v. Brownjohn* (1868), 3 Ch. App. 711. *As to* (2) *Consd.*, *Hayward v. Pile* (1870), 5 Ch. App. 211. *Refd.*, *Re Bute*, *Bute v. Ryder* (1884), 27 Ch. D. 196. *As to* (3) *Consd.*, *Hudleston v. Whelpdale* (1852), 9 Hare, 775. *Distd.*, *Solley v. Wood* (1861), 29 Beav. 482.

3219. — Repayment in lifetime. — *HARRIS v. HARRIS*, (No. 3), No. 3202, *ante*.

3220. Security by tenant for life—For proportionate share. — *JONES v. JONES*, No. 3218, *ante*.

3221. — Insurance on life of *cestui que vie*. — (1) Where leases, which testator had directed to be renewed, were renewed by adding a *cestui que vie*, by means of a payment out of funds belonging to testator's estate, not charged with such renewal, & it was referred to the master to inquire what security the tenant for life of the leases ought to give, & to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal, the master found, & the ct. had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new *cestui que vie*, the costs & premiums in respect of which ought to be paid out of the rents & profits of the estate to which the tenant for life was entitled.

(2) Although it may be that, when provision is made of a fund for renewal, the remainderman will not suffer, this is not the principle, for the principle is that the remainderman ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given.

(3) The ct. will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals, before the occasion for giving such security has arisen.

(4) A rule that the obligation of the tenant for life of property subject to fines for renewal is satisfied by keeping down the interest only of the

amount necessary to be paid for the renewal, would be unjust if the tenant for life survived the first *cestui que vie*, & a second renewal was necessary in his lifetime, for then the tenant for life would have had the whole benefit of the first renewal; & the rule therefore is that the tenant for life is bound, not only to bear the interest of the sum paid for the renewal, but to contribute towards the payment of such sum.

(5) A rule, which attributed one-third of the expense of renewal to the tenant for life, & two-thirds to the parties in remainder, would not remove the injustice; & therefore the ct. holds that the amount of contributions of the tenant for life & remainderman are to be determined by the amount of the benefit which they respectively derive for the renewal. — *HUDLESTON v. WHELPDALE* (1852), 9 Hare, 775; 68 E. R. 729.

3222. — Retention of income by court. — *HUDLESTON v. WHELPDALE*, No. 3221, *ante*.

3223. Liability of tenant for life—Misapplication by trustee—Of rents applicable on payment of renewal fines. — If a trustee misapplies rents which ought to have been applied in payment of fines for the renewal of a lease, the loss will fall on the tenant for life, & not upon the trust estate generally. — *SOLLEY v. WOOD* (1861), 29 Beav. 482; 30 L. J. Ch. 813; 7 Jur. N. S. 1225; 54 E. R. 714.

Annotation :—*Refd.*, *Bradford v. Brownjohn* (1868), 3 Ch. App. 711.

B. Provision in Settlement for Expenses.

See Law of Property Act, 1922 (c. 16), sched. XV.

3224. Direction to raise from rents & profits — Whether right to raise by sale or mortgage implied. —

(1) The words "rents & profits" extended beyond their natural meaning, annual profits, to mtge. or sale, when necessary to effect the object, raising a gross sum: for fines on renewal therefore as well as portions; & not controlled by the apparent general intention to preserve the estate entire.

(2) Contribution of tenant for life to the fine on renewal in proportion to his enjoyment; not, as formerly, one third, nor, as upon a mtge., confined to keeping down the interest.

(3) Direction to settle construed with reference to a preceding power of sale. — *ALLAN v. BACKHOUSE* (1813), 2 Ves. & B. 65; 35 E. R. 243; *affd.* (1821), Jac. 631, L. C.

Annotations :—*As to* (1) *Consd.*, *Shaftsbury v. Marlborough* (1833), 2 My. & K. 111; *Haldenby v. Spofforth* (1839), 1 Beav. 390. *Distd.*, *Solley v. Wood* (1861), 29 Beav. 482. *Refd.*, *Garmstone v. Gaunt* (1845), 1 Coll. 577; *Forbes v. Richardson* (1853), 11 Hare, 351; *Wragg v. Morley* (1866), 14 W. R. 949. *As to* (2) *Apld.*, *Jones v. Jones* (1846), 5 Hare, 440. *Refd.*, *Hayward v. Pile* (1870), 22 L. T. 893. *Generally*, *Refd.*, *Bute v. Ryder* (1884), 53 L. J. Ch. 1090.

3225. — Liability of party in possession. — *MILSINTOWN (VISCOUNT) v. PORTMORE (EARL)* (1821), 5 Madd. 471; 56 E. R. 976.

3226. — Liability of tenant for life—Apportionment. — *ISAAC v. WALL*, No. 3232, *post*.
Provision in will. — See *WILLS*.

SUB-SECT. 4.—RENEWAL IMPOSSIBLE.

See Law of Property Act, 1922 (c. 16), sched. XV.

3227. Right of tenant for life—Rents & profits in full. — *RICHARDSON v. MOORE* (1817), 27 Beav. 629, n.; 54 E. R. 249.

Annotations :—*Distd.*, *Maddy v. Hale* (1876), 3 Ch. D. 327. *Refd.*, *Colgrave v. Manby* (1821), 6 Madd. 72; *Re Wood's Estate* (1870), L. R. 10 Eq. 572.

Sect. 3.—Renewable leaseholds: Sub-sects. 4 & Sect. 4.]

3228. ———.]—TARDIFF *v.* ROBINSON (1819), 27 Beav. 630, n.; 54 E. R. 250, L. C.
*Annotations:—*Folld. *Re* Morris *v.* Hodges (1860), 27 Beav. 625; *Re* Money's Trusts (1862), 2 Drew. & Sm. 94. *Distd. Re* Wood's Estate (1870), L. R. 10 Eq. 572; *Maddy v. Hale* (1876), 3 Ch. D. 327. *Refd. Colgrave v. Manby* (1821), 6 Madd. 72; *Re* Ranelagh's Will (1884), 26 Ch. D. 590.

3229. ———.]—**Fund reserved from rents.**—By a settlement, the trustees were to use their utmost endeavours to renew an ecclesiastical lease upon reasonable terms, & to raise the fines out of the rents or by mtge. A renewal became impracticable:—*Held*: the fund reserved by the trustees out of rents for the purpose of renewal belonged absolutely to the tenant for life.—*MORRES v. HODGES* (1859), 27 Beav. 625; 1 L. T. 425; 54 E. R. 218.

*Annotations:—*Folld. *Re* Money's Trusts (1862), 2 Drew. & Sm. 94. *Distd. Re* Wood's Estate (1870), L. R. 10 Eq. 572; *Maddy v. Hale* (1876), 3 Ch. D. 327. *Refd. Re* Ranelagh's Will (1884), 26 Ch. D. 590.

3230. Trust for renewal—Investment of proceeds of sale—Right of tenant for life to income.—Leaseholds for lives were devised on trust for J. in fee, but, if he should die without leaving issue living at his death, then on trust for W. in fee, & there was an overriding trust for renewal of the lease out of the rents. After the death of testator the reversioner refused to renew the lease or to sell the reversion, & the lease was sold under the provisions of the Settled Estates Act, 1877 (c. 18):—*Held*: the purchase-money must be invested in ordinary securities, & the income only paid to J. for his life.—*Re* BARBER'S SETTLED ESTATES (1881), 18 Ch. D. 621; 50 L. J. Ch. 769; 45 L. T. 433; 29 W. R. 909.

*Annotation:—**Refd. Re* Michell, *Moore v. Moore*, [1892] 2 Ch. 87.

Lease taken by compulsory purchase.—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 247-248, Nos. 1461-1481.

SUB-SECT. 5.—PURCHASE OF REVERSION.

See Law of Property Act, 1922 (c. 16), sched. XV.

3231. Purchase by tenant for life—Whether for benefit of remainderman.—Tenant for life of an ecclesiastical lease who purchases the reversion is considered in equity as a trustee for the remainderman, & is entitled to a charge on the estate for the purchase-money.—*MASON v. HULKE* (1874), 22 W. R. 622.

3232. ———.]—A tenant for life & sole trustee of settled estates, by will, purchased reversions in fee of leases for lives, his own life being one, & for years, parts of the settled estates, & the estates were conveyed, as to the reversion of the lease for lives, to him upon the trusts of the will; & as to one of the reversions of the leases for years to him absolutely; & as to the other reversion of the leases for years to him upon trusts of the will. He died while the leases for years would have been running out, & without having declared any intention that the purchase-moneys were to enure for the benefit of those entitled under the will. The first tenant in tail died in tenant for life's lifetime intestate, leaving a widow, & a son heir in tail:—*Held*: as to all the reversions purchased, the estate of the tenant for life was entitled to be repaid the purchase-moneys; as regarded the legal personal representative of the first tenant in tail, both the estates of which there had been leases for years must be treated as being subject to those leases for the benefit of his first tenant in tail's estate; & as to the estate conveyed to

the tenant for life absolutely, it belonged to the legal personal representative of the first tenant in tail; & as to the other estate conveyed to him upon the trusts of the will she was entitled to a leasehold interest of the same extent as the term would have conferred.

A tenant for life of leaseholds for years is not to contribute to the expense of renewal beyond a proportion calculated in reference to the extent of his enjoyment of the newly created interest, although the settlement may contain a trust for renewal out of rents & profits.—*ISAAC v. WALL* (1877), 6 Ch. D. 706; 46 L. J. Ch. 576; 37 L. T. 227; 25 W. R. 844.

3233. ———.]—The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remaindermen applies equally to a purchase of the reversion.

Testatrix devised leaseholds, renewable by custom, to J. P. for the residue of the term, & after the death of J. P., during the residue of the term, to the children of J. P. in equal shares. J. P. renewed the leaseholds more than once, & finally purchased the reversion:—*Held*: the fee simple in the property passed by the devise in the will to the children of J. P., & became subject to the trusts of the will.—*PHILLIPS v. PHILLIPS* (1885), 29 Ch. D. 673; 54 L. J. Ch. 943; 53 L. T. 403; 33 W. R. 863, C. A.

*Annotations:—**Distd. Longton v. Wilsby* (1897), 76 L. T. 770. *Consd. & Expld. Bevan v. Webb*, [1905] 1 Ch. 620. *Refd. Griffith v. Owen*, [1907] 1 Ch. 195.

3234. ———.]—Purchase-money charged on estate.—*MASON v. HULKE*, No. 3231, *ante*.

3235. ———.]—*ISAAC v. WALL*, No. 3232, *ante*.
 Conversion of perpetually renewable leaseholds, *see* Law of Property Act, 1922 (c. 16), s. 145.

SECT. 4.—SETTLEMENTS OF PERSONALTY TO DEVOLVE AS REALTY.

Creation of entailed interest in personal property.—*See, now*, Law of Property Act, 1925 (c. 20), s. 130.

3236. Postponement of vesting—"As far as the rules of law or equity will permit."—A bequest or settlement of chattels upon the same limitations as real estate, whether immediate or by way of trust executed, vests them absolutely in the first tenant in tail at birth, & this whether the limitations of the chattels be expressed in extenso or created by reference to the limitations of the realty; & such reference may be effectually made either by declaring that the chattels are to go upon the limitations of the realty or by saying that they are to be treated as heirlooms.

The addition of the words "as far as the rules of law or equity will permit" & the circumstance that the legal interest is left in exors., will not prevail to alter the general rule or make the trusts executory.

Semble: where the trusts of the chattels are executory as in the case of covenants to settle, particular restrictions, as to the attainment of twenty-one or otherwise, may be implied for the purpose of keeping the realty & personalty together. Doubtful words tending to restrict the interest of the chattels to those who come into possession of the realty, will not overrule the operation of the general canons of construction, nor suspend the interest until possession of the realty is acquired. But clear words imposing such a restriction will overrule the ordinary construction of a bequest or settlement of heirlooms.

The rule is that which was established in

Foley v. Burrell, No. 3243, *post*, & is favourable to the contention of those who insist that the chattels rest in the first tenant in tail. But the full extent of that authority is no more than this, that doubtful words tending to restrict the interest in the chattels to those who come into possession of the real estate, will not overrule the operation of the general canons of construction, or have the effect of suspending the interest until the time when possession of the realty is obtained (*PAGE WOOD, V.-C.*).—*SCARSDALE (LORD) v. CURZON* (1860), 1 John. & H. 40; 29 L. J. Ch. 249; 3 L. T. 29; 6 Jur. N. S. 209; 70 E. R. 653.

Annotations:—*Consd.* *Hogg v. Jones* (1863), 32 Beav. 45; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 716. *Apld.* *Re Angerstein, Angerstein v. Angerstein*, [1895] 2 Ch. 883; *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149. *Consd.* *Re Chesham's Settlement, Valentia v. Chesham*, [1909] 2 Ch. 329. *Apprvd.* *Portman v. Portman*, [1922] 2 A. C. 473. *Refd.* *Holmesdale v. West* (1866), L. R. 3 Eq. 474. *Re Hill, Hill v. Hill*, [1902] 1 Ch. 537; *Re Parker, Parker v. Parkin*, [1910] 1 Ch. 581; *Re Beresford-Hope, Aldenham v. Beresford-Hope*, [1917] 1 Ch. 287; *Re Lewis, Busk v. Lewis*, [1918] 2 Ch. 308. *Mentd.* *Clifford v. Koe* (1880), 43 L. T. 322.

3237.—*Direction must be certain.*—*SCARSDALE (LORD) v. CURZON*, No. 3236, *ante*.

3238.—*Tenant in tail by purchase under twenty-one.*—By a settlement of real estates made in 1877, plate, pictures, & chattels were assigned to trustees "upon trust to permit the same to be used, held, & enjoyed with the mansion house aforesaid by the person who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained." yet so that for the effect of transmission they should not vest absolutely in any person thereby made tenant in tail male by purchase who should not attain the age of twenty-one years. The eldest son attained twenty-one years but died in the lifetime of the tenant for life. On the death of the tenant for life in 1907, the second son, an infant, claimed to be entitled to these heirlooms as tenant in tail male in possession:—*Held*: as a question of construction, there was sufficient indication of intention on the part of the settlor these heirlooms should go with the mansion house & vest only in a tenant in tail male in possession, & consequently, they vested in the second son, though liable to be divested in the event of his dying under twenty-one.—*Re CHESHAM'S (LORD) SETTLEMENT, VALENTIA (VISCOUNT) v. CHESHAM (LADY)*, [1909] 2 Ch. 329; 78 L. J. Ch. 692; 101 L. T. 9; 25 T. L. R. 657; 53 Sol. Jo. 197, C. A.

Annotations:—*Distd.* *Re Parker, Parker v. Parkin*, [1910] 1 Ch. 581; *Re Beresford-Hope, Aldenham v. Beresford-Hope*, [1917] 1 Ch. 287. *Consd.* *Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307. *Distd.* *Re Lewis, Busk v. Lewis*, [1918] 2 Ch. 308; *Portman v. Portman*, [1922] 2 A. C. 473.

3239. *Whether executory trust of personality created—Limitations of settled land—Direction to "release & convey."*—(1) A settlement, on marriage, of real estate upon trust for the intended wife for life, remainder to the husband for life, & after the death of the survivor, "in trust for & to be released & conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for & to be released & conveyed unto" the children as tenants in common in tail; & in default of issue, if the wife should survive the husband, "in trust for & to be released & conveyed unto" the wife, "her heirs & assigns for ever." By the same deed, personal property was assigned to the same trustees, upon trust to pay the income & principal "to such person & persons, for such uses, ends, intents & purposes, & in such manner & form, & subject to the same powers, provisos, contingencies, declarations & agreements as were thereinbefore expressed concerning the payment

by the trustees of the rents & profits of the said real estate thereby conveyed, & concerning their release & conveyance of the same, or as near thereto as circumstances & the nature of the case would admit":—*Held*: this trust of the personality was not rendered executory by reference to the direction to release & convey the real estate, such direction being merely superadded to a distinct declaration of trust of such real estate.

(2) This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for her next of kin; the meaning of such proviso being only that if, by the failure of the preceding limitations, the real estate should at any time become vested in possession in the heirs of the wife, the personality, which was settled upon corresponding trusts, should belong to her next of kin. There was only one child of the marriage, who died an infant in the lifetime of his father. On the subsequent death of the father:—*Held*: such child took an absolute interest in the personality, subject to open & let in other children, if any.—*DONCASTER v. DONCASTER* (1856), 3 K. & J. 26; 2 Jur. N. S. 1066; 69 E. R. 1007.

Annotation:—*As to (1)* *Refd.* *Foxwell v. Van Grutten* (1898), 79 L. T. 617.

3240. *Effect of ultimate limitations of personality—Trust for next of kin.*—*DONCASTER v. DONCASTER*, No. 3239, *ante*.

3241. *Whether heirlooms settled to devolve with land "insurable property."*—Chattels settled as heirlooms are "insurable property" within Trustee Act, 1893 (c. 53), s. 18, & small variations in detail between the trusts of these "heirlooms" & of other property comprised in the same settlement where such trusts are substantially the same will not prevent this other property being held upon the "same trusts" as the heirlooms within Trustee Act, 1893 (c. 53), s. 18 (2). Consequently, where certain chattels were by a settlement vested in trustees upon trust to be enjoyed by the person for the time being entitled to the freehold of real estate settled by the same settlement, & under the settlement other personal property was settled upon such trusts as those upon which it would have been held if it had been proceeds of sale of the settled realty made under Settled Land Act, 1882 (c. 38), the trustees were held entitled to insure the "heirlooms" against fire, & to pay the premiums out of the income of the other settled personality, although no power to insure was contained in the settlement.—*Re EGMONT'S (EARL) TRUSTS, LEFROY v. EGMONT (EARL)*, [1908] 1 Ch. 821; 77 L. J. Ch. 479; 98 L. T. 826; 24 T. L. R. 783.

See now, Trustee Act, 1925 (c. 19), s. 19.

3242. *Whether power over chattels imported—Land subject to power of appointment.*—By a settlement made by a father & his eldest son certain freehold hereditaments were appointed & conveyed to such uses & trusts & subject to such powers as the father & son should by deed appoint, & in default, & until, & subject to any such appointment, to the use of trustees for a term of a thousand years upon trust to raise certain annual sums & subject thereto to the use of the father for life, & after his death for his eldest son for life, with remainder to his first & other sons successively in tail male, with remainder to the use of the second son of the settlor for life, & then to his first & other sons successively in tail male; with remainders over. By the same indenture certain jewels were assigned to the trustees upon trust

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that they should allow the same to devolve & be enjoyed, so far as the law would permit, as heirlooms along with the settled hereditaments. By a subsequent indenture made in purported exercise of the power conferred on them the father & eldest son appointed that the trustees of the settlement should stand possessed of the jewels in trust for the father absolutely. Upon a summons by the father & son asking for a declaration that under the trust in the settlement they had a joint general power of appointment over the jewels corresponding to but exercisable independently of their joint general power of appointment by deed of the settled hereditaments:—*Held*: the ct. was bound to import into the trusts of the chattels a general power of appointment corresponding with the first limitation of the realty as the only means of securing unity of ownership in the event of the realty being withdrawn from the settlement, & the settlors desiring to maintain unity of ownership.—*Re PENTON'S SETTLEMENT TRUSTS*, *PENTON v. LANGLEY*, [1924] 2 Ch. 192; 93 L. J. Ch. 494; 131 L. T. 627; 68 Sol. Jo. 647.

3243. Whether tenant for life must give security—Sufficiency of inventory—Unless goods in danger.]

—The cases as to tenant for life giving security for the goods have been overruled & the ct. now demands only an inventory, which is more equal justice; as there ought to be danger in order to give security (*LORD THURLOW, C.*).—*FOLEY v. BURNELL* (1783), 1 Bro. C. C. 274; 28 E. R. 1125, L. C.; *affd.* (1785), 4 Bro. Parl. Cas. 319, H. L.

Annotations:—Folld. Conduitt v. Soane (1844), 1 Coll. 285; *Temple v. Thring* (1887), 56 L. J. Ch. 767. *Refd. Vaughan v. Burslem* (1790), 3 Bro. C. C. 101. *Lincoln v. Newcastle* (1806), 12 Ves. 218; *Carr v. Erroll* (1808), 14 Ves. 478; *Brandon v. Robinson* (1811), 18 Ves. 429; *Brouncker v. Bagot* (1816), 1 Mer. 271; *Potts v. Potts* (1848), 1 H. L. Cas. 671; *Rowland v. Morgan* (1848), 6 Hare, 463; *Rochford v. Hackman* (1852), 9 Hare, 475; *Cox v. Sutton* (1856), 25 L. J. Ch. 845; *Doncaster v. Doncaster* (1856), 3 K. & J. 26; *Scarsdale v. Curzon* (1860), 1 John. & H. 40; *Hogg v. Jones* (1863), 32 Beav. 45; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 716; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540; *Martelli v. Holloway* (1872), L. R. 5 H. L. 532; *Re Angerstein, Angerstein v. Angerstein*, [1895] 2 Ch. 883; *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149. *Re Chesham's Settlement, Valentia v. Chesham*, [1909] 2 Ch. 329; *Re Parker, Parker v. Parkin*, [1910] 1 Ch. 581; *Re Swan, Witham v. Swan*, [1915] 1 Ch. 829; *Re Beresford-Hope, Aldenham v. Beresford-Hope*, [1917] 1 Ch. 287; *Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307; *Re Lewis, Busk v. Lewis*, [1918] 2 Ch. 308; *Portman v. Portman*, [1922] 2 A. C. 473. *Mentd. Moseley v. Cressey's London & Burton Steam Coal Co.* (1861), 35 L. J. Ch. 360; *Ashton v. Blackshaw* (1870), 39 L. J. Ch. 205; *Re Fitzgerald, Surman v. Fitzgerald* (1904), 73 L. J. Ch. 136.

3244. — — — — —.]—CONDUITT v. SOANE (1844), 1 Coll. 285; 13 L. J. Ch. 390; 63 E. R. 421. *Annotation:—Consd. Temple v. Thring* (1887), 56 L. J. Ch. 767.

3245. — — — — —.]—A tenant for life of heirlooms will not be required to give security for the heirlooms but only to sign an inventory unless there is reason to suppose that the heirlooms will be in danger in his possession.—*TEMPLE v. THRING* (1887), 56 L. J. Ch. 767; 56 L. T. 283.

Chattels which descend as real estate.]—See REAL PROPERTY, Vol. XXXVIII., pp. 709–710, Nos. 532–550.

Limitations created by will.]—See WILLS.

SECT. 5.—SETTLEMENT OF PERSONAL CHATTELS.

Entailed interest in personal property.]—See Law of Property Act, 1925 (c. 20), s. 130.

3246. What amounts to settlement—Delivery of chattels—With letter of directions.]—A casket containing diamonds was sent to pltf.'s father, accompanied by a letter to the effect that the diamonds were to be considered as heirlooms in the family, & were to be left to the eldest son & heir, after the death of his mother, as long as the family should continue. On the death of pltf.'s mother, who survived her husband, one of her exors., the other having renounced, refused to deliver up the diamonds to pltf., the heir, & raised the question as to their forming part of the assets of the mother:—*Held*: the diamonds formed no part of the assets of the mother, but belonged to the family as heirlooms.—*SEALE v. HAYNE* (1863), 3 New Rep. 189; 9 L. T. 570; 9 Jur. N. S. 1338; 12 W. R. 239.

Annotation:—Refd. Shelley v. Shelley (1868), 37 L. J. Ch. 357.

3247. Settlement of furniture—Right to pledge.]—A woman on her marriage settled, among other property, furniture on trustees in trust to allow her to use it during life & to dispose of it by will or deed to operate after death:—*Held*: she had no power to pledge the furniture, & her trustees might recover it from the pawnbroker.—*WORSNOP v. BENASSI* (1873), 21 W. R. 684.

3248. — — — — —.]—*Re* TORRINGTON'S SETTLED ESTATES (1924), 157 L. T. Jo. 408.

3249. Whether heirlooms "insurable property."]—*Re* EGMONT'S (EARL) TRUSTS, *LEFROY v. EGMONT (EARL)*, No. 3241, *ante*.

Sec. note, Trustee Act, 1925 (c. 19), s. 19.

3250. Settlement of secret remedy—Order for account.]—The sole possessor of a recipe for making a medicine assigned it, on the marriage of his daughter, to trustees, in trust for her & her husband for their lives; & directed that after their decease it should be sold for the benefit of their children. The mother destroyed the recipe & verbally communicated the contents to her eldest son for the benefit of his brothers & sisters. Upon a bill filed against him by some of the younger children, he was declared to hold the secret upon the trusts of the settlement & was decreed to account for the profits made by him by the sale of the medicine after his mother's death, & as a sale was impracticable, an issue was directed to ascertain the value of the secret.—*GREEN v. FOLGHAM* (1823), 1 Sim. & St. 398; 57 E. R. 159; *sub nom. GREEN v. CHURCH*, 1 L. J. O. S. Ch. 203.

Annotations:—Consd. Morison v. Moat (1851), 9 Hare, 211. *Mentd. Dietrichsen v. Cabburn* (1846), 1 Coop. temp. Cott. 72.

Chattels settled by will.]—See WILLS.

SECT. 6.—SETTLEMENTS OF INSURANCE POLICIES.

3251. Covenant to effect policy—Insurance becoming impossible.]—By a Scotch marriage settlement dated Aug. 18, 1873, the husband assigned to trustees two policies on his life for £5,000 each, expiring respectively on July 2, & July 3, 1875; & he covenanted "on or before July 2, 1875," to insure his life in the names of the trustees in the sum of £10,000; the existing & future policies to be held upon trusts for his wife & children. The husband took no steps towards effecting a new policy until July 1, 1875, shortly before which date his health, which had previously been good, had become so bad, that he was unable to effect an insurance, & in Sept. following he died:—*Held*: the life having become uninsurable on July 1, 1875, did not relieve the husband from the obligation

to insure or pay damages, & accordingly his estate was answerable in damages to the trustees of the settlement.—*Re ARTHUR, ARTHUR v. WYNNE* (1880), 14 Ch. D. 603; 49 L. J. Ch. 550; 43 L. T. 46; 28 W. R. 972.

3252. Policy containing condition against assignment—Whether subject to settlement.—A marriage settlement contained a covenant by the settlor to settle his estate & interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise. He afterwards effected some policies of insurance on his life, one of which was subject to a condition that "it should not be assignable in any case whatever":—*Held*: (1) the policies were property to which the settlor had during the marriage become entitled by purchase within the specific words of the covenant, & the covenant was divisible, & could be enforced as to that property by a ct. of equity; (2) the effect of the condition against assignment was merely to make the policy non-assignable at law, as it would have been prior to the Policies of Assurance Act, 1867 (c. 144), & did not prevent the settlor from dealing with the beneficial interest in it in accordance with his covenant.—*Re TURCAN* (1888), 40 Ch. D. 5; 58 L. J. Ch. 101; 59 L. T. 712; 37 W. R. 70, C. A.

Annotations:—*As to* (2) *Refd.* *Churston v. Buller* (1897), 77 L. T. 45. *Generally, Refd.* *Re Royle, Royle v. Hayes* (1889), 43 Ch. D. 18; *Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109; *Laurie v. West Hartlepool Steamship Thirds Indemnity Assn.*, & *David* (1899), 15 T. L. R. 486. *Re Reils, Ex p. Clough*, [1904] 2 K. B. 769.

3253. Bonus—Whether subject to trusts of settlement.—A policy of insurance for £3,000 on A.'s life was assigned to trustees, & by a deed of even date, trusts were declared of it by the description of "the sum of £3,000 for which A.'s life was insured," & power was given to B. to dispose of it by will. B. after reciting the settlement, bequeathed £1,000 part of the sum of £3,000 to A. & the remaining sum of £2,000 to C. At A.'s death, £9,000 was received under the policy:—*Held*: the whole fruits of the policy were subject to the trusts of the settlement, & passed by the bequests to A. & C. in proportion to their legacies.—*COURTNEY v. FERRERS* (1827), 1 Sim. 137; 5 L. J. O. S. Ch. 107; 57 E. R. 530.

Annotation:—*Distd.* *Shimpon v. Mountain* (1835), 4 L. J. Ch. 221.

3254. — — —.]—In pursuance of the provisions of a marriage settlement, the husband insured his life in the names of the trustees, in a specified insurance office, for a certain sum, which, upon his death, was to be received & applied by the trustees upon the trusts of the settlement. Additions were made to the policy by the insurance co., as profits or bonus. The husband became bkpt., & died uncertificated:—*Held*: the assignees of the husband were not entitled to the sums so added to the policy, but the same were to be held by the trustees upon the trusts of the settlement.—*PARKES v. BOTT* (1838), 9 Sim. 388; 8 L. J. Ch. 14; 59 E. R. 407.

Annotation:—*Consd.* *Domville v. Lamb* (1853), 1 W. R. 246.

3255. — — —.]—The trustees of a marriage settlement were directed to pay the premiums & other expenses of a policy of insurance to be effected in some office in England or Ireland on the life & in the name of B. the husband, out of the income of the property forming the subject of the settlement. They were further directed to stand possessed of the policy & of a sum of £4,000 thereby

to be raised & secured upon trust, after the death of B., for the wife & the children of the marriage. B., on his part, covenanted to execute an assignment of the policy "together with the sum of £4,000 sterling, to be insured upon the trusts & for the purposes aforesaid." Prior to the date of the settlement B. had effected an Irish policy for £4,000, Irish currency, on his life, & after the execution of the settlement he assigned this policy to the trustees. Subsequently the trustees allowed the Irish policy to drop, & in its place effected an English policy, on the life of B., but in their own names, for £3,666 13s. 4d., which sum they were advised was equivalent to £4,000 Irish currency. This later policy was to be held by the trustees on the same trusts as those declared concerning the Irish policy & the trustees paid the premiums, as directed by the settlement, out of B.'s life estate. Many years afterwards the trustees, on discovering that it was doubtful whether they had acted in compliance with the actual trusts of the settlement, obtained from B. a deed of indemnity. B. by his will bequeathed all the bonuses on the policy upon certain trusts. On a bill filed by some of the children of the marriage:—*Held*: the bonuses were subject to the trusts of the settlement & did not pass by the will of B.—*WARREN v. WYBAULT* (1866), 15 L. T. 155; 12 Jur. N. S. 639.

3256. — — — **Option to apply bonus in reduction of premiums.**—Bonuses on a policy:—*Held*: to be subject to the trusts of a marriage settlement.

Upon the construction of a settlement:—*Held*: a policy effected in the names of trustees was itself settled; but under the covenant of the husband & the rules of the co., the husband was entitled to an option to have any bonus applied in reduction of the premiums. Bonuses having been declared, the husband continued to pay the full premiums:—*Held*: on his death, the bonuses were accretions to the trust, & did not belong to his exors.—*GILLY v. BURLEY* (1856), 22 Beav. 619; 28 L. T. O. S. 55; 2 Jur. N. S. 897; 4 W. R. 769; 52 E. R. 1247.

3257. — — — — —.]—*HUGHES v. SEARLE*, [1885] W. N. 79.

3258. — — — — — **Bond given for face value of policies.**—A marriage settlement recited that the settlor, the husband, had in pursuance of agreement effected insurances on his life for the sums of £2,000 & £5,000, & had given a bond to secure the sum of £7,000, & provided that the trustees should stand possessed of the sums of £2,000 & £5,000 so assured on the trusts of the settlement:—*Held*: the bonuses did not pass.—*DOMVILLE v. LAMB* (1853), 1 W. R. 246.

3259. — — — **Express exclusion from settlement—Whether available for settlor's defalcations.**—A policy on the life of a *cestui que trust*, the settlor, was vested in trustees & settled, bonuses being excluded. The settlor misappropriated some of the trust funds, & died insolvent. The trustees were not allowed to retain bonuses received after the death of the settlor to make good the settlor's defalcations.—*HALLETT v. HALLETT* (1879), 13 Ch. D. 232; 49 L. J. Ch. 61; 41 L. T. 723; 28 W. R. 321.

Annotations:—*Apld.* *Re Gregson, Christison v. Bolam* (1887), 36 Ch. D. 223. *Distd.* *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164.

3260. Covenant to keep policy on foot—Suicide of assured whereby policy moneys forfeited.—Testator previously to his marriage, covenanted

PART XVII. SECT. 6.

3253 i. Bonus—Whether subject to trusts of settlement.—*SPARKS v. BURNETT* (1890), 17 R. (Ct. of Sess.) 997; 27 Sc. L. R. 798.—*SCOT*.

Sect. 6.—Settlements of insurance policies. Sects. 7, 8 & 9. Part XVIII.]

with certain persons as trustees to pay, during his life, all premiums & other moneys, & do & perform all such acts, matters, & things as should be requisite for keeping on foot a policy of assurance previously effected by him on his own life; & the policy contained a proviso, declaring that it should be void in case the party should die by his own hands. The party was afterwards drowned in the River Thames; & by the verdict of a jury, returned in an action at law, directed by the ct. to be brought by the exors. of the settlor against the assurance co., it was found "that the settlor threw himself into the River Thames, intending to destroy himself, but that at the time of committing the act he was incapable of judging between right & wrong":—*Held*: the trustees of the settlement were not entitled to claim as against the settlor's estate the sum secured by the policy.—*DORMAY v. BORRODAILE* (1847), 10 Beav. 335; 9 L. T. O. S. 449; 11 Jur. 379; 50 E. R. 611; *previous proceedings*, 5 C. B. 380.

Innovations:—*Apld.* *Dufaur v. Professional Life Insee.* (1858), 4 Jur. N. S. 841. *Refd.* *Cleaver v. Mutual Reserve Fund Assn.* (1891), 60 L. J. Q. B. 672. *Mentd.* *Hawkins v. Coulthurst* (1851), 5 B. & S. 343.

3281. Covenant to effect new policy to replace existing one—Failure to perform.—By the terms of a marriage settlement, £1,000, secured by a policy of insurance on the life of the intended wife's father, was to be paid to the intended husband, provided he had previously effected an insurance on his own life for a similar amount; if not, it was to be paid to the wife. It then directed that if the insurance should not have been effected, or if the husband & wife should be both dead when the £1,000 should be received by the trustees, it should be paid to the issue of the marriage. The husband covenanted to effect an insurance within six months after the decease of the wife's father, to secure the payment of the sum of £1,000 at his decease. By a clause at the end of the settlement, it was directed that in default of the husband effecting the insurance the £1,000 should be invested, & the interest paid to the husband until he effected it, & then he was to receive the principal. The insurance was not effected within the time mentioned:—*Held*: the husband might effect the insurance at any time during his life.—*BUSH v. WATKINS* (1851), 14 Beav. 425; 51 E. R. 199.

3282. Policy settled without covenant to pay the premiums—Mortgage of policy—Mortgagees priority to cestui que trust.—A. voluntarily assigned a policy on his life to trustees for his infant son, if he attained twenty-five; but if he died under that age & A. should think proper to keep up the policy, upon trust for C. A. covenanted to pay the premiums during the life of his son only, & in

the event of A. ceasing to pay the premiums, he should be at liberty to sell the policy & retain the money. The son died under twenty-five, A. mortgaged the policy, covenanting to pay the premiums, which he did:—*Held*: on the death of A., the produce of the policy belonged to the mtgees., & not to C.—*PEDDER v. MOSELY* (1862), 31 Beav. 159; 7 L. T. 205; 54 E. R. 1099.

Effect of fraudulent appointment.—See *POWERS*, Vol. XXXVII., p. 504, No. 970.

Insurable interest—Trustee.—See *INSURANCE*, Vol. XXIX., p. 347, Nos. 2808, 2809.

SECT. 7.—REFERENTIAL TRUSTS.

See *TRUSTS*

SECT. 8.—ADVOWSONS.

See, generally, *ECCLESIASTICAL LAW*, Vol. XIX., pp. 370-425.

3263. Advowson settled on successive persons in tail—Condition as to presentation—Effect of dis-tail.—By deed of settlement dated in 1783 an advowson was limited to H. & his issue male in strict settlement, "upon this express condition & limitation" that the person who should at any time thereafter be seised of or entitled to the advowson under the deed should from time to time, as the church should become vacant, present a Fellow of J. College. On failure of such person presenting as aforesaid, & from & after such failure, the advowson should remain to the use of the Master & Senior Fellows of J. College. One of the persons entitled under the deed having suffered a recovery & conveyed the fee simple of the advowson to deft.'s predecessor in title:—*Held*: in a suit by the college, the advowson was limited in trust, not on condition, & on failure of deft. to present a fellow, the gift over took effect in favour of the Master & Seniors.—*ST. JOHN'S COLLEGE, CAMBRIDGE v. EFFINGHAM (EARL)* (1873), 29 L. T. 447; 22 W. R. 125.

Consent to sale by infant tenant in tail.—See *ECCLESIASTICAL LAW*, Vol. XIX., p. 499, No. 3555.

SECT. 9.—PROVISIONS FOR SUBSEQUENT MARRIAGE.

Settlement on marriage of ward of court.—See *INFANTS*, Vol. XXVIII., pp. 345-347, Nos. 2161-2164, 2173-2175.

Variation of power of appointment after decree in matrimonial cause.—See *HUSBAND & WIFE*, Vol. XXVII., pp. 525-526, Nos. 5673-5680

Part XVIII.—Stamps on Settlements.

See Stamp Act, 1891 (c. 34), ss. 107-109 & sched.: *REVENUE*, Vol. XXXIX., pp. 295, 296, Nos. 755-762.

Settlements with reservations.—See *ESTATE &*

OTHER DEATH DUTIES, Vol. XXI., pp. 13-14, Nos. 61-67.

Liability to account duty.—See *ESTATE & OTHER DEATH DUTIES*, Vol. XXI., p. 129, Nos. 952-954.

SEVERANCE.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION ; LANDLORD AND TENANT ; PARTITION ;
POWERS ; REAL PROPERTY AND CHATTELS REAL.

SEWAGE.

See EASEMENTS AND PROFITS À PRENDRE ; PUBLIC HEALTH AND LOCAL ADMINISTRATION ; SEWERS
AND DRAINS ; WATERS AND WATERCOURSES.

END OF VOL. XL.

